Republic of Zambia

REPORT OF THE CONSTITUTION REVIEW COMMISSION

Secretariat
Constitution Review Commission
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TABLE OF CONTENTS

ACKNOWLEDGEMENTS

The Mung'omba Constitution Review Commission is indebted to all those who supported and made valuable contributions to the success of the Constitution Review exercise.

In the first instance, the Commission wishes to pay deserving tribute to the President of the Republic of Zambia, His Excellency Mr. Levy Patrick Mwanawasa, SC, and the Government for initiating the review exercise.

The Commission is especially thankful to the Cabinet Office for the overall co-ordination and general mobilisation of logistics and human and financial resources that ensured the programmes and work plans of the Commission were implemented according to schedule.

Particular tribute goes to the Ministry of Justice for providing the necessary support, counsel and guidance to ensure the Commission's work progressed well.

The Commission is grateful for the warm reception and support from the provincial and district leadership led by Deputy Ministers, Permanent Secretaries and District Commissioners. It was heartening to note that everywhere the Commission sat, scores of people, young and old, turned up to make submissions on the type of Constitution they want. Such overwhelming response only came about because of the support from all organs of Government, the Church, school authorities, traditional leaders, Members of Parliament, civic authorities, civil society, community leaders and others too numerous to mention.

Traditional rulers and District Commissioners, in particular, deserve special mention, for not only rallying the people, but also for leading the way in making submissions to the Commission. The Commission, as a matter of fact, recorded one of the highest numbers of submissions from traditional rulers in the various districts.

Public demand obliged the Commission to hold multiple ordinary and special sittings for stakeholders and members of the general public in Lusaka. These included the Judiciary, the National Assembly of Zambia (NAZ), the Anti-Corruption Commission (ACC), the Human Right Commission (HRC), the Law Association of Zambia (LAZ), the Zambia Congress of Trade Unions (ZCTU), Federation of the Free Trade Unions of Zambia (FFTUZ), the Economic Advisory Council (EAC), the Electoral Commission of Zambia (ECZ), the Ministry of Finance and National Planning, the Secretary to the Cabinet, political parties, the Children of Zambia and the Oasis Forum, to mention but a few. Their participation and input greatly enriched the quality and quantity of submissions received by the Commission.

The Zambia Police Force also deserves special commendation for providing security during the Commission's tour of all the 150 constituencies around the country. The men and women assigned to the Commission acquitted themselves well and professionally in the execution of their duties.

Sincere thanks also go to the Zambia Air Force (ZAF) High Command for their invaluable support in the provision of helicopters and other aircraft to airlift the Commissioners and support staff to some constituencies in Western and Northern Provinces, which could not be reached by land due to various geographical and logistical problems.

For the first time in the history of constitution making in Zambia, members of the Defence and Security Forces were accorded an opportunity to make submissions to the Commission. The Commission is grateful for their overwhelming response.

The Commission also wishes to register its deep appreciation of and commend the media fraternity in the country, both print and electronic, private and public, for the effective role they played in publicising and sensitising the public on the work of the Commission. Particular thanks go to the Zambia Information Services for working tirelessly, in rural constituencies, distributing the terms of reference and announcing the dates and times of sittings to the local people through the mobile public address system.

Zambia is not an island. Therefore, it needs to learn and share experiences with other countries in the world which have undertaken, or are still undertaking constitutional reforms.

The experiences of these countries may provide valuable lessons for Zambia's own constitution review process, such as putting in place the necessary legal and institutional framework and the requisite capacities, as well as various critical aspects of the review process, that would facilitate effective implementation of the Constitution.

It is in this light that the Commission wishes to thank, most sincerely, the United Nations Development Programme (UNDP) Country Office in Zambia for sponsoring the Commission's comparative study tours to South Africa, Uganda, Kenya, Ethiopia, Nigeria, Sweden, Denmark, Norway and India. The lessons learnt from these selected countries greatly enriched the constitution review process in Zambia. Particular thanks also go to the Governments of these countries for facilitating the success of the study tours.

The Commission also wishes to thank UNDP for providing financial resources for the hire of research experts, purchase of computers and other related equipment, as well as for sponsoring public sensitisation programmes on the Constitution in the electronic media and through school debates and workshops.

Further, the Commission acknowledges the assistance rendered by UNDP through the provision of financial resources for the hire of draftspersons, namely: Mrs Eva Jhala and Mrs Daisy Nkhata Ng'ambi. The Commonwealth Secretariat in London also deserves special appreciation for assisting the Commission in the drafting stages of the Constitution through the services of Mrs. Sabina Ofori Boateng and Professor Vincent Crabbe who were engaged as draftspersons.

The work of the Commission would not have been possible without the services of the Secretariat team under the leadership of the Secretary, Mr Villie Lombanya, and his Deputy, Mrs Judy Mulongoti. The team that included administrative staff, secretarial staff, medical personnel, technicians, drivers and messengers worked tirelessly to ensure that the work of the Commission was accomplished.

The Commission wishes to thank the Zambian people for their overwhelming response to the cause of Constitution making, which was demonstrated by their massive turnout at all the sittings of the Commission throughout the country. The seriousness with which they spoke about what they wished to be reflected in the new Constitution left no doubt about what they desire the Constitution to be.

The Commission also acknowledges the comments received from the three organs of Government, public institutions, other organisations as well as individuals on its Interim Report and draft Constitution which were published in June, 2005. These comments were an invaluable resource in completing the Commission's assignment.

With this type of support, the Commission has no cause to doubt the resolve of the Zambian people to write for themselves a constitution that will not only stand the test of time, but also serve as a basis for sustainable peace, unity and development.

LIST OF APPENDICES

LIST OF ABBREVIATIONS

ACC	-	Anti-Corruption Commission
ACP	-	African Caribbean and Pacific Nations
ACPHR	-	African Charter on People's and Human Rights
ACRWC	-	African Charter on the Rights and the Welfare of the Child
ADB	-	African Development Bank
ANC	-	African National Congress
AMS	-	Additional Member System
APRW	-	African Protocol on the Rights of Women
ARVs	-	Anti-Retrovirals
ARV	-	Anti-Retroviral Therapy
AU	-	African Union
BCC	-	Behavioural Change Communication
BESSIP	-	Basic Education Sub-Sector Investment Programme
BPFA	-	Beijing Declaration and Platform of Action
BSA	-	British South Africa Company
CAT	-	Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment
CBPP	-	Contagious Bovine Pleuro-Pneumonia
CBOs	-	Community-Based Organisations
CEDAW	-	Convention on the Elimination of All Forms of Discrimination Against Women
CERD	-	Convention on the Elimination of all Forms of Racial Discrimination
COMESA	-	Common Market for Eastern and Southern Africa
CPC	-	Criminal Procedure Code
CRC	-	Constitution Review Commission
CSO	-	Central Statistical Office
CSPFB	-	Civil Service (Local Conditions) Pension Fund Board
DEC	-	Drug Enforcement Commission
DPP	-	Director of Public Prosecutions
DRC	-	Democratic Republic of Congo
EAC	-	Economic Advisory Council
EEC	-	European Economic Commission
ECZ	-	Electoral Commission of Zambia
ERTC	-	Electoral Reform Technical Committee
EU	-	European Union
FFTUZ	-	Federation of Free Trade Unions in Zambia
FPTP	-	First Past the Post
GDP	-	Gross Domestic Product
HIPC	-	Highly Indebted Poor Countries
HRC	-	Human Rights Commission
ICCPR	-	International Covenant on Civil and Political Rights
ICESCR	-	International Covenant on Economic, Social and Cultural Rights
IMF	-	International Monetary Fund

IRC	-	Industrial Relations Court
IULA	-	International Union of Local Authorities
JCC	-	Judicial Complaints Committee
LGAZ	-	Local Government Association of Zambia
LASF	-	Local Authority Superannuation Fund
LAZ	-	Law Association of Zambia
LRF	-	Legal Resource Foundation
MMD	-	Movement for Multi-party Democracy
MMR	-	Mixed Member Representation
MP	-	Member of Parliament
NAC	-	National HIV/AIDS/STI/TB Council
NAPSA	-	National Pension Scheme Authority
NAZ	-	National Assembly of Zambia
NGOs	-	Non-Governmental Organisations
NGOCC	-	Non-Governmental Organisations Co-ordinating Committee
NRC	-	National Registration Card
NRP	-	Northern Rhodesia Police
NRR	-	Northern Rhodesia Regiment
NWLAC	-	National Women's Legal Aid Clinic
PAZA	-	Press Association of Zambia
PEVAWC	-	Addendum to SADC Declaration to Gender and Development on the Prevention and Elimination of Violence Against Women and Children
PMTCT	-	Prevent Mother to Child Transmission
PPCA	-	Police Public Complaints Authority
PR	-	Proportional Representation
PSPF	-	Public Service Pension Fund
PSPFB	-	Public Service Pensions Fund Board
PSV	-	Public Service Vehicles
OAG	-	Office of the Auditor-General
OAU	-	Organisation of African Unity
OPEC	-	Organisation of the Petroleum Exporting Countries
OVC	-	Orphans and Vulnerable Children
ROADSIP	-	Road Sector Investment Programme
SADC	-	Southern Africa Development Community
SADCDGD	-	SADC Declaration on Gender and Development
SAP	-	Structural Adjustment Programme
SC	-	State Counsel
SIDO	-	Small Industries Development Organisation
SSJ	-	Society for Senior Journalists
STD	-	Sexually Transmitted Diseases
TAZAMA	-	Tanzania-Zambia Oil Pipeline
TAZARA	-	Tanzania-Zambia Railway Authority
TBN	-	Trinity Broadcasting Network
UDHR	-	Universal Declaration of Human Rights
UDI	-	Unilateral Declaration of Independence

UFP	-	United Federal Party
UN	-	United Nations
UNCRC	-	United Nations Convention on the Rights of the Child
UNDEVAW	-	United Nations Declaration on the Elimination of Violence Against Women
UNDP	-	United Nations Development Programme
UNESCO	-	United Nations Education Scientific and Cultural Organisation
UNIP	-	United National Independence Party
UNZA	-	University of Zambia
USA	-	United States of America
VDHR	-	Vienna Declaration on Human Rights
VSU	-	Victim Support Unit
WiLDAF	-	Women in Law and Development
WLSA	-	Women and Law in Southern Africa
YWCA	-	Young Women Christian Association
ZAF	-	Zambia Air Force
ZAMTEL	-	Zambia Telecommunications Corporation
ZAMWA	-	Zambia Media Women Association
ZANACO	-	Zambia National Commercial Bank
ZANC	-	Zambia African National Congress
ZAWA	-	Zambia Wildlife Authority
ZCCM	-	Zambia Consolidated Copper Mines
ZCTU	-	Zambia Congress of Trade Unions
ZDHS	-	Zambia Demographic and Health Survey
ZNBC	-	Zambia National Broadcasting Corporation
ZNPF	-	Zambia National Provident Fund
ZNS	-	Zambia National Service
ZSIC	-	Zambia State Insurance Corporation

LIST OF CONSTITUTIONS

Constitutions of Zambia

1. The Federation of Rhodesia and Nyasaland (Constitution) Order in Council, 1953
2. The Federation of Rhodesia and Nyasaland Constitution, 1962
3. The Constitution of Zambia, 1964
4. The Constitution of Zambia (Amendment) Act, 1969
5. The Constitution of Zambia, 1973
6. The Constitution of Zambia, 1991
7. The Constitution of Zambia (Amendment) Act, 1996

Other Constitutions

8. The Constitution of Ghana, 1992
9. The Constitution of the Republic of Kenya
10. The Constitution of the Republic of Nigeria
11. The Constitution of the Republic of South Africa, 1996
12. The Constitution of the Republic of Uganda, 1995
13. The Constitution of Sweden – The Fundamental Laws and the Riksdag Act
14. The Constitution of the United States of America
15. The Constitution of the State of California
16. The Constitution of India, 1949
17. The Constitution of the Federal Republic of Ethiopia, 1994

LIST OF INTERNATIONAL AGREEMENTS

1. UN Convention on the Rights of the Child (1989) (UNCRC)
2. Convention on the Elimination of All Forms of Racial Discrimination (1965) (CERD)
3. International Covenant on Civil and Political Rights 1966 (ICCPR)
4. Convention on the Elimination of All Forms of Discrimination Against Women 1979 (CEDAW)
5. Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment 1984 (CAT)
6. International Covenant on Economic, Social and Cultural Rights, 1966 (ICESCR)
7. Universal Declaration of Human Rights, 1948 (UDHR)
8. African Charter on People's and Human Rights 1981 (ACPHR)
9. Beijing Declaration and Platform for Action, 1995 (BPFA)
10. UN Declaration on the Elimination of Violence Against Women, 1993 (DEVAW)
11. SADC Declaration on Gender and Development, 1997 (DGD)
12. Addendum to SADC Declaration on Gender and Development on the Prevention and Elimination of Violence Against Women and Children, 1998 (PEVAWC)
13. African Charter on the Rights and Welfare of the Child (ACRWC)
14. African Protocol on the Rights of Women (APRW)
15. Vienna Declaration on Human Rights, 1993 (VDHR)

LIST OF STATUTES

Zambian Statutes

1. Anti-Corruption Commission Act, No. 42 of 1996
2. Bank of Zambia Act, No. 43 of 1996
3. Banking and Financial Services Act, Cap. 387
4. Chiefs Act, Cap. 287
5. Citizenship of Zambia Act, Cap. 124
6. Commission for Investigations Act, Cap. 39
7. Criminal Procedure Code, Cap. 88
8. Defence Act, Cap. 106
9. Electoral Act, Cap. 13
10. Emergency Powers Act, Cap. 108
11. Employment of Young Persons and Children Act, Cap. 274
12. Environmental Protection and Pollution Control Act, Cap. 204
13. Federation of Rhodesia and Nyasaland (Constitution) Order in Council, 1953
14. Fisheries Act, Cap. 200
15. Forests Act, Cap. 311
16. HRC Act, Act No. 39 of 1996
17. Housing (Statutory and Improvement Areas) Act, Cap. 194
18. Immigration and Deportation Act, Cap. 123
19. Industrial Development Act, 1977 (repealed by Investment Act)
20. Judges (Conditions of Service) Act, Cap. 277
21. Judicature Administration Act, Cap. 24
22. Judicial (Code of Conduct) Act, No. 13 of 1999
23. Juveniles Act, Cap. 53
24. Land (Conversion of Titles) Act, 1975
25. Legal Aid Act, Cap. 34
26. Loans and Guarantees (Authorisation) Act, Cap. 366
27. Local Courts Act, Cap. 29
28 Local Government Act, 1965
29. Local Government Act, Cap. 28
30 Local Government Elections Act, Cap. 282
31. National Anthem Act, Cap. 7
32. National Flat and Armorial Ensigns Act, Cap. 6
33. Northern Rhodesia (Crown Lands and Native Reserves) Order in Council, 1928
34. Northern Rhodesia (Legislative Council) Order in Council, 1924
35. Northern Rhodesia (Supplemental) Order in Council, 1929
36. Northern Rhodesia Crown Land and Native Reserves (Tanganyika Districts) Order in Council, 1929
37. Northern Rhodesia Order in Council, 1924
38. Northern Rhodesia Police Ordinance, No. 5 of 1953
39. Parliamentary and Ministerial Code of Conduct Act, Cap. 16
40. Protected Places and Areas Act, Cap. 125
41. Public Order (Amendment) Ordinance, 1959

42. Public Order Act, Cap. 113
43. Public Order Ordinance, No. 38 of 1955
44. Public Pensions Act, No. 35 of 1996
45. Rent (Amendment) Act, Cap. 1974
46. Service Commissions Act, Cap. 259
47. Societies Act, Cap. 105
48. Subordinate Courts Act, Cap. 28
49. The Agricultural Lands Act, Cap.292
50. The British Acts Extension Act, Cap. 10
51. The Corrupt Practices Act, Cap. 91 (Repealed by the Anti-Corruption Commission Act)
52. The Defamation Act, Cap. 68
53. The Electoral Commission Act, No. 24 of 1996
54. The English Law (Extent of Application) Act, Cap. 11
55. The High Court Act, Cap. 27
56. The Immigration and Deportation Act, Cap. 123
57. The Independence Broadcasting Authority Act
58. The Industrial and Labour Relations Act, Cap. 269
59. The Inquiries Act, Cap. 41
60. The Intestate Succession Act, Cap. 59
61. The Investment Act, Cap. 385
62. The Land (Perpetual Succession) Act, Cap. 186
63. The Lands Act, Cap. 184
64. The Local Administration Act, No. 15 of 1980
65. The Local Authorities Superannuation Fund (Amendment) Act No. 27 of 1991
66. The Local Authorities Superannuation Fund Act, Cap. 284
67. The Mines and Minerals Act, Cap. 213
68. The Narcotic Drugs and Psychotropic Substances Act, Cap. 96
69. The National Parks and Wildlife Act, Cap. 201 (repealed by the Zambia Wildlife Act No. 12 of 1998)
70. The Penal Code Act, Cap. 87
71. The Preservation of Public Security Act, Cap. 112
72. The Prisons Act, Cap. 97
73. The Public Audit Act, Cap. 378
74. The Public Service Pensions Act, No. 35 of 1996
75. The Radio Communications Act, Cap. 169
76. The Rating Act, Cap. 192
77. The Referendum Act, Cap. 14
78. The Supreme Court Act, Cap. 25
79. The Water Act, Cap. 198
80. The Zambia Independence Order, 1964
81. Zambia National Service Act, Cap. 121
82. Western Province (Land and Miscellaneous Provisions) Act, 1970
83. Wills and Administration of Testate Estates Act, Cap. 60
84. Witchcraft Act, Cap. 90
85. Workers' Compensation Act, Cap. 271

86. Zambia Civil Service (Local Conditions) Contributing Pensions Ordinance, Cap. 48
87. Zambia Police Act, Cap. 107
88. Zambia Security Intelligence Service Act, Cap. 109

Other Statutes

89. The Budget Act, 2001 of Uganda
90. The Constitution Review Commission Act of Kenya

LIST OF CASES

1. Nkumbula Vs. Attorney-General, HP/Cons/REF/1/1972
2. Nkumbula Vs. Attorney-General, C.A case No. 6 of 1972
3. Mulundika and Others Vs. The People (1996) ZLR, p.195
4. Resident Doctors Association of Zambia Vs. The Attorney-General, Appeal No. 39/2002 SCZ No. 12, 2003
5. Cuthbert Mambwe Nyirongo Vs. Attorney-General (1990-1992) ZR82 (SC)

EXECUTIVE SUMMARY

1.0 Introduction

On 17th April, 2003, by Statutory Instrument No. 40 of 2003, His Excellency the President, Mr. Levy Patrick Mwanawasa, SC, in exercise of the powers under the Inquiries Act, Cap. 41, appointed a Commission, chaired by Mr. Wila D. Mung'omba, to review the Constitution of Zambia.

The terms of reference of the Constitution Review Commission (hereinafter referred to as "the Commission" or "this Commission") are thirty-one and, briefly stated, included:

- recommending a Constitution that should exalt and effectively entrench and promote legal and institutional protection of fundamental human rights and stand the test of time;
- examining and recommending on the desirability of the death penalty;
- examining and recommending the elimination of perceived discriminatory provisions in the Constitution;
- recommending a system of government that will promote democratic governance and guard against the emergence of a dictatorial form of government;
- reviewing the electoral system to ensure fairness in the conduct of presidential, parliamentary and local government elections;
- recommending provisions to ensure the competence, impartiality and independence of the Judiciary, and access of the public to justice;
- examining and recommending the composition and functions of the organs of government with the view to maximising on checks and balances and securing, as mush as possible, their independence;
- examining and recommending effective methods to ensure grassroots participation in the political process of the country, including the type of provincial and district administration;
- examining the local government system and recommending how a democratic system of local government as specified in the Constitution may be realised; and
- examining and recommending on issues of gender equality.

Also key among the terms of reference were those enjoining the Commission to recommend suitable methods of amending and adopting the Constitution.

The Commission found the terms of reference sufficiently broad to accommodate all shades of opinion aimed at reaching national consensus and allowing the people of Zambia to draft a Constitution that will secure individual liberties and stand the test of time.

In line with its terms of reference, the Commission undertook wide consultations with the public and relevant social, political and economic groups in the country. The Commission collated, summarised and analysed the submissions, both oral and written, received from petitioners across the country as well as from Zambians living abroad. The Report of the Commission is primarily based on these submissions.

In executing the assignment, the approach taken included review of relevant literature. This involved both a qualitative and a critical appraisal of the underlying philosophies and values of constitutions. In this regard, constitutions from selected countries were reviewed relative to the Zambian experience.

The Report is organised into 28 thematic chapters, covering a wide range of areas, including National Sovereignty and the State, Democratic Governance, Fundamental Human Rights and Freedoms, the Executive, the Legislature, the Judiciary, Local Government, Political Parties, Traditional Authority, Public Finance and Budget, Land, Mode of Adoption of the Constitution and Mode of Amending the Constitution.

2.0 Background: Constitution Development of Zambia

The history of constitution making in Zambia dates as far back as the colonial era, starting with the Federation of Rhodesia and Nyasaland (Constitution) Order in Council of 1953, which created the Federation of Rhodesia and Nyasaland. Among other things, the Order defined the powers of the Federal Government and those of territorial governments.

This was followed by the 1962 Constitution, which was mainly designed by the Colonial Administration to accommodate the participation of both the white settlers and the Africans in the Legislative Council whilst ensuring that the former had electoral advantage over the latter. Elections conducted under this Constitution resulted in a coalition African Government consisting of United National Independence Party (UNIP) and African National Congress (ANC). Despite assuming power in 1962, both UNIP and ANC made it clear that they were not satisfied with the 1962 Constitution. Their goal was to bring about a Constitution based on universal adult suffrage and the granting of independence to Northern Rhodesia outside the Federation. The Federation was dissolved in 1963, after Nyasaland was allowed to secede.

The 1964 independence Constitution was worked out as a result of negotiations among the major political actors of the day. The constitutional arrangements were aimed at resolving the conflicting interests of the indigenous Africans, the settler white community and the colonial Government. The Constitution came into being through the Zambia Independence Order, 1964.

In essence, however, the 1964 Constitution, like the previous Constitutions, was not a creation of the people of Zambia, as they were not involved in its making. This Constitution was based on a Westminster model designed for the emerging nations of former British Colonies and Protectorates.

Since independence, Zambia has experienced at least three major phases in constitutional development. These were inspired by various factors, such as changed political environment in the country. Developments within the regional and global contexts have also played a part in shaping the Constitution of the country.

Many factors played a role in weakening the idea of liberal democracy enshrined in the 1964 Constitution, resulting in the 1973 Constitution which introduced the One-Party State under the UNIP Government. The architects of One-Party rule were inspired by a desire to eliminate political conflicts and build a united political order. The Government of Zambia, like other countries on the continent, justified a one-party State as a variant of democracy best suited to the peculiar African circumstances. Cases of inter-party political violence, the hostile regional environment within Southern Africa occasioned by the Unilateral Declaration of Independence (UDI) in Southern Rhodesia (now Zimbabwe) and the need for political self-preservation all combined to provide a strong argument for replacing the 1964 constitutional order. An additional factor was the socialist influence from the Eastern European Bloc.

However, the 1980s saw the demise of communism in the Eastern European Bloc countries and the re-emergence of new democracies in its place. These developments culminated in sweeping ideological re-alignments across the world. This historic shift in the global balance of power precipitated the crisis that led to the crumble of One-Party rule.

The shift in the political order in Zambia was also catalysed by serious economic difficulties, which by 1990 had reached extreme levels. There was overwhelming public support in favour of the move towards multi-party democracy. This culminated in the 1991 Constitution, the thrust of which was the re-introduction of plural politics.

The 1991 Constitution was seen more as a transitional instrument to answer the immediate pressures of the time. On 31st October 1991, Zambia went to the polls under the multi-party Constitution. The Movement for Multi-Party

Democracy emerged winner with a landslide victory. This was followed by renewed search for a lasting Constitution.

Thus after coming into power in 1991, the MMD Government initiated another constitution review. The Constitution Review Commission, led by Mr. John Mwanakatwe, SC, made far-reaching recommendations. Notable among these were the strengthening of the Bill of Rights and the inclusion of a range of new rights. Those proposed for addition referred to residence, human dignity and reputation, culture, marriage, a clean environment and equal pay for equal work. Freedom of the press and the related rights of journalists were to be strengthened. Academic and intellectual freedom and the right to strike and lock out were scheduled for protection. Most notable was a proposed drastic increase in the protection of the rights of women and the prohibition of laws, customary practices and stereotypes which worked against the dignity of women. Economic protection of women, including maternity leave, was to be included, as was a comprehensive provision on children's rights.

Other notable recommendations included restrictions on declarations of emergencies; appointment of Cabinet Ministers from outside Parliament; recall of a non-performing MP; establishment of a Constitutional Court to exercise jurisdiction over alleged violation of any right guaranteed by the Constitution; and adoption of the Constitution through a Constituent Assembly.

With regard to qualifications to contest presidential elections in relation to citizenship, the Mwanakatwe Commission recommended that a presidential candidate had to be a citizen of Zambia, born in Zambia. Her or his parents were also required to be Zambian citizens born in Zambia of Zambian citizens.

Historically, constitution making in Zambia has been initiated by successive Governments under the Inquiries Act. Under the provisions of this Act, the President determines the terms of reference, appoints the Commission, and the report of the Commission is made to the President. The method of review and adoption of the Constitution under this Act allows the Government to override the wishes of the people. Consequently, this has been a source of contention, particularly following the constitution review undertaken by the Mwanakatwe Commission. The Mwanakatwe Commission, in response to popular demands, recommended adoption of the Constitution through a Constituent Assembly, which was considered to be a more representative body. Government rejected this on account of what it considered to be legal and technical constraints. Therefore, the issue remains contentious.

By and large, the 1996 amendment to the Constitution was considered to lack popular legitimacy, as it did not take into account most of the submissions made by the people. Contending political parties in the 2001 elections pledged immediate review of the Constitution after the elections.

It was against this background that the Commission, chaired by Mr. Wila Mung'omba, was appointed.

3.0 Submissions, Observations and Recommendations

A summary of submissions made to the Commission by petitioners as well as the observations and recommendations of the Commission is provided below according to thematic chapters.

Chapter 1: National Sovereignty and the State

Submissions made by petitioners on this subject include the question of whether Zambia should adopt a federal State system or remain a unitary State; the need for the Constitution to define the boundaries of Zambia for the protection of the territorial integrity of the country; ownership of the Constitution by the citizens through a participatory and representative mode of constitution making; and protection of the Constitution from being suspended or overthrown by force.

Other submissions include calls for simplification, translation and dissemination of the Constitution; calls for repeal and others for retention of the declaration of Zambia as a Christian nation; and for the language of the Constitution to be gender neutral.

Recommendations made by the Commission include that:

- the Constitution should provide that Zambia is a unitary State in which State power and authority is constitutionally devolved to lower levels of government;

- Zambia's international boundaries should be defined and described in the Constitution;

- the Constitution should explicitly provide that the people shall adopt and give to themselves a Constitution and that the constitution making process should be defined by an Act of Parliament;

- the Constitution should make provision for its protection from being suspended or overthrown by force or other unlawful means, and that it should be the right and duty of every citizen to defend the Constitution;

- the Constitution should provide that the language of the Constitution shall be plain and gender neutral and that the State shall promote public awareness of the Constitution by translating it into local languages and disseminating it as widely as possible; and

- the declaration of Zambia as a Christian nation as contained in the current Constitution should be retained, subject to further debate and a decision by the people of Zambia through the Constituent Assembly and national referendum.

Chapter 2: Citizenship

Submissions received by the Commission on this subject included those pertaining to the right to citizenship; the Constitution permitting or prohibiting dual citizenship; the need for the Constitution to restrict acquisition of citizenship by registration; whether or not the Constitution should permit citizenship by birth or citizenship by marriage; and the right to a passport.

The Commission recommends, among others, that:

- there should be automatic acquisition of citizenship by birth or descent;
- loss of citizenship should be on restricted and specified grounds;
- the Constitution should permit dual citizenship in respect of citizenship by birth or descent;
- the Constitution should provide for citizenship by registration; and
- the right to a passport should be provided for in the Bill of Rights to supplement the freedom of movement.

Chapter 3: Fundamental Human Rights and Freedoms

Some of the submissions made by petitioners on this subject called for the Bill of Rights to be made superior to other provisions of the Constitution; the abolition, on the one hand, and retention, on the other hand, of the death penalty; the right to justice, including speedy disposal of cases and enjoyment of the fruits of judgement; and the Constitution to make all offences bailable, on the one hand, and the exclusion of certain offences such as murder, rape and defilement, on the other hand.

Others called for the right of access to public information held by the State to be guaranteed by the Constitution; press freedom to be explicitly guaranteed by the Bill of Rights; the repeal of the Public Order Act; the repeal of all discriminatory clauses in the Constitution; the rights of persons with disabilities to be enshrined in the Constitution.

Further, petitioners submitted that the rights of the child as provided for in the UN Convention on the Rights of the Child should be enshrined in the Constitution; the Bill of Rights should guarantee gender equality and women's rights; the Intestate

Succession Act should be reviewed in order to increase the percentage of the estate due to parents; economic, social and cultural rights should be included in the Bill of Rights; and that the right to pension should be guaranteed by the Constitution and be justiciable.

Some petitioners also called for provisions for derogation from guaranteed rights and freedoms to be limited.

Some of the recommendations of the Commission on the subject are that:

- the death penalty should be retained;
- the Constitution should provide for accused persons to be brought before courts within reasonable time, in any case not later than 48 hours after arrest;
- the Constitution should guarantee the right to administrative justice and the right to judicial review;
- the Constitution should explicitly provide relief to aggrieved parties against the State in enforcing judgments;
- all offences should be bailable and that the question of whether or not bail should be granted should be left to the discretion of courts;
- the right of access to public information held by the State subject to security considerations, should be enshrined in the Bill of Rights;
- press freedom should be specifically provided for in the Bill of Rights;
- the right to freedom of association, peaceful assembly, demonstration and petition should be enshrined in the Constitution;
- the offences of criminal libel and defamation of the President should be repealed;
- the Public Order Act should be amended to make the Act more flexible and permissive;
- the rights of the child as provided for in the UN Convention on the Rights of the Child should be incorporated in the Bill of Rights;
- the principle of gender equality and women's rights should be enshrined in the Bill of Rights;

- the rights of persons with disabilities should be enshrined in the Bill of Rights; and

- economic, social and cultural rights should be enshrined in the Bill of Rights.

Further, the Commission recommends that the Constitution should have one derogation clause of general application.

Chapter 4: State of Emergency

Most petitioners who addressed this subject called for constitutional provisions on declarations of emergencies to be made more stringent by requiring parliamentary approval by at least two-thirds of all the members of the National Assembly.

The Commission recommends, among others, that:

- a declaration of a state of emergency should require approval by the National Assembly within 7 days by a resolution supported by not less than two-thirds of all the members and that this should apply to any subsequent extensions;

- the Constitutional Court should have jurisdiction to decide the validity of a declaration of a state of emergency or threatened state of emergency, including the reasonableness thereof; and the validity of any extension of a declaration of state of emergency and any legislation enacted or other measures taken in consequence of such declaration.

Chapter 5: Enforcement Machinery of Human Rights

Some of the petitioners who addressed this subject called for the Constitution to make provision for the Human Rights Commission (HRC) in terms of its establishment; powers and functions; power to prosecute; broad representation of membership through nomination by various interest groups; and reporting directly to the National Assembly.

Other petitioners called for the establishment of a Commission for Gender Equality.

There were also submissions that the class of persons entitled to bring up court actions for violation of human rights should be expanded.

Recommendations of the Commission on the subject include that:

- the HRC should continue to be established by the Constitution and that its core functions should also be spelt out in the Constitution;

- the Constitution should vest the HRC with powers to prosecute cases of human rights violations, subject to the DPP's authority;

- provisions for appointment of Commissioners to the HRC should be enshrined in the Constitution, and that they should be appointed by the President subject to ratification by the National assembly;

- the Constitution should make provision for the establishment of a Commission for Gender Equality; and

- the class of persons entitled to bring up court actions for violation of human rights should be expanded to encompass group action, persons suing in a representative capacity and public interest litigation.

Chapter 6: Directive Principles of State Policy and Duties of a Citizen

Submissions on this subject included calls for the Constitution to direct Government to pursue policies that will promote national development for the benefit of all citizens; ensure equitable distribution of national wealth; and prohibition of corruption.

The Commission recommends that the scope of the Chapter in the Constitution on Directive Principles of State Policy and Duties of the Citizen should include policy objectives of the State and duties of a citizen in the areas of: politics, socio-economic, defence, culture, accountability, environment and foreign relations.

Chapter 7: Democratic Governance

Petitioners on this subject mainly addressed issues of the electoral system and process. Some of the specific submissions were that the current First-Past-the-Post electoral system should be retained, on the one hand, and that the Constitution should provide for a Mixed Member Representation electoral system, on the other hand.

Other submissions were that the Constitution should have provisions that guarantee the independence and autonomy of the Electoral Commission of Zambia; and that the Constitution should provide for powers and functions of the Electoral Commission and mode of appointment of Commissioners.

Further, petitioners called for presidential and parliamentary elections to be conducted on the same day; the date of the elections to be enshrined in the Constitution; the Constitution to provide a limited period within which election petitions should be determined; the establishment by the Constitution of a special court or tribunal for the settlement of election petitions; abolition of by-elections; equal access by political parties to the media during election campaigns; equitable representation of women, persons with disabilities and the youth in governance; and for oaths of office of constitutional office holders to be enshrined in the Constitution.

Recommendations of the Commission include that:

- the Mixed Member electoral system should be adopted for parliamentary and local government elections as a step towards graduating to the Proportional Representation system, and that provision for this should be made in the Constitution and the Electoral Act;

- the Constitution should establish an independent and autonomous Electoral Commission under which the Electoral Office should operate and provide for some of the core functions of the independent Electoral Commission;

- the Constitution should provide for the recruitment and appointment of the Electoral Commissioners by advertisement and selection by a panel of independent experts consisting of one member of the Supreme and Constitutional Court appointed by the Chief Justice, a member of the Public Service Commission, a member of the Judicial Service Commission, a representative from LAZ and the Ombudsman;

- the date of presidential, parliamentary and local government elections should be enshrined in the Constitution;

- the Constitution should provide that results from polling stations should be openly, accurately collated and promptly announced by the returning officer;

- the Constitution should provide that presidential election petitions should be determined by the full bench of the Constitutional Court and that parliamentary election petitions and local government election petitions shall be determined by *ad hoc* tribunals which should also have final jurisdiction;

- the Constitution should provide that election petitions shall be determined within a period of 90 days;

- the Constitution should make provision that complaints shall be lodged with the Electoral Commission immediately after noticing the malpractice; and election petitions based on complaints of malpractices which could have been known before or during the election but were not reported shall be barred;

- the Constitution should state that the Electoral Commission shall have power to determine electoral complaints or disputes brought before it and in this regard to disqualify candidates, or their agents, found guilty of electoral malpractices; and to cancel an election or election results and order a fresh election if the extent of the electoral malpractice is such that it would affect the results;

- the Constitution should provide that by-elections shall only be held 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;

- the Constitution should provide that the public media shall accord equal and balanced coverage to all persons and political parties participating in elections prior to and during election campaigns;

- the Constitution should make provision for women, persons with disabilities and the youth to be represented equitably at all levels of governance;

- the content of the Oath of Office of the President, Vice-President, Speaker, MPs and other constitutional office holders should be reviewed so that the Oath is not to the President but to the Constitution and the country; and

- the format and content of oaths of the various constitutional offices should be appended to the Constitution.

Chapter 8: The Executive

Some of the submissions made by petitioners on this subject were that the constitutional provision for election to the Office of President requiring both parents of a candidate to be Zambians by birth or descent should be repealed, on the one hand, and that it should be retained on the other hand; and that there should be a minimum education qualification for a person to contest an election to the Office of President, preferably Grade 12.

Other submissions were that a presidential candidate must obtain at least 51% of the votes cast in order to be declared winner, failure would lead to a re-run between the two contenders with the highest number of votes; the Chief Justice should not be the Returning Officer in presidential elections; the Constitution

should provide for a handover period following elections; and that in the event of a presidential election petition, the President-elect should not be sworn in until the petition is determined.

There were also submissions that powers of the President, particularly in relation to the appointment of constitutional office holders should be reduced; the President should lose immunity from legal proceedings upon vacating office, on the one hand, and that the President should retain immunity, on the other hand.

Other petitioners submitted that the Vice-President should be popularly elected through universal adult suffrage; Cabinet should be appointed from outside the National Assembly, on the one hand, from inside the National Assembly, on the other hand. Others submitted that Cabinet should be appointed from both inside and outside the National Assembly; and that the Constitution should limit the size of Cabinet.

Among recommendations made by the Commission are that the Constitution should provide that:

- a presidential candidate should be a Zambian citizen by birth or descent;

- a winning presidential candidate should receive a minimum of 50% plus one valid votes cast and that failure by any of the candidates to attain this threshold should lead to a re-run, within 30 days, between candidates who receive the two highest numbers of valid votes cast;

- the Chairperson of the Electoral Commission of Zambia shall be the Returning Officer in Presidential elections;

- there should be a 90 days period of handover of the Presidency;

- in the event of an election petition, the President-elect should not be sworn- in until the petition has been disposed of;

- a former President should enjoy immunity from legal proceedings only in respect of civil and criminal proceedings for acts committed or omissions made in the course of duty or private capacity, but immunity in respect of acts committed or omissions made in a private capacity may be removed by the National Assembly on a resolution supported by at least two-thirds of all MPs;

- the Vice-President should be elected by universal adult suffrage as running mate of a winning presidential candidate;

- Cabinet Ministers and Deputy Ministers should be appointed from outside the National Assembly; and

- the President should establish or dissolve Government Ministries and Departments subject to the approval of the National Assembly, and that this should be extended to any increase above or reduction below 21 in the number of Cabinet Ministers or Deputy Ministers.

Chapter 9: The Legislature

Some of the submissions on the subject were that the President should be a member of Parliament or be eligible to contest parliamentary elections, on the one hand, and that the President should not be part of the Legislature, on the other hand.

Other submissions were that the number of constituencies should be increased; there should be equitable gender representation and representation of persons with disabilities and the youth in the National Assembly; the term of office of an MP should be limited; in the event of a parliamentary election petition, the MP-elect should not assume office until the petition is settled; the number of nominated MPs should be increased, on the one hand, and that the number should be decreased, on the other hand. Other petitioners submitted that the provision for nomination of MPs should be repealed. There were also submissions that International Agreements should be approved by the National Assembly before they are ratified by the Executive; and that the electorate should have the right to recall a non-performing MP.

Some of the recommendations of the Commission are that the Constitution should provide that:

- presidential candidates should not be eligible to contest parliamentary elections;

- the President should be part of Parliament for the purpose of assenting to Bills and summoning and dissolving Parliament;

- parliament should be the highest legislative body and should enact legislation submitted to it as well as initiate its own legislation at public expense;

- legislative power should be vested in Parliament;

- the right of a citizen to comment on deliberations of the National Assembly should be guaranteed by the Constitution;

- when a Bill is presented to the President for assent, he/she should assent to it within twenty-one days, unless he/she sooner refers it back to the National Assembly for reconsideration;

- when a Bill referred back to the National Assembly for further consideration has been passed by a two-thirds majority of all MPs, the President should be obliged to give his assent to it unless the President's reservation is on a question of constitutionality, in which case he/she should refer it to the Constitutional Court, whose decision shall be final and binding;

- the total number of elective seats based on the First-Past-The-Post electoral system, i.e. constituencies, should not be less than 150 or more than 200;

- neither gender should be represented by less than 30% of all elective seats and that details of the formula should be provided for by the electoral laws;

- there should be no limit on the term of office of MPs;

- an MP elect whose election has been petitioned should take up the seat in the National Assembly pending the outcome of the petition;

- the electorate should have power to recall an MP elected on the basis of the First-Past-The-Post electoral system on grounds of failure to perform;

- the National Assembly should approve international treaties or Agreements before ratification, accession or adhesion;

- the President should have power to summon the National Assembly for the first sitting of each Parliament and, when the National Assembly is dissolved, in situations of war or a state of emergency;

- the President should be able to request the Speaker, in writing, to summon the National Assembly for a special sitting to conduct extraordinary business;

- the only instance when the President should be allowed to dissolve Parliament and call for elections is where the situation is such that the National Assembly makes it impossible for the President to govern; and

- the National Assembly should stand prorogued ninety days before parliamentary elections and dissolved at the expiry of its term or upon the first sitting of the next Parliament, whichever is the earlier.

Further, the Commission recommends that the Constitutional provision for nomination of MPs should be repealed.

Chapter 10: The Judiciary

Some of the submissions made by petitioners on this subject were that the Constitution should vest judicial powers in the Judiciary and guarantee its independence and autonomy; that the Chief Justice and other judges should not be appointed by the President; the Office of Deputy Chief Justice should be abolished; that the Chief Justice and other judges should enjoy security of tenure and their salaries and conditions of service should be determined by the National Assembly in consultation with the Judicial Service Commission; and that the President should have no role in the removal of the Chief Justice and other judges.

Petitioners also called for the establishment by the Constitution of a Constitutional Court to deal with constitutional matters, including human rights violations and election petitions; and for the Industrial Relations Court to be established by the Constitution.

Some of the recommendations of the Commission on this subject are that the Constitution should provide that:

- the judicial power of the State should vest in the courts;

- in the exercise of the judicial power of Zambia, the Judiciary, in both its judicial and administrative functions, including financial administration should be subject only to the Constitution and should not be subject to the control or direction of any person or authority;

- the President, after consulting the Judicial Service Commission and with the approval of the National Assembly, should appoint the Chief Justice, Deputy Chief Justice and Judges of the Supreme and Constitutional Court and Court of Appeal;

- Judges of the High Court should be appointed by the President on the recommendation of the Judicial Service Commission and with the approval of the National Assembly;

- the emoluments, pensions and other conditions of service of judges should be reviewed and recommended in the first instance by the Judicial Service Commission and submitted to an independent National Fiscal and Emoluments Commission which should make recommendations to the National Assembly;

- the Chief Justice, Deputy Chief Justice and other judges should retire at the age of 75 years, subject to an option to retire early at the age of 65 years;

- once retired, a judge shall not be eligibile for reappointment to the Office of Judge;

- removal of a Chief Justice, Deputy Chief Justice or Judge shall be only on grounds of:

    (a) inability to perform the functions of the Office, whether arising from infirmity of body or mind, incompentence, misbehaviour or misconduct, bankcruptcy or insolvency; and

    (b) undue and unreasonable delays in the delivery of judgments.

- the Judicial Complaints Commission should initiate the process of removal of a judge by referring the matter to the President who should thereafter refer the same to the National Assembly, which should appoint a tribunal, receive the report of the tribunal and determine the matter.

Further, the Commission recommends that the Constitution should establish:

- a Constitutional Court which should be part of the Supreme Court and exercise exclusive jurisdiction in constitutional matters, subject to provisions of the Constitution;

- the Industrial Relations Court as a specialised Division of the High Court;

- the Judicial Service Commission, whose composition and some of whose core functions should also be in the Constitution; and

- a Judicial Complaints Commission whose composition, powers and functions should be prescribed by an Act of Parliament.

Chapter 11: Local Government

Submissions made by petitioners on this subject included that the Constitution should provide for the system of local government; the principle of devolution of power to lower levels of government should be enshrined in the Constitution; the Barotseland Agreement should be restored and incorporated in the Constitution; and that Local Authorities should be adequately funded, be allowed to levy and retain a substantial percentage of local taxes and that they should be entitled to an equitable share of national resources.

Other petitioners submitted that the Office of the District Commissioner should be abolished; the Constitution should provide that Mayors and Chairpersons of Councils should be elected by universal adult suffrage and that their term of office as well as that of Councillors should be 5 years; the principle of equal gender

representation in Councils should be enshrined in the Constitution; and that the Constitution should provide for recall of a non-performing Councillor.

Some petitioners called for the Office of Provincial Deputy Minister to be elevated to the level of Cabinet Minister.

The Commission recommends, among others, that the Constitution should:

- make provision for the system of local government in terms of objectives, structures, functions and financing and decentralisation from the Central Government of some powers, functions and resources to appropriate Local Government structures;

- make provision for adequate and predictable financing of local governments through appropriate resource mobilisation and allocation policies and other measures, including direct collection of local taxes;

- establish an independent Commission to determine sharing of resources between Central Government and Local Government;

- provide that Mayors and Chairpersons of Councils shall be elected by universal adult suffrage for a term of 5 years;

- provide that the term of office of councillors shall be 5 years;

- provide for the principle of equitable gender representation;

- provide for recall of a non-performing Councillor; and

- provide that the Office of Provincial Deputy Minister shall be at the same level as Cabinet Minister and re-designate the Office as that of Provincial Minister.

Further, the Commission recommends that the Barotseland Agreement should be addressed through the decentralised system of Local Government.

Chapter 12: Traditional Authority, Customs and Practice

Among submissions made by petitioners were that traditional rulers should not actively participate in politics, on the one hand, and that they should be free to actively participate in politics, on the other hand; the House of Chiefs should be retained and its composition increased, on the one hand, and that it should be abolished on the other; disputes over succession to chieftaincy should be determined by traditional courts; and that customary law should be harmonised with statutory law to remove conflict.

Some of the recommendations of the Commission are that:

- Chiefs should be free to participate in active politics and seek elective office;

- the House of Chiefs should be retained and the institution of chieftaincy should continue to be recognised subject to the Constitution;

- the House of Chiefs should have jurisdiction to deal with disputes over chieftaincy, customary land or any other matters of traditions and customs where the affected community has failed to resolve these but the parties should have recourse to courts of competent jurisdiction;

- Government should have no role in resolving disputes over chieftaincy; and

- statutory and customary laws should be harmonised wherever there are conflicts between these.

Chapter 13: Political Parties

Among the submissions made by petitioners to the Commission are that the Constitution should provide for strict conditions for the registration of political parties and that these should be registered by a body other than the Registrar of Societies; the conduct of political parties should be regulated by law; and that the number of political parties should be limited.

Some petitioners submitted that political parties should be funded by government, on the one hand, and that the State should not fund political parties, on the other; political parties should be compelled by law to disclose their sources of funds and that there should be a limit on the amount that political parties should be permitted to spend on election campaigns.

Other submissions were that the Constitution should provide for institutional mechanisms to facilitate dialogue between the ruling and opposition parties; and that political parties should be compelled to observe basic tenets of democracy in the manner in which they conduct their intra-party affairs.

The Commission recommends, among others, that:

- the Electoral Commission of Zambia should register, de-register and regulate the conduct of political parties;

- there should be a constitutional provision setting out clear criteria for forming and registering political parties and providing for a code of conduct to be prescribed by legislation, which should include that political

parties should observe basic tenets of democracy and conform to their constitutions and objectives;

- the law should not limit the number of political parties to be registered;

- the Constitution should provide that political parties with seats in Parliament or Local Authorities, as the case may be, should be funded by Government on pro rata basis in proportion to their respective number of seats;

- appropriate legislation should compel political parties and election candidates to be transparent regarding sources of funds, including election campaign funds and limit the amount of election campaign funds that can be raised and used by a political party as well as require disclosure of sources of campaign funds where these exceed the prescribed limit;

- appropriate legislation should establish a forum for the purpose of inter-party dialogue;

- courts should have jurisdiction, in intra-party conflict or disputes, to grant appropriate relief; and

- the code of conduct for political parties to be prescribed by legislation should include provisions that a member of a party shall not be unjustly penalized for exercising democratic rights or fundamental rights and freedoms

Chapter 14: The Civil Society and Non-Governmental Organisations

Among the submissions from petitioners were that the Constitution should provide for a regulatory framework for NGOs whilst others were that Government should regulate activities of NGOs.

Some petitioners submitted that the Constitution should compel NGOs to disclose their sources of funds; and that the Auditor-General should audit those NGOs receiving public funds, including from the donor community.

Some of the recommendations of the Commission are that:

- the Constitution should provide for legal and regulatory framework for Non-Governmental Organisations and other civil society organisations; and

- NGOs should disclose their sources of funding, be audited and held accountable.

Chapter 15: Code of Ethics and Conduct - Holders of Public Office

One major submission on this subject was that the Constitution should provide for a code of conduct for holders of public office, including the President. There were also some submissions that political leaders and senior public officers should be required to declare their assets before being elected or appointed and on vacating office.

The main recommendation of the Commission on this subject is that the Constitution should provide for a Code of Ethics and Conduct to be prescribed for holders of public office and that these should be required by law to declare their assets and liabilities before election or upon appointment and upon vacating office. The Commission also recommends that the Constitution should make provision for the President to declare assets and liabilities before elections, annually thereafter and upon vacating office.

Chapter 16: Defence and Security

Some of the submissions made by the petitioners on this subject were that the President should not appoint Defence and Security Chiefs, on the one hand, and that the President should continue making these appointments subject to ratification by the National Assembly, on the other; and that Defence and Security Chiefs should enjoy security of tenure of office similar to that of High Court Judges.

Other submissions were that the Constitution should guarantee the right of members of the defence and security service, including the Police Force, to form and belong to trade unions; defence and security personnel should not be allowed to actively participate in politics, on the one hand, and that they should have the right to participate in active politics, on the other; the military court should be modernised to include observance of fundamental rights and freedoms; and that the defence and security budget should be subjected to parliamentary scrutiny.

Some of the recommendations of the Commission are that:

- the Constitution should establish the defence forces and national security agencies and stipulate their functions under separate Articles;

- the Constitution should establish the Defence Council, the National Intelligence Council and the Police Prison Services Commission;

- Defence and Security Chiefs should be appointed by the President on the recommendation of the Defence Council and respective Commissions and should continue to serve at the pleasure of the President in order to enhance national security;

- Defence and Security Chiefs should be citizens of Zambia by birth or descent and should not have dual citizenship;

- the current provision of the law that defence and security personnel should not form or belong to trade unions should be retained;

- the Constitution should provide that defence and security personnel should not be involved in active politics but should continue to exercise their civic and constitutional right to vote;

- the procedures of military courts should be reviewed to bring them into conformity with provisions of the Constitution on fundamental rights and freedoms; and

- the Constitution should provide that the National Assembly should debate and scrutinise the defence budget and expenditure, provided that debate or scrutiny of defence and security operations should be done in camera.

Chapter 17: Investigative Commissions

Some of the submissions made by petitioners on the subject were that investigative Commissions should have administrative and financial autonomy and that their functions should be clearly spelt out in the Constitution; the Commissioners should be appointed by and be answerable to the National Assembly, on the one hand and that they should be appointed by independent bodies, on the other.

Some petitioners called for the Investor-General's Office to be merged with the Anti-Corruption Commission, whilst others wanted the Investor-General's Office to be abolished.

Some of the recommendations of the Commission are that:

- the Anti-Corruption Commission, Drug Enforcement Commission and other key investigative Commissions should be established by the Constitution and be guaranteed independence and autonomy;

- the Constitution should provide that Heads of investigative Commissions are appointed by the President on recommendations of the respective Commissions, subject to ratification by the National Assembly;

- the Constitution should provide that members and Heads of investigative Commissions will enjoy security of tenure and will not be removed except on grounds of incapacity to discharge their duties by reason of infirmity of body or mind, for incompetence, misconduct or bankruptcy;

- the powers and functions of investigative Commissions should be distinct and should be clearly defined and spelt out in enabling Acts of Parliament;

- the Office of the Investigator-General and the Commission for Investigations should be abolished and their functions should be transferred to other appropriate investigative bodies; and

- the Constitution should provide that members of investigative Commissions are appointed by the President on recommendations of the Judicial Service Commission, subject to ratification by the National Assembly.

Chapter 18: Parliamentary Ombudsman

Petitioners on this subject submitted that the Constitution should establish the Office of Parliamentary Ombudsman.

The Commission recommends that the Constitution should establish the Office of Parliamentary Ombudsman, who shall be elected by the National Assembly from names recommended by the Judicial Service Commission.

Other recommendations of the Commission on the subject include that the functions of the Parliamentary Ombudsman shall include to:

- initiate on own motion or on a complaint received from any person, investigations into cases of abuse of public office or authority or mal-administration of justice in public offices with the exception of cases involving corruption; and

- prosecute such cases, where necessary.

Chapter 19: Public Service

Some of the submissions received by the Commission on the subject were that Chairpersons of Service Commissions should be appointed by an independent body on the one hand, nominated by various Commissions, appointed by the President and ratified by the National Assembly, on the other.

Other submissions were that the Attorney-General and the Solicitor-General should not be appointed by the President but by the National Assembly and that they should not vacate office on change of Government.

There were also submissions that the Secretary to the Cabinet, Deputy Secretary to the Cabinet and other senior civil servants should be appointed by the Public Service Commission.

Some petitioners suggested that the DPP should be appointed by the Judicial Service Commission and that the Office should be independent and accorded security of tenure; the DPP should be required to apply for leave to enter a *nolle prosequi* and to provide sufficient grounds to the court.

Further, some petitioners submitted that civil servants should be allowed to participate in active politics, including contesting elective office, whilst a minority of petitioners submitted that the prohibition of civil servants from participating in active politics should be retained.

Some of the recommendations of the Commission are that the Constitution should state that:

- Chairpersons and Commissioners of all Service Commissions be appointed by the President subject to ratification by the National Assembly;

- the Attorney-General and Solicitor-General should be appointed by the President on the recommendation of the Judicial Service Commission, subject to ratification by the National Assembly;

- the Attorney-General should enjoy security of tenure similar to that accorded to a Judges of a superior court (the Attorney-General should not vacate office upon change in the Office of the President);

- the Secretary to the Cabinet and Deputy Secretary to the Cabinet should be appointed by the President, in consultation with the Civil Service Commission, subject to ratification by the National Assembly;

- Permanent Secretaries should be appointed by the President acting in accordance with advice of the Civil Service Commission, subject to parliamentary ratification, and that this should be on the basis of professional merit;

- the DPP should be appointed by the President on the recommendation of the Judicial Service Commission, subject to ratification by the National Assembly;

- removal of the DPP from office should be entirely the responsibility of the National Assembly instead of the President;

- the power of entry of *nolle prosequi* should be conditional on the DPP being required to obtain leave of the court and the court having power to inquire into the grounds thereof; and

- where *nolle prosequi* has been entered, an accused person should only be charged afresh on the same facts within a reasonable time (not being more than 12 months), after which the accused person shall be deemed to have been acquitted.

The Commission also recommends that:

- the constitutional provision requiring the DPP to consult and receive directives from the Attorney-General on matters of public interest should be repealed; and

- the Constitution should state that public officers should not be allowed to participate in active politics but that should they choose to do so, then if they have served for 20 or more years they should be retired in the National Interest and if they have served for less than 20 years they should retire or be retired.

Chapter 20: Pensions

Among submissions made by petitioners on this subject were that the right to pension should be enshrined in the Constitution as a justiciable right; the retirement age should be reduced, on the one hand, whilst a minority, on the other hand, submitted that it should be retained; retirement benefits should be exempted from tax and paid promptly on retirement; and that payment of pension benefits should be decentralised.

Recommendations of the Commission, among others, are that:

- the right to pension should be enshrined in the Constitution as a justiciable right;

- appropriate laws should make provision that the retirement age be 60 years, with an option for early retirement with full benefits at the age of 55 years;

- the Constitution should provide that pension must be paid promptly upon retirement; and

- retirees should be exempted from paying tax on pension benefits.

Chapter 21: Public Finance and the Budget

Among submissions made by petitioners to the Commission on this subject were that the grassroots should determine their development programmes and participate in formulating the national budget; the national budget should be presented to and approved by the National Assembly before the beginning of the

financial year to which it relates; a supplementary budget should be approved by the National Assembly before expenditure is incurred; and that the National Assembly should play a central role in the budget process and oversight of public finance management.

Other submissions were that the Financial Report of Government should be detailed and submitted to the National Assembly within a reasonable time; emoluments of holders of constitutional offices and senior civil servants should be determined by an independent Commission; international and domestic contracts for public debt should be determined and approved by the National Assembly; major public assets should not be sold, transferred or disposed of without the approval of the National Assembly; and that every adult should be taxed.

Some of the recommendations of the Commission are that:

- the grassroots, including the ward, constituency, district and province should participate in the preparation of the national budget and that this should be in conformity with decentralisation of power as recommended in this Report under the Chapter on Local Government;

- the Constitution should provide that the Minister responsible for finance shall cause to be prepared and laid before the National Assembly estimates of revenues and expenditure of Government for the financial year and that the estimates shall be submitted in October and approved by December before the commencement of the financial year to which the estimates relate;

- the Constitution should provide that the National Assembly should have power to amend the national budget but not vary the total estimates of revenue and expenditure;

- parliament should enact a Budget Act to make provision for the budgeting process, including the submission of financial and economic information and indicative estimates of revenues and expenditure for the following year to the National Assembly well before the presentation of the estimates;

- the Financial Report of Government should be detailed and include payments relating to public debt;

- the Financial Report should be submitted to the National Assembly by the Auditor-General together with the opinion of the Auditor-General, within nine months after the end of each financial year;

- expenditure in excess of or outside the annual budget should be prohibited and the Constitution should provide that Parliament must give prior

approval to any expenditure that may exceed the budget (supplementary budget);

- the Constitution should establish a National Fiscal and Emoluments Commission to, among others, recommend to the National Assembly the emoluments of the President, Vice-President, Ministers, Speaker, Chief Justice, MPs, Judges and other constitutional office holders as well as senior civil servants;

- the Constitution should provide that direct international and domestic contracts for public debt and loan guarantees should be approved by the National Assembly before taking effect;

- the Constitution should provide that any measure to sell, transfer or dispose of major public assets should require approval by the National Assembly through a resolution supported by not less than two-thirds of all the MPs; and

- Government should broaden the tax base by levying all eligible adults.

Chapter 22: Auditor- General

Some of the petitioners who addressed this subject submitted that the Office should be independent and autonomous and that the Auditor-General should be an officer of the National Assembly and report directly to the National Assembly; the Auditor-General should not be appointed by the President but by the National Assembly; and that there should be established a State Audit Commission to oversee the administration and financing of the Office of the Auditor-General.

Some of the Commission's recommendations are that the Constitution provide that:

- the Auditor-General's Office should be autonomous and independent in its operations;

- the Auditor-General should be appointed by the President following nomination by a State Audit Commission and approval by the National Assembly;

- the Office of the Auditor-General shall prepare the budget of the Office in consultation with the Ministry responsible for finance, taking into account the principle of equitable sharing of resources;

- a State Audit Commission should be established; and

- the Auditor-General's report should be presented to both the National Assembly and the President not later than nine months after the end of each financial year.

Chapter 23: The Central Bank

Some of the submissions made by petitioners on this subject are that the Bank of Zambia should be established by the Constitution and be guaranteed operational independence; the Office of Governor of the Central Bank should be constitutional and that the office holder should enjoy security of tenure.

Recommendations of the Commission include that the Constitution should:

- establish the Bank of Zambia;

- provide for and guarantee the operational independence of the Bank;

- provide that the Governor of the Central Bank should be appointed by the President on a renewable fixed period contract terms of which should be prescribed by an Act of Parliament; and

- state that the emoluments of Govenor of the Central Bank shall be recommended to the National Assembly for approval by the National Fiscal and Emoluments Commission.

Chapter 24: Land

Some of the submissions received by the Commission on the subject of land were that land under traditional authority should vest in Chiefs, on the one hand, and that all land should vest in the President on the other. Other submissions were that the Constitution should guarantee the right of access to and ownership of land by Zambians; the amount of land that can be acquired by a person should be limited; and that non-Zambians should not be eligible to own land.

There were also submissions that the Office of Commissioner of Lands should be a constitutional Office and that the holder should be appointed by the President subject to ratification by the National Assembly, on the one hand, and that the Office be abolished and replaced by a Lands Board, on the other.

Some of the recommendations of the Commission were that the Constitution should:

- provide that all land in Zambia belongs to the citizens of Zambia and should be vested in the President on behalf of the citizens for the purpose of administration and regulation, for the use or common benefit, direct or indirect, of the citizens of Zambia;

- provide that in the regulation and administration of land, Local Authorities and Chiefs should have a part to play within the context of devolution of power;

- provide that citizens should have the right of access to and right to acquire land without any impediment, all conditions of acquisition having been met and at the expiry of a lease, the lease should be renewed as a matter of right;

- provide that eligibility of non-Zambians to acquire land should be restricted and regulated by law; and

- establish a Lands Commission.

Chapter 25: The Environment

Some petitioners on this subject wanted the Constitution to make provision for the protection of the environment and sustainable utilisation of natural resources. Others wanted the law dealing with protection of wildlife to be reviewed in order to achieve a balance between protecting wildlife and recognising the value of human life and property; and that local communities should benefit from exploitation of natural resources and be compensated for environmental degradation resulting from such exploitation.

Some of the recommendations of the Commission are that:

- the right to a clean and healthy environment should be enshrined in the Bill of Rights;

- natural resources management should emphasise the concept of community-based natural resources management and that this should be implemented in consultation with the communities concerned;

- The Zambia Wildlife Act should be reviewed to provide for compensation for injury, death or damage to crops occasioned by wild animals in exceptional circumstances;

- benefits accrued to communities from wildlife products should be re-invested in the communities; and
- a percentage of royalties and other fees levied for the exploitation of natural resources should be retained by local authorities and communities.

Chapter 26: Method of Adoption of the Constitution

An overwhelming number of petitioners submitted that the Constitution should be adopted by a Constituent Assembly, a Constitutional Conference or a body with broad representation. Others called for the Constitution to be adopted by the National Assembly or a national Referendum.

The Commission recommends, among others, that:

- the Constitution should be repealed and replaced;
- the Constitution should be adopted by a Constituent Assembly followed by a national Referendum;
- the Constituent Assembly should be composed of elected district representatives, all MPs and representatives of various interest groups;
- all members of the Constituent Assembly should be citizens of Zambia; and
- the method of review of the Constitution, including the Constituent Assembly, should be given legal effect by an Act of Parliament laying down the processes and procedures, allocating the necessary resources, as well as stating the composition and functions of the Constituent Assembly.

Chapter 27: Method of Amending the Constitution

The majority of petitioners who submitted on this subject wanted the Constitution to be amended by Parliament, whilst others submitted that it should be amended through a Constituent Assembly or national Referendum.

The Commission recommends that the Constitution provide that:

- amendments to the Constitution should be made by Parliament;
- in order to be amended, entrenched provisions of the Constitution shall require not less than two-thirds of all members of Parliament and a national Referendum;
- any amendment to any provision relating to objectives, principles and structures of Local Government should not be effected except with prior approval by simple majority resolution of not less than two-thirds of all the Councils in the country and a National Assembly resolution supported by not less two-thirds of all the MPs; and

- amending any other provision of the Constitution should require the support of not less than two-thirds of all the members of the National Assembly.

The Commission further recommends that the Constitution should provide that entrenched provisions are: the Bill of Rights; procedures for amending the Constitution; provisions on sovereignty of the State and Defence of the Constitution; citizenship; key provisions on representation of the people; election to the Office of the President, Vice-President and MPs and their terms of office; powers of the President; immunity of the President and former President from legal proceedings; impeachment and removal from Office of the President and Vice President; prohibition of retrospective legislation; appointment of Ministers; and protection of the independence of the Judiciary.

In addition, the Commission recommends that the Constitution should provide that review, repeal and replacement of the whole Constitution should be undertaken only after the need to do so has been decided by the Constituent Assembly which should also determine the terms of reference. A new Constitution should be adopted by the Constituent Assembly and National Referendum after which the Legislature should bring it into commencement and provide for incidental matters by an Act of Parliament.

Chapter 28: Miscellaneous

Among the issues dealt with under this Chapter are price controls; the sale of Government houses; compensation for freedom fighters; drug trafficking/abuse; the minimum age for obtaining PSV driving licences, incentives for rural areas; HIV/STD infections, and defilement and rape.

Some of the recommendations of the Commission under this Chapter would require policy, legislative and or administrative measures.

PART I: GENERAL INTRODUCTION

1. 0 INTRODUCTION

On 17th April, 2003, by Statutory Instrument No. 40 of 2003, His Excellency the President, Mr. Levy Patrick Mwanawasa, SC, in exercise of the powers under the Inquiries Act, Cap. 41, appointed a Commission to review the Constitution of Zambia. This is the Report of the Constitution Review Commission (hereinafter referred to as "the Commission" or "this Commission"). The Report is, primarily, based on written and oral submissions received from petitioners across the country as well as from Zambians living abroad.

Although most petitioners to the Commission addressed themselves to the terms of reference of the Commission and made submissions largely within the context of the current Constitution, some dealt with issues not directly related to the Constitution.

Many petitioners complained that they were not adequately prepared to contribute to the exercise because they had little or no knowledge of the Constitution and the terms of reference of the Commission. There were repeated calls for wide dissemination of the Constitution in local languages and in simplified form. There were also calls that, in future, the constitution-review process should be accompanied by an extensive education programme.

Although the Commission had no mandate to conduct educational programmes, it nevertheless appreciated the need for education and, in response, sent advance parties with terms of reference translated into local languages wherever the sittings were taking place. In addition, publication of its sittings was done in both electronic and print media well in advance. Further, pursuant to Term of Reference No. 31, the Commission subsequently organised public debates on the subject on both radio and television.

One of the major findings was that very few women (only 10.7% of the total number of petitioners) made submissions; out of a total of 12,647 petitioners, 1,365 were women and 10,461 were men whilst 821 were unclassified in terms of gender. Most of the people who made submissions were aged between 25 and 60 years.

On the whole, the majority of petitioners addressed principles of democratic governance, such as separation and devolution of powers.

1.1 Appointment and Composition of the Commission

The Commission appointed on 17th April, 2003 comprised members from a cross section of the Zambian society and consisted of the following:

Wila Mung`omba, Esq	-	Chairperson
General Godwin Kingsley Chinkuli	-	Vice-Chairperson
Doctor Sipula Kabanje, MP	-	Commissioner
Senior Chief Nalubamba	-	Commissioner
Senior Chief Inyambo	-	Commissioner
Chieftainess Nkomeshya Mukamambo II	-	Commissioner
Chief Mwansakombe	-	Commissioner
Ms. Rosemary Chiphazi Banda, MP	-	Commissioner
Lucas Limbikani Phiri, MP	-	Commissioner
Mwitila Chrispin Shumina, MP	-	Commissioner
Kennedy Mpolobe Shepande, MP	-	Commissioner
Benny Tetamashimba, MP	-	Commissioner
Austin Liato, MP	-	Commissioner
Wynter Kabimba, Esq	-	Commissioner
Ben Kapita, Esq	-	Commissioner
Faustino Lombe, Esq	-	Commissioner
Ridgeway Liwena, Esq	-	Commissioner
Leonard Hikaumba, Esq	-	Commissioner
Ms. Joyce Nonde	-	Commissioner
Reverend David Masupa	-	Commissioner
Ngande Mwanajiti, Esq	-	Commissioner
Alex Chola Kafwabulula, Esq	-	Commissioner
Mrs Nellie Butete Kashumba Mutti	-	Commissioner
Bishop John Mambo	-	Commissioner
Professor Mutale Chanda	-	Commissioner
Christopher Mundia, Esq	-	Commissioner
Cosmas Mwananshiku, Esq	-	Commissioner
Mrs Dorothy Mulwila	-	Commissioner
Mrs Hillary Mulenga Fyfe	-	Commissioner
Professor Mphanza Patrick Mvunga	-	Commissioner
Emmanuel Musonda, MP	-	Commissioner
Ronald Banda, MP	-	Commissioner
Dickson Jere, Esq	-	Commissioner
Passmore Mudundulu, Esq	-	Commissioner
Ms. Charity Mwansa	-	Commissioner
Dean Namulya Mung'omba, Esq	-	Commissioner
Ms. Rosemary Chipampe, MP	-	Commissioner
Ali Simwinga, Esq	-	Commissioner
Hicks Sikazwe, Esq	-	Commissioner
Jitesh Naik, Esq	-	Commissioner
Dale Litana, Esq	-	Commissioner

Mrs. Gertrude Kalulu was appointed Secretary and Mrs. Judy Zulu Mulongoti as Deputy Secretary.

By Statutory Instrument No. 42, gazetted on 2nd May, 2003, the President withdrew the commission of Mr. Ngande Mwanajiti. By the same Statutory Instrument, the following were appointed as members of the Commission:

Robert Henry Mataka, Esq;
Doctor Joshua Kanganja;
Reverend Charles Mwape; and
Levy Museteka, Esq.

Later, under Statutory Instrument No. 86 gazetted on 8th August, 2003, the President de-commissioned Reverend Charles Mwape and Passmore Mudundulu, Esq. By the same Statutory Instrument, he appointed:

William Harrington, Esq;
Stan Kristafor, Esq;
Kelvin Hambwezya, Esq;
Ms. Lauren Mwanza Sikaonga; and
Nason Chongo Musonda, Esq, as new members.

On 4th September, 2003 by Statutory Instrument No. 98 of 2003, the President appointed Mr. Villie E. Lombanya as Secretary to the Commission to replace Mrs. Kalulu who had been appointed Permanent Secretary in the Ministry of Legal Affairs (now Ministry of Justice). By the same Statutory Instrument, the President withdrew the commission of Mr. Kelvin Hambwezya, Esq.

Further, by Gazette Notice of 24th December, 2003, the President under Statutory Instrument No. 134, of 2003, withdrew the commissions of:

Wynter Kabimba, Esq;
Leonard Hikaumba, Esq;
Mrs Dorothy Mulwila;
Dean Namulya Mung`omba Esq;
Stan Kristafor, Esq; and
Ronald Banda, MP, and substituted them with:

Sam Phiri, Esq;
Charles Hector Sambondu, Esq;
Enock Shamapani, Esq; and
Levy Joseph Ngoma, MP.

Finally, following the appointment of General Godwin Kingsley Chinkuli to Diplomatic Service, the President, by Statutory Instrument No. 56 of 7th May, 2004, withdrew his commission and appointed Senior Chief Inyambo Yeta as the Vice-Chairman.

The Statutory Instruments by which Commissioners were appointed are *Appendix I* to the Report.

1.2 Terms of Reference

Under the terms of reference contained in Statutory Instrument No. 40 of 2003, the Commission was mandated to:

1. Collect views by all practicable means from the general public, in such places, within Zambia, as you may consider necessary, and from Zambians living outside Zambia, on what type of Constitution Zambia should enact, bearing in mind that the Constitution should exalt and effectively entrench and promote legal and institutional protection of fundamental human rights and stand the test of time;

2. Recommend a system of government that will ensure that Zambia is governed in a manner that will promote the democratic principles of regular and fair elections, transparency and accountability, and that will guard against the emergence of a dictatorial form of government;

3. Recommend appropriate ways and means of entrenching and protecting human rights, the rule of law and good governance in the Constitution;

4. Examine and recommend whether the death penalty should be maintained or prohibited by the Constitution;

5. Examine and recommend the elimination of provisions which are perceived to be discriminatory in the Constitution;

6. Recommend provisions to ensure the competence, impartiality and independence of the judiciary, and access of the public to justice;

7. Examine and recommend the composition and functions of the organs of government and their manner of operating, with a view to maximising on checks and balances and securing, as much as possible their independence;

8. Examine and recommend whether the holder of the office of Attorney-General should vacate office following a change in Republican Presidents;

9. Examine the effectiveness of the office of the Auditor-General and that of the Investigator-General and recommend means of improving their effectiveness where necessary;

10. Recommend a suitable electoral system to ensure fairness in the conduct of Presidential and Parliamentary elections as well as local government elections;

11. Examine and recommend effective methods to ensure grass-root participation in the political process of the country, including what type of provincial and district administration should be instituted;

12. Recommend a suitable system for a smooth transfer of power by the outgoing administration to the incoming administration following an election;

13. Recommend the relationship that should exist between the party in power and the parties in opposition and whether or not political parties should be funded by government and, if so, to what extent;

14. Examine and recommend the status of a Member of Parliament who joins another political party or is expelled from the Member's party, whether or not such member should vacate the seat in Parliament;

15. Examine Constitutional provisions relating to the settlement of election disputes following Presidential and Parliamentary elections and recommend a method of ensuring expeditious and final disposal of election petitions;

16. Examine and recommend to what extent issues of gender equality should be addressed in the Zambian Constitution;

17. Examine and recommend whether international agreements should be considered and ratified by the National Assembly prior to Zambia's ratification of those agreements;

18. Take into account the provisions of the 1964 Republican Constitution, previous Constitutions and Constitutions of other countries;

19. Examine the views submitted to the Chona Commission of 1972, the Mvunga Commission of 1990, the Mwanakatwe Commission of 1993 and views expressed in Constitutional debates of a national nature and make recommendations thereon;

20. Recommend a suitable method of amending any part of the Constitution;

21. Recommend on whether the Constitution should be adopted, altered or re-enacted by the National Assembly, by a Constituent Assembly, by a national referendum or by any other method;

22. Recommend ways and means of implementing the recommendation made under item 21 in view of existing constitutional provisions;

23. Examine and recommend whether the Cabinet should be appointed from outside the National Assembly or from the National Assembly;

24. Examine and recommend whether the number of nominated Members of Parliament should be increased or reduced in the light of past experience and if so, recommend a suitable number;

25. Examine and recommend to what extent members of the public should participate in the formulation of budgetary proposals, and whether or not the time for presentation of the budget in Parliament should be changed and if so, to when;

26. Examine provisions relating to Government's accountability and transparency in the expenditure of public funds and those relating to the presentation of a financial report as required by Article 118 of the Constitution;

27. Examine provisions of the Constitution which impact on Press Freedom and the Freedom of Speech;

28. Examine and recommend on any subject-matter of a Constitutional, political or economic nature which, in the Commission's view has relevance in the strengthening of Parliamentary and multi-party democracy;

29. Examine the local government system and recommend how a democratic system of local government as specified in the Constitution may be realised;

30. Examine and recommend on any matter that is connected with or incidental to the foregoing terms of reference; and

31. In the discharge of your responsibilities, undertake wide consultations with the public and relevant social, political and economic groups on the terms of reference and endeavour to ensure a high degree of public debate on Constitutional proposals for a democratic Zambia.

1.3 Scope of Terms of Reference

The Commission found the terms of reference sufficiently broad to accommodate all shades of opinion aimed at reaching national consensus and allowing the people of Zambia to draft a constitution that will secure true individual liberties and stand the test of time. Key among the terms of reference was the liberty given to the Commission to resolve and make recommendations not only on the critical substance of the Constitution, but also the mode of adopting such a constitution. Experiences gained by the Commission from consultations abroad added value to this process.

1.4 Method of Work

Upon the Commission being constituted, His Excellency the President, Mr. Levy Patrick Mwanawasa, SC, addressed the members at State House. In his address, the President stressed that the Commission had been constituted following very extensive consultations with stakeholders. He said it was a non-partisan exercise meant to enhance good governance, constitutionalism and the rule of law in the country. He added that a good constitution would strengthen the country's young democracy and ensure that there was harmony and peace in the nation. The Commission was later sworn in by the Chief Justice, Mr. Ernest Sakala, at the Supreme Court.

The Commission held its inaugural meeting two months later, in June, 2003, at Mulungushi International Conference Centre, to work out a programme and method of work.

The Commission unanimously agreed on a programme of work that would ensure that they reached as many citizens as possible, especially those in rural areas. To achieve this goal, the Commission resolved to visit and conduct public sittings in every parliamentary constituency in the country. The Commission created a number of sub-committees to carry out various tasks. Among these were the Information and Publicity Committee, the Planning and Preparatory Committee and the Technical Committee.

In order to speed up the work of the Commission, it was agreed that it should be split into two groups, A and B, for the purpose of conducting public sittings. The Chairman headed group A whilst the Vice-Chairman headed Group B and, on occasions, they alternated.

It was further agreed that upon satisfactory completion of tours throughout the country, the Commission would travel abroad to selected countries for comparative constitutional studies.

Between August 2003 and September 2004, the Commission conducted public sittings in all 150 Parliamentary Constituencies. Where accessibility to an area

was impeded by bad weather or rough terrain, the Commission sought assistance from the Zambia Air Force. The tour programme is *Appendix II* to the Report.

To prepare the people for the public sittings, the Commission, through the Publicity and Information Committee, translated the terms of reference into all the vernacular languages spoken on Zambia National Broadcasting Corporation (ZNBC) radio. These were distributed to all the areas in advance of the Commission's visit. Publicity was also carried out through advertisements in both the print and electronic media.

In order to capture the views of Zambians living abroad, the Commission established a website on the Internet and opened an e-mail address. In addition, other information materials, including the terms of reference, were dispatched to all the countries where Zambia has Diplomatic Missions.

During country tours, members of the Information and Publicity Committee, who constituted advance parties, worked closely with the local leadership at all levels in identifying venues for sittings, securing accommodation and preparing various facilities before the arrival of the Commission.

At every sitting, the Commission made use of a local interpreter who took oath before the Chairman prior to starting the proceedings. Prior to receiving submissions, the Chairman requested petitioners to provide their particulars and explained the Commission's Terms of Reference and its tasks. In most cases, petitioners where asked to clarify certain issues arising from their own submissions. In addition, all public sittings were audio-recorded while stenographers made verbatim recordings in shorthand. Petitioners were free to give their submissions orally or in writing, and in any language of their choice.

By the end of its tour, the Commission had received submissions from a total of 12,569 petitioners. Out of these, 5,203 were oral whilst 7,366 were written. Many of the petitions were in form of group submissions, representing various stakeholders. Among these were the Law Association of Zambia, the Zambia Congress of Trade Unions, the Federation of Free Trade Unions of Zambia, the House of Chiefs, Children of Zambia, the Oasis Forum, youth movements, university student bodies, media organisations, organisations representing persons with disabilities, the National Assembly of Zambia, the Executive, the Judiciary, local authorities, the Auditor-General, the Anti-Corruption Commission (ACC), the Electoral Commission of Zambia, nature conservationists, Human Rights Commission, traditional rulers, political parties, the Church and other religious groups, civil society organisations, women's organisations and many other interest groups. The list of petitioners is *Appendix III* to the Report.

For its comparative studies, the Commission assigned small groups of Commissioners to travel to selected countries with perceived systems of good governance. The countries visited included: Kenya, Uganda, Ethiopia, India,

South Africa, Nigeria, Sweden, Norway and Denmark. The objective was to collect comparative data on their constitutions and practices, and to share experiences and ideas on the constitution review processes that they had undertaken.

With the assistance of the UNDP, the Commission, in April 2004, hired a team of experts to collate, analyse and summarise all the submissions and assist the Commission to prepare the Report. The Research Team, as it was known, was headed by Mrs. Eness Chiyenge, a lawyer, former diplomat and Permanent Secretary. She was assisted by Dr. Frederick Ng`andu, Dean of the School of Law at the University of Zambia (UNZA). Others were Mr. Mataa Mwiya and Mr. Clint Mbangweta, lecturers at the University of Zambia, Dr. Neo Simutanyi and Mr. Stephen Mwale, from the Institute of Economic and Social Research, UNZA, Ms. Engiwe Simfukwe, Mr. Sipopa Mulikita and Dr. Patrick Manda. In September 2004, Dr. Neo Simutanyi, however, ceased to be a member of the Research Team. Mr. Clint Mbangweta, Ms. Engiwe Simfukwe, Mr. Sipopa Mulikita and Dr. Patrick Manda also ceased to be members of the Research Team in October, 2004.

The Commission engaged other experts who contributed some material on the background to the Report. These were Dr. Gilbert Mudenda and Mr. Patrick Matibini.

The Commission was also assisted by a team of draftspersons who were engaged with the support of the Commonwealth Secretariat and UNDP.

The Commission was serviced by a Secretariat the composition of which is reflected in *Appendix IV* to the Report.

1.4.1 Analysis of Submissions

Having satisfied itself that it had received views from a cross section of the population, the Commission proceeded to consider oral and written evidence presented to it.

The approach taken in executing the assignment included a review of relevant literature. This involved both qualitative and critical appraisal of the underlying philosophies and values of constitutions. In this regard, constitutions from selected countries were reviewed relative to the Zambian experience.

An instrument was developed for analysing, collating and summarising the submissions. A specimen of the form is *Appendix V* to the Report. The contents of submissions were critically analysed and recurring views were identified. The submissions were then categorised according to identified

themes, such as Sovereignty and the State, Directive Principles of State Policy and Citizenship.

In analysing, collating and summarising the submissions, the Commission considered the importance of the issues raised to the promotion of constitutionalism, transparency, accountability, good governance, democracy and the rule of law. The Commission also admitted submissions which some petitioners perceived had a bearing on the Constitution.

Reasons for submissions were recorded only in those cases where petitioners gave them.

It was observed that petitioners used the terms "Parliament" and "National Assembly" interchangeably. The Commission found it appropriate to take the same approach for purposes of this Report.

The Commission's observations and recommendations are based, primarily, on the submissions received from petitioners.

1.4.2 Publication of Interim Report and Draft Constitution

By Statutory Instrument No. 84 of 2004, which is *Appendix VI* to this Report, His Excellency, the President directed the Commission that prior to submitting its final Report, the Commission should publish an Interim Report together with a draft Constitution and invite the public to comment thereon within ninety days.

On 29 June, 2005 the Commission simultaneously presented to the President and published its Interim Report and draft Constitution and invited comments from the public on the two documents. The Commission received comments from the public up to 31st October, 2005. Those who commented included the three organs of Government, namely, the Executive, the Legislature and the Judiciary; other public institutions; civil society organisations and individuals.

A summary of the comments and the Commission's reactions are contained in *Appendix VII* to this Report.

1.4.3 Problems and Limitations

The framework for the constitution review process did not provide a structured method of collecting submissions. Thus, petitioners were not responding to specific questions, but made submissions within the broad terms of reference of the Commission. Consequently, the submissions were so varied that the Commission had some difficulty in standardising

the emerging trends. The fact that petitioners were not responding to standard questions has implications on the assessment of people's views on particular issues. Exceptions to this problem were those terms of reference that were specific, namely:

- whether or not the death penalty should be maintained;
- whether or not the Attorney-General should vacate office in the event of change in the Republican Presidency;
- whether or not a Member of Parliament who joins another political party or is expelled from her/his party should vacate the seat;
- whether or not international agreements should be considered and ratified by the National Assembly prior to Zambia's ratification of those agreements;
- whether the Cabinet should be appointed from outside the National Assembly or from the National Assembly; and
- whether the number of nominated Members of Parliament should be increased or reduced in light of past experience.

The Commission, however, realises that guided questions may not be the best method of collecting views in an exercise of this nature.

The response from the public in accessing the Interim Report and draft Constitution was poor. However, the comments received by the Commission were substantive and enriched the Report.

1.5 Organisation of the Report

This Report is organised into 28 thematic chapters, covering a wide range of areas which include National Sovereignty and the State, Democratic Governance, Fundamental Human Rights and Freedoms, the Executive, Legislature, the Judiciary, Local Government, Political Parties, Traditional Authority, Public Finance and Budget, Land, Mode of Adoption of the Constitution and Mode of Amending the Constitution.

Each thematic chapter starts with an introduction. In introducing each chapter, an attempt has been made to provide the relevant underlying general principles and concepts. The current provisions of the Constitution and other laws have been discussed wherever appropriate. In addition, an attempt has been made to draw comparisons with the provisions of other constitutions.

2.0 BACKGROUND

2.1 Socio-Economic Background

2.1.1 Geography

Zambia is a land-locked Sub-Saharan country sharing boundaries with eight countries. These are: Angola, Botswana, the Democratic Republic of Congo, Malawi, Mozambique, Namibia, Tanzania and Zimbabwe. It has a total surface area of about 752,614 square kilometres.

Zambia is part of the African plateau, which gives it a moderately cool mild climate. There are three distinct seasons: the cool and dry season, the hot and dry season and the hot and wet season. The lowest temperature in the cool/dry season ranges from 8 to 15 degrees Celsius, while the highest temperature during the hot dry season averages 35 degrees Celsius. The rainfall ranges from 700 mm in the drier parts of the country in the south, to 1,400 mm in the northern high rainfall areas.

2.1.2 Administration

Zambia gained independence from Britain on 24th October, 1964. It has experienced three major phases of governance, namely: multiparty system from 1964 to 1972, one-party system from 1972 to 1991 and a reversion to multiparty system since 1991.

Administratively, the country is divided into nine provinces: Central, Copperbelt, Eastern, Luapula, Lusaka, Northern, North-Western, Southern and Western. These are divided into seventy-two districts. Lusaka Province seats the Capital City, Lusaka. The Government comprises central and local government. Government power is, however, concentrated in central Government, which administers government functions at national, provincial and district levels. Local authorities (councils) enjoy only limited administrative authority.

In terms of political representation, the country is divided into 150 constituencies, which constitute elective seats in the National Assembly. The President of Zambia and the National Assembly, which includes eight nominated members, comprise Parliament, which is the people's legislative body.

2.1.3 Natural Resources

Zambia has abundant natural resources. It is drained by three river basins; the Zambezi, the Chambeshi/Luapula and the Tanganyika. The Zambezi basin is the largest and covers more than two-thirds of the country. Apart from the Zambezi River, it also includes the Kafue River and the Luangwa River catchments. The Chambeshi/Luapula River Basin is the second largest and drains most of the Northern and Luapula provinces. It is connected to the Congo River Basin. Zambia has five main rivers; the Zambezi, Kafue, Luangwa, Luapula and Chambeshi. In addition, the country has lakes such as Tanganyika, Mweru, Mweru-Wa-Ntipa, Bangweulu and the man-made lakes of Kariba and Itezhi-Tezhi. Other features include the Victoria Falls, one of the seven wonders of the world.

Most of Zambia's vegetation is classified as well-wooded savannah, dominated by miombo woodland. The predominant tree species is Brachystegia speciformis (miombo) and dry savannah with mopane (Colophospermum mopane) and acacias at lower altitudes. In the Kalahari sands, the teak (Baikiaea plurijuga) forests are dominant. There are also open grasslands in drainage lines such as flood plains and dambos.

Zambia has rich biodiversity, i.e. ecosystems, animals, plants and micro-organisms. Much of the country's biodiversity has not been explored or exploited. However, some of the biodiversity has been lost, mainly, due to socio-economic activities.

The country is also endowed with various minerals and precious stones such as copper, emeralds, aquamarine, zinc, lead and cobalt.

2.1.4 The People

The pre-colonial history of Zambia was characterised by a series of migrations of people into the territory which now forms Zambia. The ancestors of the majority of Zambians are Bantu-speaking peoples such as the Ila who came into the country during the first century and introduced the Iron Age. They did not move into an empty territory, but displaced the San people who were pushed further south into drier areas. The Bantu-speaking people were predominantly agriculturalists and practised sedentary agriculture. They also hunted and fished to supplement their food requirements. In addition, they engaged in regional and long distance trade.

The second wave of migrations was dominated by groups from the north who wished to establish new settlements and kingdoms. These movements started as early as the twelfth century and continued up to the sixteenth century. These migrations involved present day tribes, including the Bisa, Lala, Chewa, Lenje, Bemba, Lozi, Lunda and others such as the Luvale, Kaonde and Mbunda, who were later migrants. As intimated earlier, these migrants did not move into empty territories, as there had been earlier migrations. In most cases, they co-existed or integrated with people that were already there before them. This might explain the linguistic similarities of contiguous tribes.

The third wave of migration was from the south. This came as an after shock of the upheavals following Tshaka's exploits in Natal, and the more notable groups were the Kololo and the Ngoni.

2.1.5 Languages and Ethnicity

Zambia is endowed with many languages. There are seventy-two ethnic and other minority groups. Though language is not synonymous with tribe and many tribes share a common language, each tribe generally has a dialect of its own.

It is important to note that language groups tend to spread across national boundaries.

English is Zambia's official language. However, for the purposes of official dissemination of information such as broadcasting, seven local languages are also used. These are Bemba, Kaonde, Lozi, Lunda, Luvale, Nyanja and Tonga. They all represent language clusters around which exist several dialects. Though these languages are taught in schools in specific provinces, English is the official language of instruction.

2.1.6 Population

The 2000 Census of Population and Housing estimated the population of the country to be 9.9 million, with an annual population growth rate of 2.4%. Zambia is one of the most urbanised countries in Sub-Saharan Africa, with about 35% of the population living in urban areas. Zambia, with a median age of about seventeen years, has a relatively youthful population, comprising 50% men and 50% women.

2.1.7 The Economy

2.1.7.1 Evolution of the Zambian Economy

Colonial Era

The Zambian economy was developed as an appendage of the white settler economies to the south (Southern Rhodesia, now Zimbabwe, and South Africa) and, ultimately, to the more powerful economies of the Western world. Zambia's role in this arrangement was to provide the global economy with mineral resources (copper, cobalt, lead and zinc) while the rural areas were a source of cheap labour.

From the very beginning of colonial rule, the major investment was in the construction of the railway line to connect the mineral-rich areas of the Zambian Copperbelt to seaports in South Africa, Angola and Mozambique. Thereafter, large investments were made in the mining sector for the extraction of minerals.

Owing to the remoteness of these mining areas, new settlements and infrastructure as well as ancillary plants to process the ore (in order to reduce transport costs) were constructed. These large urban settlements required food, hence the development of commercial agriculture, mainly along the line of rail, and fishing industries in the lakes regions of Luapula and Northern provinces. The increasing demand for grain and meat resulted in African agricultural development in Central, Southern and Eastern provinces.

Other service sectors, such as banking, insurance, equipment supply and repair, retail and wholesale trade, and education and health services were developed as a direct result of the requirements of the mining industry and the related urban communities. Before independence, however, the main sources of supply for many sophisticated goods and services were Zimbabwe and South Africa, and these two countries were Zambia's main trading partners.

Throughout the colonial period, large mining corporations and their allied subsidiary companies, which provided services to the mining corporations, controlled the economy. For example, Anglo American, the giant South

African based mining conglomerate, not only dominated the mining sector, but its subsidiary companies were very active in mining input supplies and services. It also dominated banking, insurance, metal marketing, construction, real estate and other sectors of the economy. The rest of the economy was dominated by the private sector, mainly foreign companies.

Commercial agriculture was also dominated by the settler community, mostly along the line of rail and around Chipata, Mkushi and Mbala, producing maize, beef, dairy, poultry, pigs and tobacco. African agriculture largely produced maize, beef, small stock (goats and sheep), small grains (sorghum and millet), groundnuts, tobacco, cotton, cassava and fish. It was mainly based on small-scale production.

The rural areas were reserved as sources of cheap labour. Initially, the mining industry employed a migrant labour system where workers were contracted for a period of time – not exceeding eighteen months. Those not employed on the Copperbelt were exported to neighbouring countries such as Zimbabwe, South Africa, Congo and Tanzania. However, by the early 1950s, there was greater demand for more skilled labour and the migratory system of labour was discontinued in favour of labour stabilisation. This contributed to the growth of an urban working class.

Post-Independence Era – Nationalisation and Liberalisation

In the immediate post-independence era, socio-economic policies and programmes were influenced by nationalism. After independence and, more especially, after the Unilateral Declaration of Independence (UDI) by Rhodesia in 1965 and the declaration of hostilities with Apartheid South Africa, coupled with growing nationalism, Zambia embarked on an ambitious programme of local industrialisation. This was done through the nationalisation of foreign-owned companies, including mining companies, and the establishment of new industries for import substitution. African farmers were encouraged to participate in commercial farming. Where this was not possible, the State invested in large-scale farming projects such as the establishment of Nakambala Sugar Estates in Mazabuka.

The nationalisation of the "commanding heights" of the economy introduced public ownership of the major economic activities in the country. This was achieved through the creation of parastatal (Government-owned) companies, which took over the assets and running of previously privately-owned companies. Additional parastatal companies were established to invest in new economic ventures in the various sectors of the Zambian economy. The parastatals came to dominate all sectors of the economy to an extent that each sub-sector was dominated by at least one large parastatal company. As a consequence, the Government became the largest employer in the country.

The Government adopted a number of other populist socio-economic policies, which included the provision of free social services in the areas of education, health and social welfare. All schools and hospitals were taken over by the Government. In addition, provision of other services such as water supply, energy, roads and other infrastructure became the sole responsibility of the Government. The Government also decided on cheap food policies, by promoting the growing of maize all over the country, controlling prices and subsidising the price of mealie-meal, the main staple food of the country. Further, the Government adopted a tax regime which excluded all those not involved in the formal sector from paying any tax, and extended this facility to the low income earners within the formal sector.

Initially, the Government was able to pay for all of these goods and services because of the relatively high earnings from copper-related taxes and the huge reserves inherited from the colonial Government. However, as the demand for public goods and services increased and the revenue from copper dropped, the Government was no longer able to finance these high levels of expenditure.

Both the Government and the international community believed that this problem was a temporary one and would be overcome after the international price of copper picked up. Sadly, the demands on public goods and services continued to increase and copper prices did not recover sufficiently to redress the balance of payments crisis or to

enable the Government to meet its commitment to providing free public goods and services.

The situation was made worse by the fact that the expected income from investments in the parastatal sector was not forthcoming. Instead of contributing to the Treasury, most parastatal companies had become dependent on Government subventions for their continued operations, due to poor management and the total collapse of the business and commercial culture in the country. The Government found itself in a situation where it could no longer maintain schools, hospitals, roads and other public facilities. The combined effects of these and other factors forced the Government to resort to external borrowing and deficit financing.

It was largely due to these problems that the multilateral institutions were invited to participate in Zambia's recovery programmes. Consequently, a number of programmes were designed and implemented.

The Third Republic (from 1991) heralded the return to a multiparty system of Government with market-oriented economic system in which the private sector is seen to be the engine of growth. One of the newly-found roles of the State in the economy is the promotion of economic activities in the country. These range from the creation of an “enabling environment” for private enterprise, through favourable legislation and incentives for investors, to giving support to institutions which promote various economic activities.

In an attempt to address the country’s economic problems, the Government adopted the Structural Adjustment Programme (SAP) in the mid 1980s, with the intention of creating macro-economic stability in the economy. Measures taken, especially after the country’s return to plural politics in 1991, included liberalisation of trade, prices, interest and foreign exchange rates, the removal of subsidies, privatisation, a reduction in public expenditure, public sector reforms, and liberalisation of the marketing and pricing of agricultural produce.

Structurally, Zambia’s economy has changed little in spite of implementing the above measures. Consistent high economic growth has been elusive. Over the period from

1980 to 1990, the country's economic growth was the second lowest in the Southern Africa Development Community (SADC) after Mozambique. Over the period 1990 to 1999, it had the lowest average annual growth rate in the SADC region, at 1% (below the Sub-Saharan Africa rate of 1.4%). However, between 1994 and 2002, real Gross Domestic Product (GDP) grew from 2.2% in 1999 to 3.6% in 2000 and 4.9% in 2001, before declining to 3.0% in 2002. (Source: Zambia Poverty Reduction Strategy Paper, 2002 – 2004: Ministry of Finance).

The Debt Crisis

Zambia's economic misfortunes have contributed to the country's debt crisis which, in turn, has exacerbated the situation. The debt stock has grown over the years, compounded by interest, debt-service lapses and more borrowing to service the debt and mitigate the impact of the growing balance of payment deficit. This has created a downward spiral in the country's economy. Debt servicing became unmanageable and has led to extreme under-investment in the economy, particularly in the social sectors such as education, health, transport and communication.

For many years now, the debt stock has fluctuated between US $6 billion and 7 billion. More than 50% is owed to the International Monetary Fund (IMF) and the Word Bank Group whilst about 35% is owed to bilateral cooperating partners and 8% is owed to the private sector and parastatal companies. This is why the Highly Indebted Poor Countries (HIPC) initiative, which the Government embarked on in 2000, was an attractive option for Zambia, as following the attainment of the HIPC completion point early in 2005, a substantial amount of the bilateral debt has been written off.

Even with debt cancellation, however, the country still owes about US $3.7 billion. The country has also accumulated a huge domestic debt which stood at K4.8 trillion in 2002 and K6.2 trillion in 2003. This is largely from Government bonds, suppliers' arrears, pension arrears and unremitted pension contributions.

Zambia's debt crisis can be traced back to the late 1970s when the country started borrowing in order to support

public expenditure, including large-scale development projects. Borrowing was necessitated by a number of factors such as falling copper prices, OPEC oil price increases and the dismal performance of the parastatals. The Southern African liberation struggle also contributed to the Government's opting to borrow in order to counter the hostile political and economic environment. For example, with no access to the coastal countries of the sub-region, Zambia had to finance the construction of an alternative route – the Tanzania-Zambia Railway (TAZARA). It also became necessary for the Government to invest in manufacturing goods to substitute imports from Zimbabwe and South Africa. In addition, it had to build up its military ware.

However, Zambia has also been borrowing money to subsidise consumption and apart from investment in development infrastructure, very little is invested in the productive sectors of the economy. Analyses of debt show that in a significant number of projects, most of the borrowed money is spent on emoluments and other administrative costs. Only a small percentage is spent on core activities to benefit targeted sectors of the economy.

2.1.7.2 Dominant Features of the Zambian Economy

Both the colonial and post-colonial developments have greatly contributed to the current structure of the Zambian economy.

Mining

Zambia, like its northern neighbour, the Democratic Republic of Congo, is endowed with many minerals, large deposits of which have not been exploited or properly investigated. These can be classified into five categories: energy minerals, precious metals, precious stones, base metals and industrial minerals.

At independence, Zambia inherited a prosperous copper mining industry. However, economic shocks on the international market, caused by increases in oil prices and the decline in copper prices have had a serious negative impact on the industry. During its heyday, the mining industry was the second largest producer of cobalt after the Democratic Republic of Congo and the fourth producer of

copper after the USA, the Soviet Union and Chile. The extent of the decline of Zambia's mining industry can be adduced from the fact that during the mid 1970s, both Zambia and Chile used to produce about 800,000 tonnes of copper per year. Currently, Chile produces over 2 million tonnes per year while Zambia produces just over 300,000 tonnes of copper per year.

A large part of the decline can also be attributed to poor management during the parastatal period, lack of investment in technology, lack of exploration for new ore bodies and poor integration of the industry into the rest of the Zambian economy. Political interference by successive Governments also contributed to the decline. The decline of copper and cobalt mining activities was further accelerated by the commitment to privatise the mines at all costs. This resulted in loss of morale and restricted investment in critical areas of the operations.

However, in spite of the unfavourable performance of the mining industry, Zambia's economy is still largely based on copper and cobalt mining. Copper still accounts for approximately 80% of the country's export earnings. This continued dependence on copper mining has been partly responsible for the poor performance of the sectors of the economy that rely mainly on imported materials and capital items.

Since the advent of the privatisation programme, initiated under the economic reforms of the Third Republic, a number of mines have been sold to foreign companies. New investments have been sunk into the old mines and new mining projects in North-Western Province have been commissioned. New initiatives have been pledged to support small-scale mining and at least three companies are active in quarrying and processing of large dimension stones. Further, new investment has been committed in the production of agricultural lime.

While these initiatives and investments encourage the development of the mining sector in Zambia, they do not match its enormous potential in the country. The rich mineral resource is thus left untapped and its linkages to other sectors in terms of skills, technology and as a source of inputs to the manufacturing and agricultural sub-sectors remain unexploited.

Meanwhile, the country's balance of payments status has depended mainly on the performance of the mining industry. Despite additional foreign exchange earnings from non-traditional exports, the country continues to pay more to the outside world than it earns in exports, hence the poor balance of payments position.

Agriculture

The real growth rate in the agricultural sector has fluctuated significantly, mainly due to the sector's high dependence on seasonal rainfall, reduced investments and the failure to strategically position the sector according to its comparative advantage. The sector's contribution to GDP averaged 18% over the past decade and has provided livelihoods to more than 50% of the population. The agricultural sector is a source of food, inputs to the manufacturing sector and a potential earner of foreign exchange for the country. Whenever there is a good harvest, the Zambian economy records relatively high levels of growth. Conversely, a bad agricultural harvest translates itself in negative economic growth.

Agricultural-based commodities comprise the main component of non-traditional exports which, during the decade 1990 to 2000, increased from $46.5 million to $133.9 million, thus demonstrating the enormous potential the sector possesses. Some 75% of Zambia's population is engaged in agriculture, largely subsistence farming, which remains vulnerable to weather fluctuations. (Source: Zambia Poverty Reduction Paper, 2002 – 2004, Ibid.)

The unsatisfactory performance of the sector can be traced back to colonial policies. The colonial Government was not very keen on developing agriculture in Zambia, especially for the African population. It was only when supply from settler commercial farmers could not meet the demand from urban centres that the colonial Government began to promote African agriculture through the "improved farmer" programmes. After independence, the Government adopted agricultural policies that ensured cheap food for the urban population while peasant farmers were encouraged to produce for their subsistence. As a result, agriculture in Zambia has not developed sufficiently to match the existing potential.

Of Zambia's total land area of 75 million hectares (752,000 km2), 58% (42 million hectares) is classified as medium to high potential for agricultural production. Rainfall ranging between 800mm to 1400 mm annually is sufficient for the production of a broad range of crops, fish and livestock, yet only 14% of total agricultural land is currently being utilised.

In addition, Zambia has vast water resources (both surface and underground) which offer excellent prospects for irrigation. Again, this potential remains largely unexploited. Only 50,000 hectares are currently under irrigation, although the country's irrigation potential is conservatively estimated at 423,000 hectares. In other words, more than 88% of land that could be irrigated is not under irrigation. Under irrigation, it is possible to produce two crops in a year.

Zambia is prone to drought and because there is very little irrigation and a lack of commercialisation of cassava, the country experiences periodic food shortages. Small-scale farmers grow most of the maize, cotton, groundnuts, millet, cassava, rice, sorghum, sunflower and beans. On the other hand, commercial farmers produce wheat, coffee, soya beans, cut flowers, eggs, milk and poultry.

Livestock production has been severely constrained by the recurrent outbreaks of animal diseases. African swine fever has severely compromised the production of pork in the country. Corridor, foot and mouth and Contagious Bovine Pleuro Pneumonia (CBPP) diseases have done the same for beef production. The decimation of cattle has had serious implications for crop farming, as it robs small-scale farmers of access to animal draught power.

It has been realised that the performance of agriculture follows the rain patterns. However, it has also been realised that in order to increase agricultural production and stabilise output, a number of policy initiatives have to be adopted. These include undertaking institutional reforms and the commercialisation of agriculture.

The radical institutional reforms envisaged include the restructuring of the Ministry of Agriculture and Co-operatives, agricultural land and infrastructure

development, and taking legislative measures to control animal diseases. Agricultural land development includes the opening of additional farm blocks in order to increase the amount of agricultural land available by 300,000 hectares.

In terms of the commercialisation of agriculture, business relations between large-scale agribusinesses and small-scale producers were fostered through the support of various out-grower schemes as well as direct fertiliser support to small-scale farmers. There are currently four large out-grower schemes supported by the Government. These are for coffee, tobacco, cotton and fresh vegetables. Further, the Ministry is supporting the development of irrigation through the construction of dams as well as the improvement of rural road infrastructure. There is also need to adopt new technology for processing agricultural produce, especially that which is produced by small-scale producers.

Manufacturing Industry

Like other sectors of the Zambian economy, manufacturing industry was heavily influenced by the requirements of the mining industry and the colonial policies that discriminated against the advancement of the large majority of people in the country. The construction of mining and mineral processing plants, as well as urban settlements, stimulated the establishment of basic manufacturing plants for timber, lime and bricks production and some small engineering shops.

The country did not have a sophisticated manufacturing industry, largely because the mining industry was supplied with most of its inputs from more developed economies of South Africa and Zimbabwe. Most consumer goods were imported from the same sources, as internal demand remained low due to the low purchasing power of the majority of the population. At independence, the manufacturing sector comprised mainly an abattoir, a cigarette factory, a vegetable oil plant, a blanket factory, a shoe factory, a copper ware factory, a switch gear and fittings plant, a cement factory, a soap and toiletry plant, a pharmaceutical and patent medicines factory, a timber and joinery plant, and a cleaning brushes and brooms plant.

After independence, three events contributed to the manufacturing sector becoming the fastest growing sector in the economy. The first was the attainment of independence itself, which enabled the new Government to plan the country's industrial growth. The second was UDI, which was followed by an embargo on Rhodesian goods, which at that time constituted about 50% of Zambia's imports of manufactured goods. This provided an opportunity for Zambia to embark on an import-substitution industrial development strategy. The third was the Mulungushi Reforms of 1968, which announced the intention of the Government to nationalise most of the leading industrial and commercial enterprises in the country.

The industrial development policies which influenced industrial development in post-independence Zambia were import substitution, spatial diversification and the encouragement of private investment to stimulate industrial growth. The initial encouragement of private sector participation did not bear any fruits, as most private companies continued to locate their supply factories in the countries south of the border despite sanctions. It was largely due to this frustration that the Mulungushi Reforms were put into effect.

Import substitution industrialisation was pursued with more vigour after UDI and the nationalisation of major industrial and commercial enterprises in the country. As a result of this policy direction, industrial development concentrated on two sectors of the manufacturing industry. These were the production of components for the construction industry and the production of household goods. The former comprised commodities such as cement, bricks and tiles, timber, glass, metal doors and window frames, metal and asbestos/cement roofing sheets, sinks and light fittings, while the latter comprised textile and footwear products, processed foodstuffs, cigarettes, beer and furniture.

State participation gave a big impetus to the manufacturing sector. For example, the period between 1968 and 1970 witnessed the commissioning of a number of strategic industries. These included Zambia Sugar Company (1968), Zambia Clay Industries (1969), Dunlop Zambia (1969), Kafue Textiles (1970), Kabwe Industrial Fabrics (1970), Nitrogen Chemicals of Zambia (1970), Kafironda

Explosives (1970) and Mwinilunga Canning Factory. The production capacities of Indeco Milling, Chilanga Cement and Zambia Breweries were also expanded. Later, other new industries were launched. They included an oil refinery, a passenger car assembly plant and a glass factory.

In terms of spatial diversification, attempts were made to open up raw materials processing plants in rural areas, such as Mansa Batteries, maize milling companies in provincial and district centres, a bicycle assembly plant in Chipata and several cotton ginning plants. The establishment of the Small Industries Development Organisation (SIDO), whose objective was to strengthen the development of small-scale industries, especially those based in rural areas, further enhanced this policy.

This ambitious industrial development programme was soon to falter, for a number of reasons. Firstly, the industries selected for import-substitution were those industries that had already been established a few years before independence. For example, at independence, Zambia was already 80% self-sufficient in non-metallic mineral manufacturing and 50% self-sufficient in food processing and beverages production.

Secondly, the sectors chosen for import substitution were not those whose products were in the highest categories of imports. For example, the highest categories of imports classified by materials were machinery and transport equipment, chemical and manufacture. Thirdly, and more importantly, was the fact that import-substituting industries relied very heavily on the use of imported raw and intermediate materials and capital goods. Very little consideration was given to developing local raw material producing industries.

These oversights were to haunt the country's industrialisation process, especially after the collapse of copper prices following the oil price hikes of 1973 and the international recession that accompanied them. As a result, there was growing under-utilisation of capacity in the manufacturing sector due to shortage of foreign exchange to import the required inputs. Other factors which contributed to a slow down in the manufacturing sector included the lack of integration of the mining industry's technology base in the rest of the industrial sector and the

lingering hope that international capital would somehow come to Zambia and provide the necessary impetus for further industrial growth. To this end, the Industrial Development Act of 1977 was enacted to provide incentives for foreign investment.

In spite of the problems mentioned above, Zambia remained one of the most highly industrialised countries in Black Africa after Zimbabwe and Côte d'Ivoire. In fact, Zambia's ranking would change dramatically if metallurgical aspects of the mining industry were included in the industrial sector. However, it is also true to say that Zambia has been deindustrialised since the mid-1980s. This is due to a number of factors, including poor management and cross subsidisation within the Indeco Group of companies, and the Washington Consensus, which promoted policies of liberalisation and later privatisation of State-owned enterprises.

The rapid implementation of liberalisation in the 1990s opened parastatal companies to global competition which they were ill-prepared to face. This in turn made a number of parastatal companies unprofitable, as they were not in a position to compete, especially with South African companies that received huge export subsidies. In addition, the fast drive for privatising parastatal companies robbed the companies of the necessary investment to recapitalise their operations. And by the time these companies were privatised, they were mere shells and most of them were due for liquidation.

The current industrial development strategy has identified critical areas that require serious attention and Government support. These include investment promotion, trade policy and export promotion, capital markets development, skills development, science and technology and research development, small and medium enterprise development, rural industrialisation, and reform of the legal and regulatory framework. While these objectives are important for the development of the manufacturing sector, it is very unlikely that Government expenditure in the sector will make a noticeable impact. So far, most of the money targeted for the development of the sector has been spent on "training, sensitisation and consultancies" instead of productive investment in identified niche industrial sub-sectors.

Employment

In technical terms, a country's labour force is defined as all persons aged 12 years and above of either sex, whose economic activity status is to supply their labour force for the production of goods and services. The total labour force thus includes both employed and unemployed persons. However, the active labour force excludes persons who are in school, terminally ill and old persons who can no longer work.

According to the 2000 census, Zambia had an active labour force of 3,165,151 out of a total population of 9,885,591. This represents about 32% of the total population. However, the more revealing statistic is that only 10% of the labour force is in formal employment and 90% is engaged in various coping strategies such as subsistence agriculture (64%) and informal employment (16%), others are unemployed (10%). Of those in formal sector employment, the Government employs 26%. This shows that the majority of Zambians are supported by a very small fraction of the population. Out of every 100 persons, 79 are economically dependent. In other words, every economically active person supports about four persons.

Overall, unemployment rates have declined from 15% in 1990 to 13% in 2000. However, unemployment has, drastically, increased in urban areas from 16% in 1990 to 26% in 2000 in rural areas it has dropped from 15% in 1990 to 7% in 2000. Overall unemployment rates are higher for males, at 14%, than for females, at 11%.

Youth unemployment is still very high in Zambia. The 2000 census shows that 23% and 21% of the youths aged 15-19 and 20-24, respectively, were unemployed. By residence, youth unemployment was higher in urban areas than rural areas, (55%), compared to 12% in the 15-19 age group and 42% compared to 9% in the 20-25 age group. Youth unemployment was slightly lower among females than males at 21%, compared to 25% males in the 15-19 age group and 18% compared to 23% males in the 20-25 age group.

Education

Education plays an important role in the development of a nation. It is for this reason that education has been declared a human rights issue, as attested by the UN Convention on the Rights of the Child (UNCRC) (1989).

Zambia has a three-tier education system, consisting of seven-year primary education, followed by five-year secondary education. Post-secondary schooling is the last stage.

At independence, Zambia was described as the least educated country in the least educated continent. This is because of the colonial neglect of African education. In fact, it was the missionaries that opened up the first schools for Africans. Thus, at independence, there were about one hundred graduates and an equally small number of people with post-secondary education.

The education sector experienced exceptional expansion during the immediate post-independence era as a result of efforts aimed at redressing imbalances created by the discriminatory colonial policies. The independence Government saw education as one of its priorities and built many primary and secondary schools in all districts, and expanded those that already existed. In addition, the Government built the University of Zambia as well as technical colleges. In 1966, the Government introduced free education for all levels of the education system.

By the 1980s, Zambia was one of the most educated countries in the Southern African Region and began to export its highly trained professionals to other countries in the region and beyond. As indicated earlier, education was also used as a means for social mobility. Those who received high educational qualifications had access to well-paid jobs in the public sector as well as in the parastatal sector.

This high level of achievement was made possible by the buoyant economy. However, with the collapse of economic growth, the Government did not have the resources to support the demands of the education sector. At first, new investment in the sector was put on hold.

Thereafter, even recurrent expenditure became a problem. Schools did not have the resources to buy books. Consequently, standards of educational provision began to fall.

Poverty in the education sector manifests itself in several other ways, including the following: low enrolments, low progression and high dropout rates, poor attendance because the children are engaged in income-generating activities to supplement family income, attending to sick family members and having to travel long distances to schools. Others are poor learning environments and lack of appropriate skills training, malnourished learners who are unable to achieve their full learning potential, and demotivated teachers.

There are proportionately more males than females attending school, especially in rural areas. By 2000, almost two-thirds of the eligible children had no access to secondary school education. The problem is more pronounced in rural areas where only one-fifth of children have access to school.

According to the 2000 Census, only 55.3% of the population aged five and above were literate. More than half of the rural population was illiterate. Adult illiteracy stood at 67%. More than half of the rural population was illiterate, compared to only a third of the urban population. The level of illiteracy remained higher among females at 49.8%, compared to males at 39%.

In an attempt to arrest the deteriorating situation in the education sector, the Government has devised a number of strategies. Initially, the Government introduced cost sharing measures (fees) to minimise the budgetary deficit in funding education. The Basic Education Sub-Sector Investment Programme (BESSIP) has been adopted to support basic primary education. The challenge currently facing Zambia is the prospect of having a poorly educated population, which will not be able to meet the skills demands of a technologically driven development process.

Health

The health sector has followed a similar path to the education sector. The colonial Government was rather

ungenerous in its provision of health services to the African population. The post-independence period expanded the health sector and made it freely accessible to all who could reach a health facility. Again, this service could not be provided in the same quality and quantity after the advent of economic woes.

In 1991, the Government articulated radical health-care reforms, characterised by a move from a strongly centralised health system in which the central structures provided support and national guidance to the peripheral structures. One important feature of the reforms is cost sharing between the Government and the recipients of services. The problem with this approach is that the poor cannot afford the cost of the services and are thus deprived of health-care facilities and services.

However, following the implementation of health reforms, some improvements in the general health indicators in Zambia have been seen. For instance, life expectancy at birth improved from 47 years in 1990 to 50 years in 2000. The infant mortality rate dropped from 123 in 1990 to 110 in 2000. However, maternal mortality has remained moderately high since 1996 (649 per 100,000 women and 729 per 100,000 women in 2002).

There are 1,285 health institutions in the country. These include three central hospitals, four specialised hospitals, eighteen general hospitals, forty-two district hospitals, one military hospital and eight industrial hospitals. There are also 899 rural health centres, 187 urban health centres, twenty industrial rural health centres and seventy-five industrial urban health centres. The number of health posts is nine while the number of mission hospitals stands at 19. (Source: Central Statistical Office, 2000 Census of Population and Housing, Zambia Analytical Report, Vol. 10, 2003)

Transport

There are five main modes of transport (rail, road, water, air and pipeline). Zambia has developed all of these albeit at different levels. The major modes of transport are rail and road.

The administration of colonial Northern Rhodesia by the British South African Company (BSA) was closely associated with the building of the railway line connecting Zambia to the South African ports. Later, the line was extended to reach the Angolan port of Lobito, through the Congolese Copperbelt and ports in Mozambique through Zimbabwe and South Africa.

Zambia has two railway lines. The first was the line from the South, built by Cecil Rhodes. It crossed the Zambezi River just below the Victoria Falls in 1904, had reached Kabwe by 1906 and the Copperbelt en route to the DRC by 1908. Given the level of technology and the skill levels of the labour force at that time, this was an amazing engineering accomplishment. It is along this railway line that most major Zambian towns and cities are built. Apart from the normal repair and maintenance, nothing very substantive has been added to this line.

The second line is the TAZARA which connects Zambia to the seaport of Dar-es-Salaam in Tanzania. The line was built by the Chinese in the early 1970s to provide Zambia with an alternative route away from the hostile ports in Southern African countries that were still under colonialism. Again, the line was completed in record time.

What is characteristic about these railway lines is that they are single-track lines, designed for import and export trade. They are not designed for in-country traffic for both passenger and goods transportation. With the decline in mineral exports, the railway transport business has declined drastically and most traffic has gone to road transport.

Like the railway line, road transport was also designed to move passengers and goods to the ports. The first major road followed the railway line from the south to the Copperbelt. Throughout the colonial periods, roads linking provincial towns remained as bush tracks. It was after independence that the Government built all-weather roads to all provincial headquarters and most of the districts in the country. In addition, the road connecting Zambia and Tanzania was paved to facilitate the movement of goods. Further, a number of rural (feeder) roads were constructed to facilitate the movement of agricultural and other primary produce to urban markets.

Apart from the initiatives of the private transporters, the Government invested very heavily in public passenger transport as well as in the movement of goods. However, with liberalisation and privatisation policies, State-owned road transport companies collapsed and the private sector, including foreign transporters, has moved in to fill the vacuum. Further, the switch from rail to road transport, even for bulky goods, has had serious implications for the cost of maintaining the vast road network. This has further implications for the cost of importing fuel as well as increasing the cost of goods and services in the country, as increases in the price of oil are quickly translated into price hikes for goods and services.

Although Zambia boasts many large rivers and lakes, water transport is the least developed. There are historical records of rivers and lakes, especially in the northern part of the country, which were used to transport men and material during the First World War. There was a water transport company in Western Province, which is no longer operating. The only serious water transport business in Zambia is found on Lake Tanganyika. This transports goods and passengers, mostly traders, between Burundi, DRC, Tanzania and Zambia. There are also some ferryboats that ply the waters of lakes Bangweulu and Mweru.

Air transport has also hit hard times. During the Federation of Rhodesia and Nyasaland, the three countries (Northern Rhodesia, Southern Rhodesia and Nyasaland) had an airline which came to an end with the demise of the Federation. Zambia Airways became Zambia's national airline and for some time it was a viable carrier of passengers and cargo in and out of Zambia. However, the airline became one of the casualties of the privatisation policy. Thereafter, a number of airlines established themselves, but most did not last. At the moment, South African and other international airlines dominate most air traffic.

Pipelines are important in the transportation of liquids and gases. In Zambia, pipelines are used mainly to transport water and wastewater within municipal areas. For example, Lusaka water is transported by pipe from Kafue. However, the most important pipeline is the Tanzania Zambia Oil Pipelines (TAZAMA) pipeline, which pumps petroleum products from Dar-es-Salaam to the oil refinery in Ndola.

The pipeline was built with the assistance of the Italian Government in order to reduce the cost of trucking petroleum products from Tanzania. Again, this project was completed within a record time of fourteen months. However, the pipeline now requires a lot of maintenance to minimise loss through leakages.

Power

Apart from petroleum products, of which Zambia is a net importer, the country is richly endowed with a wide range of energy sources, such as wood fuel, hydropower and coal as well as solar power. Wood fuel in the form of firewood and charcoal continues to be the major source of energy for the majority of Zambians in both rural and urban areas. While wood fuel is a renewable resource and Zambia has vast forests, there are signs of deforestation, especially around major urban centres.

Zambia is a major producer and exporter of hydropower. Apart from the natural endowment in water resources, the development of hydropower generation is closely associated with the development of the mining industry. Initially, the mines and the urban settlements that ensued depended on coal-fired power stations. It was realised, however, that there was need to invest in hydropower generating infrastructure. The first such installations were in Livingstone and Kabwe and this were followed by the construction of the Kariba Dam in the late 1950s.

With the advent of UDI, Zambia invested heavily in the hydropower generating facilities within the country. These included both large and smaller hydropower stations. The smaller power stations were largely in the northern parts of the country located in Serenje, Mansa and Kasama. The larger investments were in the construction of the Kariba North Bank as well as the Kafue Gorge Power Station. They also included the construction of the Itezh-itezhi Dam as a reservoir up-stream for the Kafue Gorge Power Station.

Zambia has a huge potential for coal production. However, only one coal mine was developed and this is the Maamba Collieries. The colliery has production capacity of one million tonnes of coal per year. However, current production is well below this capacity, due to the lack of

demand from the mines, Nitrogen Chemicals of Zambia and other industries. In Zambia, coal is not used as a household fuel.

Zambia has great potential for solar energy. However, this source of energy has not been exploited fully due to technological constraints and lack of its promotion. There are a few companies promoting this technology for use in rural areas, including rural clinics and in radio transmitters. This source of energy would be further enhanced if it were applied in domestic applications such as water heating and lighting.

Communications

It has been said that communications, especially telecommunications, are an important facilitator of any modern economy. Traditionally, Zambian communication infrastructure was confined to the land-based telephone network, the postal services and broadcasting, both radio and television.

The first system of telecommunications was associated with the rail signalling system. Thereafter came the fixed land telephone system as well as the establishment of the postal system and the broadcasting system. After independence, these communication systems were further expanded. For example, before independence, television services were confined to the Copperbelt. After independence, these were extended to other towns along the line of rail. Later, the service was extended to all provincial centres and surrounding districts together with the telecommunication services through the construction of microwave links and the commissioning of the Mwembeshi Earth Satellite Station for international connectivity.

The advent of the Third Republic, which advocated the liberalisation of the communications sector together with advances in communication technology, brought about a revolution in the sector. The most significant changes were the introduction of mobile phones as well as Internet services. There are currently three mobile telecommunication system providers (ZAMTEL, CELTEL and TELECEL) and there are three main Internet service providers (ZAMTEL, ZAMNET and COPPERNET).

In the broadcasting sub-sector, there are again many players. With the liberalisation of the airwaves, several radio broadcasting stations have been established. Apart from the Government-owned Zambia National Broadcasting Corporation, there are Christian radio stations such as Radio Christian Voice International and Radio Yatsani. Other privately-owned radio stations include Radio Phoenix, Sky FM and many community radio stations scattered throughout the country. Television broadcasting has also attracted a number of entrants. Apart from ZNBC there are several private television stations. These include Multichoice, Trinity Broadcasting Network (TBN) and Cable and Satellite Television (CASAT).

Liberalisation of the mail delivery system has also seen the entrance of many privately-owned courier service companies such as DHL, FEDEX, Skynet, Post-Courier and Postnet.

Construction

The construction industry is an essential component of building the country's physical infrastructure. It is said that the construction industry is a good indicator of the health of the economy. In periods of boom, the construction industry expands; it contracts during periods of economic slump. The industry is intimately linked to other industries that supply various goods and services. These include cement, iron and steel, bricks and clay industries, timber and engineering services, etc.

The modern construction industry in Zambia started with the construction of the railway line and continued to grow with the development of the mines and the associated expansion programmes immediately after the Second World War. The construction of the Kariba Dam also gave great impetus to the industry.

However, it was the post-independence development projects that provided the industry its greatest push. The decisions to build schools and health facilities, roads and industrial establishments gave the construction industry an opportunity for exponential growth. In some years, the industry was the largest employer in the whole economy.

The slow down in economic development which took place during the late 1980s, and the company closures during the 1990s resulting from the liberalisation and privatisation policies of the MMD Government have had a serious impact on the sector. More recently however the construction industry has been given a modicum of growth from the road rehabilitation programmes under the Road Sector Investment Programme (ROADSIP) and mine development projects, such as the development of Kansanshi Mine in North-Western Province.

Other Services

There are other service sectors which are important to economic development. These include trade, the hotel and tourism industry and the financial and real estate sub-sectors.

The wholesale and retail trade is one of the largest sectors of the economy, contributing about 18% of GDP. During the Second Republic, a large portion of the trade sector, especially for domestic consumption was under parastatals. However, with changes in policy this is currently dominated by large South African chain stores. However, at the medium and small-scale level, there are many local traders who are active in the sector and are responsible for catering for the needs of the rural population. The growth of the sector is constrained by the lack of a national policy. For example, a large portion of trade in agricultural products, such as maize, is controlled by the Ministry of Agriculture and Co-operatives.

The hospitality industry is a small sub-sector, contributing only about 2% of GDP, because the tourism sector is not developed. One of the major factors is that Zambians are poor and do not have a culture of going on holiday, camping, sight-seeing and eating out. However, there has been noticeable growth in the sub-sector over the past few years. This is largely due to the mushrooming of guesthouses in most of the urban centres where local travellers can afford to pay.

The financial sub-sector is an important element in an economy. Financial services from commercial banks and other non-bank financial institutions contribute about 8% of

GDP. International commercial banks dominate in the provision of financial services.

In the insurance services, Zambia State Insurance Corporation is still the largest insurer in the country. However, its position is being challenged by the emergence of privately-owned insurance companies. Since the liberalisation of the financial markets, a number of financial institutions, offering a wider range of financial services have emerged. During the late 1990s, it was only the financial sector that was experiencing growth.

The real estate and business services account for about 9% of GDP. Private sector participation in real estate business was totally frustrated during the Second Republic. Since liberalisation, a number of real estate agents have come on the market. The sub-sector received a boost with the sale of Government houses and mine houses. The popularisation of home ownership has also stimulated growth in the sector.

Business services comprise various services given to individuals as well as corporate entities mostly by professionals such as lawyers, accountants and consulting engineers. The growth of this component of the sub-sector is largely dependent on the volume of economic activities as well as the purchasing power of the individuals.

Poverty

Zambia is a poor country and the levels of poverty have been increasing over the years. For example, between 1983 and 1987, income per capita fell from US $580 to US $250, a decline of more than 50%. In 2002, the income per capita stood at US $354. Income per capita is only a general indicator of the wealth or poverty levels of a country, and it does not show differences within the population.

According to the Central Statistical Office (CSO) Living Conditions Monitoring Survey in Zambia, 1998, 73% and 58% of the population of the country was living in poverty and extreme poverty, respectively. According to the UNDP Human Development Report of 2001, Zambia ranked 143 out of 161 countries on the human development index.

Just as all socio-economic groups do not uniformly experience poverty, it is also not uniformly spread across

the country. There is more poverty in rural areas than in urban areas, and in the provinces outside the country's main line of rail. There are also intra-provincial disparities. The distribution of Zambia's poor by province shows that the poorest provinces are Western, Luapula, Northern, Eastern and North-Western.

High levels of poverty have various harmful effects on the national economy as well as on individuals. At the national level, poverty is associated with low incomes and low purchasing power. In turn, low purchasing power has serious implications on prospects for economic growth, as the population has no capacity to buy goods and services. Poor people have no savings and, without savings, there can be no capacity for investment.

Poverty has serious implications for the quality of life, as poor people cannot afford basic necessities of life such as food, shelter and clothing. Neither can they access essential services such as health, education, clean water and sanitation. Consequently a poverty stricken population is prone to malnutrition, stunting, illiteracy and infectious diseases. This vicious circle of poverty is the living reality of the majority of Zambians. It can only be addressed by increasing opportunities for employment, especially in urban areas, as well as markets for rural produce.

HIV/AIDS

The first HIV/AIDS case was reported in Zambia in 1985. Initially, the HIV/AIDS epidemic was in urban areas, but it soon became clear that all parts of the country were affected. It is now agreed that HIV/AIDS has reached pandemic proportions. According to the Zambia Demographic and Health Survey (ZDHS) 2001-2002, it is estimated that about 16% of the population in Zambia is living with HIV/AIDS and nearly 100,000 deaths per year are attributed to the disease. The majority of the victims are between the ages of 20 and 45, the most productive segment of the population. This has serious implications for the country's labour force as well as the dependency ratio. In addition, the HIV/AIDS pandemic has drastically reduced the life expectancy from 52 to 37 years, within a very short period of time.

The prevalence varies by residence. The urban HIV/AIDS prevalence of about (23%) is twice that of rural areas (11%). Provinces with prevalence levels above the national average include Lusaka (22%), Copperbelt (20%) and Southern (18%). The lowest prevalence levels are found in Northern Province (8%) and North-Western Province (9%). In terms of gender, prevalence rates are markedly higher in women than in men, in all provinces except North-Western.

During the early years, HIV/AIDS was viewed as a medical problem. Later, when nearly all families in the country were affected by the pandemic, together with the increase in the number of orphans, vulnerable children and destitute parents resulting from the pandemic, the social aspect was included. It is now accepted that HIV/AIDS is a multifaceted problem that touches all aspects of human life: it is a medical, social, economic and developmental problem.

The country's response to HIV/AIDS is contained in the National HIV/AIDS/STD/TB Policy and the National HIV/AIDS Intervention Strategic Plan, 2002–2005. This response is centred on nine sets of interventions and these are:

- Behavioural Change Communication (BCC);
- condom promotion and availability;
- controlling other Sexually Transmitted Infections (STIs);
- meeting the needs of groups practising high-risk behaviours;
- Preventing Mother-to-Child Transmission (PMTCT);
- Care and Support for People Living with HIV/AIDS (PLAWHA);
- Antiretroviral Drugs (ARV) and Antiretroviral Therapy (ART); and
- Orphans and Vulnerable Children (OVC).

These interventions are co-ordinated by the National HIV/AIDS/STI/TB Council (NAC) under the Ministry of Health, in collaboration with the line ministries and various Non-Governmental Organisations (NGOs) and Community-Based Organisations (CBOs) in the country. In addition to Government support, Zambia is a beneficiary of resources from the Global Fund to Fight AIDS. These efforts are beginning to bear fruit, albeit very slowly.

2.1.7.3 The Social Structure of the Economy - The Urban-Rural Divide

The structure of the Zambian economy has been significantly influenced by three factors that have characterised its development. These are the predominant and persistent rural-urban divide, the structure of the labour force and the very high dependence ratio. The latter two have been discussed previously.

Zambia is one of the most highly urbanised countries in Africa. This is largely due to the fact that the Zambian economy was overly dependent on large-scale mining which required high concentrations of labour for the mines as well as the industries that serviced the mines. Because of the unique requirements of the mining industry, rural areas were seen as reservoirs of cheap labour. By the same logic, rural areas were designed to be devoid of viable economic activities.

During the colonial period, this dual economy was underpinned by a more sinister racial ideology. The urban economy was characterised as a white enclave, comprising the international companies in alliance with the settler community, while the rural economy was for the African majority, whose sojourn in the urban centres was to provide cheap labour for a limited time and then retire back to the "native reserve". This structuring of a plural society or two nations within one country was also reflected in the structure of the wages that were paid to the members of the two different communities. Members of the settler community enjoyed a much higher standard of life and opportunities than their African counterparts.

At independence, this dualism persisted, albeit in a modified manner. International capital, especially after nationalisation, was substituted by the State. The influence

of the settler community no longer held sway as political power had been transferred to the African leaders of the nationalist movement. However, in spite of the political dispensation, the urban-rural divide persisted.

The major modification was that the rural areas were now seen as the source of political power, cheap food, labour and a reservoir for the recruitment of the urban elite. Due to the fact that the new political system depended on the principles of universal adult suffrage and majority rule, the rural vote became significant in the political power equation.

In addition, programmes aimed at rural development, such as the development of mono-crop agriculture (maize), subsidies of agricultural inputs and the building of roads and other infrastructural developments were largely aimed at producing cheap food to feed the population in urban centres. The fact that the Government did not make any serious attempt to promote low-input, high value crops such as cassava, tree crops and livestock is proof of this. Further, controls were imposed in the marketing of agricultural produce in order to ensure low food prices for urban areas.

Even after independence, the rural areas continued to be a source of cheap labour through a system of rural-urban migration. The only difference was that during the post-independence period, rural-urban migration supplied the urban areas both cheap labour and a cadre of educated migrants who were recruited to bolster the ranks of the emergent black elite. In this way, the acquisition of a modern education was the conduit for social mobility. As a result, the rural areas continued to lose their human resource capital to the urban areas.

Current indices of poverty show a striking bias against rural areas.

2.1.7.4 The Global and Regional Context

No one country is an island and Zambia has taken this saying literally in its commitment to participating in international affairs. Zambia chose its Independence Day, 24th October, to coincide with United Nations Day. The Zambian economy is integrated in the global economy and,

for political as well as economic reasons, Zambia has been actively engaged in various regional co-operation and integration initiatives.

Globalisation

Globalisation has been defined as an integrative process resulting in one world market and one world culture. It has been said that this process is not only irreversible and inevitable, but is also profoundly transforming all societies around the world. The driving forces behind this process are embedded in technological advances in communication and information.

In earlier epochs, the steamship, the railway lines and aeroplanes, on the one hand, and the printed word, radio and telephone, on the other, contributed to the creation of the world market. However, these technological advances did not succeed in creating a world culture. It was only after the digital revolution (microelectronic computers and satellite imagery) managed to conquer time and space that the concept of a global village in terms of commerce, information and culture has become a reality.

Thus, the development of technology and its widespread use are preconditions for successful globalisation. Access to it is also a necessary precondition for attaining full membership of the global economy. The problem, however, is that there is no equal membership in the global economy and the global village. Some have characterised the current international system (the end of the bipolar world), not as a celebration to an end of history, but rather the beginning of a more cynical world order.

The process of globalisation has seen the emergence of large and powerful regional trading blocs (North America, Europe and the Pacific Rim), and the disappearance or balkanisation of weaker nation states of the South.

Although globalisation has not led to dismemberment of the country, Zambia's marginalisation in the global economy is evident. This is reflected in the fall of commodity prices, the debt trap and increasing poverty. One way of mitigating these adverse outcomes has been the pursuit of regional co-operation and regional economic integration.

At the political level, Zambia is committed, not only symbolically, to the United Nations system and is a member of various UN specialised agencies. In addition, Zambia is a member of various international organisations such as the World Bank and the International Monetary Fund, the Commonwealth and the European Economic Commission/African Caribbean Pacific (EEC/ACP) Convention.

Regional Co-operation and Integration

Zambia is a member of various regional organisations. These include the African Union (AU), the African Development Bank (ADB), SADC, the Common Market for Eastern and Southern Africa (COMESA) and, more recently, the Great Lakes Region. Zambia's commitment to regional co-operation and integration initiatives is largely due to three factors. These are the country's political history, its geographical position and the quest for economic development.

Zambia's colonial past and its struggle for independence is intimately connected to its pan-African vision. Consequently, Zambia's independence was not seen as complete without the liberation of the rest of the African countries. Zambia played an important role in supporting the liberation movements in Africa in general and Southern Africa in particular. It is this pan-African tradition that made Zambia a valued member of the Organisation of African Unity (OAU), the precursor of the AU and its development agencies such as the African Development Bank, SADC and COMESA.

Zambia's geographical position has also contributed to its active participation in regional co-operation projects. In Southern Africa, the region where most countries were still under colonial rule, Zambia became a natural haven for liberation movements. As Zambia has borders with eight countries, it is necessary that the country supports regional co-operation and regional economic integration initiatives.

The quest for economic development has also been a large part of Zambia's participation in regional integration projects, such as membership of the African Development Bank, COMESA and SADC. As a response to the

marginalisation of African economies in the world market, African countries have resorted to forming regional economic institutions. These are building blocks for the establishment of an African economic market and developing the small economies of African countries, thereby gaining leverage in the global economy.

From the above, it can be concluded that the trends in socio-political development in Zambia and the region pose both opportunities and challenges. These opportunities relate to the prospects for peace, democratisation and the attainment of higher levels of social justice and economic welfare. Conversely, these windows of opportunity are challenges. The most recalcitrant challenge to the developmental prospect of Zambia and the region is to be found in the manner in which the problems posed by the current international system will be addressed and solved.

2.2 The Zambian Legal System

2.2.1 Introduction

Theoretically, a legal system may be defined as the set of all laws enacted directly or indirectly by one sovereign State. Simply described, it is the totality of laws of a state or community. However, the phrase assumes a more complex definition when qualified by an adjective, as presently, i.e. the Zambian legal system. It refers to a complex combination of:

- bodies of principles and rules such as constitutional law, statutory law or customary law principles;
- ideas, theories, methods, procedures, techniques, traditions and practices which collectively make up a distinct system of application of law in a particular society; and
- institutions which comprise the State regime that makes, executes and interprets the laws (i.e. the Legislature, Executive and Judiciary).

2.2.2 Sources of Law

The sources of law in Zambia are the Constitution; Zambian statutes and delegated legislation; English statutes extended to Zambia by legislative enactments; English common law and

doctrines of equity; Zambian customary law; and public international law that has been integrated into domestic law.

The Constitution is the supreme law of the land to which all the other sources of the law are subordinate. The Constitution vests legislative power in Parliament. Zambian statutes are passed by Parliament and known as Acts of Parliament. Delegated legislation is made by the Executive or local authorities by virtue of powers conferred upon them by an enabling statute.

The application of certain British statutes, common law and doctrines of equity is by virtue of the British Acts Extension Act, Cap. 10 and the English Law (Extent of Application) Act, Cap. 11, of the Laws of Zambia.

English common law comprises judicial decisions and principles that evolve out of proceedings of the courts of law based originally on the common unwritten customs of that country. Equity is a body of rules administered by a specialised English Court to supplement common law. Equity is primarily concerned with fairness and is founded on principles of natural justice.

Zambian customary law is founded on the widespread use of customs and practices of a community which, over time, gain acceptability and the force of law. The customary law of Zambia is complex and it varies among ethnic groups and tribes.

Public international law applicable to Zambia is the law of the international community or the body of customary or treaty rules accepted as legally binding by the country in its relations with other States. Public international law cannot be enforced in Zambia unless Parliament enacts relevant enabling legislation.

2.2.3 The Court System

The Judiciary is established by Article 91 of the Constitution. The court system comprises the Supreme Court, the High Court, Industrial Relations Court, Subordinate Courts, Local Courts and such lower courts as may be prescribed by an Act of Parliament. All courts in Zambia other than the Industrial Relations Court have (to the extent specified by law) both criminal and civil jurisdiction. The Industrial Relations Court was established to deal with labour matters and its jurisdiction is concurrent with that of the High Court.

Apart from courts that comprise the Judiciary, there are quasi-judicial bodies that administer specific laws subject to powers of review and appellate jurisdiction of specified courts. Examples are the Court-Martial, which is constituted under the Defence Act, Cap. 106, and the Lands Tribunal established under the Lands Act, Cap. 184.

2.3 Constitutional Development of Zambia

2.3.1 Introduction

A constitution is a set of rules and precedents governing political and administrative conduct. It enables society to function properly, to minimise conflicts among its constitutive components and to safeguard citizens' rights. Such a body of rules may be based on tradition or embodied in a formal, codified document that assumes a certain idea of organised power, describes the arrangements of public office and delineates the rights and duties of the citizenry as well as the prerogatives of the different organs of Government.

All organs of the State should derive their powers from the Constitution. Any action by any organ of the State that is not in conformity with the Constitution is invalid. The Constitution derives its authority and legitimacy from the people. Thus, the source of State power is in the people. In this modern organisation, the people are the masters.

Zambia has experienced at least three major phases in constitutional development. These were inspired by various considerations, such as the need to attain independence from colonial rule and the need to have a constitution that reflected a changed political environment. Developments within the regional and global contexts have also played a part in shaping the Constitution of the country.

This section traces, in brief, the history of constitution-making in Zambia from the colonial era. It highlights the salient features of the successive constitutions of the country. In particular, the section looks at the systems of Government, organs of the State and their relationships. It also looks at the processes that have shaped the constitutions.

2.3.2 Pre-independence Constitutional Development

2.3.2.1 BSA Company Administration: 1890 - 1924

Before the imposition of colonial rule in the 1890s, Northern Rhodesia did not exist as a single unified entity. Various parts of the territory were occupied by seventy-two ethnic groups, all having separate, independent administrations of varying strengths. The largest and the best organised ethnic groups were the Bemba, Lozi, Lunda and Ngoni.

The single most important individual responsible for the colonisation of the territory now known as Zambia was Cecil Rhodes, head of the British South Africa Company, a company which had interest in mining exploration and also assumed colonial administration of the territory on behalf of the British Government. His ambition was to spread British influence from Cape to Cairo. Through the Lochner Concession signed on June 27, 1890, the BSA Company was granted administrative powers in Barotseland and much of North-Western Rhodesia.

Between 1889 and 1911, a series of treaties were signed between African Chiefs and Rhodes' representatives bringing much of North Eastern Rhodesia under the administrative control of the BSA Company.

Due to the vastness of the territory, it was difficult to administer it as one. In 1893, the two territories were declared British Protectorates and by 1899 were formally divided into two administrative units called North-Western Rhodesia and North-Eastern Rhodesia.

In 1911, the two territories were amalgamated under an Order in Council.

2.3.2.2 Direct British Crown Rule: 1924 - 1953

The rising cost of administering the territory forced the BSA Company to cede control of Northern Rhodesia to the Crown in 1924. This was based on the Devonshire Agreement. Under this arrangement, the Constitution of the country consisted of the Northern Rhodesia Order in Council, 1924, the Northern Rhodesia (Legislative Council) Order in Council, 1924, and Royal Instructions.

Under the above arrangements, all executive power was vested in the Governor who was also Commander-in-Chief of the territorial armed forces. His powers included power to alienate land; appoint public officers, prescribe their functions and discipline such officers; assent or veto Bills; and initiate legislation. In performing these functions, the Governor was assisted by an Executive Council, whose role was merely advisory.

Legislative power was vested in the Legislative Council, which comprised the Governor as President, five ex-officio members, four nominated official members and five elected unofficial members.

The High Court, Magistrates Courts and Native Commissioners' Courts were created with appeals lying from Native Commissioners' Courts to Magistrates' Courts and from the latter to the High Court and finally to the Privy Council.

2.3.2.3 Federation of Rhodesia and Nyasaland (Constitution) Order in Council: 1953

Europeans in Northern Rhodesia, who completely dominated the territory's politics until the post-war period, believed that, in a few years, Northern Rhodesia would be granted a constitution similar to the one which had conferred self-governing status on Southern Rhodesia in 1923. However, the British Government declined the idea of delegating or sharing its exercise of "trust" over the affairs of the African population, the object of which Lord Passfield, the Secretary of State for the Colonies, in his memorandum in 1930, defined, in somewhat benevolent terms, as "the protection and advancement of the native races."

The idea of a federation was an alternative to amalgamation with Southern Rhodesia, an option which the settlers had also advanced. The colonial administration convened a series of conferences at which the principle of a federation was discussed and, finally, endorsed. At about the same time, in 1948, the first African political party, the African National Congress (ANC) was formed on the Copperbelt. The party led African resistance to the Federation.

The Federation of Rhodesia and Nyasaland came into being on 3rd September, 1953, through the Federation of Rhodesia and Nyasaland (Constitution) Order in Council. Under this Order in Council, the Federation was headed by the Governor-General, who was also Commander-in-Chief of the Federation. The executive powers of the Federation were vested in Her Majesty, the Queen of England, but exercised on her behalf by the Governor-General (Art.36). The Governor-General was assisted by a Prime Minister and other Ministers, all of whom he appointed. These constituted the Executive Council which advised the Governor-General in the governance of the Federation (Art. 37 and 33). The power to appoint, promote, transfer, dismiss, and exercise disciplinary control over Federal civil servants was vested in the Governor-General (Art.40).

The executive authority of each of the territories continued in accordance with their respective constitutions (Art. 42). Northern Rhodesia and Nyasaland retained their Protectorate status while Southern Rhodesia remained a self-governing colony.

Moreover, the territorial Governments remained responsible for the control of land and native policy while European matters were handled by the Federal Government.

The legislative power of the Federation was vested in the Federal Legislature although Her Majesty reserved the right to legislate for the Federation (Art. 3 and 29(7)). The Federal Assembly consisted of the Speaker and 59 members, 44 of whom were elected (Art.9). Out of the 44 elected members, 24 were from Southern Rhodesia, 14 from Northern Rhodesia and 6 from Nyasaland.

Africans were vastly outnumbered in the Federal Assembly, despite the fact that they constituted the overwhelming majority of the population. They were allocated only 12 seats. Three other seats were reserved for specially elected European members with special responsibilities for African interests.

As regards the Judiciary, a Federal Supreme Court was established as the highest court of appeal in the Federation. It consisted of the Chief Justice as President and Federal Justices, all of whom were appointed by the Governor-

General (Arts. 45-47). The courts in the territories continued exercising their civil and criminal jurisdiction as before. Appeals lay from the territorial High Courts to the Federal Supreme Court and from the latter to the Privy Council, whose Judges were drawn from the House of Lords (Art.61, 55)

Apart from having appellate jurisdiction, the Federal Supreme Court had exclusive jurisdiction in certain matters. These were disputes between the Federal Government and Territory or between territories. Others were matters relating to the election of Federal Assembly members, matters in which a writ or order of mandamus or an injunction or interdict was sought against an officer or authority of the Federation and questions relating to the interpretation of the Federal Constitution referred by a lower court (Art. 54).

The Federal Constitution attempted to allay fears of European domination by creating a standing committee of the Federal Assembly called the African Affairs Board (Art. 67). The Board consisted of three Europeans and three Africans and its primary function was to draw attention to any Bill introduced in the Federal Assembly and any Statutory Instrument, if that Bill or Statutory Instrument was, in its opinion, a "differentiating measure" (Art. 71(1)).

The expression "differentiating measures" meant, "[A] Bill or Instrument by which Africans are subjected or made liable to any conditions, restriction or disabilities disadvantageous to them to which Europeans are not also subjected or made liable, or a Bill or Instrument which will in its practical application have such an effect" (Art. 71(2)).

From 1954 to 1957 constitutional issues took a back seat, since it was agreed in 1954 that the franchise would not be changed during the five-year life of the Legislature, and that a review of the Federal Constitution, provided for in Article 99 of the Constitution, could not be convened before October 23, 1960.

The next round of constitutional activity was initiated by the Federal Government in 1957. European politicians in the three territories and at Federal level expressed their desire to achieve Dominion Status for the Federation. Sir

Roy Welensky, the Federal Prime Minister, secured assurances from the British Government that:

(a) the Federal Review would be convened in 1960, the earliest possible time under the Constitution;

(b) a programme for the Federation's advance towards independence would be placed on the Conference's agenda; and

(c) the British Government, in the interim, would not exercise its right to legislate for the Federation, as provided in the Constitution, except at the request of the Federal Government.

Armed with these assurances, the Federation Government introduced two highly controversial Bills:

(a) the Constitution Amendment Bill, 1957, which provided for the enlargement of the Federal Assembly from 35 to 59 members; and

(b) the Federal Franchise Bill, 1957, which introduced a complicated qualified franchise system with two separate classes of voters (Report of the Advisory Commission on the Review of the Constitution of Rhodesia and Nyasaland: Survey of Developments since 1953 (Appendix VI), October 1960, p.7).

The African Affairs Board, pursuant to its powers under the Constitution, reserved both Bills for consideration by the British Government on the ground that they were "differentiating measures" which would undermine the value of African representation in the Federal Assembly. The British Government, in view of the assurances given to Welensky, overruled the Board and recommended both Bills for the Royal Assent.

This decision had an enormous impact on Northern Rhodesian politics. It destroyed African confidence in the African Affairs Board and appeared to confirm suspicions

that in 1960 the British Government would accede to the Federal Government's demands for independence.

The decision convinced many African leaders to adopt a more militant line. They recognised that Africans had to obtain political power in Northern Rhodesia before 1960 if they hoped to dismantle the Federation and to prevent their political subjugation to Central Africa's white minority.

This was followed by a period of political unrest marked by an increase in violence. Indigenous African political parties, in particular, Zambia African National Congress (ZANC), a splinter from the African National Congress (ANC) led by Kenneth Kaunda, mounted a vigorous campaign to discourage Africans from registering as voters and to agitate for independence from colonial rule.

The unrest culminated in the arrest of leaders of ZANC, including Mr. Kenneth Kaunda. The colonial administration accused them of conspiring to launch a violent revolution in Central Africa.

2.3.2.4 The 1962 Constitution

In July, 1959, the British Government appointed the Monckton Commission to make certain recommendations on the review of the Constitution of 1953. The Commission's report in October 1960 marked the beginning of lengthy negotiations which resulted in the Constitution of 1962.

The 1962 Constitution evolved in three stages. The first began in December 1960 with the Federal Review and the London Constitutional conference and ended with the Colonial Secretary's proposals of February 1961.

The Colonial Secretary's February 1961 proposals, otherwise known as "Macleods Proposals", called for a Legislative Council of forty-five elected members, up to six official members and such nominated members as the Governor might appoint on instructions from the British Government. Among the elected members, fifteen would be returned from single-member constituencies by upper roll voters, fifteen from single-member constituencies by lower roll voters and fifteen from constituencies by both rolls voting together.

Candidates in National Constituencies would be required to qualify for election by obtaining the same prescribed minimum percentages of the votes cast on each roll. Their overall support would also be expressed as a percentage figure calculated by averaging together their respective proportions of votes on the upper and lower rolls. Each of the three sets of constituencies was to extend over the entire territory. Upper roll constituencies concentrated predominantly in urban areas while lower roll constituencies centered mainly in the rural areas.

The intention of the lower roll franchise was to lower the general income and educational qualifications and to add certain categories of voters who held special offices or special qualifications, but who could not comply with the normal income or property holding requirements (e.g. ex-servicemen and members of the Native Authorities).

Under the broad franchise proposals set out in the White Paper, the upper roll was to consist of approximately 25,000 Europeans, 3,000 Africans and 2,000 Asians, thus ensuring that the upper roll seats would be mainly European.

The crux of the proposals lay in Macleod's idea of combining the two rolls in order to return national members. This idea was far from explicit.

African candidates in the national seats would be able to satisfy the minimum percentage on the upper roll by obtaining the entire African vote plus only 3% of the European votes. On the other hand, European candidates in national seats would need to obtain the whole of the 15% required on the lower roll from African voters.

Another proposal was that the Northern Rhodesia Executive Council was to consist of three or four official members and six unofficial members, including at least two Africans and two non-Africans. In forming the Council, the Governor was to pay due regard to the group which appeared to command the widest support in the Legislative Council.

Further detailed suggestions were also put forward for the establishment of an advisory House of Chiefs.

It was also proposed that consideration should be given to the inclusion in the Constitution of a Bill of Rights.

Finally, in the case of Barotseland, which retained a special relationship with the British Government in constitutional matters, it was submitted that the proposed plan would have to be discussed separately with the Protectorate's Paramount Chief as soon as possible.

The second stage comprised the February-June 1961 proposals following the Governor's consultations with the territory's various political groups in Lusaka. This resulted in the Colonial Secretary's presentation of the following proposals:

- the fifteenth national seat was to be reserved for Asian and coloured voters who would vote together in a special national constituency extending over the whole country;

- the emphasis in the national seats was to be placed on obtaining support from both races not necessarily on accumulating a majority of the votes;

- an additional qualification was introduced which required national candidates to secure 20% of the votes cast on one or other of the two rolls. This was to ensure that candidates had substantial support from at least one section of the community; and

- the minimum support required by a candidate was to be expressed as 12% or 400 votes (whichever was the less) of the votes cast by each race in the election for the national seats. This meant that the European candidate would need to win 3% of the African electorate whereas the African candidate would require 8% of the European electorate. This is because there were more African voters than European voters. Therefore, the June changes worked to the advantage of the United Federal Party (UFP) which was predominantly white.

The third stage was the July 1961 to March 1962 proposals, which followed serious disturbances in the territory. In these proposals, the only fundamental change was in the prescribed minimum percentage arrangements for the election of national members. The contentious requirement, which had stipulated that national candidates must secure 12% or 400 votes (whichever was less) of the votes cast by each race, was adjusted to 10% of the votes cast by each race.

After constitutional negotiations, general elections were conducted which resulted in a coalition African Government consisting of UNIP, which succeeded ZANC and ANC.

Despite assuming power in 1962, both UNIP and ANC made it clear that they were not satisfied with the 1962 Constitution. Their goal was to bring about a new constitution based on universal adult suffrage and the granting of independence to Northern Rhodesia outside the Federation. The Federation was dissolved in 1963, after Nyasaland was allowed to secede.

Meanwhile, Barotseland continued to be administered as a separate Protectorate from Northern Rhodesia. In anticipation of and preparation for independence, Kenneth Kaunda (then Prime Minister of Northern Rhodesia), Sir Mwanawina Lewanika III, KBE (the Litunga-King of Barotseland) and the Right Honourable Duncan Sandys (Her Majesty's Principal Secretary of State for Commonwealth relations and for the Colonies) signed the Barotseland Agreement on 18th May 1964 in London.

The fundamental object of the Agreement was to build a foundation for an independent unitary and indivisible sovereign state of the Republic of Zambia out of Northern Rhodesia, incorporating Barotseland.

An important aspect of the Agreement was that it recognised the Litunga of Barotseland as the principal local authority for the Government and administration of Barotseland, with powers to make laws for Barotseland with respect to matters of land, natural resources and taxation.

The Agreement was equally significant in that it provided for devolution of power and local government to the extent that it required the Government of the Republic of Zambia to give effect to these provisions and ensure that its laws were not inconsistent with the provisions of the Agreement.

2.3.3 The 1964 Constitution: Independence

The 1964 Independence Constitution was worked out as a result of negotiations among the major political actors of the day. The constitutional arrangements were aimed at resolving the conflicting interests of the indigenous Africans, the settler white community and the colonial Government. The Constitution came into being through the Zambia Independence Order, 1964.

In essence, however, the 1964 Constitution was not a creation of the people of Zambia, as they were not involved in its making. This Constitution was based on a Westminster model designed for the emerging nations of former British Colonies and Protectorates.

The President was elected through a system whereby every parliamentary candidate was required to declare which of the presidential candidates he/she supported and every valid vote cast in favour of that parliamentary candidate was also regarded as a vote in favour of the Presidential candidate of her or his choice.

The functions of the Head of State and Chief Executive were fused in the Office of the President. Although the Executive President was expected to act on her/his own judgment, the advisory role of the Cabinet was given constitutional recognition. The President was assisted by a Vice-President and Ministers, all of whom he/she appointed. The Constitution, however, limited the number of Cabinet Ministers to fourteen.

The Constitution paid special attention to political and civil rights though each of these was diluted by a number of derogations and limitations. Special procedures such as referenda were to be employed in amending the Bill of Rights (part of the Constitution embodying the guarantee of rights and freedoms of the individual). Subject to the derogations and limitations, the fundamental rights were judicially enforceable. Many applications found their way into courts. Quite clearly, however, the courts trod very carefully in cases with political overtones. The limitations particularly took a heavy toll in cases involving detentions without trial on the basis of an exclusively declared state of emergency. Nevertheless, this

period did establish the principle of judicial review with potential for later, more effective protection of fundamental rights.

The Constitution placed legislative power in the President and the National Assembly, the latter comprising elected and nominated members. The President had overriding powers of assent to Bills. When the President withheld assent to a Bill, it could be returned to the National Assembly and re-enacted, if it had the support of at least two-thirds of the members. If such a Bill was presented again to the President, the Constitution required the President to sign it or dissolve Parliament. Seven or more members could challenge a Bill on the grounds that it violated provisions of the Constitution which protected the fundamental rights of the individual, by asking the Speaker to refer it to a tribunal. Thereupon the Chief Justice was empowered to appoint a tribunal to report whether in the opinion of the tribunal any or all provisions of the Bill were inconsistent with the Constitution.

Members of the Civil Service, Police and Defence Forces were disqualified from contesting elections to the National Assembly.

The Constitution vested judicial power in the Court of Appeal, the High Court and lower courts. A declaration by the President was required to make the Privy Council's Judicial Committee of the House of Lords as a final court of appeal. The Chief Justice was appointed by the President whilst the Judges of the Court of Appeal and the High Court were appointed by the President on the advice of the Judicial Service Commission. The Judges had security of tenure. The Judiciary remained reasonably independent, though there were some incidents of executive interference. For instance, in 1969, President Kaunda questioned a decision of the High Court Judge reducing the sentence of two Portuguese soldiers who had been convicted by a lower court of illegal entry into Zambia. This led to the resignation of the Chief Justice.

The Constitution also provided for a House of Chiefs. Mainly a deliberative body, it could consider, discuss and render advice on any Bill introduced in the National Assembly or any other matter referred to the House by the President.

The President had the power to create the Electoral Commission, but its status and mode of operation were not spelt out in the Constitution.

Political parties, as necessary instruments for democratic governance, were not specifically provided for in the Constitution.

Their existence and role were assumed in the guarantees that provided for freedoms of association and assembly. There was, nevertheless, a vibrant opposition present in Parliament.

In terms of the relationship between the Executive and Legislature and the principle of separation of powers, the following features are noted:

- the Cabinet was drawn from and accountable to the Legislature;
- the President had power to nominate persons to be members of the National Assembly;
- the President had overriding power of assent to Bills; and
- the President had power to dissolve Parliament.

Many of the features of the 1964 Constitution have been preserved to date.

2.3.4 Amendment of the 1964 Constitution

The 1964 Constitution contained stricter procedures to be followed for the alteration of the Constitution than for the enactment of ordinary legislation. A Bill to amend the Constitution required the votes of not less than two-thirds of all of the members of the National Assembly. Further, in so far as it altered any part of the Constitution relating to fundamental rights, such a Bill could not come into force until submitted to a National Referendum and was approved thereby. Intended to make it difficult to alter provisions of the Constitution which protect rights of individuals, this provision was unfortunately targeted for repeal early in the life of the Constitution. It was eliminated by a 1969 amendment following a referendum renowned as the "referendum to end all referenda." This repeal was aimed specifically at facilitating amendments to the right to property, but its implications were far broader.

In 1968, the Government had embarked on economic reforms designed to enhance African participation in the economy. The Government desired to take over substantial sectors of private business through large-scale nationalisation. The property clause as it existed in the Constitution was seen as an impediment to these measures. The removal of the referendum clause was later to

facilitate the adoption of a One-Party State. It avoided the need for a referendum and left the entire Constitution subject to amendment if those in control possessed a majority of two-thirds in Parliament.

2.3.5 The 1973 Constitution: One-Party State

The 1964 Constitution made the executive President a dominant player on the political scene, exercising considerable influence over the Legislature.

This factor, coupled with the dominance of one party (the United National Independence Party) led to systemic constitutional amendments that resulted in radical reorganisation of the entire political order and culminated in a one- party State.

Many factors played a role in weakening the idea of liberal democracy enshrined in the 1964 Constitution. The architects of one-party rule were inspired by a desire to eliminate political conflicts and build a united political order. Cases of inter-party political violence, the hostile regional environment within Southern Africa occasioned by the Unilateral Declaration of Independence in Southern Rhodesia (now Zimbabwe) and the need for political self-preservation all combined to provide a strong argument for replacing the 1964 constitutional order. An additional factor was the socialist influence from the Eastern European Bloc.

The Government of Zambia, like those of other countries on the continent, justified a one-party State as a variant of democracy best suited to the peculiar African circumstances. It was argued that elimination of political pluralism would lead to unity and foster socio-economic development. The idea of democracy was re-defined so that political pluralism was not considered as a basic ingredient.

The transition to a one-party State was carried through a Commission of Inquiry, historically referred to as the Chona Commission, which was headed by the then Vice-President, Mr. Mainza Chona. The Commission was appointed to receive evidence and examine the form of one-party State Zambia would adopt. In its terms of reference, the Commission had no mandate to hear evidence on the desirability or otherwise of a one-party State.

The move to constitute a Commission with the aim of establishing a one-party State was challenged in court by Mr. Harry Mwaanga Nkumbula, leader of the ANC. He contended that the Government's decision to establish a one-party state and to appoint

a Commission to facilitate this was likely to infringe his freedom of association. Mr. Nkumbula lost the petition both in the High Court and in the Court of Appeal *(HP/cons/REF/1/1972; C.A. Case No. 6 of 1972).*

The Commission made recommendations, notable among which were that the President's term should be limited to two terms; that a standing tribunal should be established to review detentions and restrictions within three months and that its decisions be binding on the President; that the Prime Minister should have power to appoint and dismiss members of the Cabinet and need only consult the President; that the Supreme Court should have power to give advisory opinions on the Constitution without the need for litigation; and that various institutions should be represented in Parliament through special seats.

Following the submission of the Chona Commission recommendations, in October 1972, President Kaunda on 13th December 1972, signed a Bill which ended plural politics in Zambia, thus ushering in the one-party State.

2.3.2.5.1 One–Party State and Democracy

The 1964 Constitution was replaced with the one-party Constitution in 1973. Under Article 4 of the new Constitution, only UNIP was to exist and, accordingly, no one was to form or attempt to form any other political party or organisation.

A considerable number of the Chona Commission's recommendations were rejected. The President remained the Head of State and, in effect, the Head of Government. Executive power was vested in the President. Instead of a Vice-President, there was a Prime Minister who was the "Head of Government Administration" and Leader of Government Business in the National Assembly. His function was advisory to the President. The Prime Minister did not appoint Ministers or preside over Cabinet meetings except in the absence of the President.

The President's position was also strengthened by the state of emergency which had been declared by the last British Governor of Northern Rhodesia, Sir Evelyn Hone, on 25th July 1964. The President had, among others, power to detain without trial, declare curfews and control

assemblies. The state of emergency continued for twenty-seven years after independence.

One significant development resulting from the new constitutional order was the progressive dominance of the party, UNIP, which culminated in its assuming supremacy over all organs of the State, including the National Assembly; Members of the Central Committee assumed powers and privileges that were once a preserve of Ministers; thus, the Central Committee of the Party took precedence over the Cabinet. The highest organ for formulation of policies became the Party Congress. By Article 4 of the Constitution, the Party constitution was annexed to the Constitution of the country for reference.

The Party's General Conference was given the important mandate of providing the sole candidate for presidential elections.

There were also changes to the Judiciary. The dormant provision for referring cases to the Judicial Committee of the Privy Council was removed. The Court of Appeal was replaced by the Supreme Court, which became the highest court in the land. Two entirely new instruments of controlling executive power were introduced - the Leadership Code and the Ombudsman. The former was aimed at tackling corruption among politicians. The latter was intended to supplement the judicial system in dealing with improper conduct in public office.

2.3.5.2 Decline of One-Party Rule

The legitimacy of the one-party rule came under sweeping challenge in the late 1980s and early 1990s. The 1980s saw the demise of communism in the Eastern European Bloc countries and the re-emergence of new democracies in its place. These developments culminated in sweeping ideological realignments across the world, and the historic shift in the global balance of power precipitated the crisis that led to the crumble of the one-party rule.

The shift in the political order in Zambia was also catalysed by serious economic difficulties which, by 1990, had reached extreme levels. By this time, the conflicts in Southern Africa had eased with the

attainment of independence of most countries in the sub-region. There were also signals that the system of apartheid in South Africa was about to give way.

It soon became clear that the one-party Government could no longer withstand popularly supported political and social pressures mounted by a coalition of several interest groups. It was against this background that early in July President Kaunda set the date for a referendum to determine Zambia's political future. The date was set as 17th October 1990 and at the same time a Special Select Parliamentary Committee was appointed to study and recommend on the democratisation of the Party and its Government. At about the same time, on 21st July 1990, the National Interim Committee for Multi-Party Democracy was formed to lobby public support for return to multi-party politics. There was overwhelming public support in favour of the move towards multi-party democracy.

By September 1990, there was overwhelming indication of public desire to return to multi-party politics. President Kaunda announced the cancellation of the referendum and instead appointed a constitution review commission to recommend a political order for the Third Republic. The Commission was chaired by Professor Mphanza Patrick Mvunga, the then Solicitor-General.

2.3.6 The 1991 Constitution

The thrust of the terms of reference of the Mvunga Commission was to design a constitution that would mark a departure from the one-party Constitution and usher in a regime suited to plural politics.

The Mvunga Commission recommended the enlargement of the Bill of Rights; the establishment of a constitutional court to deal with violations of Human Rights; the funding of political parties from Government resources in order to strengthen democracy; the establishment of review tribunals to consider cases of individuals detained under the preservation of Public Security Regulations; and the introduction of the Chamber of Representatives as a second house of Parliament. The Government rejected these recommendations.

The Government accepted the inclusion of Directive Principles of State Policy; the abolition of the Office of Prime Minister; the re-introduction of the Office of Vice-President; the requirement for a presidential candidate to obtain 51% or more of the votes in order to be declared winner; ratification of appointment of constitutional office holders by Parliament; replacement of Minister of State with Deputy Minister; repeal of provisions relating to the Leadership Code and replacing it with a new code to accommodate the new political order.

The resulting Constitution Bill gave rise to serious differences between the Government and the emerging opposition alliance which threatened to boycott elections. Perceiving a political crisis, the Church brokered talks between the parties. Under the Chairmanship of the Anglican Church, Bishop Stephen Mumba, an Inter-Party Group of Experts was formed on 25th July 1991 to look at the mechanics of the Constitution of the Third Republic.

The inter-party dialogue achieved a compromise which facilitated the enactment of the Constitution Act that came into force on 30th August 1991. The new Constitution was seen as a transitional instrument to answer the immediate pressures of the time, and there was no time to do a comprehensive review of the Constitution.

Some of the salient features of the 1991 Constitution were provisions for:

- removal of Article 4 of the 1973 Constitution, which restricted formation of parties to one;

- fundamental human rights and freedoms which in general terms corresponded with those contained in the 1964 and 1973 Constitutions;

- Directive Principles of State Policy and Duties of a Citizen;

- an Executive with wide, though greatly reduced and more circumscribed, powers;

- requiring a presidential candidate to win by more than 50% of the valid votes cast. Failure would require a fresh election between the top two contenders to be conducted. If neither candidate emerged winner, then

Parliament would elect a President between the top two contenders;

- limiting the presidential tenure of office to two (five-year) terms;

- a unicameral Legislature with an option that the National Assembly could, by a resolution passed by a two-thirds majority of its members, establish a House of Representatives; and

- enactment by Parliament of a Bill to alter the Bill of Rights and the Article providing for alteration of the Constitution only if the Bill seeking such alteration had already been passed in a national referendum and supported by not less than 50% of persons eligible to register as voters.

The Movement for Multi-party Democracy (MMD) campaigned in the 1991 elections on the platform that if elected to power, it would change the 1991 Constitution and replace it with one that would be above partisan considerations and would strengthen democracy and the protection of human rights.

On 31st October 1991, Zambia went to the polls under the multi-party constitution. The Movement for Multi-party Democracy emerged winner with a landslide victory. This was followed by renewed search for a lasting constitution.

2.3.7 The 1996 Amendment to the Constitution

In 1993, the then President, Mr. Frederick J.T. Chiluba, appointed a constitution review commission, chaired by Mr. John Mwanakatwe, SC, a former Minister in the First and Second Republics. The terms of reference of the Commission were wide. At the completion of its work, the Commission made far-reaching recommendations. A number of these recommendations are note-worthy.

The Commission's rejection of submissions that the preamble recite that Zambia is a Christian Nation was significant. Following the preamble, the Commission's draft Constitution included a chapter on "Directive Principles of State Policy", an aspirational list of principles for the guidance of all branches of Government in law making, administration and adjudication. The principles

covered a wide range of policy areas and were to be non-enforceable in court.

In the field of fundamental rights, the Commission recommended strengthening some rights whilst adding others. Those proposed for addition referred to residence, human dignity and reputation, culture, marriage, a clean environment and equal pay for equal work. Freedom of the Press and related rights of journalists were to be strengthened. Academic and intellectual freedom and the right to strike and lock out were scheduled for protection. Most notable was a proposed drastic increase in the protection of rights of women and prohibition of laws, customary practices and stereotypes which worked against the dignity of women. Economic protection of women, including maternity leave, were to be included, as was a comprehensive provision on children's rights.

The Mwanakatwe Commission recommendations further sought to restrict declarations of emergencies to situations involving the security of the country by invasion, general insurrection or at a time of national disaster. It also provided a check that the declaration of an emergency was to be made subject to judicial review by the Constitutional Court.

In terms of enforcement of fundamental rights, the Commission proposed an extension of the range of entities that could bring actions to enforce in a court of law any of the enumerated rights. The Commission further recommended the creation of a HRC to investigate, on its own initiative or on a complaint made by any one or more persons, human rights violations and to promote programmes aimed at enhancing respect for human rights.

The Commission recommended that the provision relating to election of the President should be clarified in the event of none of the candidates receiving 50% or more valid votes. However, it did not seek a substantive change to the provision. The Commission recommended the appointment of Cabinet Ministers from outside Parliament and that where such an appointment involved a Member of Parliament, the affected MP would be required to vacate the seat in Parliament.

The only significant change recommended with respect to the National Assembly was the right of a constituency to recall an MP on the petition of a prescribed number of registered voters.

With respect to the Judiciary, the Commission recommended the creation of a constitutional court to exercise jurisdiction over any alleged violation of any right guaranteed by the Constitution.

For the first time, provisions on local government, the armed forces and Police, the Bank of Zambia and a specific date of elections were recommended, thus seeking to involve the Constitution in the details of governance of the State.

With regard to qualifications to contest presidential elections, related to citizenship, the Mwanakatwe Commission recommended that a presidential candidate had to be a citizen of Zambia, born in Zambia. Her/his parents were also required to be Zambian citizens born in Zambia of Zambian citizens. The resulting constitutional provision became contentious as some people viewed it as discriminatory. There was a perception that it was targeted at preventing the first President, Dr. Kenneth Kaunda, from contesting presidential elections.

The Mwanakatwe Commission further recommended that, to achieve maximum consensus, the Constitution should be adopted through a Constituent Assembly, composed of one representative elected from each district, representatives of all political parties and those drawn from many segments of society - the professions, the labour movement, employers, Churches, women's groups, the universities, including students and others on a detailed list.

However, most of the Commission's recommendations were rejected by the Government, except the parentage clause which was accepted and implemented. Specifically, the Government rejected the introduction of several new personal rights, the introduction of a constitutional court, the recommendations on rights of women and a recommendation for the establishment of an independent Electoral Commission.

One of the contentious issues was the mode of adopting the Constitution. Civil society groups insisted that it should be done through a Constituent Assembly while the Government maintained that it would be done by Parliament.

Another issue was the requirement for a simple majority for the election of a President. This was widely opposed by the civil society. The Government maintained that a simple majority vote was necessary in the event of many presidential candidates, as a re-run might pose financial and logistical problems.

By and large, the 1996 amendment to the Constitution was considered to lack popular legitimacy as it did not take into account most of the submissions made by the people. Furthermore, it introduced contentious clauses and the phenomenon of a minority president. Contending political parties in the 2001 elections pledged an immediate review of the Constitution after the elections.

It was against this background that the Constitution Review Commission, chaired by Mr. Wila Mung'omba, a lawyer and banker, was appointed.

2.3.8 Method of Constitution Review

Article 79 of the Constitution vests power to alter the Constitution in Parliament. However, the same Article provides that any amendment bill seeking changes to that particular Article or the Bill of Rights requires to be passed by a national referendum before the bill may be tabled in the National Assembly.

Historically, constitution-making in Zambia has been initiated by successive Governments under the Inquiries Act. Under the provisions of the Act, the President determines the terms of reference, appoints the Commission and the report of the Commission is made to the President. Consequently, it has been the prerogative of the President and his Cabinet to accept or reject recommendations of the Commission and to initiate the Constitution Bill. All the three processes so far undertaken have seen the rejection of a considerable number of recommendations and substitution of the Government's own views.

The Mwanakatwe Commission was invited to examine the issue of mode of adoption of the Constitution. Following overwhelming demand by the people, the Mwanakatwe Commission recommended adoption of the Constitution through a Constituent Assembly whose composition would comprise various interest groups. This was rejected by the Government.

The practice of undertaking constitution review under the Inquiries Act has come under heavy challenge from the people and civil society groups. The argument is that the method of review and adoption of the Constitution under this Act allows the Government to override the wishes of the people. Controversy on this issue surrounded the appointment of the Mung'omba Commission. This resulted in some civil society organisations and some individuals

declining to sit on the Commission, though later some of them made submissions to the Commission.

The Government, on the other hand, argued that the mode of adoption of the Constitution is one of the terms of reference that the Commission should make recommendations on. It further argued that should the people of Zambia demand another mode of adoption of the Constitution and the Commission so recommend, it would treat the recommendation as representing the will of the people and would endeavour to implement that will.

PART II: SUBMISSIONS, OBSERVATIONS AND RECOMMENDATIONS

This part of the Report contains a summary of submissions made to the Commission by petitioners as well as the observations and recommendations of the Commission. The observations and recommendations are primarily based on the submissions. However, in making its observations and recommendations, the Commission has also taken into account comments received from the public on its Interim Report and draft Constitution which were published on 29th June, 2005. A revised draft Constitution has been prepared separately on the basis of these recommendations.

CHAPTER 1

NATIONAL SOVEREIGNTY AND THE STATE – GENERAL PRINCIPLES

Terms of Reference:

No. 2 Recommend a system of government that will ensure that Zambia is governed in a manner that will promote the democratic principles of regular and fair elections, transparency and accountability, and that will guard against the emergence of a dictatorial from of government;

No. 29 Examine and recommend on any subject-matter of a constitutional, political or economic nature which, in the Commission's view has relevance in the strengthening of parliamentary and multi-party democracy; and

No. 30 Examine and recommend on any matter that is connected with or incidental to the foregoing Terms of Reference.

1.1 Introduction

Sovereignty may be defined as the power wielded by an overseer or superior authority in the decision-making process of the State. The body that holds this power could be described as the source of all political power from which all authority to govern, including the power to make or change the law, is derived. In a real sense, therefore, sovereignty can be said to be the "will" of any particular State.

The question of where this "will" or sovereignty resides is crucial in understanding the functioning of any democratic State. In the history of nation States, sovereignty has been shown to lie in the people, Parliament or, indeed, in a monarch. However, it is a commonly held view that locating sovereignty in the people makes it possible to prevent the rise of tyranny and makes the governed accept easily those who govern them. This is because the governed will consider the governors as their agents with the mandate of implementing the "will" of the people and being accountable to them.

In relation to sovereignty, until the 1996 amendment the Constitution simply stated that Zambia is a sovereign State. The Mwanakatwe Commission addressed the issues of sovereignty and the State system and recommended that Zambia should continue to be a unitary sovereign State comprising the present borders and that the Constitution explicitly reaffirm the notion that, in Zambia, power belongs to the people who should exercise it through appropriate democratic institutions. This recommendation was effected by the 1996 amendment to the Constitution.

Current Constitutional Provisions

The Constitution of Zambia provides, in Article 1, that:

> *"(1) Zambia is a unitary, indivisible, multi-party and democratic sovereign state.*
>
> *(2) All power resides in the people who shall exercise their sovereignty through the democratic institutions of the State in accordance with this Constitution."*

A number of other modern constitutions recognise that sovereignty lies with the people and that the Government is merely the agent of the people. For example, the Constitution of Uganda states, clearly, in Article 1, that:

> *" (1) All power belongs to the people who shall exercise their sovereignty in accordance with this Constitution"*
>
> *(2) ...all authority in the State emanates from the people of Uganda; and the people shall be governed through their will and consent."*

Another example is the 1992 Constitution of Ghana which provides, in Article 35, (1), that:

> *"Ghana shall be a democratic state dedicated to the realisation of freedom, justice, and, accordingly, sovereignty resides in the people of Ghana, from whom Government derives all its powers and authority through this Constitution."*

As regards the United States of America (USA), the Constitution, by virtue of its preambular declaration, derives its supreme authority from the people. The preamble states:

> *"We, the people of the United States, in order to form a more perfect union, establish justice, insure domestic Tranquility, provide for the common defence, promote the general welfare, and secure the Blessings of*

Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America."

1.2 Submissions, Observations and Recommendations

There were one thousand six hundred and sixty-three (1,663) submissions on this subject.

1.2.1 The State System

Submissions

The majority of petitioners who addressed this subject made submissions to the effect that Zambia should be a federal State (187). Reasons advanced by the petitioners included the need to:

- foster self-determination;
- ensure equitable participation and distribution of resources;
- ensure effective control of socio-economic development by the people at grassroots levels; and
- redress weaknesses in the current local government system.

Some petitioners specifically proposed that the federal system of government should be based on a system of States, to be defined by the current provincial boundaries. Further, that each State should have its own legislature.

Others called for the retention of a unitary system of government (10).

Some petitioners were of the view that Zambia should remain a multi-party State (6) while one felt that the country should revert to a one-party State (1).

Observations

The Commission notes that most petitioners who addressed this subject called for Zambia to be a federal state. The Commission also notes that the reasons people advanced in favour of a federal system were perceived alienation from the Central Government; concentration of power and resources at Central Government level; marginalisation and neglect of provinces and districts; widespread absolute poverty; tribal imbalances in appointments; exclusion of

communities and ordinary people at grassroots level from meaningful participation in planning and management of development activities; lopsided development; inadequate control over local resources; unfair distribution of resources between provinces and severe deprivation in rural areas. They also reasoned that a federal system was better placed to foster self-determination, ensure effective control of socio-economic development by the people and redress weaknesses in the current local government system.

In articulating their call for a federal system of government, some petitioners proposed that the system should comprise States to be defined according to the existing provinces. These should have their own Legislatures. Petitioners further envisaged States that would have the power to determine their own socio-economic development plans and budgets, with a Federal Government reserving an exclusive mandate in key areas of national interest such as defence and security, foreign relations, immigration and citizenship.

The Commission acknowledges the concerns of the people and agrees that there is need for substantial transfer of Government powers and functions to local levels in order for people to participate meaningfully in matters of governance and development. However, the Commission is of the view that these concerns should be addressed through decentralisation of power to lower levels of Government and not through a federal system of government. The Commission feels that a federal system such as exists in the United States of America, India and Nigeria is not feasible for Zambia, as it may alienate the people and breed disunity and division. Furthermore, a federation would be demographically untenable given the geographical and population size of the country. Besides, a federal system would be economically and politically costly for a fledgling democracy such as Zambia.

In this regard, the Commission observes that in the past, there have been unsuccessful attempts to decentralise power to the people, mainly through policy pronouncements and extension of the Central Government structures to provincial and district levels. This has not been accompanied by a shift of powers, functions and resources to democratically established institutions of governance at the lower levels.

On the issue of political party system, the Commission acknowledges that some petitioners preferred that Zambia remains

a multi-party State. The Commission agrees with these petitioners and believes that principles on which multipartyism stands, including freedom of choice, diversity of political opinion and democratic participation in governance, are good grounds for retention of multipartyism.

Recommendations

The Commission recommends that the Constitution should state that Zambia is a unitary multiparty State in which State power and authority shall be constitutionally devolved.

The Commission further recommends that in line with recommendations made in this Report under the Chapter dealing with local government, the Constitution should:

- state that decentralisation of power shall involve the transfer of power, functions and resources from Central Government to democratically established institutions at local government level; and

- define decentralisation of power in terms of structures, functions and powers from national level through provincial level to districts and other institutions and structures at lower levels.

1.2.2 Sovereignty

Submissions

One organisation made a submission that constitutional provisions relating to sovereignty should be strengthened in order to curtail foreign influence (1). Another petitioner called for the Constitution to treat sovereignty as a matter of vital national interest.

Observations

The Commission notes that the petitioners' desire was for the Constitution protect the people's sovereign authority from undue foreign influence and that this should be treated as a matter of vital national interest. The Commission acknowledges that Zambia is an independent sovereign State in which all power resides in the people who should exercise their sovereign will in accordance with the Constitution. In this regard, the Commission observes that Article 1 (2) of the Constitution states that all power resides in the

people who shall exercise their sovereignty through the democratic institutions of the State in accordance with this Constitution.

Whilst the petitioners' concern is addressed by Article 1 (2) of the Constitution, the Commission wishes to add that the sovereign will of the people in relation to State power or authority is so fundamental that the Constitution ought to reflect it in more profound terms than is currently the case. For example, the exercise of this will is above the institution of the State and should, therefore, not be subject to democratic institutions, but the Constitution itself. The constitutional provisions should go further and state that the people shall be governed through their will and consent which shall be expressed in regular free and fair elections or through referenda; and that all power and authority in the State and its organs shall derive from the people who consent to be governed in accordance with the Constitution. Such enhanced provisions would strengthen sovereignty and statehood.

Recommendations

The Commission recommends that the Constitution should:

- have enhanced provisions relating to the sovereign will of the people and state that the people shall be governed through their will and consent which shall be expressed in regular free and fair elections or through national referenda;

- provide that all power and authority of the State and its organs resides and derives from the people who consent to be governed in accordance with the Constitution;

- state that provisions on the sovereignty of the people and statehood shall not be amended without the consent of the people through a national referendum; and

- provide that the people shall have the right to reserve to themselves all the power and authority that they do not expressly delegate to the State, its organs and institutions.

1.2.3 Territorial Integrity

Submissions

Three submissions were received on the issue of territorial integrity. One petitioner made a submission that no part of Zambian land should be ceded to another country in any

instrument without the authority of Parliament whilst another called for the Constitution to reflect territorial integrity as a matter of vital interest (2).

Another petitioner was of the view that the boundary and surface area of Zambia should be clearly defined in the Constitution (1).

Observations

The Commission observes that the three petitioners who spoke on this subject were concerned about the need to safeguard the territorial integrity of the country by ensuring that its boundary is defined and protected from violation by the Constitution. It is clear from the submissions that the petitioners were concerned about the possibility of parts of Zambia being ceded to other States or its boundary being violated by other States.

The Commission concurs with the views of the petitioners and observes that the Constitution does not have any direct provisions on the country's boundary and territorial integrity. The Commission notes the importance of defining the boundary and surface area of Zambia in the Constitution. This is essential for ascertaining the extent of the country's territory and resolution of any territorial disputes that may arise with neighbouring countries. Further, the Commission wishes to state that it is necessary to ensure that organs of the State do not have authority to cede any part of Zambia to another country.

Although previous Commissions did not address this subject, the Commission observes that the idea of the Constitution making provision for the territorial boundary of the country is not novel. The Constitutions of Ethiopia, Ghana and Uganda, for example, define or make provision for defining their territorial boundaries.

Recommendations

The Commission recommends that:

- Zambia's international boundary should be defined and described in the Constitution;

- an official map should be provided in the Constitution clearly outlining and showing the territorial surface area and parts of the country upon which the State is sovereign; and

- the Constitution should provide that no part of Zambia shall be ceded to another country.

1.2.4 The Constitution - Ownership

Submissions

There were three submissions to the effect that the preamble to the Constitution should reflect that the Constitution and the constitution- making process are a direct product of the people (3).

Some petitioners argued that the constitution review process should not be conducted under the Inquiries Act (13). Three petitioners made a submission that the Act should be amended to remove the powers of the President to receive the recommendations (3). They reasoned that under the Inquiries Act, the process is driven by the President and the Executive instead of the people.

Observations

The Commission notes that it was the desire of petitioners that the people should define the constitution-making process and that the Constitution should be a product of the will of the people. Arising from this, the Constitution is supreme, final and binding on all authorities and peoples within Zambia.

In this regard, petitioners wanted the Constitution to be made or amended through a popular mode and not through the Inquiries Act. They argued that under the Inquiries Act, the Executive determines the process of making or amending the Constitution.

The Commission, in concurring with the petitioners, observes that the process of making the 1964 Constitution did not acknowledge the people's sovereignty in that the people did not participate. The Constitution was essentially designed by the British Government. All subsequent Constitutions and amendments have been made under the Inquiries Act. The current Constitution Review Commission (CRC) was also constituted under the same Act.

In their submissions to the various Commissions, the people said that they wanted to participate in the process of making their own Constitution. They did not want either the Government or any group of technocrats to draft a constitution for them. The visit to all the 150 parliamentary constituencies by this Commission was applauded by many people who made submissions because they

saw in this exercise an opportunity to express their views on the subject. They stated that they did not want any Government "White Paper" to determine their future. They preferred that a popularly representative body should discuss the findings of the Commission and that any Constitution ensuing from such findings and discussions must be referred to them by way of Referendum for approval.

The Commission further observes that in order for the Constitution to stand the test of time, it ought to be a product of the will of the people expressed directly by them. In this regard, the Commission notes that the Constitution addresses the subject only in the preamble and in the following terms:

> *"WE, THE PEOPLE OF ZAMBIA by our representatives, assembled in our Parliament, having solemnly resolved to maintain Zambia as a sovereign Democratic Republic;*
>
> *DETERMINED to uphold and exercise our inherent and inviolable right as a people to decide, appoint and proclaim the means and style to govern ourselves;*
>
> *DO HEREBY ENACT AND GIVE TO OURSELVES THIS CONSTITUTION".*

The Constitution relegates the enactment process to Parliament and does not address the subject of constitution-making by the people prior to enactment. The Commission's view is that this undermines the sovereign will of the people in constitution-making. Some Constitutions explicitly specify that the people adopt the Constitution. Examples are Ghana and Uganda. In the case of Uganda, the Constitution explicitly states in the preamble that this shall be done by a Constituent Assembly, specifically, created for the purpose of adopting and enacting the Constitution. Further, the Constitution of Uganda extends the principle of constitution-making by the people to the operative part of the Constitution. Article 1 (3) states, in part, that all power and authority of the Government and its organs derives from this Constitution which, in turn, derives its authority from the people.

Recommendations

The Commission recommends that:

- the Constitution should explicitly reflect in the preamble as well as the operative part that the people shall adopt and give to themselves the Constitution;

- the Constitution should recognise that Government derives all power from the people who shall exercise it in accordance with the Constitution; and

- the Constitution review process should not be conducted under the Inquiries Act. The Constitution should stipulate that the review process should involve participation by the people and, in this regard, Parliament should enact specific legislation for the entire constitution-making process.

1.2.5 Defence of the Constitution

Submissions

There was a submission that there should be provisions to protect the Constitution from being suspended or overthrown by force or other unconstitutional means (1). The petitioner argued that the Constitution should retain its validity even where its observance is interrupted by a government established by force and unconstitutional means. Another petitioner felt that defence of the Constitution should be of vital national interest requiring constitutional protection (1).

Observations

The Commission notes that although only two petitioners addressed the subject of defence of the Constitution, the matter is nonetheless important, particularly in view of the historical experiences in Africa where legitimate governments have been overthrown and constitutions suspended with impunity. In this regard, the Commission recalls that Zambia has experienced attempted coups which would have upset the constitutional order if they had succeeded.

The Commission wishes to state that constitutionalism entails that the Constitution is not forcefully or unlawfully overthrown. Such an act would constitute an attack on the sovereign will of the

people from whom the Constitution derives its authority. Therefore, in the first instance, the Constitution should prohibit the overthrow or abrogation of the Constitution by unlawful means. Further, since the constitution-making power shall reside in the people, it follows logically that they should have a corresponding duty to defend it. So far, none of Zambia's Constitutions have made provision for the defence of the Constitution. Similarly, previous Constitution Review Commissions have not addressed this issue.

In its consideration of this subject, the Commission examined constitutions of other countries. The Constitution of Uganda makes the unlawful suspension, overthrow, abrogation or amendment of the Constitution a treasonable offence and states that the Constitution shall not lose its force and effect. The Constitution of Ghana confers on the citizens the right and duty to defend the Constitution and, in particular, to resist any person or group of persons who, by unlawful means, suspends, overthrows or abrogates the Constitution. Both Constitutions provide that any punishment imposed on a citizen for any act in defence of the Constitution shall be void and, in addition, make provision for compensation.

Recommendations

The Commission recommends that the Constitution should have entrenched provisions that:

- the Constitution shall not be suspended or overthrown or amended by force or other unlawful means and that any attempts or acts to unlawfully suspend, overthrow or amend the Constitution shall be a treasonable offence;

- the Constitution shall not lose its force and effect even where its observance is interrupted by force or other unlawful means;

- all citizens shall have the right and duty, at all times, to defend the Constitution and, in particular, to resist any attempts or acts to unlawfully suspend or overthrow or amend the Constitution;

- any punishment imposed on a citizen for any act in defence of the Constitution shall be void from the time of its imposition; and

- any person who suffers punishment or loss arising from defence of the Constitution shall be entitled to compensation from the State.

1.2.6 Simplification, Translation and Dissemination of the Constitution

Submissions

A large number of petitioners made submissions to the effect that the language of the Constitution should be clear and in plain English (375). They also called for translation of the Constitution into local languages. Most of these petitioners further called for wide dissemination of the Constitution to the people of Zambia, including through public awareness programmes and school syllabi. They complained that they were inadequately prepared to contribute to the Constitution review, as it was not preceded by a public awareness programme.

Observations

The Commission notes that petitioners who addressed this subject wish the language of the Constitution to be plain and clear so that the people easily understand it. Petitioners also called for the Constitution to be translated into local languages and to be widely publicised. In this regard, the Commission observes that despite people's desire for a popular Constitution, many of the petitioners complained that they had neither seen nor read the current Constitution.

The Commission agrees with the views of the petitioners and further wishes to observe that since the Constitution derives its authority from the people and defines how they are to be governed, it is necessary that they are conversant with its contents. In this regard, the Commission notes that the Constitution of Uganda provides for the promotion of public awareness of the Constitution by the State, including through translation into local languages, dissemination through the media and teaching in education and training institutions.

The Commission is persuaded by the principle that the Constitution derives its authority from the people, who, in turn, are governed in accordance with its provisions. This principle is so fundamental that it is necessary for the Constitution to make provision for public awareness of its contents.

Recommendations

The Commission recommends that the Constitution should make provision that the language of the Constitution shall be plain so that it is easily understood.

The Commission further recommends that the Constitution should provide that the State shall promote public awareness of the Constitution by:

- translating it into local languages and disseminating it as widely as possible;
- providing for the teaching of the Constitution in educational and training institutions; and
- publicising it through the media and making it widely accessible to the people.

1.2.7 The State and Religion

Submissions

An overwhelming number of those who made submissions on the subject called for the retention in the Constitution of the declaration of Zambia as a Christian nation (736). A majority of these said that the declaration should be reflected in the preamble whilst a minority said that it should be in the main body. The major reason cited for the retention of the declaration was that the majority of Zambians are Christians.

On the other hand, a number of petitioners called for the repeal of this provision from the Constitution (142). They found the declaration discriminatory and a violation of the freedom of worship and conscience.

Both those in support of and against the declaration shared a common concern that there was need to safeguard the Zambian society against religious fanaticism. Petitioners on both sides acknowledged that God presides over the affairs of the nation.

Observations

The Commission observes that a relatively large number of petitioners called for the retention of the declaration of Zambia as a

Christian nation, stating that the majority of Zambians are Christians and that the declaration merely acknowledged this fact.

They further argued that the declaration does not impose Christianity as a state religion but, to the contrary, allows other religions to freely exist and that it upholds every person's freedom of conscience or worship. They further argued that the moral values of the nation and its laws are based on Christian principle.

In this regard, the Commission wishes to acknowledge that Christian values have contributed to the moral fabric of the nation and that this has, in turn, had a positive effect on the socio-economic and cultural economic of the country.

The Commission, however, agrees with the minority of petitioners who called for the declaration to be repealed, arguing that it is discriminatory and violates the provisions of the Constitution relating to freedom of worship and conscience. Religion is a matter of personal belief and faith based on freedom of choice which should be guaranteed by the Constitution. Consequently, the State should be separated from religion and should not be aligned to any particular religion.

In its evaluation of the subject, the Commission also considered the observations and recommendations of the Mwanakatwe Commission. The Mwanakatwe Commission observed that the pronouncement by the President in December 1991 declaring Zambia a Christian nation attracted the attention of many petitioners who made submissions to the Commission calling for the declaration to be enshrined in the Constitution whilst others called for the separation of the State from religion. The Mwanakatwe Commission, in responding to these petitions, observed that Christianity or any other religion could be safely secured without any form of declaration and therefore recommended that the Constitution should make it clear that Zambia should remain a secular State.

The Commission, however, observes that in spite of the strong and persuasive reasons advanced in support of the argument that the declaration should be repealed, it is clear that people want the declaration of Zambia as a Christian nation to be retained. Considering that the subject is emotive and contentious, the Commission is of the view that the matter should be subjected to further debate and a decision by the people through the institutions and processes recommended by the Commission, that is, the Constituent Assembly and national Referendum. In the meantime,

the declaration of Zambia as a Christian nation as contained in the current Constitution should be retained.

Recommendations

In light of the above considerations, the Commission recommends that the declaration of Zambia as a Christian nation as contained in the current Constitution should be retained, subject to further debate and a decision by the people of Zambia through the Constituent Assembly and national referendum.

1.2.8 National Anthem

Submissions

Four petitioners, including a civil society organisation representing the women's movement, said that the language of the National Anthem should be gender neutral and that the phrase "free men" should be changed to "freely" and "brothers" to "all one"(4).

Observations

The Commission notes that the call by petitioners to subject the language of the National Anthem, particularly the phrases reading "free men" and "brothers", to gender-neutrality was made by petitioners who included the Women's Movement. These petitioners were concerned that the language used in the National Anthem is biased in favour of the masculine gender. Whilst acknowledging the concern of the petitioners, the Commission observes that at the time of Independence in 1964 when the National Anthem was written and the National Anthem Act, Cap. 7, was enacted, laws and other official documents defined the masculine gender to include females where the context permitted. The Commission is satisfied that steps are being taken, both locally and internationally, to give importance to gender equality and reflect it wherever necessary. Therefore, the Commission notes that appropriate measures are being taken by the relevant authorities.

The Commission further observes that similar submissions were made to the Mwanakatwe Commission which in response observed that since the National Anthem was provided for in an Act of Parliament, any proposed changes to the content of the National Anthem could best be dealt with by appropriate legislation. This Commission, however, feels that the National Anthem is composed

of historical lyrics that reflect the country's heritage. Therefore, it would be inappropriate to subject these to change.

Recommendations

The Commission accordingly recommends that there should be no changes to the text and content of the National Anthem.

1.2.9 National Flag and Emblem

Submissions

Three petitioners were of the view that the eagle on the National Flag and Emblem should be replaced by a dove to symbolise peace (3).

Observations

The Commission wishes to observe that the designs of the National Flag and Emblem are prescribed by an Act of Parliament, the National Flag and Armorial Ensigns Act, Cap. 6. This is in accordance with Article 3 of the Constitution.

In its consideration of the subject, the Commission also noted that one petitioner to the Mwanakatwe Commission made a similar submission. The Mwanakatwe Commission observed and recommended that the call to substitute the eagle with a dove was isolated and therefore did not justify change. This observation is equally valid in the present case. However, this notwithstanding, the Commission considered the call by the petitioners on its merits. The Commission is of the view that the eagle is historically significant in that it symbolises the country's quest for freedom and reflects our country's struggle for independence.

Recommendations

The Commission recommends that the image of an eagle on the National Flag and the National Emblem should be maintained.

1.2.10 National Motto "One Zambia, One Nation"

Submissions

A number of petitioners wanted the national Motto "One Zambia, One Nation" to be enshrined in the Constitution (88). The reason advanced by petitioners was that the motto would help promote national unity.

Observations

The Commission notes that a number of petitioners called for the Motto of "One Zambia, One Nation" to be enshrined in the Constitution. They argued that the Motto is important in the promotion of national unity.

The Commission notes that the Motto "One Zambia, One Nation" was declared the national Motto in the preamble to the 1973 one-party Constitution. The Commission observes that petitioners to the Mwanakatwe Commission made a similar call and the Commission, in recommending that the Motto of "One Zambia, One Nation" be enshrined in the Constitution, observed that petitioners argued very strongly that the Motto was a unifying factor which stood above party considerations.

The Commission notes further that as a response to the recommendation of the Mwanakatwe Commission, Article 3 of the Constitution provides that the National Motto should be such as may be prescribed by an Act of Parliament.

This Commission agrees with the petitioners and the recommendation of the Mwanakatwe Commission that the Motto "One Zambia, One Nation" should be enshrined in the Constitution as the National Motto.

Recommendations

The Commission recommends that the Motto "One Zambia, One Nation" should be enshrined in the Constitution as the National Motto.

1.2.11 National Prayer

Submissions

One petitioner expressed the view that Article 3 of the Constitution should be amended to include a National Prayer (1). This petitioner wanted to see the text of the National Prayer prescribed by Parliament.

Observations

The Commission considered this submission. However, the Commission notes that it has already recommended that Zambia should be a secular State and that the declaration of Zambia as a Christian Nation should be repealed. Any particular form of prayer would be contrary to the freedom of worship and conscience and the spirit of secularism.

Recommendations

The Commission recommends that Zambia should not have a National Prayer provided for in the Constitution.

1.2.12 Official Languages

Submissions

Two petitioners expressed the view that Zambia should adopt another official language in addition to English (2). The petitioners proposed French, which is used in many other countries in the world. Other submissions called for Zambia to adopt one of the local languages as the country's official language (9).

There were some submissions to the effect that sign language and braille should be used for the deaf and blind in all official communication (8). This included submissions from organisations representing persons with disabilities.

Observations

The Commission observes that the use of English as the official language dates back to the pre-independence era and that it has been a neutral and unifying factor in the development of the nation.

The English language has facilitated interaction internally, regionally and internationally. It is widely spoken and has many

advantages as a medium of communication, particularly in the fields of science, education and research. The Commission further notes that there have been no petitioners to any of the Constitution Review Commissions opposed to the use of English as the official language of the country. In this regard, the Commission observes that the Mwanakatwe Commission made similar observations and recommended the continued use of English as the official language. This Commission agrees with this position.

Regarding the suggestion that French should be a second official language, the Commission recognises that although French is widely used at international level, in Zambia the language has not adequately evolved to merit its consideration as an official language, although it is taught in schools. In addition, resource constraints would not permit the use of French as an official language. However, the continued use of French, particularly its inclusion in school curricula, should be encouraged.

In relation to the submission that one local language should be adopted as an official language, the Commission acknowledges the equal importance of all local languages and therefore wishes to state that it would not be appropriate to prefer one local language for official use.

The Commission considered calls by some petitioners for sign language and braille to be used in all official communication. The Commission observes that such a measure would entail that all official documents, including laws be transcribed into braille and that all oral official communication be translated into sign language. This would not be feasible. In any case, whilst acknowledging that some people who are deaf or blind would benefit from such a measure, the majority are not able to use braille and do not have access to official media of communication. However, the provision of these facilities should be enhanced.

Recommendations

The Commission recommends that:

- English should remain the official language;
- the continued use of French, particularly its inclusion in school curricula, should be encouraged; and
- use of sign language and braille should be enhanced.

1.2.13 Equality of Zambian Languages

Submissions

Some petitioners made submissions to the effect that the Constitution should provide for equal status (treatment) of all Zambian languages (36). Some petitioners argued passionately that no particular language should enjoy a superior status to others. Petitioners also wanted all local languages to be used in schools in their respective localities and in the media, reasoning that this would prevent the suppression of minority languages and promote different cultures and development. In this vein, one petitioner called for legislation that would promote the use of minority languages in schools and other public places (1).

Observations

The Commission notes that petitioners on this subject wanted all Zambian languages to be treated equally. These petitioners lamented what they perceived as the suppression of some minority languages through the promotion of widespread use of certain languages in schools and official media.

The Commission wishes to acknowledge the equality of all local languages and their importance to cultural development. The Commission observes that purely for purposes of official dissemination of information such as broadcasting, seven local languages are used (Bemba, Kaonde, Lozi, Lunda, Luvale, Nyanja and Tonga). These languages are also taught in schools in specific provinces although English is the official language of instruction. It is understood that the choice of these languages is founded on the fact that they represent language clusters around which exist several dialects. Further, the Commission observes that the widespread use of certain languages is a matter of spontaneous cultural evolution and not a result of deliberate official policy.

Whilst it may be desirable that all local languages be used in schools and the official media, this is not feasible due to various constraints. Besides, such a measure, if not properly handled, could promote ethnic divisions and disunity. However, wherever possible, the use of any language other than the official language as a medium of instruction in schools or other educational institutions or legislative, administrative and judicial purposes should be permitted.

In its consideration of the subject, this Commission noted that the Mwanakatwe Commission considered three categories of petitioners on the subject of use of local languages. One category wanted constitutional recognition of the use of Zambian languages whilst another wanted the languages, which currently enjoy air time on the public media, to be accorded the status of official language side by side with English. The third category called for the right of all Zambians to use the languages of their localities, especially as media of instruction in local schools. The Mwanakatwe Commission, whilst recognising the use of local languages as an inalienable cultural right of the people, observed that the question of which language to use in a particular locality or region was a complicated and politically sensitive matter, which could lead to conflicts. The Commission therefore recommended that besides the official language, other languages could be used as media of instruction in schools or for legislative, administrative or judicial purposes.

Recommendations

The Commission recommends that the Constitution:

- should reaffirm the equality of all local languages; and

- should provide that any language other than the official language may be used as a medium of instruction in schools or other educational institutions or for legislative, administrative or judicial purposes as may be prescribed by law.

The Commission further recommends that the Constitution should state under the Chapter dealing with Directive Principles of State Policy that the State shall:

- promote the different cultures of the country consistent with the Constitution, in particular fundamental rights and freedoms, human dignity and democracy;

- take such measures as may be practically possible to promote the use, development and preservation of all local languages; and

- promote development of sign language for the deaf and Braille for the blind.

1.2.14 The Constitution – Gender Neutrality

Submissions

A number of petitioners called for the language of the Constitution to be inclusive of both genders or to be gender-neutral (20). These petitioners argued that both genders should be treated equally.

Observations

In considering petitioners' submissions on this subject, the Commission notes that the use of gender-neutral language is in conformity with the principle of equality of all persons. In this regard, the Commission observes that, contrary to this principle, all Constitutions and other legislation of the country since independence have used the masculine gender to include females.

The Commission also observes that petitioners to the Mwanakatwe Commission found this unacceptable and maintained that there ought to be no discrimination both in form and content of expression used in the Constitution and legislation. The Mwanakatwe Commission recommended that the Constitution adopt gender-neutral language and that the Government should progressively work towards adopting gender-neutral language for all the laws of the Republic.

Recommendations

The Commission recommends that the language of the Constitution should be gender-neutral and that the Government should take measures to progressively ensure that all legislation adopts gender-neutral language.

1.2.15 Preamble

Submissions

There was a submission that the preamble to the Constitution should include a recognition that Zambia is a multi-cultural and multi-ethnic country (1).

The petitioner further said that paragraphs 3, 5 and 7 of the preamble to the Constitution should be amended so as to:

- reflect recognition of the equal worth of men and women, different communities and different faiths;

- declare that Zambia shall uphold the right of every person to the enjoyment of freedom of conscience or religion, as long as the enjoyment of the same does not infringe on the freedom of others and maintenance of public order as provided by law; and

- further resolve that Zambia should forever remain a unitary and indivisible, multi-party, multi-ethnic, multi-cultural and democratic sovereign state and that, to this end, Article 1 (1) should also be amended.

In addition, the petitioner suggested reversion to the 1991 wording of the preamble as an alternative.

Some petitioners said that the preamble to the Constitution should include principles of democratic governance and accountability (6).

Observations

In its consideration of the subject of the preamble to the Constitution, the Commission first and foremost examined the purpose of a preamble in a constitution. In a preamble, the people as the makers of a constitution introduce it, setting out its objectives in broad terms and outlining the principles and values which the nation espouses. A preamble is not part of the operative part of a constitution, but its content helps to give context to the constitution. Some constitutions do not have a preamble, while others have a very brief preamble. Since 1973, the Constitution of Zambia, like many other constitutions, has had a preamble.

The Commission observes that amongst the petitioners who specifically addressed the subject of the preamble to the Constitution of Zambia, one wanted paragraphs 3, 5 and 7 of the preamble to be amended so as to reflect the equal worth of different communities and different faiths, remove the declaration of Zambia as a Christian nation and limit the enjoyment of freedom of conscience or religion to the extent that it does not infringe on the freedoms of others and maintenance of public order. The petitioner also wanted Article 1 (1) of the Constitution to reflect that Zambia shall forever remain a unitary and indivisible, multi-party, multi-ethnic and multi-cultural and democratic sovereign State.

The Commission accepts the principle of equality of different communities and faiths. The Commission also sees no harm in including the words "multi-ethnic", "multi-cultural" and "shall forever remain" in paragraph 7 of the preamble and Article 1 (1) of the Constitution. However, the Commission is of the view that it is not desirable to include a limitation on the freedom of conscience or religion in the preamble as this would be an unnecessary detail.

In relation to the submission that consideration be given to revise the 1991 wording of the preamble, the Commission wishes to observe that the preambles to the Constitutions of 1973 and 1991 were substantially the same and that, following the recommendations of the Mwanakatwe Commission, these were amended in 1996. The amendment incorporated values of democracy, transparency, accountability and good governance. In this regard, the Commission observes that the previous preambles were more detailed than necessary.

In conclusion, the Commission wishes to state that amendments to the preamble should be confined to necessary but minimal substantive changes.

Recommendations

The Commission recommends that, apart from the amendments recommended elsewhere in this Report, the preamble to the Constitution be amended as appropriate in order to:

- reflect the multi-ethnic and multi-cultural character of Zambia;

- reflect the equal worth of different communities and different faiths; and

- reflect that Zambia shall remain a unitary and indivisible, multi-party, multi-ethnic, multi-cultural, multi-racial, multi-religious and democratic sovereign State.

CHAPTER 2

CITIZENSHIP

Term of Reference:

No. 3 Recommend appropriate ways and means of entrenching and protecting human rights, the rule of law and good governance in the Constitution;

No. 5 Examine and recommend the elimination of provisions which are perceived to be discriminatory in the Constitution; and

No. 30 Examine and recommend on any matter which is connected with or incidental to the foregoing Terms of Reference.

2.1 Introduction

Citizenship is one of the most important statuses in law, because it confers rights and privileges which non-citizens do not enjoy. It also imposes obligations on citizens. The law on citizenship should be explicit and as exhaustive as human foresight allows. Any inadvertent omission in the law may render certain persons in a country stateless. This is particularly so in a country of immigrants or permissive to immigrants. Citizenship requirements are generally standard across most jurisdictions.

As a general rule, the constitutions of most countries accord citizenship on the basis of birth or descent, naturalisation or registration, and marriage. This is the position in Namibia, Nigeria, Uganda, Kenya and Ghana. Most of these countries, however, prohibit dual citizenships except in very restricted circumstances such as where the other citizenship is acquired through birth or marriage.

Besides various categories of citizenship, there is another related area of importance which the law should address. This relates to deprivation of citizenship acquired other than by birth or descent and renunciation of the same.

The Mvunga Commission received submissions in favour of the citizen's right to a passport and made a recommendation to this effect.

Submissions to the Mwanakatwe Commission on citizenship focused mainly on the 1991 constitutional provision permitting foreign women who had been married to Zambian men for at least three years prior to 24th July 1988, (the

effective date of the 1988 constitutional amendment which had removed this provision) to acquire Zambian citizenship on account of the marriage. The same did not apply to men in similar circumstances. The Commission recommended that marriage should no longer be a ground for acquisition of citizenship and the Constitution was amended accordingly.

Current Constitutional Provisions

Part II of the Constitution provides for acquisition and qualifications to Zambian citizenship. It also gives powers to Parliament to make provisions for acquisition of citizenship and cesser of the same.

According to Article 5 of the Constitution, a person born of a Zambian parent automatically becomes a citizen at birth. Under Article 6, other persons are entitled to apply to be registered as citizens provided they have attained the age of 21 and have been ordinarily resident in Zambia for a continuous period of not less than 10 years immediately preceding that person's application for registration.

In terms of Article 7 (a) and (b) of the Constitution, respectively, Parliament may:

- make provision for the acquisition of citizenship of Zambia by persons who are not eligible under Part II of the Constitution; and

- deprive any person of citizenship of Zambia if that person is a citizen of another country or obtained citizenship by fraud.

In effect, Article 7 (a) makes it possible for various categories of citizenship other than those stated in this Part of the Constitution to be introduced by way of legislation. In this regard, the Citizenship Act, Cap. 124, sections 11, 12, 13 15 and 16 make provision for:

- a non-Zambian child who has been adopted under the Adoption Act, Cap. 54 by a citizen of Zambia to automatically become a Zambian citizen from the date of adoption;

- any person not of full age who has associations by way of descent, residence or otherwise with Zambia to be registered as a citizen;

- the President, as a token or honour, to cause to be registered as a citizen any person who, in his opinion, has done signal honour or rendered distinguished service to Zambia;

- the President to confer citizenship by registration on any person not otherwise entitled to or eligible for citizenship of Zambia if, in the opinion of the President, circumstances exist to warrant this; and

- any person born in Zambia before the commencement of the Constitution of a non-Zambian father and who ceased to be a citizen by reason of his failure to renounce his citizenship of another country by descent to be granted citizenship.

Article 9 provides that a person may cease to be a citizen of Zambia if he/she acquires the citizenship of a country other than Zambia by a voluntary act other than marriages and shows the intention to adopt or make use of any other citizenship. The Article further provides that a person who acquires citizenship by registration and immediately after becoming a citizen is also a citizen of some other country shall lose the Zambian citizenship unless, within a specified period, the person renounces citizenship of the other country.

The Constitution of Ghana, though not exhaustive, is quite instructive on the provisions covering various categories of citizenship. The following situations reveal a variety of categories of citizenship:

- citizenship on coming into force of the Constitution;
- citizenship by birth or descent;
- children of unknown parents resident in the country;
- children of parents who are not citizens of the country but adopted by parents who are citizens;
- a spouse who is not a citizen of the country, but married to a person who is a citizen of the country;
- a spouse married to a citizen of the country who has since died, who but for the death would have continued to be a citizen of the country;
- citizenship of a spouse acquired through marriage whose marriage is annulled or dissolved;
- children of a marriage which has been dissolved or annulled;
- dual citizenship; and
- acquisition of citizenship in situations or instances not covered by the Constitution.

Similarly, the Constitution of Uganda has more categories of citizenship than the Constitution of Zambia.

2.2 Submissions, Observations and Recommendations

This subject received sixty-six (66) submissions. Among these were those seeking the Constitution to permit dual citizenship and citizenship by marriage.

2.2.1 Right to Citizenship

Submissions

There was a submission that Zambian citizenship should be a right which should be made available to anyone who has been eligible to acquire Zambian citizenship under any of the Constitutions of Zambia since independence (1). Two petitioners felt that citizenship should be recognised as a primary non-derogable right (2).

Observations

Though very few petitioners spoke on the subject of right to citizenship, the Commission gave due consideration to it, taking into account that the subject touches on fundamental rights of the individual.

The Commission examined provisions of the Constitution and the Citizenship Act in relation to entitlement, eligibility and acquisition of Zambian citizenship.

According to the current Constitution, persons who are citizens of Zambia at the time of commencement of constitution continue to be Zambians. Further, Zambian citizenship is acquired automatically at birth, whether a person is born in or outside Zambia if at the time of birth at least one of the parents is a citizen of Zambia. This is commonly referred to as citizenship by birth or descent, although there is no generic name assigned to this category of citizenship by the Constitution. The Constitution also provides for acquisition of citizenship by registration to persons of 21years and above who have been ordinarily resident in Zambia for a continuous period of not less than 10 years.

In addition to categories of citizenship prescribed by the Constitution, the Citizenship Act makes provision for the acquisition of citizenship automatically by a child adopted by a Zambian; by registration through conferment by the President on account of singular honour or distinguished service to the country, or in special circumstances which, in the opinion of the President, warrant such registration, and by registration of any person who is born in the country of a foreign father and who has ceased to be a citizen by reason of failure to renounce citizenship of another country.

The Commission further notes that by virtue of Article 7 (a) of the Constitution, an Act of Parliament may make provision for categories of citizenship not provided for in the Constitution. This opens up the possibility of Parliament introducing categories of citizenship that may be detrimental to national interest. For example, under Section 13 of the Citizenship Act, the President has absolute discretion to cause any person to be registered as a citizen.

Having outlined the various categories of Zambian citizenship, the Commission wishes to state that citizenship is a very important status that confers certain rights or obligations on citizens. It is, therefore, important that a person is not arbitrarily denied citizenship. In this vein, the Commission agrees that the right to citizenship should be enshrined in the Constitution. However, it would not be appropriate for citizenship to be granted as a matter of right in respect of all categories of citizenship. The inalienable right to citizenship should only be accorded to persons who at the commencement of any Constitution of Zambia are citizens of Zambia and those who acquire automatic citizenship at birth.

Further, there is need to guard against categories of citizenship that can be easily abused and leave the country open to non-Zambians of questionable motive acquiring Zambian citizenship. According to the country's historical experience, categories of citizenship that have often been abused are citizenship by marriage and citizenship by adoption.

One category of citizenship that deserves to be included in the Constitution and accorded the right to citizenship by registration is that of a person born in or outside Zambia, at least one of whose grandparents was at the time of birth of that person a Zambian.

In view of the importance of the subject, all the above outlined categories of citizenship and the inalienable right to citizenship accorded to these categories should be enshrined in the Constitution and not be left to ordinary legislation.

Although no petitioners addressed the issue of the citizenship status of children of unknown parents found in Zambia, the issue needs to be addressed. The current problem of street kids may create a situation whereby a number of children may not be able to provide proof of their birth or parentage and therefore be unable to assert their right to Zambian citizenship. On the other hand, the Commission is aware that automatic acquisition of citizenship by this category of persons could prove difficult to regulate and be open to abuse.

With respect to the submission that the right to citizenship should be available to anyone who has been eligible to acquire citizenship under any

of the Constitutions of Zambia, the Commission observes that the petitioner did not articulate the justification for this submission. However, it is the view of the Commission that this would be undesirable because it would open up categories of citizenship which were justifiably removed. In any case, there is no justification for resurrecting eligibility to citizenship which was not utilised at the appropriate time.

The Commission notes that one particular saving that has been maintained by all Constitutions after independence has nothing to do with eligibility to citizenship, but preservation of citizenship already acquired under previous Constitutions. This is necessary in order to prevent loss of citizenship on coming into force of a new Constitution.

Recommendations

The Commission recommends that the following all categories of citizenship be enshrined in the Constitution:

- a person who was a citizen of Zambia at the time of commencement of the Constitution of Zambia;

- a person who acquires Zambian citizenship automatically at birth by virtue of being born in Zambia and at least one of the parents being a citizen of Zambia (citizenship by birth);

- a person who is born outside Zambia and acquires Zambian citizenship automatically at birth by virtue of at least one of the parents being a citizen of Zambia (citizenship by descent);

- automatic acquisition of citizenship by a child adopted by a Zambian citizen by birth or descent under the Laws of Zambia, subject to renunciation of citizenship of any other country on attaining the age of 21years and any further restrictions that Parliament may impose by legislation (citizenship by adoption);

- a person born in Zambia of non-Zambian parents, and who is not born of a diplomat accredited to Zambia or a person of refugee status, may upon attaining the age of 21 apply to be registered as a citizen of Zambia, subject to renunciation of citizenship of any other country" (citizenship by registration);

- acquisition of citizenship by registration of a person who is 21 years or above and has been ordinarily resident in Zambia for a continuous period of not less than 12 years, subject to renunciation of citizenship of any other country (citizenship by registration); and

- acquisition of citizenship by registration of a person born in Zambia or outside Zambia at least one of whose grandparents was at the time of birth a Zambian, subject to renunciation of citizenship of any other country (citizenship by registration).

The Commission further recommends that the Constitution should provide, in the Bill of Rights, that citizenship accorded to the categories outlined in the foregoing recommendation shall not be taken away except where citizenship is acquired by fraud, misrepresentation, deceit or other illegal means, or:

- in the case of citizenship acquired by birth or descent, where a citizen renounces Zambian citizenship; and

- in the case of other categories of citizenship, where a citizen fails to renounce the citizenship of another country as prescribed by the Constitution or acquires citizenship of another country by a voluntary act other than marriage or shows the intention to adopt or make use of that other citizenship.

2.2.2 Dual Citizenship

Submissions

Some petitioners made submissions that the Constitution should provide for dual citizenship because there was need to encourage Zambians living abroad who have acquired foreign citizenship to retain their Zambian citizenship (33). Some of these petitioners felt that Article 9 (1) (b) of the Constitution, which provides that a person shall lose citizenship if that person acquires citizenship of another country by a voluntary act other than marriage and shows the intention to adopt or make use of that other citizenship should be repealed.

On the other hand, very few petitioners said that the Constitution should prohibit dual citizenship (4).

Observations

The Commission notes that of all the petitioners who spoke on various aspects of the subject of citizenship, most wanted the Constitution to permit dual citizenship. Relatively few petitioners were opposed to dual citizenship.

The argument advanced by those petitioners who called for the Constitution to permit dual citizenship was that Zambian citizens who have acquired citizenship of other countries should be encouraged to

maintain ties with Zambia. This would encourage the promotion of investment for the benefit of the country.

The Commission observes that Article 9 specifies instances when Zambian citizenship may be lost. According to Clause (1), a person ceases to be a citizen of Zambia if that person acquires citizenship of another country by a voluntary act other than marriage and does anything indicating intention to adopt or make use of any other citizenship. Clause (2) provides that a person loses Zambian citizenship if after acquiring Zambian citizenship by registration that person fails to renounce the citizenship of another country within the prescribed period.

The Commission wishes to point out that Clause (1) lacks clarity. It is possible under the Constitution for a person to have dual citizenship if the citizenship of the other country was not acquired through a voluntary act, or if, having acquired the other citizenship by a voluntary act that person does not do anything to indicate intention to adopt or make use of that citizenship. It is doubtful, however, that the latter part was the intention of the Legislature. This apparent error was introduced by the 1996 amendment to the Constitution.

The Commission notes that constitutions of many other countries prohibit dual citizenship. These include Ghana, India, Kenya, Sweden and Uganda. In some countries, prohibition of dual citizenship is restricted to certain categories of citizenship. For example, the Constitution of Nigeria provides that a citizen of the country other than by birth who acquires citizenship of another country other than that person's country of birth loses Nigerian citizenship.

It is the Commission's understanding that the rationale for prohibition of dual citizenship may be that it could lead to conflict of allegiance. Although the prohibition is justified, it is the Commission's view that this should not be absolute. In this age of globalisation, the world has become one village and for economic reasons many citizens of Zambia have migrated to other countries and acquired citizenship of those countries. It is desirable that Zambians who have acquired foreign citizenship should be encouraged to maintain ties with Zambia by permitting dual citizenship. One advantage of this would be that these citizens could bring investment into the country. The Commission is, however, of the view that dual citizenship should only be allowed in respect of persons who have acquired Zambian citizenship by birth or descent.

Recommendations

The Commission recommends that the Constitution should permit dual citizenship only in respect of Zambian citizenship acquired by birth or descent.

2.2.3 Citizenship by Registration -Residents

Submissions

A few petitioners said that qualification for citizenship by registration should include residence in Zambia for a minimum period of between 5 and 21 years (4). These petitioners expressed concern that non-Zambians could come into the country and easily acquire Zambian citizenship. One petitioner said that acquisition of citizenship by registration should be more restricted than is the case now (1).

Observations

The Commission observes that on the issue of citizenship by registration, petitioners were concerned that there was an influx of foreigners in the country and attributed the rise in crime and other vices to this. These petitioners therefore wanted the grant of citizenship by registration to be restricted to persons who have lived in the country for a specified time and are contributing to the economy of the country by bringing in useful and necessary skills.

The Commission observes that petitioners appeared not to be conversant with the provisions of the Constitution in terms of the minimum period of residence in the country required for acquisition of citizenship by registration. According to Article 6 (1) of the Constitution, the minimum period is ten years of continuous residence in the country. This period has remained the same since the 1973 Constitution.

The Commission also wishes to observe that this subject attracted submissions to the Chona, Mvunga and Mwanakatwe Commissions. Petitioners to all these Commissions expressed similar concerns to those expressed by petitioners to this Commission. The majority of the petitioners wanted acquisition of Zambian citizenship by naturalisation or registration to be restricted, while some suggested that this category of citizenship should be discontinued.

Others suggested that those holding citizenship by naturalisation or registration should not be eligible to hold certain posts such as that of President, Cabinet Minister or Diplomat. The Mwanakatwe Commission observed that there were genuine fears by many petitioners that the

indiscriminate grant of citizenship, if not checked, could lead to undesirable results. The Chona Commission recommended the extension of the period of residence to 15 years, but the 1973 Constitution provided for a minimum period of 10 years. The Mwanakatwe Commission recommended the retention of this constitutional provision.

The Commission wishes to acknowledge that citizenship by naturalisation or registration is a standard category found in most countries. However, the conditions on which this is granted, including a minimum period of residence, vary although in many countries the requisite minimum period is between 5 and 15 years. For example, in the case of Kenya, Uganda and Nigeria the minimum period of residence is 5 years, 10 years and 15 years, respectively.

The Commission is persuaded that the current minimum period of 10 years continuous residence required for acquisition of citizenship by registration is short and can, therefore, be taken advantage of by non-Zambians whose motives to acquire Zambian citizenship may not be genuine. It is important that acquisition of citizenship by registration is guarded and only restricted to persons who deserve this status.

The Commission also feels that the Constitution should provide for another category of citizenship by registration. A person born inside or outside Zambia, at least one of whose grandparents was at the time of birth of that person a Zambian, should be eligible to apply for citizenship by registration. Such a situation could arise, for instance, where the person is born outside Zambia of parents who were Zambian citizens prior to the birth of that person, but subsequently renounced Zambian citizenship.

Recommendations

The Commission recommends that the Constitution provide that the period required for acquisition of citizenship by registration of persons who have been resident in the country be a continuous period of residence of not less than 12 years.

The Commission also recommends that a person born inside or outside Zambia, at least one of whose grandparents was at the time of birth of that person a Zambian, should be eligible to apply for citizenship by registration.

2.2.4 Citizenship by Marriage

Submissions

A few petitioners wanted non-Zambians married to Zambians to automatically be granted citizenship after five years of residence in the country (6). Some added that current provisions of the law are discriminatory and favour men. On the other hand, two petitioners representing the Women's Movement said that constitutional provisions which delink citizenship from marriage should be maintained (2).

One petitioner suggested that foreign nationals married to Zambian citizens be guaranteed the right to residence status for as long as the marriage subsists (1). One petitioner suggested that special residence status should be accorded to non-Zambians who marry Zambians (1).

Observations

Although not many petitioners addressed the subject of citizenship by marriage, the Commission notes that among the petitioners was the Women's Movement, which did not want the provision for acquisition of citizenship by marriage to be reintroduced in the Constitution. The majority of the petitioners, however, called for a constitutional provision that foreign nationals married to Zambians should automatically be granted citizenship after five years of residence in Zambia. Among these, some emphasised that this provision should not discriminate against Zambian women who marry non-Zambian men, as was the case in the previous Constitutions. Yet others called for a foreigner married to a Zambian citizen to be granted residence status only.

The Commission notes that citizenship by marriage is a category that is found in constitutions and laws of many countries. Historically, in the majority of countries, including Zambia, this category has been discriminatory in that it has been restricted to foreign women who marry citizens. This discrimination is felt by women who marry foreign men who cannot acquire the nationality of their wives. In the case of Zambia, this category of citizenship was in the Constitution until a 1988 amendment to the Constitution repealed the provision. However, the 1991 Constitution made provision for the application of this provision in respect of women who were eligible before the effective date of repeal of the provision in 1988. Following recommendations of the Mwanakatwe Commission that marriage be no longer a basis for the acquisition of citizenship, this provision was repealed.

The Commission acknowledges that citizenship by marriage, if not discriminatory, could be in the interest of Zambian citizens who may

marry non-Zambians. However, the Commission is aware that this category of citizenship is open to abuse through marriages of convenience and is difficult to regulate. This may explain why, increasingly, countries are doing away with it. The Mwanakatwe Commission, in its observations on the subject, expressed similar misgivings.

This Commission further notes the concern of the petitioners who were opposed to this category of citizenship because, if reintroduced, the provision may be discriminatory against Zambian women who marry foreign men, as was the case in previous Constitutions. In the light of these considerations, the Commission is of the view that citizenship by marriage should not be provided for in the Constitution, but this category of persons can, on meeting prescribed conditions, obtain citizenship by registration.

Regarding the related submission that non-Zambians married to Zambians should be granted automatic residence status, the Commission has reservations similar to those already expressed in relation to the subject of citizenship by marriage. Therefore, the Commission is of the view that this category of persons should be accorded the same treatment as other non-Zambians in relation to acquisition of residence permits.

Recommendations

The Commission recommends that:

- citizenship by marriage should not be provided for in the Constitution, but a person married to a Zambian may apply to be registered as a Zambian in accordance with the provisions of the law relating to citizenship by registration; and

- non-Zambians married to Zambians should be granted residence status upon application, in accordance with the provisions of the law.

2.2.5 Citizenship of Persons born in Zambia of non-Zambian Parents

Submissions

Six petitioners said that any person born in Zambia should automatically be granted citizenship (6).

Observations

The Commission addressed itself to the question whether citizenship by virtue of one being born in Zambia should be introduced in the Constitution.

The Commission notes that the 1973 Constitution contained a provision that a person born in Zambia whose father was an established resident became a citizen of Zambia at birth, except that retention of this citizenship after attainment of the age of 21 years was subject to fulfillment of certain conditions. The Commission also observes that although this category of citizenship is not common, constitutions of some countries do provide for it. The Commission is persuaded that the Constitution should provide for this category of citizenship, but that it should be conditional on application and renunciation of citizenship of any other country upon attainment of the age of 21. However, this category of citizenship should not include children born of diplomats accredited to Zambia or persons who have refugee status in the country.

Recommendations

The Commission therefore recommends that the Constitution should provide for acquisition of citizenship of persons born in Zambia of non-Zambian parents, with the exception of children born of diplomats accredited to Zambia and persons who have refugee status in the country. The Constitution should also provide that this category of citizenship is subject to application and renunciation of citizenship of any other country upon attainment of 21 years.

2.2.6 Loss of Citizenship

Submissions

One petitioner felt that a citizen should only lose citizenship on full assumption of citizenship of another country (1).

Observations

Only one petitioner addressed the subject of loss of citizenship per se. It is, however, the Commission's view that the subject is of fundamental importance and deserves serious consideration.

The Commission wishes to state that no citizen should be deprived arbitrarily of citizenship. Loss or deprivation of citizenship should be conditional on specified and restricted circumstances. In this regard, the Commission is of the view that there should be a distinction between

citizenship acquired by birth or descent on the one hand and the remaining categories of citizenship under the Constitution as recommended in this Chapter.

Where citizenship is acquired by birth or descent, it should not be lost except where a person renounces Zambian citizenship or acquired the citizenship by fraud, misrepresentation, deceit or other illegal means. In the case of other categories of citizenship, it should not be lost except where a citizen acquires or indicates the intention to acquire foreign citizenship, or where citizenship was acquired by fraud, misrepresentation, deceit or other illegal means. The Commission is, however, satisfied that Article 7 (b), subject to the amendment recommended under the subject of the right to citizenship and hereunder, is sufficiently restrictive.

Recommendations

The Commission recommends that the Constitution should provide that:

- where citizenship is by birth or descent, it shall not be lost other than by renunciation, or where the citizenship was acquired by fraud, misrepresentation or deceit; and

- in the case of other categories of citizenship, it should only be lost where a person renounces Zambian citizenship or acquires citizenship of another country other than by marriage, or where citizenship was acquired by fraud, misrepresentation, deceit or other illegal means.

2.2.7 Right to a Passport

Submissions

Some petitioners said that acquisition of a passport should be a right of every citizen (4).

Observations

The Commission notes that very few petitioners spoke on this subject. The Commission, however, considered that the subject touches on fundamental rights and freedoms and that it was previously dealt with by the Mvunga Commission.

This Commission observes that one of the basic fundamental freedoms is that of movement within and outside the country. For citizens to enjoy the freedom of movement outside the country, they must have access to a passport. Denial of a passport or undue restriction on the right to obtain a

passport would, therefore, amount to a restriction on the freedom of movement.

The Commission is alive to the principle that the right to a passport is part and parcel of the fundamental freedom of movement, which includes freedom to leave and come back to Zambia, and that this principle was established and confirmed by the Supreme Court in the case of Cuthbert Mambwe Nyirongo Vs the Attorney-General (1990 – 1992) ZR 82 (SC). The Commission, therefore, agrees with the few petitioners who addressed this subject, that this right be provided for in the Constitution.

The Commission also notes that the Mvunga Commission observed that there was a strong argument by petitioners in favour of the citizen's right to a passport being part and parcel of the fundamental freedom of movement. The Commission recommended that the right of every Zambian to be issued with a passport, subject only to refusal on grounds of state security or good cause, to supplement the freedom of movement.

The Commission further notes that such a provision would not be peculiar to Zambia. The Constitution of Uganda and South Africa have similar provisions.

Recommendations

The Commission recommends that the right to a passport be provided for in the Bill of Rights to supplement the freedom of movement, in particular the right to leave and return to Zambia.

CHAPTER 3

FUNDAMENTAL HUMAN RIGHTS AND FREEDOMS

Terms of Reference:

No. 3 Recommend appropriate ways and means of entrenching and protecting Human Rights, the rule of law and good governance;

No. 4 Examine and recommend whether the death penalty should be maintained or prohibited by the Constitution;

No. 5 Examine and recommend the elimination of provisions which are perceived to be discriminatory in the Constitution; and

No. 16 Examine and recommend to what extent issues of gender equality should be addressed in the Zambian Constitution.

3.1 Introduction

The term "human rights" is understood to mean all those conditions of life that men and women have a right to expect by virtue of being human. The concept involves claims, rights and privileges which every individual can expect, irrespective of colour, race, sex, religion, status in life, or origin.

Internationally, these rights have been grouped as follows:

- civil and political rights (first generation rights);
- economic, social and cultural rights (second generation rights); and
- group or solidarity rights (third generation rights).

The first generation rights were the first to be widely recognised by states and they are now so firmly established that no serious government can claim to be unwilling or unable to enforce them. However, second generation rights which were recognised by states later, are considered by many to still be aspirational, especially for developing countries which may not be able to realise them until such a time that their economies are able to support their realisation.

Civil and political (first generation) rights are normally phrased in such a manner as to require the State to refrain from interfering with the enjoyment of these rights by the individual. Examples of these rights are freedom of expression, freedom of conscience, freedom of assembly and association, freedom of movement, and the right to personal liberty. All these are essentially claims that the State should not limit the exercise and enjoyment of these rights by the individual.

By contrast, economic, social and cultural rights are demands that the State take positive action in support of the individual. They impose obligations on the State to adopt measures which will positively support the individual to secure certain standards of life in areas such as education, health and social security.

Group or solidarity rights have been recognised more recently and include the right to a clean, healthy and sustainable environment; the right to peace; the right to nurturing one's culture and to development. These rights are as important to the community as to the individual.

It is important to note that some rights cannot be said to belong exclusively to a particular generation of rights. Some rights are hybrid and belong to both the first and the second generations or the second and the third generations.

The challenge facing Zambia, following the new democracy, is building a country that is fair to all of its citizens; a country in which all individuals feel and know that they are valued members of society and that they have rights in respect of human dignity, development, equality and freedom. As the supreme law of the land, the Constitution needs to reflect these democratic principles.

Current Constitutional Provisions

Civil and political rights are currently protected in the Constitution under the Bill of Rights, which forms Part III of the Constitution. The rights guaranteed under this Part include:

- the right to life;
- the right to personal liberty;
- protection from slavery and forced labour;
- protection from torture or inhuman or degrading punishment or other like treatment;

- protection from deprivation of property;
- protection of privacy of home and other property;
- protection of the law;
- freedom of conscience;
- freedom of expression, assembly and association;
- freedom of movement;
- protection from discrimination on the grounds of race, tribe, sex, place of origin, marital status, political opinion, colour or creed; and
- protection of young persons from exploitation.

All these rights are to be enjoyed by all individuals in Zambia, subject to limitations which are intended to protect the rights and freedoms of others as well as considerations of public interest.

The major limitations of the current Bill of Rights can be summarised as follows:

- the number of rights protected is limited and does not, for example, adequately address the rights of children, women and other vulnerable groups;
- the enjoyment of these rights is made subject to a number of derogation clauses. Most of the rights are restricted on the grounds of defence, public safety, public order, public morality and public health;
- the anti-discrimination Clause sanctions discrimination in matters of personal law [Article 23 (4) (c)];
- only a person whose right or freedom is infringed or threatened can seek redress;
- although the current Constitution tacitly recognises second generation rights, these are in the Directive Principles of State Policy and are therefore not enforceable; and

- in respect of third generation rights, namely group or solidarity rights, these are completely ignored except for the directive principles of State policy relating to a clean and healthy environment.

Some modern constitutions of countries like Uganda and South Africa have taken a deliberate approach in protecting the rights of women and children and other vulnerable groups. For example, Article 33 of the Constitution of Uganda in guaranteeing the rights of women states that:

> *"(1) Women shall be accorded full and equal dignity of the person with men:*
>
> *(2) The State shall provide the facilities and opportunities necessary to enhance the welfare of women to enable them to realise their full potential and advancement;*
>
> *(3) The State shall protect women and their rights, taking into account their unique status and maternal functions in society;*
>
> *(4) Women shall have the right to equal treatment with men and that right shall include equal opportunities in political, economic and social activities;*
>
> *(5) Without prejudice to Article 32 of this Constitution, women shall have the right to affirmative action for the purpose of redressing the imbalances created by history, tradition or custom; and*
>
> *(6) Laws, cultures, customs or traditions which are against the dignity, welfare or interest of women or which undermine their status, are prohibited by this Constitution."*

The South African Constitution has taken a similar deliberate approach. Section 9 of the Constitution has guaranteed the equality of both sexes by stating in part that:

> *"(1) Everyone is equal before the law and has the right to equal protection and benefit of the law.*
>
> *(2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.*

(3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

(4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.

(5) Discrimination on one or more of the grounds listed in sub-section (3) is unfair unless it is established that the discrimination is fair."

Similarly, the Constitution of Ethiopia provides for the rights of children in Article 36 and the rights of women in Article 25.

Regarding limitations to rights and freedoms, some constitutions provide for general limitation to safeguard the rights and freedoms of others and public interest. The limitation is restricted to what is reasonable and justifiable in a free and democratic society. In most of these constitutions, the general limitation is in addition to limitations falling under specific rights and freedoms and those relating to war and emergency situations. Examples are the Constitutions of Ghana and Uganda. The South African Bill of Rights is unique in that specific rights and freedoms are not encumbered by several limitations. It has a general limitation provision and derogations relating specifically to states of emergency. Very few rights and freedoms have specific limitations and these are minimal.

Some constitutions prohibit derogation from certain rights and freedoms. For example, the Constitution of Uganda prohibits derogation from rights relating to protection from inhuman and degrading treatment, freedom from slavery and servitude, the right to fair hearing and the right to an order of habeas corpus. In the case of South Africa, derogations permitted under provisions relating to states of emergency exclude certain "non-derogable" rights relating to equality, human dignity, life, freedom and security of the person, slavery, servitude and forced labour, children and arrests and detentions.

Generally, constitutions provide for the right of a person whose right or freedom has been infringed or violated or is threatened to seek redress from a competent court or other judicial body. Some constitutions also provide for the right of any person or organisation to bring up an action on

behalf of another person, persons, group or class of persons. Yet other constitutions include the right of anyone acting in the public interest to seek redress. Examples of constitutions which have broader category of persons who may bring up an action for the enforcement of human rights, are those of Uganda and South Africa.

Some of the human rights, particularly those that have a direct bearing on some terms of reference of the Commission, deserve specific attention and are accordingly discussed below.

Death Penalty vis-a-vis the Right to Life

Under Article 6 of the International Covenant on Civil and Political Rights (ICCPR) every human being, including an unborn child, has an inherent right to life and no one shall be arbitrarily deprived of his or her life.

Part III of the Zambian Constitution guarantees fundamental rights and freedoms of the individual. One of the rights guaranteed under this Part of the Constitution is the right to life. However, under Article 12(1), the death penalty is permissible if it is in "execution of the sentence of a court in respect of a criminal offence under the law in force in Zambia of which he has been convicted."

Zambia inherited the death penalty from the colonial era and successive Constitutions have never abolished it. The death penalty has been justified by reference to the traditional deterrent and retributive theories of punishment. The arguments behind these theories are that since the death penalty eliminates the offender, this serves as a deterrent to would-be offenders, and that it satisfies the natural urge in human beings for revenge.

Research in a number of countries such as Britain and some parts of the United States of America and the Second Optional Protocol to the International Covenant on Civil and Political Rights (1989) have, however, discounted the value of these arguments. Research in these countries has shown that the death penalty is neither a deterrent nor a civilised way of punishing offenders.

Crimes that attract the death penalty in Zambia are treason, murder and aggravated robbery involving use of a firearm.

Equality

Equality refers to the equal enjoyment of all rights and treatment of persons equally or alike. It is commonly accepted among "natural rights"

and is one of the ideals and attributes of justice. It derives from the self-evident truth that all people are created equal.

The most general application of equality in the legal context is the principle that rules of law should apply equally to all members of the community and that nobody should be exempt or treated differently save for good reasons.

The ideal of equality has increasingly been used as a basis for constitutional and legal reforms such as extension of the franchise, the rights of women, gender equality, equal opportunities in education and training and equal rights and protection for minority groups. Universally, the ideal of equality has been at the core of struggles for independence and self-determination.

Equality of rights does not, however, require or justify that persons should have the same quantity of rights. Equality is moreover not a standard to be rigidly applied, because persons possess different potentials, abilities, attributes, personalities and occupy different stations in life such that rigid application could result in injustices. For example, women, children or persons with disabilities may require differential treatments because of their special circumstances. Therefore, in the context of human rights, the ideal of equality assumes the need for differential treatment such as affirmative action, where this is necessary, in order to achieve justice or redress imbalances.

Gender Equality

Gender equality is defined by the National Gender Policy adopted by the Government in the year 2000 as, " a situation where women and men have equal conditions for realising their full human rights and potential to contribute to and benefit from socio-economic, cultural and political development of the nation taking into account their similarities, differences and varying roles that they play."

One of the concerns of the subject of gender is the promotion of gender equality between the sexes and improvement in the status of both women and men in society. Gender equality is cardinal in achieving sustainable socio-economic development, including job creation, ensuring better food security and reducing poverty.

The existence of gender imbalances and inequalities that disadvantage women and girls at all levels of the society in all areas of development is acknowledged. The underlying cause is the socialisation process which places more value on the male gender. Other causes include unequal

power relations between men and women, customs and traditions as well as religious beliefs.

The National Gender Policy, already referred to, outlines the measures that the Government intends to take to advance the status of women in order to redress these historical injustices and promote gender equality. Zambia has also signified its commitment to taking necessary measures to achieve gender equality by being a State Party/signatory to a number of international and regional instruments, notably:

- the UN Convention on the Elimination of all forms of Discrimination Against Women (CEDAW) (1979), which provides a comprehensive framework for enjoyment by women on an equal basis with men of political, civil, economic, social and cultural rights;

- the Beijing Declaration and Platform for Action (BPFA (1995);

- the UN Declaration on the Elimination of Violence Against Women
  (1993) (UNDEVAW); and

- the SADC Declaration on Gender and Development (SADCGD (1997) which provides for, amongst other measures, the achievement by member States of a minimum target of 30% women in politics and decision-making positions by 2005.

These instruments were developed in recognition of the fact that the UN Declaration of Human Rights (UNDHR) (1948), the International Covenant on Civil and Political Rights (1966) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) (1966) alone were found inadequate in addressing the special circumstances of women. Women continued to suffer inequalities.

The 1991 Constitution of Zambia attempted to address women's rights by incorporating the words "sex" and "marital status" in Article 11 of the Constitution, which is intended to guarantee fundamental rights and freedoms of the individual. This was also done in defining the term "discrimination" under Article 23. This was aimed at securing protection of women against discriminatory laws or actions on these two grounds in the public sphere.

Further, the Local Courts Act and Subordinate Courts Act empower these courts to administer equity and to disregard customary laws that are repugnant to natural justice, good conscience or contrary to statutory law.

The Constitution, however, does not adequately guarantee women's rights. On the contrary, Article 23 itself takes away the protection of women from discrimination through exceptions, particularly Clauses (4) (a), (c), (d) and (e); (5), (6) and (8).

The exceptions, among other things, permit discriminatory laws in matters of marriage, divorce, burial, devolution of property on death and other matters of personal law. They also permit the application of customary law to the "exclusion of all other laws". The whole socio-cultural structure of the country, including its customary law, is biased against women. Personal law, in particular, is an area that most affects the rights of women.

In addition, by virtue of Article 139 (13), in the language of the Constitution, the feminine gender is subsumed in the masculine gender, rendering women invisible.

Women are directly and adversely affected by these inequalities. The effects are manifested in various forms such as their low socio-economic status; their under-representation in politics and at all levels of decision-making in public life and the private domain; their high levels of illiteracy; their high levels of poverty; and their poor health. In addition, physical, sexual and psychological violence is often targeted at them.

Socio-economic issues such as education, shelter, food, health, water and sanitation are of paramount concern to women who not only suffer discriminatory treatment in these areas, but also bear the disproportionate burden of caring for the household. Economic, social and cultural rights are not part of the Bill of Rights and cannot be enforced.

Women continue to dominate in non-remunerated or low-paid occupations. Slightly more females (79%) than males (65%) are engaged in agriculture, mostly as labourers.

The other important observation is that, according to the 2000 census, women were classified as economically inactive, mainly because of home making (53%), whereas the males were classified as economically inactive mainly due to studying (65%). It is further observed that though the proportion of the female employed population increased during the period 1999 to 2000, there has been no significant improvement in the quality of their work. A large proportion of females compared to males are employed as unpaid family workers; 62% and 25%, respectively (2000 census).

The 2000 census also recorded a slight increase in the proportion of female-headed households from 17% in 1990 to 19% in 2000. This means that females are increasingly becoming the main economic support for

households. However, persons in female-headed households are more likely to be extremely poor than those in male-headed households. The 1998 Living Conditions Monitoring Survey shows that poverty associated with food security was more prevalent among female-headed households (61%) compared to male-headed households (52%).

Efforts made by the Women's Movement to have the Constitution guarantee human rights and freedoms of women have so far not succeeded. In 1996, the Government rejected the recommendations made by the Mwanakatwe Commission.

Right to Equality – Persons with Disabilities

According to the 2000 Census of Population and Housing, out of the total population of 9.9 million, 2.7 % are persons with disabilities.

Persons with disabilities have the same rights as other citizens to opportunities for self-actualisation and participation in the economic and social development of the country. Barriers that limit their enjoyment of human rights and their integration into the mainstream of society should be addressed.

The Vienna Declaration on Human Rights (VDHR) of 1993 in paragraph 63 reaffirms that:

> *" ... all Human Rights and fundamental freedoms are universal and thus unreservedly include persons with disabilities. Every person is born equal and has the same rights to life and welfare, education and work, living independently and active participation in all aspects of society. Any direct discrimination or other negative discriminatory treatment of a disabled person is therefore a violation of his or her rights. The World Conference on Human Rights calls on Governments, where necessary, to adopt or adjust legislation to assure access to these and other rights for disabled persons."*

The Constitution of Zambia does not guarantee equality for persons with disabilities. Article 23, which is intended to protect against discrimination, does not include, in its definition of "discrimination", disability as a ground of discrimination.

The Constitutions of Ghana and Uganda have provisions in their Bills of Rights protecting the rights of persons with disabilities. Article 29 of the Constitution of Ghana provides that:

"(1) Disabled persons have the right to live with their families or with foster parents and to participate in social, creative or recreational activities.

(2) A disabled person shall not be subjected to differential treatment in respect of his residence other than that required by his condition or by the improvement which he may derive from the treatment.

(3) If the stay of a disabled person in a specified establishment is indispensable, the environment and living conditions there shall be as close as possible to those of the normal life of a person of his age.

(4) Disabled persons shall be protected against all exploitation, all regulations and all treatment of a discriminatory, abusive or degrading nature.

(5) In any Judicial proceedings in which a disabled person is a party, the legal procedure applied shall take his physical and mental condition into account.

(6) As far as practicable, every place to which the public have access shall have appropriate facilities for disabled persons.

(7) Special incentive shall be given to disabled persons engaged in business and also to business organisations that employ disabled persons in significant numbers.

(8) Parliament shall enact such laws as are necessary to ensure the enforcement of the provisions of the article."

The Constitution of Uganda (Article 35) provides that persons with disabilities have a right to respect and human dignity and obligates the State to take appropriate measures to ensure the realisation of their full potential. It also obligates Parliament to enact suitable laws for the protection of persons with disabilities.

A number of petitioners addressed themselves to those rights not protected or not adequately protected by the current Constitution. These include the rights of persons with disabilities.

Freedom of Assembly and Association – The Public Order Act

On account of the importance of the freedoms of expression, assembly and association vis-à-vis the Public Order Act, it is here necessary to briefly outline the administration of this Act and subsequent changes made to this law in order to enhance the observance and exercise of the said rights.

Guarantees to the freedom of speech, association and assembly have been in place since the 1964 Independence Constitution. Despite these guarantees, these freedoms have, in practice, experienced limitations arising from provisions of the Public Order Act. Under this Act, the exercise of these freedoms was conditional on obtaining a Police permit prior to their exercise.

The genesis of the Public Order Act can be traced to 1953. Nine years before independence, the Public Order Act came into force as the Public Order Ordinance (No. 38 of 1955). When originally enacted, this Ordinance was concerned only with prohibiting the wearing of uniforms in connection with political objects and prohibiting quasi-military organisations, the carrying of weapons at public meetings and processions, prohibiting the promotion of hostility between sections of the community and similar matters.

The Northern Rhodesia Police Ordinance (No. 5 of 1953) governed regulation of meetings and processions through the requirement of a police permit. Under this Ordinance, any person who wished to convene an assembly or form a procession had to obtain a permit from the Officer-in-Charge of Police in the particular area. The said officer would issue such permit if satisfied that such assembly or procession was unlikely to cause a breach of peace.

These provisions were transferred from the Police Ordinance of 1953 to the Public Order Ordinance of 1955, by the Public Order (Amendment) Ordinance of 1959. It should be noted from this historical background that these provisions were enacted at a time when the Constitution did not provide for fundamental rights and freedoms. Hence, there were no constitutional guarantees to the freedoms of speech, assembly and association.

During the immediate post-independence era, interference by the State with these freedoms was, however, not ostensible, particularly during the period of the one-party State, because these freedoms were generally enjoyed under the shelter of the only party, UNIP. Following the reintroduction of multi-party politics in 1991, the Public Order Act acquired a changed dimension as competitive politics opened the doors to political gatherings. In this political scenario, opposition parties became

vulnerable to the ruling party under whose Police establishment permits were to be issued. The criteria upon which a permit was to be issued increasingly depended on the subjective determination of the Police through the designated regulating officer.

The point at issue became whether those provisions of the Public Order Act which required any person wishing to hold a peaceful assembly to obtain a permit (contravention of which was criminalised) were constitutional and reasonably justifiable in a democratic society. On these provisions being challenged for their unconstitutionality, the Supreme Court of Zambia delivered its landmark judgment in 1996, that:

> *"The right to organise and participate in public gatherings was inherent in the freedom to express and to receive ideas and information without interference and the requirement of prior permission, with the possibility that such permission might be refused on improper or arbitrary grounds or even unknown grounds, was an obvious hindrance to those freedoms." (Mulundika and Others Vs The People 1996, ZLR p. 195).*

The Supreme Court proceeded to direct that the provision requiring a Police permit was null and void and, therefore, invalid for unconstitutionality. Further, the invalidity and constitutional guarantee of the rights of assembly and expression preclude the prosecution of persons and criminalisation of gatherings.

Subsequent to the Supreme Court decision, the Public Order Act was amended in 1996 by repealing the provision which required obtaining a police permit. The Act now merely required conveners of public gatherings to notify the police before any such gathering was to take place. The Police had to oblige unless they had inadequate personnel to police the event, but even then they had to give the conveners an alternative date for the gathering.

Despite this amendment having been made, the Police in one instance insisted on the convenors obtaining a permit and stopped them from proceeding with the event, even though they had filed a notification as required by the new law. The Supreme Court in 2003 had occasion to restate and re-affirm the law on notification as required under the amended Public Order Act.

The Court held that:

> *"The petitioners complied with the law and duly notified the Police within the time allowed by law. The regulating officer had a duty to inform the petitioners in writing, at least, five days before the event, if they were unable to police the march and propose alternative days. The petitioners' right to assemble and march therefore accrued at this stage. The regulating officer's endorsement of a purported rejection of the march, a day before the event for reasons that the demonstration would cause a breach of the peace, was not a valid exercise of power under the Act…" (Resident Doctors Association of Zambia Vs The Attorney-General, Appeal No.39/2002 SCZ No. 12, 2003 at p. 17)."*

To dispel any misunderstanding on the part of law enforcement agents as well as the citizenry, particularly those petitioners who made submissions to the Commission on the subject, the correct position of the Public Order Act needs restating. There is no longer the requirement to obtain a police permit for any public gathering to take place. What is required is to notify the police within the prescribed period and the Police, in turn, should oblige. If they are unable to police the event for reasons stipulated under the Act, they should suggest alternative dates for the public event.

Right to Property – Intestate Succession Act

In Zambia, both customary and statutory laws govern inheritance. Both testate and intestate succession are governed by statutes which were enacted in 1989, namely, the Wills and Administration of Testate Estates Act, Cap. 60, and Intestate Succession Act, Cap. 59. In the case of intestate succession, section 2 (2) of the Intestate Succession Act excludes application of the Act to the following categories of property:

- land acquired and held under customary law;
- institutionalised property of a chieftaincy; and
- family property.

This means that customary law may apply to these categories of property.

An important distinction between the statutory law and customary law of succession is that the former is concerned only with the distribution of property while the latter includes inheriting the deceased's social responsibilities.

As in many other parts of Africa, succession laws, as they affect women, have continued to be a source of conflicts. The main focus of concern has been the widow. Prior to the enactment of the Intestate Succession Act in 1989, customary law regulated distribution of an intestate estate. Customary law proved to be inadequate and unsatisfactory in relation to the widow and children of a deceased husband.

One of the reasons for this inadequacy is the existence of two social groupings in the Zambian society, namely those ethnic groups that are matrilineal and those that are patrilineal. The majority of the people of Zambia are matrilineal while the minority are patrilineal. Among the matrilineal people, if one dies intestate the property devolves on the maternal side of the deceased's relatives (uncles, nephews, nieces etc.). In such a system of the law of succession, the surviving spouse and children of the deceased are excluded from the category of beneficiaries of an intestate estate. The patrilineal groups trace their descent through the male ancestor and, therefore, succession among these groups favours the children, particularly the sons and the paternal relatives.

Another reason for the inadequacy in the law was that, contrary to customary law and practice, the surviving widow and children were often left destitutes when the breadwinner (husband) died, causing considerable distress.

In this scenario, "property grabbing" emerged, premised *inter alia* on the assumption that the widow did not contribute to the acquisition of the property. The perception has been that ownership of property is a preserve of men. Therefore, almost invariably, title to property is vested in the man, even where the woman has made a direct or an indirect contribution (e.g. where property is acquired during the subsistence of and from proceeds accrued during the marriage).

Equal enjoyment by both spouses of rights related to ownership of property is a subject of the United Nations Convention on Elimination of all forms of Discrimination Against Women, to which Zambia is a State Party. Article 16, Clause 1, obligates State Parties to:

> *"Take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women:*
>
> *(h) The same rights for both spouses in respect of ownership, acquisition, management, administration, enjoyment and disposition of property…"*

The outcry from women, especially women groups against injustices suffered by widows led to the enactment in 1989 of the Intestate Succession Act. The objects of the Act include:

> *"...to make adequate financial and other provisions for the surviving spouse, children, dependants and other relatives of an intestate to provide for the administration of the estate of persons dying not having made a will..."*

Section 5 (1) of the Act makes provision for distribution of the estate of an intestate as follows:

> *" (a) 20% of the estate shall devolve upon the surviving spouse; except that where more than one widow survives the intestate, twenty per cent of the estate shall be distributed among them proportional to the duration of their respective marriages to the deceased, and other factors such as the widow's contribution to the deceased's property may be taken into account when justice so requires;*
>
> *(b) 50% of the estate shall devolve upon the children in such proportions as are commensurate with a child's age or educational needs or both;*
>
> *(c) 20% of the estate shall devolve upon the parents of the deceased; and*
>
> *(d) 10% of the estate shall devolve upon the dependants, in equal shares."*

In addition, the surviving spouse is entitled, under section 9 (1), to live in the matrimonial home for life, subject to determination upon remarriage.

However, implementation of the Act and its enforcement have not followed automatically, due to factors such as resistance and ignorance. Incidents of "property grabbing" continue to be reported. Although the Act is gender-neutral in its treatment of the surviving spouse, in practice the widow and not the widower, is viewed as the beneficiary. As already alluded to, this is partly attributed to the socio-cultural setting where property ownership is viewed as a preserve of men.

A widow continues to be treated with resentment by parents and relatives of the deceased husband because the Act has secured what is perceived to be the lion's share of the estate for the surviving spouse. The complaint against the Intestate Succession Act, which is mostly made by elderly

parents, arises mainly from a perception that the widow is an undeserving beneficiary who has not contributed to the acquisition of the property. They argue that in some cases the widow would have contracted the marriage shortly before the death of the husband. They further allege that women are making "commercial capital" by "marrying and killing" men in order to inherit their estates. They also complain that widows fail to look after the children and that parents of the deceased have to assume the responsibility. However, it is generally observed that the HIV/AIDS epidemic has contributed to the high incidence of deaths, resulting in elderly people looking after young children.

Some African countries have enshrined the right to equal enjoyment by both spouses of the right to property in the Bill of Rights. For Example, Article 22 of the Constitution of Ghana provides that:

"(1) A spouse shall not be deprived of a reasonable provision out of the estate of a spouse whether or not the spouse died having made a will."

(2) Parliament shall as soon as practicable after the coming into force of this Constitution, enact legislation regulating the property rights of spouses.

(3) With a view to achieving the full realisation of the rights referred to in clause (2) of this Article.

(a) Spouses shall have equal access to property jointly acquired during marriage; and

(b) Assets which are jointly acquired during marriage shall be distributed equitably between the spouses upon dissolution of the marriage."

Children's Rights

Out of the total Zambian population of 9.9 million, the majority, 5.1 million are children (0-18). Over one-fifth (1.1 million) are orphans.

The survival and development of many children in Zambia is under threat owing to a number of factors, notably pervasive poverty, deteriorating access to education and health care, parental neglect, and the lack of a welfare system for the vulnerable groups in society. The situation has been compounded by the breakdown of the traditional extended family system.

The HIV/AIDS pandemic has had far-reaching effects on the lives of children in Zambia. With an estimated 775,080 adults infected with HIV

and an estimated prevalence rate of 16%, the number of orphans is expected to continue to rise to an estimated 1.3 million by 2010. Deaths and chronic illnesses have complicated the poverty situation for many households. Many children have been pushed out of school. Some have been forced on to the streets to earn a living for themselves and their households. There has been a marked increase in the number of child-headed households due to the HIV/AIDS pandemic.

Orphans and other vulnerable children are susceptible to all forms of abuse, including economic and sexual exploitation, and physical and psychological violence. The crisis of orphaned and vulnerable children is an emergency that calls for urgent and decisive action.

The creation of an environment that is conducive to the survival and development of children and protection of their rights is essential for sustainable socio-economic development of the country.

Articles 14 (1) and 15 protect persons from slavery and servitude, torture or inhuman and degrading punishment, respectively. Although these provisions do not specifically relate to children they are, nonetheless, significant in articulating their rights.

On the other hand, Article 24 specifically seeks to protect young persons (below 15 years) from occupation or employment that is prejudicial to their health or education, or hazardous to their physical, mental or moral development (with some exception as to statutory provision for employment for a wage under certain conditions). The Article also seeks to protect young persons against physical or mental ill-treatment, all forms of neglect, cruelty or exploitation and traffic in any form. In practice, however, these provisions are commonly violated.

Beyond the provisions of Article 24 outlined above, the Constitution does not articulate children's rights, particularly those found in the UN Convention on the Rights of the Child. These rights include the right to survival and development; the right to a name and nationality, and the right not to be subjected to torture or other cruel or inhuman or degrading treatment or punishment. Similarly, most economic, social and cultural rights under the International Covenant on Economic, Social and Cultural Rights have not been incorporated into the Constitution. Those that have been are not in the Bill of Rights and are not enforceable in courts of law. Socio-economic issues such as education, shelter, food, health, the environment, water and sanitation are of paramount importance for the survival and development of a child.

3.2 Submissions, Observations and Recommendations

There were six thousand eight hundred and ninety-six (6,896) submissions on fundamental human rights and freedoms.

3.2.1 Bill of Rights – Supremacy and Content

Submissions

A few petitioners wanted the Bill of Rights to be made expressly superior to other provisions of the Constitution (4). Some petitioners said that it should be strengthened to include all the rights in international instruments ratified by Zambia (5).

There was a suggestion that the Bill of Rights should be reviewed with a view to enhancing and updating it (1). Another was that the Bill of Rights should be well defined and broad based by the inclusion of economic, social and cultural rights, and that it should be entrenched in Part III of the Constitution (1).

Three petitioners said that second and third generation rights (including economic, social and cultural rights), currently placed in the Directive Principles of State Policy, should be moved to the Bill of Rights so that rights such as those relating to employment, education, health and housing are given a clear place in the heart of the Constitution (3).

The HRC submitted that the Bill of Rights, as proposed by the Mwanakatwe Constitutional Review Commission, should be adopted (1).

Observations

The Commission wishes to observe that a few petitioners wanted to see the provisions of the Bill of Rights being superior to provisions contained in other parts of the Constitution. A few others wished to see the content of the Bill of Rights enhanced by the inclusion of second and third generation rights.

The Commission further observes that the Constitution is the supreme law of the land and that all laws derive their authority from it. The supremacy of the Constitution implies that laws or actions taken in contravention of the provisions of the Constitution may be struck down by courts as being unconstitutional. This is a well established principle in all countries with written constitutions. Petitioners who addressed this issue, however,

wanted this position extended to the Bill of Rights vis-à-vis the other provisions of the Constitution.

The Commission understands these petitioners as calling for the provisions in the Bill of Rights to be superior to those in other parts of the Constitution. The implication of this submission is that a provision in the Constitution that is inconsistent with a provision in the Bill of Rights should be considered null and void to the extent of the inconsistency.

While the concerns of the petitioners are appreciated, it is an established principle that the provisions of the Constitution should not be in conflict with each other. The proposed provision would result in some provisions of the Constitution being struck down for being inconsistent with the Bill of Rights.

On the issue of expanding the content of the Bill of Rights, the specific economic, social and cultural as well as solidarity rights are addressed subsequently in this chapter.

Recommendations

The Commission recommends that the Constitution should not provide that the Bill of Rights is superior to other provisions of the Constitution.

3 .2.2 Civil and Political Rights

3.2.2.1 Right to Life

Submissions

An overwhelming number of petitioners, including the HRC, made submissions that the death penalty should be abolished (1,661). The reasons advanced were that:

- it is not a deterrent against violent crime;
- it is an inhuman and degrading form of punishment;
- it goes against the declaration of Zambia as a Christian nation and goes against the teachings of the Bible;
- given an opportunity, people have the ability to reform;

- innocent persons may be wrongly convicted and once the sentence is executed life cannot be restored;

- it goes against the fundamental right to life;

- it goes against International Human Rights Conventions, such as the Universal Declaration of Human Rights and the African Charter on Human and Peoples Rights; and

- most people sentenced to death are poor and cannot afford to pay for legal representation.

Most of the petitioners who called for the abolition of the death penalty said that it should be substituted with long terms of imprisonment, including life imprisonment.

On the other hand, almost as many petitioners (1,616) including the House of Chiefs, said that the death sentence should be maintained. The reasons advanced were that:

- it is a deterrent against violent crimes, such as murder and aggravated robbery;

- it is justified by Biblical teachings;

- it helps to avenge and reduce crime; and

- it reduces the burden on taxpayers.

Some of those who said that the death penalty should be retained also suggested that it should be extended to the offences of rape and defilement, and to those who knowingly infect others with HIV/AIDS, as well as economic plunderers (32). Four petitioners said that the waiting time for prisoners on death row should be clearly spelt out so that the sentence is carried out with minimal delay.

One petitioner said that persons below the age of 18 years and pregnant women should not face the death penalty (1).

Another petitioner said that the power of prerogative of mercy should not be exercised in relation to murder cases (1).

Observations

The Commission observes that a very large number of petitioners made submissions on this subject. The majority expressed the view that the death penalty should be abolished while others expressed the view that the death penalty should be maintained.

The Commission observes that there was a small number of petitioners who wanted this sentence extended to persons convicted of rape, defilement and infecting others with the HIV virus. The main concern of these petitioners was the escalation of cases of defilement and rape.

In its consideration of the subject, the Commission critically evaluated the arguments for the retention and abolition of the death penalty.

At the very outset, the Commission notes that the death penalty is an emotive, moral and controversial subject. Further, between the competing views of petitioners, the margin between those for abolition and those against is extremely slim. Those for abolition have only about 2% over those for retention of the penalty, the actual percentages being 50.68% for and 49.3% against.

The Commission appreciates the fact that the continued sanction of the death penalty by the Constitution evokes the deepest feelings in many people and challenges the nation's sense of values.

From independence to January 2005, a total number of 710 people have been sentenced to death, out of which only six were females. Historical records on the subject indicate that the most common crime for which the death penalty has been imposed in Zambia is murder, which has accounted for 362, out of which five were females. This is followed by aggravated robbery, accounting for 227, out of which one was female. Others are treason, accounting for 71 and murder/aggravated robbery, accounting for 50, in respect of which there were no females. Only 130 executions have been carried out, the majority before 1977.

Further, it is noted that the overwhelming majority of those sentenced to death are below 40 years of age. Those below the age of 34 account for 69% whilst those below the age of 40 account for 83%.

Therefore, relatively few convicts on the death row have actually been executed, particularly in the recent past. This is illustrated by the following statistics: from 1978 to 1987 and 1988 to 1997, only 7 and 12 convicts were executed, respectively. There has been no execution since 1998.

The Commission notes that under the current Government's administration, there has been a de facto moratorium on the implementation of the death penalty. The President has publicly announced his unwillingness to sign any death warrant. As the situation is now, abolition would not be removing any existing deterrent. In fact, the de facto moratorium has resulted in extreme anxiety on the part of condemned prisoners who are made to spend many years on "death row".

The Commission also notes the contents of international instruments setting out international standards on the death penalty and the fact that Zambia has ratified the International Covenant on Civil and Political Rights and its First Optional Protocol, but is yet to ratify the Second Optional Protocol that provides for the abolition of the death penalty.

The Commission further notes the worldwide trend towards abolition of the death penalty and that in Africa alone, ten countries have outlawed the death penalty. These countries are South Africa, Namibia, Mozambique, Angola, Cape Verde, Djibouti, Guinea Bissau, Mauritius, Ivory Coast and Senegal. It is however worth noting that on the African continent only ten out of 53 countries have chosen to abolish the death penalty, indicating that the continent has not taken a firm stand on this delicate subject.

The Commission further notes that this is a subject that has attracted international debate culminating in 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 has not yet ratified this Optional Protocol. It is interesting to further observe that though progress at this level has been for abolition, this

trend has been gradual with the caution in the ICCPR that, "in countries that have not abolished the death penalty, a sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime".

The Commission notes that, in Zambia, there has been no formal and organised debate on the subject. The Commission's tour was apparently the first national opportunity for debate. Disparities in views or opinions between urban and rural populations are quite evident, with the latter being hesitant to abolish the death sentence.

On the moral and spiritual front, there has been an even divide between the two spheres of views, both citing biblical authority for maintaining the position for or against the death penalty.

The Commission further wishes to express concern that in a country with such high levels of illiteracy, intellectual and refined arguments can gloss over the attitudes and fears of most of the Zambian people.

The Commission notes that both the Mvunga and Mwanakatwe Commissions addressed this subject. The Mvunga Commission, after considering the views expressed by petitioners, concluded that the subject of abolition of the death penalty posed fundamental questions and that there should be further national debate to ascertain the national consensus. The Mwanakatwe Commission observed that both the petitioners and Commissioners could not reach consensus on the abolition of the death penalty, but because the majority of the Commissioners did not support the abolition of the penalty, it recommended the retention of capital punishment. This Commission agrees that the subject requires empirical research and further national debate.

Taking into account the above, the Commission is of the view that Zambia has not reached a stage where it can abolish this sentence because it does not have an alternative way of protecting victims of violent crime which can serve as a deterrent to would-be offenders. The Commission fears that abolition of this sentence could trigger an increase in the number of cases of violent crime. The Commission is of the view that the only effective way of protecting society

against cases of violent crime, at the moment, is the retention of the death penalty.

The Commission, however, notes that some petitioners on both sides of the argument expressed misgivings about the manner in which this sentence is carried out. These petitioners felt that the manner in which the sentence is carried out is cruel and inhuman. They argued that the delay in the execution of the sentence also contributes to the cruelty of this penalty. Thus, while calling for the retention of this penalty, the Commission agrees that a more humane way of administering this sentence should be found.

Recommendations

The Commission therefore recommends that:

- for the time being, the death penalty be retained; and

- further public debate and a national referendum should be conducted on the subject.

3.2.2.2 Right to Liberty – *Habeas Corpus*

Observations

The Commission observes that there was no submission on the right to liberty. However, the Commission wishes to address this subject in relation to the right to *Habeas Corpus.*

The essence of the right to liberty is that a person should not be detained or held captive by another. The right to liberty, which is a basic universal and common law right, is guaranteed under Article 13 of the Constitution. Like other fundamental rights, however, this right is not absolute, but is subject to limitations as recognised by law.

On the basis of the right to liberty, if a person has been unlawfully detained and is not released, that person is entitled to challenge the detention in a court of law. *Habeas Corpus* is a common law court process by which a detaining authority is ordered or commanded to bring the

detained person into court and to explain the grounds for detention of the person. If the grounds are unsatisfactory and invalid, the court can order the release of the detained person.

The right to *Habeas Corpus* is not enshrined in the Constitution. Although it is available to citizens as a common law process, the Commission observes that it is so fundamental to citizens that without it being guaranteed by the Constitution, the right to liberty generally becomes assailable and can be overthrown by an undemocratic government. In the United States of America, for instance, the Writ of *Habeas Corpus* is protected by the Constitution and cannot be suspended except when public safety necessitates these actions such as in cases of rebellion or invasion. The Constitution of Uganda provides that the right to an order of *Habeas Corpus* is non-derogable. The Commission feels that it is important that the right is explicitly provided for and entrenched in the Constitution.

Recommendations

The right to the relief of an order of *Habeas Corpus* should be explicitly provided for and entrenched in the Bill of Rights.

3.2.2.3 Protection from Slavery

Submissions

There were three petitioners who felt that the Constitution should provide for protection from slavery and forced labour (3).

Observations

The Commission observes that very few petitioners made submissions on this issue. It also observes that the Mwanakatwe Commission had supported the retention of this non-derogable right.

This right is currently combined with the right not to be required to perform forced labour. Under this provision, the Constitution also spells out what does not constitute forced labour. The Commission notes that the Mwanakatwe Commission had recommended the inclusion of a detailed

list of what does not constitute "forced labour". The Commission agrees with this recommendation, but is of the view that the term "forced labour" should be defined in appropriate legislation.

Recommendations

The Commission recommends that the current provisions of the Constitution relating to protection from slavery and forced labour should be maintained, but that appropriate legislation should spell out what constitutes "forced labour".

3.2.2.4 Protection from Inhuman and Degrading Treatment- Gender Violence

Submissions

A large number of petitioners made submissions that the law should prescribe stiffer penalties for the offences of rape and defilement. Petitioners bemoaned the current high incidences of rape and defilement as well as the light sentences prescribed in the current laws. They also argued that the situation was worsened in the administration of the law as courts tended to mete out inadequate sentences (543).

A number of petitioners wanted that the Constitution to provide adequate protection from gender violence, including "property grabbing" and the withholding of resources by a spouse (15).

Some petitioners felt that negative and discriminatory customs and practices such as "widow inheritance", "sexual cleansing" and "property grabbing" should be prohibited by the Constitution (5).

Observations

The Commission observes that a large number of petitioners expressed concern about the increasing cases of gender violence against women.

The Commission observes further that cases of defilement in the country have been rising at an alarming rate and that

there was urgent need to protect children from this form of violence.

The Commission also notes that, in a democratic State, every person has the right to protection of his or her dignity and should therefore not be subjected to physical, mental or emotional torture. The Commission accepts the view that issues raised by petitioners amount to torture or conditions that detract from the person's dignity and worth as a human being and should therefore not be allowed in a democracy.

The current Constitution does provide protection from torture, inhuman or degrading punishment or other like treatment. In terms of comparison, similar provisions are found in the Constitutions of Uganda, South Africa and Ghana.

The Commission also observes that, whilst various offences relating to gender violence are in the Penal Code, the penalties are inadequate in that no minimum sentences are provided, with the result that the penalties meted out by courts are often not commensurate with the offence.

The Commission further notes that the Mwanakatwe Commission, when dealing with the right to protection from cruel, inhuman and degrading treatment, accepted the proposition that in a democratic society, the physical and mental integrity of every individual must be preserved. The Commission therefore recommended that, "no person should be subjected to torture of any kind, whether physical, mental or emotional nor should any person be subjected to cruel, inhuman or degrading treatment or punishment".

Recommendations

After considering the petitioners' views as well as making comparison with constitutions of other African countries, the Commission recommends:

- that the provision in the Constitution that offers protection from cruel, inhuman and degrading treatment should be maintained; and

- the appropriate law should provide for stiffer penalties for anyone violating this right.

3.2.2.5 Protection from Discrimination

Submissions

A few petitioners wanted all discriminatory clauses to be removed from the Constitution (9).

Observations

The Commission observes that protection from discrimination is provided for in Article 23 of the current Constitution. The principle upon which the right to non-discrimination is founded is equality. Equality entails that rules of law should apply equally to all members of the community and that nobody should be treated differently. However, equality also implies differential treatment, where this is necessary, in order to achieve justice or redress imbalances.

The right to non-discrimination, as provided in Article 23, has a number of exceptions. However, the Commission concurs with the concern of petitioners that some of the exceptions have the effect of undermining the very principle of equality that the Article is intended to protect. For example, the Constitution permits discriminatory laws in respect of issues of personal law and where it is reasonably justifiable in a democratic state. It is the Commission's view that the Constitution should not specify limitations to or derogations from the principle of non-discrimination and that instead there should be a general derogations clause to the Bill of Rights.

The term "discrimination" is defined in paragraph 3 of this Article as affording different treatment to different persons attributable wholly or mainly to their race, tribe, sex, place of origin, marital status, political opinions, colour or creed. This definition implies that affording different treatment on the basis of other factors not mentioned in Article 23 does not amount to discrimination. Thus, for example, discrimination on the basis of religion, health status, social/economic status and disability cannot amount to discrimination under the provisions of this Article. In the case of South Africa, the grounds on which the Constitution

prohibits discrimination are not limited, but include those specified in the Constitution.

Recommendations

Accordingly, the Commission recommends that the Constitution should:

- not specify limitations to or derogations from the right to non-discrimination; and

- specify, but not limit the grounds on which discrimination is prohibited and that these should be extended to include different treatment on the basis of gender, religion, health status, economic and social status, disability and age.

3.2.2.6 Gender Equality and Women's Rights

Submissions

A number of petitioners, including Women in Law and Development in Africa (WiLDAF) and Women and Law in Southern Africa (WLSA), on behalf of the Women's Movement, said that the principle of gender equality should be enshrined in the Constitution. Some among these said that this should be enshrined in the Bill of Rights and that it should not be qualified in any way (210). WiLDAF and WLSA said that the Constitution should guarantee women's rights unreservedly on an equal basis with men and that in articulating these rights the special socio-cultural, economic and physiological circumstances and roles of women should be taken into account (2).

Further, the two organisations said that the rights and freedoms should be specific for women because of their subordinate status in decision-making roles in the home (2). Other organisations representing persons with disabilities said that the rights and freedoms should take into account the fact that women with disabilities suffer double disadvantage (2).

Seventeen petitioners suggested that in order to enhance women's rights, Article 23, particularly clauses (2), (4) (a), (c), (d) and (e), and (5), (6), (7) and (8), which bring in an element of discrimination against women, should be

repealed and replaced (17). Two other petitioners said that there should be clear constitutional principles prohibiting discrimination with no exceptions (2).

A number of petitioners felt that the principle of affirmative action for women be enshrined in the Constitution in order to promote the realisation of gender equality (35), while others said that there should be no affirmative action for women and that merit should be the only guiding principle (45). Some of these petitioners urged that gender equality should not be extended to homes, with some using biblical concepts, cultural traditions and customs in their arguments. In particular, they suggested that affirmative action should not apply to running for elective office and "cut off points" for school places.

One petitioner said that the Constitution should provide for the right of married women to own and administer property (1).

Observations

The Commission notes that a number of petitioners, including organisations representing the Women's Movement, wanted the principle of gender equality to be enshrined in the Bill of Rights, without any qualification. Petitioners on behalf of the Women's Movement emphasised that the Constitution should guarantee the enjoyment by women of fundamental rights and freedoms on an equal basis with men. They also called for consideration, in articulating these rights and freedoms, to be given to the special social, cultural, economic and physiological circumstances and roles of women. Some petitioners called for repeal of Article 23 of the Constitution in order to remove the element of discrimination against women.

In addition, some petitioners called for the principle of affirmative action for women to be enshrined in the Bill of Rights and other parts of the Constitution in order to achieve gender equality. On the other hand, there were a few petitioners opposed to the principle of affirmative action.

There was also a call for the Constitution to guarantee the right of women to own property.

The Commission deliberated on the subject of gender equality at length. In its consideration of the matter, the Commission took into account the realities of the circumstances of women in relation to men. The Commission is persuaded that the situation warrants remedial constitutional intervention in order to enable women to enjoy fundamental rights and freedoms on an equal basis with men. The Commission is of the view that currently the constitutional provisions are inadequate.

In this regard, the Commission examined some rights and freedoms under the Constitution in relation to the status of women. The Constitution assumes equality of the sexes without regard to the reality of inequalities created by the socio-cultural and economic construct of the society.

In particular, some exceptions to discrimination under Article 23 virtually, take away women's right to enjoyment of human rights and freedoms on equal basis with men. In addition, the fact that the language of the Constitution is not gender-neutral, but uses expressions importing the male gender, has a negative effect on the status of women in relation to the Bill of Rights.

The Commission further notes that women with disabilities suffer a double disability by virtue of being women and by their disabilities. This makes disabled women more vulnerable than their disabled male counterparts.

The Commission also took into account international and regional instruments on gender equality and the rights of women to which Zambia is a State Party or signatory. Zambia has an obligation to incorporate provisions of some of these instruments, in particular the CEDAW, into its Constitution and other domestic laws.

Further, the Commission observes that at the national level, the country has made commitments to take necessary measures, including a review of the Constitution and other laws, in order to incorporate provisions of international and regional instruments, advance the status of women and promote gender equality in all areas of political and socio-economic development.

In its consideration of the subject, the Commission also noted the observations and recommendations of the Mwanakatwe Commission. The Mwanakatwe Commission observed that many petitioners addressed the need for a constitution that would address the rights of women and reaffirm their equality with men in all respects and give affirmative action to reverse the effects of discrimination that women might have suffered.

The Commission recommended that the Constitution should reaffirm the principle of equality of men and women in all respects and that there should be affirmative action in favour of women. Other recommendations of the Commission were that all laws, customary practices and stereotyped attitudes which are against the dignity, welfare or interest of women or which otherwise adversely affect their physical or mental well-being should be prohibited.

Recommendations

Accordingly, the Commission recommends that:

- the principle of gender equality should be enshrined in the Bill of Rights;

- the rights of women should be specifically stated in the Bill of Rights;

- the rights of women with disabilities should be specifically stated in the Bill of Rights;

- provisions of international and regional instruments on gender equality and women's rights, to which Zambia is a State Party or signatory, including the CEDAW, SADC Declaration on Gender and Development and Beijing Declaration and Plan of Action, should be incorporated into the Constitution, as appropriate;

- the principle of affirmative action should be enshrined in the Bill of Rights; and

- the Article which guarantees non-discrimination should not be limited by exceptions or derogation clauses.

The Commission further recommends that pursuant to the above recommendations, the Bill of Rights should include the following provisions:

- women shall be accorded full and equal dignity of the person with men and shall be guaranteed the exercise and enjoyment of fundamental rights and freedoms on a basis of equality with men;

- women shall have the right to equal treatment with men and that right shall include equal opportunities in political, economic and social activities;

- the State shall protect women and their rights, taking into account their unique status and natural maternal functions in society, their right to reproductive health, including family planning and access to related information and education;

- women shall have equal rights with men with respect to marriage;

- women shall have equal rights with men regarding ownership, use, transfer, administration and control of land and enjoy the same rights with men with respect to inheritance;

- women shall be protected against all forms of violence, physical or mental ill-treatment, cruelty, deprivation or exploitation;

- custodial sentences shall not be imposed on pregnant women and nursing mothers or mothers of young children except as a last resort for those women convicted of the most serious offences and who pose a danger to the community;

- there shall be developed and implemented educational programmes for criminal justice personnel on the subject of mothers and young children consistent with provisions of the Bill of Rights;

- without prejudice to the foregoing provisions, women shall have the right to affirmative action for

the purpose of redressing the imbalances created by history, tradition or custom;

- laws, cultures, customs or traditions which are against the dignity, rights, welfare or interest of women or which undermine their status should be prohibited by the Constitution; and

- Parliament shall make laws for giving effect to these provisions, including the establishment or designation of institutions for the protection of women against discrimination and promotion of their enjoyment of human rights and fundamental freedoms on a basis of equality with men.

3.2.2.7 Right of Persons with Disabilities

Submissions

A number of petitioners made submissions that the rights of persons with disabilities should be protected by the Constitution (98). These petitioners suggested affirmative action for the disabled and the provision of special facilities to enable them participate in national life.

One petitioner suggested that there should be welfare programmes for persons living with disabilities (1).

Some petitioners felt that the Government should look after widows, orphans, persons with disabilities and street kids (18). Other petitioners said that a Ministry for the Disabled and the Blind should be created (7).

Nine petitioners proposed that persons with disabilities should be exempted from paying tax (9). However, six petitioners were of a different view and said that people with disabilities should not be exempted from paying tax (6).

Observations

The Commission observes that petitioners (who included persons with disabilities) desired the inclusion of the rights of the disabled in the Constitution. They noted that disabled persons had unique needs that should be provided for in the Constitution. These should include the right to proper care,

the right to respect and dignity, the right not to be discriminated against on account of disability, and the right to equal opportunities.

It was apparent from the submissions that persons with disabilities face a wide range of difficulties. Many of these difficulties are as a result of inadequate resources being devoted to their welfare, discrimination in the laws, and prejudice in the society they live in.

The Commission also observes that the current Constitution does not have a provision specifically addressing the rights of this group of citizens.

The Mwanakatwe Commission received similar submissions and concluded that it was not practical to have the rights of persons with disabilities treated as justiciable rights.

The Commission, however, observes that modern constitutions do recognise the rights of persons with disabilities and the need to take affirmative action to redress imbalances that exist against them. Examples of Constitutions that the Commission considered were those of Uganda and Ghana.

On the question whether or not persons with disabilities should be exempted from tax, the Commission notes that persons with disabilities face a lot of discrimination and prejudice as they try to compete for employment with their able-bodied counterparts with similar qualifications. As a result, they are not as able to earn a living as their able-bodied counterparts. Further, the costs associated with their disabilities reduce their disposable income, and yet their able-bodied counterparts do not face such costs. This is the basis on which petitioners said that tax on assistive devices of persons with disabilities (such as wheelchairs, white canes, crutches, braille material etc.) should be removed.

In the case of totally impaired persons, it is necessary for the State to introduce social security schemes to take care of their welfare.

Recommendations

Having taken into account the views of petitioners, the recommendations of the Mwanakatwe Commission and the trend in other countries, the Commission recommends that the Constitution should make provision in the Bill of Rights for:

- the protection of persons with disabilities;
- the right of persons with disabilities to use sign language, braille or other appropriate means of communication as well as have access to other special facilities, devices and materials to enable them overcome constraints due to disability; and
- parliament to enact laws to enable persons with disabilities realise their full potential.

The Commission further recommends that:

- the State should establish social security schemes for persons who are totally impaired;
- persons with disabilities should be given a much higher tax exemption on their income than is currently the case; and
- all tax on devices used by persons with disabilities should be removed.

3.2.2.8 Rights of the Child

Submissions

Three petitioners said that Part III of the Constitution should reflect and highlight the rights of the child (3). These petitioners defined a child as any person below the age of 18.

A large number of petitioners made submissions that the rights of the child as provided for in the United Nations Convention on the Rights of the Child should be enshrined in the Constitution and that these should include the right of the unborn child (103). A few other petitioners added that a child's right to parental care should be provided for in the Constitution (19).

One petitioner said that the observance of the rights of the child should not lead to deprivation of parental role in the upbringing of the child (1).

Two petitioners suggested that any laws relating to children must ensure that the girl-child does not suffer any discrimination on the grounds of culture, religion or personal laws or other grounds (2).

Five petitioners said that the rights of the child should include the right to (5):

- survive;
- develop;
- be protected; and
- a name and nationality.

Some petitioners said that the following principles should be considered in upholding the rights of the child (3):

- the best interest of the child;
- non-discrimination on grounds of culture, religion, race and creed or any form of social status;
- participation in matters affecting their welfare and development;
- protection from all forms of exploitation; and
- Christian values.

Observations

The Commission notes that the majority of petitioners who made submissions on this subject were concerned that the rights of the child were not specifically addressed in the Bill of Rights. They therefore called for the Rights of the Child as provided for in the United Nations Convention on the Rights of the Child to be included in the Bill of Rights. Petitioners particularly wanted to see the right to parental care, the rights of the unborn child, the right to a name and nationality, the right to survive and a child's right to develop protected in the Bill of Rights.

The Commission notes with concern that the lives of many children in the country are blighted by abject poverty, child prostitution, child labour, sexual exploitation as well as parental neglect which has resulted in multitudes of children living on the streets.

A change in attitude towards children is required before they can truly be said to have recognition for their human rights. Such a change requires positive steps to show that children require additional protection for their rights.

The Commission notes that it is important, for the purposes of entitlement to these rights, to define a child. In the Commission's view, this should be a person below the age of 18. Unborn children should be included in this definition.

The Commission observes that currently the Constitution does not specifically address the issue of children's rights, apart from Article 24 that deals with protection of young persons from exploitation.

The Commission notes that the most widely adopted and almost universally accepted international human rights instrument on children is the UN Convention on the Rights of the Child. Zambia acceded to this Convention in 1991. The UN Convention was a direct result of the desire by the world community to establish a new regime of children's rights. Compliance with the provisions of the UN Convention on the Rights of the Child by incorporating them into the Constitution will send a clear and positive message that the rights of the Zambian child are recognised and worthy of such recognition.

The Commission notes, in particular, Article 2 of the UN Convention on the Rights of the Child, which demands that Contracting Parties respect and ensure that all children within their jurisdiction enjoy the rights contained in the Convention without discrimination. This is complemented by Article 4, which requires a contracting party to introduce all appropriate legislative, administrative and other measures for the implementation of the rights recognised in the Convention.

The Commission further notes that the rights protected under the Convention include the following:

- protection from economic exploitation and from performing any hazardous work, including wars;

- protection from all forms of physical or mental violence;
- protection from all forms of sexual exploitation and abuse;
- the right to the enjoyment of the highest attainable standard of health;
- the right of a mentally or physically disabled child to enjoy a full and decent life;
- the right to education, with a view to achieving this right progressively, making primary education compulsory and free;
- the right to parental care;
- the right to a name and nationality;
- the right to social security, including social insurance;
- the right to a standard of living adequate for the child's physical, mental, spiritual, moral and social development; and
- the rights of refugee children, whether accompanied by parents or not, to appropriate protection and humanitarian assistance as set out in the Convention and the Guidelines on Protection and Care of Refugee Children.

The Commission also notes that recently enacted constitutions of some countries have incorporated some specific rights of the child in their Bills of Rights. For example, the Constitution of Uganda provides for the right to know and be cared for by parents, the right to basic education, which shall be the responsibility of both the State and parents, and protection from social or economic exploitation. The Constitution of South Africa, on the other hand, includes in its Bill of Rights the right of every child to a name and nationality; parental care; basic nutrition; shelter; health care; protection from exploitative labour practices; and the right not to be detained except as a measure of last resort.

Recommendations

In the light of the global recognition of the need for a new regime of children's rights and the fact that Zambia is a party to the UN

Convention on the Rights of the Child, the Commission recommends that the rights of the child as provided for in the United Nations Convention should be incorporated in the Bill of Rights. In particular, the Commission recommends that the following children's rights should be enshrined in the Bill of Rights:

- the right to life, including the right of an unborn child subject to exceptions permitted by law;
- the right to a name and a nationality;
- the right to parental care, family care or appropriate or alternative care when removed from the family environment;
- the right to survival and development;
- the right to social security, including social insurance;
- the right to basic nutrition and shelter;
- the right to a standard of living adequate for the child's physical, mental, spiritual, moral and social development;
- the right to protection from all forms of exploitation, maltreatment, neglect, abuse or degradation prejudicial to any aspect of the child's development and welfare;
- the right to protection from all forms of sexual exploitation and sexual abuse;
- the right to protection from exploitative labour practices and wars;
- the right to basic education, which shall be the responsibility of the State and parents of the child;
- the right to health care;
- the right of the disabled child to special care;
- the right to special protection for orphans and other vulnerable children;

- the right not to be detained except as a measure of last resort and, in such a case, the child should have a right to be kept separately from adult detainees;

- the right to legal representation at State expense in both civil and criminal proceedings affecting the child;

- the right to be tried in Juveniles courts;

- the right to identity protection against media exposure in criminal cases; and

- the right not to be used directly in armed conflict and to be protected in times of armed conflict.

The Commission also recommends that the Constitution should further provide that a child's best interests are of paramount importance in every matter concerning the child.

The Commission further recommends that the Constitution should define the term "child" as a person below eighteen years of age, including an unborn child as defined by law. However, an unborn child shall only be entitled to such rights as may be deemed appropriate by law.

3.2.2.9 Rights of the Youth

Observations

Although no submissions were received on this subject, the Commission notes that the youth from a substantial portion of the population, and play an important role in the socio-economic and political life of the nation and, therefore, their specific rights should be protected by the Constitution.

Recommendation

The Commission, therefore, recommends that the Constitution should guarantee the rights of the youth.

3.2.2.10 Rights of the Aged

Submissions

A number of petitioners suggested that the Constitution should provide for the right of the aged (60 years and above) to social welfare (39).

Petitioners made a passionate plea for the State to provide for the welfare of this group of citizens.

Observations

Petitioners who addressed this issue were concerned that the aged appeared to be neglected by society. The Commission notes that although petitioners considered the aged as persons of 60 years and above, the Commission felt that it should cover persons above 65 years of age. It was observed that these people faced particular difficulties that included lack of adequate health care and social security.

The Commission observes that due to the breakdown of the extended family system, the elderly in our society are usually neglected and therefore experience hardships in accessing health services, shelter and other social amenities. Difficulties experienced by this group of people are aggravated by the fact that even those who have retired from employment are often unable to access their pensions due to various reasons.

Further, the Commission notes that although persons above 65 years are entitled to free treatment in Government health facilities, more often than not, medical facilities are lacking.

In addition, the Commission notes that no social security system is in place that would assist the elderly cope with life after retirement.

Recommendations

The Commission, therefore, recommends that the rights of persons above 65 years should be enshrined in the Bill of Rights and that the State should be obligated to set up a sustainable social security system and that this should be implemented through an Act of Parliament. These rights should include the right to a reasonable standard of living, in particular the right to social security, shelter, food and clean water. Pending the establishment of a social security scheme, the State should take appropriate provisional

measures to mitigate the hardships being experienced by persons above 65 years

3.2.2.11 Rights of Refugees

Observations

Although there were no petitioners who addressed this subject, the Commission considered the matter to be sufficiently important as to warrant inclusion in the Constitution. The Commission feels that the status and the rights of refugees in the country need to be protected by the Constitution. This is standard practice in many countries. However, details pertaining to grant of refugee status or asylum and other related issues should be in ordinary legislation.

Recommendations

The Commission recommends that rights of refugees should be enshrined in the Constitution. However, details pertaining to grant of refugee status or asylum and other related issues should be in ordinary legislation.

3.2.2.12 Right to Justice

Submissions

A number of petitioners said that the right to legal representation, speedy disposal of cases and equality before the law should be guaranteed by the Constitution (21).

Other petitioners said that the Constitution should guarantee that no person should be detained without being taken to court within a limited period (13).

Three petitioners said that all cases before courts of law should be determined within a limited and specified period (3).

Some petitioners made submissions that legal aid should be made more accessible to the poor and vulnerable (16). A small number petitioners felt that lawyers' fees should be reduced whilst others said that lawyers should be obliged to defend at least one case free before obtaining a practising licence (4).

There was a submission that the right of every person to a lawful, reasonable, timely and procedurally fair administrative action should be guaranteed by the Constitution (1). The petitioner

further suggested that where administrative action has adversely affected a person's rights, freedoms, legitimate expectations or interests, such a person should be furnished with reasons in writing.

Two petitioners suggested that an individual acting as an agent of the State in perpetrating the violation of the Bill of Rights should be personally accountable and punished (2).

One petitioner said that it should be mandatory for courts not to issue security for costs in cases involving public interest (1). Two other petitioners were of the view that there should be no limitation on the right to appeal in cases involving allegations of violation of fundamental rights and freedoms on grounds that the application is frivolous or vexatious, thus this limitation should be repealed (2).

Three petitioners went further by suggesting decentralisation of legal aid as a means of improving access to justice (3).

Two petitioners felt that the Constitution should guarantee a citizen's right to seek coercive orders against the State in enforcing judgment (2).

Observations

The Commission notes that on the subject of the right to justice, petitioners addressed a number of issues. These were the right to legal representation, including the cost of legal representation and legal aid; speedy disposal of cases; detention of persons without being brought before a court within reasonable time; fair administrative action; personal liability of agents of the State for violation of human rights; security for costs in cases involving public interest; and limitation on the right to appeal to the Supreme Court from High Court decisions in matters involving allegations of violation of fundamental rights and freedoms on grounds of the application being frivolous and vexatious.

The Commission wishes to make its observations by first restating the meaning of the right to justice. Under the rule of law, the right to justice means the right to be heard; the right to be informed of the nature of the offence; the right of access to courts of law which are fair, impartial and independent; and the right to a well-reasoned and expeditiously delivered judgment. The Commission also acknowledges the submission made by two petitioners on the subject of cohesive orders against the State. The right to justice

also includes the right to benefit from one's judgment through execution.

The Commission notes that some aspects of the right to justice are not articulated in the Constitution.

The Commission observes that most petitioners who made submissions on this subject expressed concern at delays in the disposal of cases by courts and the detention of suspects for long periods without trial. They also lamented the lack of legal representation for the poor and vulnerable who are unable to afford lawyers' fees. Petitioners further expressed displeasure at delays and other bottlenecks experienced in public administration. The Commission wishes to note that the enactment of the Small Claims Court in 1996 was intended to alleviate delays and expenses incurred in legal representation. Regrettably, the Act has never been implemented, despite the good objectives of the said Court. In this regard, the Commission calls for urgent establishment of the Small Claims Court.

The Commission agrees with the petitioners and attributes some of these problems to the following:

- inadequate logistics in the country's justice delivery system;
- inadequate legal aid practitioners;
- shortage of magistrates;
- political interference in the work of the Director of Public Prosecutions;
- lack of trained local court Justices;
- lack of presence of courts in certain rural areas;
- corruption among judicial officers;
- shortage of advocates; and
- lack of harmonisation between the work of local courts and that of subordinate courts.

The Commission observes that the issues raised are critical and need to be addressed if justice has to have any meaning in the lives of the people.

The Commission further observes that the Constitution currently guarantees protection by the law to persons charged with criminal offences under Article 18. The Commission is satisfied that this Article provides the basic minimum protection to such persons.

However, this Article is silent on the period that a suspect can be held in custody before the Police are compelled to bring her/him before courts of law. The Commission feels that there is need for the Constitution to specify the period in which an accused person can be held without being brought before a court of law. In terms of comparison with other African countries, the Constitutions of Ghana, South Africa and Uganda are instructive. These three Constitutions require that a person arrested for a criminal offence is brought before a court of law as soon as possible, but not later than forty eight hours from the time of her/his arrest.

On the subject of delayed judgments, the Commission has the following observation to make. The concept of judicial immunity seems to have been misplaced in relation to expeditious disposal of cases. Judicial immunity appears to be an umbrella under which efficiency in performance by the Judiciary cannot be questioned. Coupled with the power of contempt of court, courts seem to be out of the ambit of criticism, transparency and accountability. For the same reason, courts cannot be questioned about their share or contribution to delays in the administration of justice. The Commission wishes to express concern over these delays and to reiterate that:

- courts should devote their time to judicial business and not extra-judicial activities;
- trials should be expeditiously concluded; and
- judgments should be well written and reasoned and should be delivered on time.

The Commission also observes that Article 18 does not provide for the right to legal aid for all accused persons. The Commission feels that it is necessary for the Constitution to provide for the right to legal aid for all persons unable to afford legal

representation of their own choice. The Commission is aware that legal representation to persons unable to engage a lawyer of their choice is currently provided by the Legal Aid Department under the provisions of the Legal Aid Act, Cap. 34. The Law Association of Zambia and Non-Governmental Organisations supplement the work of the Legal Aid Department. However, legal aid is not a right and, under the Legal Aid Act, it is left to the discretion of the Legal Aid Committee.

It is the view of the Commission that the Constitution should provide for mandatory legal aid for accused persons who cannot afford the cost of legal representation. Constitutions of some countries, such as South Africa, have a provision that compels the State to assign a legal practitioner to an accused person at the State's expense, if substantial injustice would otherwise result.

The Mvunga Commission, whilst acknowledging the problem posed by delays in the disposal of court cases, did not recommend time limitation because of difficulties encountered by the courts and other agents involved in the administration of justice. The Commission, however, recommended that the Law Association of Zambia, the Judiciary and the Government institutions involved should continue to seek ways of addressing the problem.

The Commission, however, agrees with the Mwanakatwe Commission which felt that there was need to place time limits on the courts and executive agents involved in the administration of justice in order to secure the right to access justice. The Mwanakatwe Commission recommended enshrining of the right to administrative justice in the Constitution.

The Commission further observes that the right to administrative justice is just as important as the right to justice in ordinary courts. A petitioner has demanded that administrative action that has adversely affected the liberties of the individual should be followed with the furnishing of reasons for such action. The Commission also observes that the right to administrative justice can be supplemented by the existing remedy of judicial review of administrative action. To enhance the effectiveness of this remedy, this too can explicitly be enshrined in the Constitution.

Two petitioners called for individuals acting as agents of the State to be personally accountable for violating the Bill of Rights. The Commission notes that these submissions would be

an improvement on existing provisions of redress available at the moment to an aggrieved party.

The Commission feels that individual accountability will make individuals more careful and conscious of their legal obligations towards citizens and place the burden of accepting or rejecting unlawful directives by superiors on their junior officers.

The Commission does, however, think that individual accountability should be in addition to the State equally being accountable for the acts or omissions of its agents.

Further, the Commission observes that courts should not insist on security of costs in cases involving the public interest. The Commission is in agreement that security for costs would hinder public interest litigation in a democratic society. Two other petitioners wanted appeals in matters involving allegations of violation of fundamental rights and freedoms not to be declined on grounds of being frivolous or vexatious. The Commission does not agree with the rationale of this submission because if an appeal is frivolous and vexatious, it means that it is without merit.

With respect to the subject of cohesive orders against the State, the Commission observes that immunity of the State against coercive orders is common practice in Commonwealth countries and elsewhere. This is intended to protect the State from mischievious disruptions in its discharge of functions. The rationale is that the State cannot be bankrupt and it would pay judgment creditors. However, in Zambia, the situation has deteriorated to levels where immunity has been abused excessively, thus, contributing to high levels of domestic debt. It has also resulted in loss of confidence by suppliers in the State and other public institutions.

The Commission further notes that enforcement of coercive orders against the State, local authorities and other public institutions is barred by statute. This immunity may be inconsistent with the fundamental right and interests of individuals and institutions that cannot enjoy the fruits of court judgments.

Recommendations

Having considered all the submissions as well as the provisions of the current Constitution and the constitutions of other countries, the Commission recommends that:

- the right of access to justice should be enshrined in the Constitution under the Bill of Rights;

- legislation should be enacted to give the Chief Justice enough administrative powers to supervise, monitor and keep a record of timely delivery of judgments;

- the Judicial Service Commission should be given supervisory powers by the Constitution;

- Article 18 of the Constitution should be maintained, but should include a provision specifying that an accused person must be brought before a court within reasonable time, but in any case not later than 48 hours after arrest;

- the right to legal representation should be enshrined in the Constitution;

- the right to administrative justice as well as the right to judicial review of administrative actions should be enshrined in the Constitution;

- appropriate legislation should be enacted to provide for the procedural and substantive details of these rights;

- the ground for removal of Judges for "incompetence" in the Constitution should include failure to deliver judgment within a reasonable time and without undue delays;

- the Legal Aid Department should be restructured, strengthened and decentralised to all provinces and districts;

- that Small Claims Court created under the Small Claims Court Act should be re-established and strengthened;

- individual accountability should be made a provision under the Constitution in order to enhance observance of the Bill

of Rights, but this should be in addition to the existing provisions of the law on accountability; and

- the Constitution should provide that no security for costs shall be ordered by Courts on matters of public interest litigation and that existing provisions on vexatious and frivolous litigations should be retained.

The Commission further recommends that in order to redress this abuse of immunity and deprivation of the right to justice:

- the Constitution should explicitly provide relief to aggrieved parties against the State in enforcing judgments and that this relief should be extended to local authorities and other public institutions; and

- the State Proceedings Act should be amended so that judgement can be executed after a period of six months.

3.2.2.13 Rights of Suspects, Accused Persons and Prisoners

Submissions

A number of petitioners wanted the rights of accused persons and prisoners to be guaranteed in the Constitution (39). The petitioners said that accused persons and prisoners should be protected from torture and inhuman and degrading treatment. Other petitioners said that no person should be detained without being taken to Court within a specified period (9). One other petitioner felt that all persons arrested or detained should be brought before the nearest court of competent jurisdiction within 24 hours of arrest or be released on bond (1). The petitioner further suggested that police officers should be obligated to read to a suspect her/his constitutional rights at the time of arrest (1).

One other petitioner said that by the fourth day of detention or restriction, a person should be informed in writing in a language he/she understands specifying in detail the grounds upon which he/she is restricted or detained (1). Another petitioner said that families of suspects should not be treated like suspects (1).

One petitioner said that entry of a *nolle prosequi* should result in acquittal of the accused person (1) whilst two others said that there should be a time limit within which an accused person who has been discharged on entry of a *nolle prosequi* may be charged

afresh on the same facts (2). The reason advanced for this submission was to prevent abuse of power.

One petitioner suggested that prisoners should be segregated according to the type of offence in order to promote a conducive environment for reform (1).

Observations

The Commission observes that a number of petitioners expressed concern at the manner in which suspects and prisoners are treated by law enforcement agencies. They also complained about the practice of Police officers detaining innocent relatives of suspects as a bait for the arrest of offenders. A few other petitioners complained about detention of suspects for lengthy periods without providing reasons for their detention.

The Commission further notes that unconventional methods of crime detection are being used because of the lack of scientific methods of detection and facilities available to law enforcement officers. This has in turn resulted in Police obtaining evidence coercively and in circumstances which may not be permitted by the Constitution.

The Commission also observes that suspects and prisoners are human beings and deserve dignified treatment and should be protected from torture and inhuman and degrading treatment. Protection from torture and inhuman treatment is currently provided for in Article 15 of the Constitution. This protection is available to all persons, including suspects and prisoners.

The Commission also notes that Zambia is a signatory to and has ratified a number of international human rights instruments such as the Convention Against Torture and other Cruel, Inhuman and Degrading Treatment (CAT) and it should therefore pursue policies and practices that enhance the observance of human rights.

In addition, the Commission observes that persons committing crimes should be responsible for their actions and that no other person should be made to pay for the wrongs of another person. Criminal conduct is personal, as *mens rea* (guilty intention) is not transferable to another person.

It is the view of the Commission that every person has a right to freedom of movement and if it is to be curtailed, grounds should be

furnished so that, if the person so wishes, he/she can challenge the detention.

In relation to the treatment of prisoners, the Commission notes several international instruments that provide for minimum standards of treatment of prisoners, namely the body of principles for the protection of all persons under any form of detention or imprisonment, and the basic principles for the treatment of prisoners. The Commission further notes that the lack of domestic legislation on treatment of offenders and prisoners has meant that various sets of guidelines and model standards formulated by the United Nations are of particular significance in indicating standards agreed by consensus of the international community. These international minimum standards require, among other things, that persons under any form of detention or imprisonment be treated in a humane manner and with respect for the inherent dignity of the human person. They also provide for impartiality and specific prison conditions from food to recreational facilities.

On the issue of *nolle prosequi*, the Commission notes that it is common practice in Commonwealth countries to reserve this power to the Director of Public Prosecutions (DPP). The power of the DPP to issue a *nolle prosequi* is intended for the protection of the public interest. This power has, however, persistently been abused, causing inconveniences and anxieties to individuals who are made to live with the threat of arrest indefinitely.

While accepting the need for the power of entering a *nolle prosequi* to be vested in the DPP and that this power should be used sparingly and in good faith, past experience has shown that there has been persistent abuse of this power. The Commission is of the view that public interest can still be protected, but within restricted scope.

Recommendations

The Commission therefore recommends that the Constitution provide that any one who is a suspect or is arrested or is an accused person or remanded in custody for allegedly committing an offence should have the right:

- to a fair hearing within a reasonable time by an independent and impartial court established by law;

- to be informed promptly of the right to remain silent and the consequences of remaining silent;

- to be informed as soon as reasonably practicable, in a language that he/she understands in detail, of the nature of the offence charged;

- to be given adequate time and facilities for the preparation of his defence;

- to defend herself/himself before the court in person or at his own expense, by a legal representative of her/his own choice unless legal aid is granted in accordance with the law;

- to be afforded facilities to examine, in person, or by her/his legal representative the witnesses called by the prosecution before the court and to obtain the attendance and carry out the examination of witnesses to testify on her/his behalf before the court on the same conditions as those applying to witnesses called by the prosecution;

- to have, without payment, the assistance of an interpreter if he/she cannot understand the language used at the trial;

- not to be compelled to make any confession or admission that could be used in evidence against her/him and that illegally obtained evidence should not be admissible, except where such evidence is relevant and excluding it would be detrimental to the administration of justice;

- not to be compelled to give self-incriminating evidence;

- to be brought before a court as soon as reasonably possible, but not later than 48 hours after arrest;

- to be released on bail if it is in the interest of justice;

- to compensation for wrongful detention;

- to conditions of detention that are consistent with human dignity, including at least physical exercise and the provision, at State expense, of adequate accommodation, nutrition, reading material and medical treatment; and

- of access to legal representation before, during and after arrest.

The Commission also recommends that persons detained under the Preservation of Public Security Regulations should be furnished with reasons for their detention within four days.

The Commission further recommends that the Constitution should provide that every prisoner should have a right to:

- be treated with the respect due to their inherent dignity and value as human beings; and

- be entitled to send and receive letters and visits, subject to such restrictions as may be necessary for the maintenance of discipline and order in prison and the prevention of crime.

The Commission also recommends that the Constitution should provide that:

- while the power of the entry of *nolle prosequi* can be retained, the exercise of the same should be conditioned on the DPP being required to obtain leave of the court for entry of *nolle prosequi* and the court having power to inquire into the grounds thereof;

- entry of a *nolle prosequi* should not, automatically, result in an acquittal; and

- where *nolle prosequi* has been entered, an accused person should only be charged afresh on the same facts within a reasonable time (not being later than 12 months), after which period the person shall be deemed to have been acquitted.

3.2.2.14 Right to Bail

Submissions

A number of petitioners made submissions that the right to bail should be guaranteed by the Constitution (83). Some petitioners felt that exceptions to bail should only be in cases of murder, rape, defilement, deliberately infecting someone with HIV/AIDS, cattle rustling and in cases of economic crimes, such as fraud and corruption (63). Some petitioners said that the question of bail should not be in the Constitution, but should be left to the discretion of courts (5).

A few petitioners suggested that the offence of motor vehicle theft should be bailable (8).

Observations

The majority of petitioners who spoke on the subject of bail called for the right to bail to be enshrined in the Constitution whilst others did not want it to apply to certain serious crimes. A few petitioners were of the view that the Constitution should not make provision for bail, but that this should be left to the discretion of the courts.

The Commission observes that the concept of bail is founded on the principle that every person is presumed innocent until proven guilty, which is enshrined in the Constitution. If the Constitution guarantees presumption of innocence, then bail should be made available in all cases. Subjecting suspects to detention for long periods before their cases are disposed of violates this principle. The Commission is, however, aware that the Constitution does not explicitly provide for the right to bail. This may explain the apparent lack of appreciation by many people of the concept of bail.

The Commission notes that the majority of petitioners were concerned about the number of cases in which bail is not available to suspects. They were especially concerned about the denial of bail to persons charged with motor vehicle theft. They expressed misgivings at the way the law was amended to make this offence non-bailable without any apparent convincing reasons.

A minority of petitioners did not wish to see the issue of bail reflected in the Constitution. These felt that bail could be ably handled at the discretion of courts of law.

In terms of comparisons, the Constitution of Uganda provides for the right of an accused person to apply and be granted bail on such conditions as the court considers reasonable. The Constitution of Ghana, on the other hand, provides for the release of a detained person who is not tried within a reasonable time unconditionally or upon reasonable conditions.

Taking the above into consideration, the Commission finds merit in the argument that the right to bail be a constitutional right.

Recommendations

The Commission, therefore, recommends that the Constitution should explicitly provide that:

- all offences are bailable;
- the question of whether or not bail should be granted should be left to the discretion of courts; and
- in the event of bail being denied, the accused person must be tried within 90 days or thereafter be released on bail unconditionally or upon reasonable conditions.

3.2.2.15 Right to Vote

Submissions

A few petitioners said that eligibility to vote should be restricted to those with minimum education qualification, for example grade nine (2). One petitioner called for the right to vote to be restricted to those who pay tax (1). These petitioners argued that there was need to ensure that those eligible to vote do so responsibly and are not ignorant or vulnerable to corruption.

Observations

Although this is an extremely important civic duty and obligation, very few petitioners addressed this subject. The majority of those who addressed the subject were concerned that uneducated voters may not be in a position to vote responsibly because they were prone to manipulation by politicians. Petitioners therefore wanted a Constitution that restricts the right to vote to persons who have attained a minimum of Grade 9 certificate and those who pay tax.

The Commission observes that in all democracies, the right to vote and be voted into office is based on the principle of universal adult suffrage. Restricting the right to vote to those who have attained a certain standard of education or those who pay tax would be undemocratic and discriminatory, and the Commission is enjoined in its terms of reference to identify discriminatory laws that should be eliminated. In addition, such restrictions in a country with a high level of unemployment and high levels of illiteracy would inevitably mean excluding most people from the electoral process.

The Commission also observes that in the current Constitution, there is no provision on the right to vote. This lacuna on such an important right ought to be remedied by an explicit provision in the Constitution.

However, the Electoral Act does provide for the qualifications of a voter. The Act defines a voter as any Zambian of 18 years and above.

Universal adult suffrage is the foundation of every democratic electoral system, since it ensures that every adult has the right to participate in elections or to stand for elective office. The State should therefore have a duty to facilitate the exercise by the citizen of the right to vote, including to register as voters. Correspondingly, citizens have a duty to register as voters and to vote.

Recommendations

The Commission therefore recommends that the Constitution should provide:

- for the right of every citizen to vote in explicit terms which should be in the Bill of Rights;

- that the State shall have a duty to ensure that citizens exercise their right to vote and that they register as voters; and

- that it shall be a duty of every citizen to register as a voter and to vote in all elections and that this should be reflected in the Chapter on Directive Principles of State Policy and Duties of a Citizen.

3.2.2.16 Right of Access to Public Information/Academic and Intellectual Freedoms

Submissions

Some petitioners made submissions that the right to access public information held by the Government should be guaranteed by the Constitution (17). These included the Press Association of Zambia (PAZA), Zambia Union of Journalists (ZUJ), Society of Senior Zambian Journalists (SSZJ) and Zambia Media Women Association (ZAMWA).

PAZA further said that the recommendations of the Mvunga and Mwanakatwe Commissions should be adopted with some additions as follows:

- the right of access to information should be made a justiciable right, including the right to make all official documents public unless such documents have been classified "secret";

- Parliament should enact a law to facilitate the realisation of freedom of information;

- persons who are involved in the production and dissemination of ideas should be protected and no person should be hindered in the enjoyment of academic and intellectual freedom; and

- apart from the Government, political parties, individuals and organisations should be free to establish their own newspapers, publications and other media.

Petitioners raised concerns with respect to criminal offences and other restrictions relating to access to information in various statutes such as the Penal Code, the Defamation Act, the Radio Communications Act, the Preservation of Public Security Act and the Protected Places and Areas Act.

The main reason advanced by petitioners who advocated these rights and freedoms was that these were essential to democratic governance, transparency, accountability and development. They further argued that an informed public would participate in and contribute better to the development of the country.

One petitioner, however, said that the right of access to public information held by the Government should be subject to national security considerations (1).

Observations

The majority of petitioners, including the media fraternity, raised concern at the effect of restrictions on access to information held by the Government on democratic governance, transparency, accountability and development. They argued that the public had a right to receive information, including that held by the State.

The Commission observes that public information is generally understood to mean all that information of a public interest held or in the custody of the Government or other public institutions. Petitioners expressed concern with regard to certain statutes that have the effect of restricting the right of access to public information, such as the Preservation of Public Security Act and the Official Secrets Act.

The Commission is of the view that access to information by the public, including information held by the Government, is essential in ensuring good governance, transparency and accountability. Therefore, the Freedom of Information Bill, which has already been initiated by the Government, is a positive development and should have constitutional backing if the right of access to public information has to be realised. However, the Commission is mindful that unrestricted access to information held by the State could, in certain circumstances, be harmful to state security.

With respect to academic and intellectual freedom, the Commission wishes to observe that this freedom, which includes the freedom to undertake research in any field and impart knowledge in any form, as well as property rights in research results, is essential to the intellectual development of the individual and beneficial to political, social, economic, scientific and cultural development of any society.

The Commission also notes that the Mvunga Commission recommended that political parties, individuals and organisations should be free to establish their own newspapers and other media subject to legislative regulation. The Mwanakatwe Commission recommended that every person should have the right of access to all information held by the State or any of its organs at any level of Government in so far as such information is required for the exercise or protection of any of that person's constitutional rights. The Commission also recommended that no person should be hindered in the enjoyment of his or her academic and intellectual freedom.

Recommendations

The Commission recommends that the Constitution provide in the Bill of Rights that:

- every person should have the right of access to public information, but that it should be subject to national security considerations;

- Parliament should enact a law that would facilitate the realisation of this right;

- no person should be hindered in the enjoyment of academic and intellectual freedom; and

- political parties, individuals and organisations should be free to establish their own newspapers, publications and other media, subject to provisions of the law.

3.2.2.17 Freedom of the Press

Submissions

A number of petitioners, including the HRC, PAZA and ZUJ made submissions that Press freedom should be explicitly enshrined in the Bill of Rights (110). Some petitioners, particularly media organisations, emphasised that this freedom deserved a separate Article and said that the following recommendations of the Mwanakatwe Commission should be adopted:

- every person should have the right to freedom of the Press, media and artistic creativity;

- Press material or other communications should not be subjected to any form of censorship;

- public owned media should be managed in a manner that ensures impartiality of a diversity of opinions;

- journalists should not be compelled to divulge their sources of information;

- the registration or licensing of any media should not be unreasonably withheld or refused; and

- Parliament should not enact any law abrogating freedom of the Press.

The media organisations further said that there should be no derogations in the Constitution from the rights and freedoms pertaining to the Press. They also suggested that the public media

should be funded by Parliament and managed by a Board appointed through a public process in order to ensure transparency. One petitioner called for the privatisation of the public media (1).

The main justification given for these submissions was that the freedom of the Press is so fundamental to the flow of information and development of any nation that it ought to be accorded a distinct place in the Bill of Rights. In this regard, some of the petitioners bemoaned the culture of harassment of journalists, particularly over Press coverage of issues of a political nature. They also expressed concern that media organisations were not protected by the Constitution against defamation suits.

Petitioners were concerned about criminal offences and other constraints created by statutes such as the Penal Code, the Defamation Act, the Radio Communications Act, the Preservation of Public Security Act and the Protected Places and Areas Act. In particular, petitioners expressed concerns about the offence of criminal libel, which they said constituted a major hindrance to Press freedom.

On the other hand, some petitioners felt that Press freedom should be limited (15). Those opposed to this freedom being specifically enshrined in the Constitution feared that it was likely to be abused.

One petitioner said that Press freedom was adequately covered in the present Constitution (1).

Observations

The Commission notes that the majority of petitioners who addressed this subject, including the media fraternity, desired inclusion of an explicit Article on freedom of the Press in the Bill of Rights. These petitioners argued that Press freedom was so fundamental to the flow of information and development that it deserved a distinct place in the Bill of Rights. They further wanted no derogations from this right. It is apparent from the submissions that these petitioners also wanted to be exempted from defamation suits, in particular, criminal libel.

On the law of defamation, the Commission notes that going by case law developed in our courts, the media is protected in the coverage of the subject of public interest. In this regard, the media has available defences of justification, qualified privilege and fair comment if the publication is not motivated by malice.

Notwithstanding the defences available against libel, the Commission is mindful of the concerns of the media that the offence of criminal libel is a hindrance to Press freedom because of the constant threat of harassment by law enforcement agents and imprisonment. In this regard, the Commission considered the question whether or not there is justification for the country to have the offence of criminal libel on its statute books.

Modern libel and slander laws, as exist in many Commonwealth countries, the United States of America and in the Republic of Ireland are descended from English defamation law. The earlier history of the English law of defamation is somewhat obscure. Civil suits for defamation can be traced as far back as 1272. However, it is uncertain whether any criminal process was in use during the early history of the law. Criminal libel was first established at common law and ingredients of the offence included spreading false reports about the Monarchy. Later, the offence became statutory.

Therefore, historically, criminal libel was intended to protect Kings and Queens from public scandal, as they were regarded as incapable of committing any wrong.

In Zambia, the offences of defamation of the President and criminal libel are a colonial legacy and are provided for in the Penal Code.

Any person who, with intent to bring the President into hatred, ridicule or contempt, publishes any defamatory or insulting matter whether by writing, print, word of mouth or in any other manner is guilty of an offence and is liable, on conviction, to imprisonment for a period not exceeding three years. The offence is not clearly defined. There is a danger, therefore, of the courts overlooking the rights and freedoms of the individual in their interpretation of the offence.

Further, the Penal Code provides for the offence of criminal libel, which concerns defamation of another person by print, writing, painting, effigy, or by any means other than exclusively by gestures, spoken words or other sounds unlawfully published.

Criminal prosecutions for defamation have been almost exclusively in respect of alleged defamation of the President. In the majority of cases involving private citizens, defamation is dealt with by way of civil claims.

The mischief that the offence of defamation of the President is intended to prevent is bringing the President and the Government into hatred or contempt, because this can lead to public discontent or disaffection. The Penal Code also provides for offences in respect of seditious practices, that is inciting the public to rebellion or agitation, under which this mischief can be addressed. Defences to the offences relating to seditious practices are stipulated in the Penal Code and, in the opinion of the Commission, adequately protect the rights and freedoms of the individual and the public interest.

In light of the foregoing considerations, the Commission feels that the continued existence of the offence of criminal libel is an unjustified hindrance to the enjoyment of freedoms, particularly under the democratic dispensation.

On the question of disclosure of sources of information, the Commission notes that journalists are not protected from disclosing their sources of information in court proceedings when directed to do so. This is because the defence of privilege from disclosing sources of information is only accorded to communication between a client and her/his lawyer.

The Commission acknowledges the rationale advanced by petitioners that journalists should not be compelled to disclose their sources of information even when directed to do so. Petitioners have put forward the pursuit of truth as justification and that it is in the public interest that they should obtain information in confidence and publish it for, by doing so, they bring to the attention of the public that which the public should know. Journalists can expose wrongdoing which would otherwise go unnoticed and unabated. It is argued that in pursuit of their professional duty, they need to access information without disclosing their source. Otherwise, their informers will not be willing to provide the information.

The Commission, however, wishes to observe that disclosure of sources may enhance the credibility of the defence. In the opinion of the Commission, the question whether or not a journalist should disclose her/his source of information is a matter that is best left to the discretion of the court which should weigh the conflicting interests. These are on the one hand, the need to maintain the confidentiality of the journalist's source of information and, on the other hand, the public interest or the interest of justice.

With respect to the current provisions of the Constitution relating to Press freedom, the Commission notes that Article 20 of the Constitution does provide for "freedom to impart and communicate ideas and information without interference …" which can be interpreted to include freedom of the Press. However, the Commission feels that Article 20 does not adequately protect press freedom, especially because no express mention of this freedom is made in that Article. Article 20 (2) of the Constitution does not permit derogations from the freedom of the Press which is not categorically stated in paragraph (1) of that article.

The Commission agrees with the petitioners that freedom of the Press is vital to the flow of information in a democratic society and therefore deserves a specific place in the Bill of Rights.

Currently, registration and licensing of electronic media is provided for under the Independent Broadcasting Authority Act and the function is entrusted with the Authority. Registration of print media organisations is provided for under the Printed Publications Act, Cap. 161 and the National Archives Act, Cap. 175 and is the function of the National Archives. The Commission agrees with the Mwanakatwe Commission which recommended that the registration or licensing of media should not be unreasonably withheld, withdrawn or refused.

The Commission also notes with interest the recommendations made by the Mwanakatwe Commission on this subject. In this regard the Commission concluded that a free Press was a great pillar of democracy and that all legal and administrative mechanisms that tended to frustrate full Press freedom should be removed. Among the specific recommendations that the Commission made were that journalists should not be compelled to divulge their sources of information and that the registration or licensing of any media should not be unreasonably withheld, withdrawn or refused.

Recommendations

The Commission therefore recommends that:

- press freedom be specifically provided for under the Bill of Rights;

- the current constitutional provision that prohibits derogations from this right should be maintained, except that this right should also acknowledge the importance of

the law of libel which seeks to protect public interest and the interests of others in circumstances where there is disregard of these interests;

The Commission further recommends that the Constitution should provide that:

- every person should have the right to freedom of the Press, media and artistic creativity;
- press material or other communications should not be subjected to any form of censorship;
- public-owned media should be managed in a manner that ensures impartiality of a diversity of opinions;
- the courts should have the discretion of determining whether or not a journalist should be compelled to divulge their sources of information;
- the registration or licensing of any media shall not be unreasonably withheld, withdrawn or refused; and
- parliament should not enact any law abrogating freedom of the Press.

Further, the Commission recommends that the offences of criminal libel and defamation of the President should be repealed.

3.2.2.18 Freedom of Speech and Expression

Submissions

A number of petitioners wanted the freedom of speech and expression to be guaranteed by the Constitution (41), while others felt that it should be limited (6).

One petitioner said that the Constitution should prohibit offences of sedition and defamation of the President, arguing that these are used as instruments for the harassment of innocent persons (1).

Observations

Relatively few petitioners made submissions on this subject. The majority of these petitioners called for freedom of speech and

expression to be enshrined in the Bill of Rights while a very small number wanted this right to be restricted.

The Commission wishes to observe that freedom of expression permits people to impart and receive ideas and information. This is a very important right that not only ensures individual self-fulfillment, but also helps build a pluralistic and tolerant society which permits a multitude of ideas and philosophies. This right is therefore a cornerstone of any democracy and must be protected. Under the current Constitution, this freedom is protected in Article 20 on the freedom of expression. However, this provision does not explicitly define what freedom of expression is.

Constitutions of other countries such as South Africa and Uganda define freedom of expression as including freedom of the press and other media; freedom to impart and receive information or ideas; freedom of artistic creativity and academic freedom. The Commission is, however, of the view that although this right seems to be adequately protected under the provisions of the current Constitution, there may be need for the Constitution to define the term "freedom of expression".

The Commission further observes, as already noted under Press freedom, that laws on libel and defamation are necessary in a democratic society because they ensure that the right of expression is not used as a tool to trample on other people's rights. These laws are essential because they ensure the observance of fundamental rights of the individual. As earlier stated under Press freedom, defences to the offences relating to seditious practices as provided by law adequately protect the freedoms of speech and expression of the individual. However, as already recommended under Press freedom, the offences of criminal libel and defamation of the President should be repealed.

Recommendations

The Commission therefore recommends that:

- the current constitutional provision should be maintained and the term "freedom of expression" should be defined by the Constitution and should include:

    a) freedom of the Press and other media;

b) freedom to receive and impart information or ideas;

c) freedom of artistic creativity; and

d) academic freedom and freedom of scientific
e) research.

- Laws on civil libel and defamation should be maintained, as every right entails a corresponding duty in relations between people.

3.2.2.19 Freedom of Association and Assembly

Submissions

Some petitioners specifically called for the freedom of association and assembly to be entrenched in the Constitution (8). Others said that there should be no derogation from these freedoms and called for the right to demonstrate, as an expression of freedom of assembly, to be protected by the Constitution (12). They further demanded that the Police should be prohibited from suppressing anti-Government demonstrations.

A number of petitioners felt that the Public Order Act should be repealed as it is applied, in a discriminatory manner in favour of the ruling party (103). Some said that the Act should be reviewed and amended (25) while a few felt that it should be maintained (5).

Some petitioners suggested that powers to review decisions of the police under this Act should be vested in the courts instead of the Minister (4).

Others wanted the policy of "One Industry One Union" to be reintroduced (9).

Observations

The majority of those who petitioned on this subject were concerned with the administration of the Public Order Act by the police. They accused the Police of discrimination in the application of this Act in favour of the ruling party. They also called for the right to demonstrate, as an expression of the freedom of assembly, to be protected by the Constitution.

The Commission observes that the right to organise and participate in public gatherings is inherent in the freedom of expression and freedom of assembly and association.

Article 21 of the present Constitution protects these freedoms, but also provides for derogations in the interest of defence, public safety, public order, public morality or public health etc. The Public Order Act was enacted as a result of one of these derogations and was intended to maintain and preserve order in the country. However, if these derogations are given broad interpretation, they may limit the level of protection accorded by this Article.

The provisions of the Public Order Act that required a police permit for public gatherings were clearly inconsistent with the freedoms of expression, assembly and association as enshrined in the Constitution. Following the Supreme Court decision in the case of *Mulundika and Others Vs The People* and the subsequent amendment to the Act, it is no longer necessary to obtain a police permit before exercising freedom of expression, assembly and association.

The Commission observes that although this Act no longer requires persons wishing to demonstrate or hold any gathering to obtain a police permit, the requirement that notice should be furnished to the Police at least seven days before the event has been used by the Police as a loophole to selectively deny some political parties and organisations the right to peaceful assembly. This requirement allows the Police to propose an alternative venue or date for such assembly if, in their view, they are unable to police the event. This, in some cases, means that those wishing to demonstrate on a particular day and for a particular purpose are denied the opportunity to express their views. Further, the Commission notes that the Act makes no distinction between various public gatherings, such as processions and outdoor and indoor meetings. It also does not take into account the different places in which these public gatherings are held, for example, rural, urban and peri-urban settings.

The Commission is therefore of the view that the concerns expressed by petitioners on this issue are as a result of the misuse of this Act by the police and do not necessarily imply that this is a bad law. The Public Order Act is necessary to preserve law and order in the country so as to ensure that individuals enjoy their constitutional rights without hindrance. However, its

administration is far from satisfactory and there is therefore need for administrative measures to be put in place to curb the misuse of its provisions.

The Commission takes note of the observations made by the Mwanakatwe Commission that citizens must be free to petition the Government by way of peaceful demonstrations without the need for police permits. The Commission also notes that the administration of the Act has, on a number of occasions, invited valid criticism from stakeholders and citizens at large. However, this is no justification for the repeal of the Act. The Commission wishes to observe, however, that even in its present amended form, the Public Order Act can be improved upon. Indoor meetings, for example, may not require police notification. Further, in certain circumstances, the notice period can be abridged or dispensed with altogether.

Finally, the Commission wishes to agree with the recommendation of the Mwanakatwe Commission that the right to the freedoms of association, peaceful assembly, demonstration and petition should be reflected in the Constitution and each freedom should stand on its own.

Recommendations

The Commission, therefore, recommends that the right to the freedoms of association, peaceful assembly, demonstration and petition should be reflected in the Constitution and each freedom should stand on its own.

The Commission also recommends that the Public Order Act should be reviewed and amended to:

- provide that where it is shown that there is need for an urgent demonstration or gathering, the requirement of seven days notice should be waived or abridged to a shorter period;

- exempt indoor meetings from the requirement of notification;

- make the Act more flexible and permissive, taking into account factors such as the duty of the Police to provide security and surveillance at public meetings and the need for an independent appeals tribunal and to localise appeals; and

- ensure that Police training programmes are appropriately structured so as to equip them with skills in administering the Act

The Commission also recommends that the right to the freedoms of association, peaceful assembly, demonstration and petition should be reflected in the Constitution and each freedom should stand on its own.

3.2.2.20 Freedom of Worship and Conscience

Submissions

There were few petitioners who called for freedom of worship to be enshrined in the Constitution (14).

Some petitioners said that churches should be exempted from paying tax (18).

Others felt that the criteria for registration of churches and other religious organisations should be reviewed to curb the proliferation of churches (23).

Observations

The Commission observes that the major concern of most petitioners who addressed this issue was the proliferation of churches in the country. These petitioners called for a review of the regulations governing churches and other religious bodies so as to arrest the trend.

The Commission agrees with these petitioners that there has been a proliferation of churches, but notes that the Constitution guarantees freedom of worship and conscience. This freedom implies that individuals are free to establish churches, provided they comply with statutory requirements.

On the suggestion by some petitioners that churches be exempted from paying tax, the Commission observes that since churches are charitable organisations, they should be registered and monitored under the relevant legislation. It is noted that under current legislation, profit making charitable organisations are required to pay tax while those that are engaged in non-profit making ventures are not. It is the Commission's view that there is no basis for a blanket exemption of all churches from paying tax.

Recommendations

The Commission therefore recommends that:

- the current constitutional provisions on freedom of worship and conscience should be maintained;

- churches and other religious organisations should continue to be registered and monitored under relevant legislation, but that this legislation should be reviewed to provide criteria for registration, compatible with the freedom of worship; and

- churches and other religious organisations engaged in profit making ventures should continue paying tax, as required by law.

3.2.2.21 Right to Property

3.2.2.21.1 The Right of the Individual to Property

Observations

Although there were no submissions on the subject of the right of the individual to property per se, the Commission feels that it is so fundamental that it deserves to be addressed in the Constitution.

According to modern theories, property is any thing, short of another person, which, within the bounds of natural law, a person can use. Property comes about through the productivity and invention of a person or persons. There are two main categories of properties, that is, real property (land) and personal property (moveable). Some personal property can be physically possessed whilst others, such as copyright or labour cannot.

One of the most valuable aspects of the right to property is the power of perpetuating property in families, that is, to inherit or to transfer or lend one's property to another for a price or as a gift. Property is central to a country's economy which is driven by the enterprise of its citizens. For enterprise to thrive, it is essential that it exist in an

environment where the right to property is guaranteed and protected. It follows, therefore, that no government can claim legitimacy if it is not able to give recognition to and protect the right to property. To this effect, the right to property and protection of this right must be incorporated as a cornerstone to a country's constitution. Currently, the Constitution only guarantees the right of the individual to protection from deprivation of property.

Recommendations

The Commission recommends that the right of the individual to property be included in the Constitution as a justiciable right.

3.2.2.21.2 Intestate Succession Act

Submissions

A large number of petitioners made submissions that the present system of sharing the deceased's estate should be reviewed to ensure that the interests of parents of the deceased are adequately addressed (547). These petitioners, who comprise mainly elderly people, argued that the 20% apportioned to parents is too small. They further argued that parents invest a lot in educating their sons and, therefore, should receive a substantial share of their estates upon death. They said that, in many instances, widows do not take care of the surviving children. They suggested that parents should receive between 40% and 50% of the estate of their deceased sons.

A few petitioners, however, felt that the Intestate Succession Act should be maintained (7).

Thirteen petitioners said that penalties under the Intestate Succession Act should be made stiffer (13).

Two petitioners suggested that the Constitution should oblige Parliament to review succession laws in order to ensure that they are gender sensitive and

that inheritance should be in accordance with the written law and not customary law (2).

Observations

The Commission wishes to observe that the issue of the Intestate Succession Act was highly subscribed to by petitioners.

Many of these petitioners complained about the 20% share of a deceased's estate that is allocated to parents of a deceased who has died intestate. These petitioners would like to see a larger portion being allocated to parents, and the majority demanded that parents get between 40% and 50% of the estate.

The Commission observes that disparities in percentage between parents, surviving spouse and children have been highlighted by the devastating effects of the HIV pandemic whereby younger people are dying much earlier than their parents. This has resulted in parents having nobody to fend for them. This pressure makes it necessary that there be a revision of the percentages to take care of the new demands.

The Act has some glaring inadequacies in the following respects:

- the term "child" is not defined in terms of age, and the definition includes a child born out of wedlock;

- whether or not a child born out of wedlock has also a right to residence in the matrimonial home and whether he or she can initiate proceedings for an order of sale and apportionment of proceeds of sale;

- what benefits an Administrator should have in an estate; and

- categories of beneficiaries do not reflect current socio-economic circumstances.

The Commission notes that the Intestate Succession Act was enacted to address problems of disposition of property that arose as a result of many Zambians dying without leaving Wills. The Commission further notes that the practice of executing Wills, if encouraged, would help resolve many of these problems.

Recommendations

The Commission recommends that the Intestate Succession Act should be urgently reviewed to take into account the new demands from parents. In particular, there should be:

- a more equitable formula of distribution of the estate between parents on the one hand, and children and the surviving spouse on the other;

- a definition of a child in terms of age and origin; what benefits an administrator should have in an estate; categories of beneficiaries; and

- a review of whether a child born out of wedlock who was not living in the matrimonial home has also a right to residence in the matrimonial home and whether he/she can initiate proceedings for an order of sale and apportionment of proceeds of sale.

The Commission also recommends that civic education measures should be put in place to encourage people to make wills.

3.2.2.21.3 Share of Matrimonial Property and Distribution of Estate

Submissions

Two organisations representing the Women's Movement made submissions that women should be entitled to a fair share of matrimonial property and

maintenance, taking into account the means and needs of the parties (2).

Observations

There were other petitioners who were concerned about the share of matrimonial property and maintenance of women, especially upon divorce or death of a spouse. They explained that, in such circumstances, women are normally deprived of a share of the matrimonial property.

The Commission observes that, at present, the Constitution does not offer protection to women in this situation. However, the Commission is aware of constitutions that have made provision for the protection of spouses in the event of death of a spouse or dissolution of marriage. For example, the Constitution of Ghana protects a spouse from deprivation of a reasonable provision out of the estate of a spouse, whether or not the spouse died having made a will. The same Constitution provides for an equal share of property acquired during marriage upon dissolution of that marriage.

The Commission considers this matter to be important since it has a bearing on the individual's rights to property and that it needs to be enshrined in the Constitution and made justiciable

Recommendations

The Commission recommends that the right to matrimonial property should be provided for explicitly in the Constitution, which should assert, unequivocally, that a spouse be entitled to an equitable apportionment taking into account all relevant factors such as:

- contribution of the spouse to the acquisition of the property during the subsistence of the marriage;

- ability of the spouse to maintain herself or himself; and

- responsibilities of spouses towards their children, if any.

3.2.3 Economic, Social and Cultural Rights

Submissions

3.2.3.1 Justiciability

A large number of petitioners made submissions in general terms that economic and social rights, such as the right to free education, health care, employment, shelter, food, clean environment, water and sanitation should be enshrined in the Constitution and be justiciable (404). Petitioners argued that including these rights in the Bill of Rights will oblige the Government to treat socio-economic development as a priority.

A large number of petitioners said that social security for vulnerable groups, such as the disabled and the aged, should be provided for in the Constitution (98).

3.2.3.2 Economic Empowerment

There was a submission that the Constitution should economically empower disadvantaged citizens such as women, persons with disabilities and children through affirmative action (1). One petitioner said that the mining policy should be reviewed in order to empower Zambians (1). Three others suggested that gemstone mining should be left in the hands of Zambians (3)

3.2.3.3 Right to Education

Many petitioners called for the right to education to be enshrined in the Constitution and that basic education should be compulsory and free (146). One submission from a group representing persons with disabilities called for the Government to provide free education for persons with disabilities (1) while another petitioner argued that the Government should be compelled to spend at least 25% of its annual budget on education (1).

Two petitioners said that all children with special needs and those living with disabilities should have the right to special education, treatment and care (2)

3.2.3.4 Access to Education

There was a submission that access to education should be provided equally in every province (1).

A few petitioners felt that the Government should open new universities and higher institutions of learning (15) whilst others suggested that a system of student loans should be introduced to finance higher education (4).

There were two submissions to the effect that the school calendar should be reviewed to ensure that children are at home during the cold season (2).

Two other petitioners said that missionary schools that were taken over by the Government should be handed back (2).

There was a submission to the effect that all subjects in schools should be taught in local languages (1).

There was also a submission that called for the reintroduction of a bursary scheme (1).

Four petitioners felt that education up to Grade 7 should be compulsory (4).

One petitioner said that every person should have the right to basic and further education which the State should make progressively available (1).

3.2.3.5 Educational Standards

One submission called for a more effective system of inspecting and monitoring schools in order to enhance performance and standards (1).

Three petitioners said that the number of subjects being taught in schools should be reduced by introducing specialisation early (3).

One petitioner called for out-of-school children to be given skills training for self-fulfillment (1).

One petitioner said that teachers should have practising licences in order to enhance professionalism (1).

Another petitioner called for the reintroduction of Grade 4 examinations (1).

3.2.3.6 School Curricula

Seven petitioners felt that the Constitution should be taught in schools (7).

One petitioner argued that Mathematics, Science and Technology be given priority in schools (1).

Two petitioners said that the school curriculum should be reviewed to include practical skills training (2).

3.2.3.7 Right to Education and Gender

Some petitioners said that the right to education for the girl child should be enshrined in the Constitution (5).

One petitioner said that there should be no gender discrimination when determining cut off point in schools (1).

Four petitioners felt that pregnant school girls should not go back to school after delivery (4). Others, on the other hand, said that such girls should have a right to go back to school (3).

3.2.3.8 Right to Health Care

Some petitioners called specifically for the right to health to be enshrined in the Constitution (37). A number of them added that medical care should be free.

A few petitioners said that free medical services should be availed to those above 50 years (10).

One petitioner said that the Government should ensure that all Zambians who cannot be treated locally are sent abroad for treatment (1).

Another petitioner suggested that more health centers should be built in rural areas in order for people to access health services (1).

A few petitioners felt that the law should be reviewed in order to authorise Clinical Officers to prescribe drugs, sign medical certificates and own private clinics (4).

Three petitioners said that health personnel should not go on strike (3).

There was a submission to the effect that traditional healers should be integrated in the Zambian health system (1).

Some petitioners argued that HIV/AIDS patients should be treated free of charge and ARVs be provided at no fee (6).

One petitioner suggested that resources meant for HIV/AIDS should be channelled through churches (1).

Four petitioners said that there should be heavy penalty for violators of public health laws (4).

3.2.3.9 Right to Employment

A number of petitioners expressed the view that the right to employment should be enshrined in the Constitution (20).

A few petitioners said that the Government should have an obligation to employ all the students it trains (16).

Another petitioner suggested that 51% of management positions in privatised companies should be held by local people (1).

3.2.3.10 Rights of Workers

3.2.3.10.1 Protection by the Constitution

A number of petitioners felt that workers' rights should be enshrined in the Constitution. This is to protect workers from exploitative and discriminatory tendencies in the labour market (33).

3.2.3.10.2 Employment and Labour Laws

A few petitioners wanted the Employment and Labour Laws to be reviewed in order to provide for better protection of workers (25). Two petitioners called for a review of the Investment Act in order to ensure good conditions of service for Zambian workers and to protect them from abuse by investors (2). Another petitioner said that every worker should have a right to fair and safe labour practices and standards. The petitioner further said that workers should be paid at least a living wage consistent with the poverty datum line (1).

3.2.3.10.3 Minimum Wage

Some petitioners called for the introduction of a minimum wage (12).

3.2.3.10.4 Poverty Datum Line

Two petitioners wanted a Poverty Datum Line to be determined (2).

3.2.3.10.5 Casual Workers

Two petitioners argued that people should not be employed as casual workers for more than one month (2).

3.2.3.10.6 Strikes

Two petitioners felt that strikes should be outlawed (2) while one petitioner felt that essential service employees such as medical doctors should not go on strike (1). Two other petitioners said that Police and other law enforcement officers should have a right to strike (2).

3.2.3.10.7 Right to form/belong to Trade Union

Two petitioners said that every person should have a right to form and join a trade union or

employees' associations of their choice, and that every trade union should have a right to engage in collective bargaining (2). However, one other petitioner said that the right of workers to belong to any trade union of their choice should be subject to a provision that the union is within the workers' industry (1).

3.2.3.10.8 Workers' Compensation Act

It was suggested by two petitioners that the Workers' Compensation Act should be reviewed to provide for better compensation packages (2).

3.2.3.10.9 Working Hours

Two petitioners called for the review of working hours for public service workers so that they too may participate in economic activities (2).

3.2.3.10.10 Maternity/Paternity Leave

One petitioner suggested that female workers should be entitled to fully paid maternity leave (1). Two others said that male employees should have a right to paternity leave (2).

One petitioner felt that all Government workers should be entitled to a medical allowance (1).

Some petitioners said that conditions of service for civil servants should be improved (9).

Observations

The Commission observes that a relatively large number of petitioners made submissions on the subject of economic, social and cultural rights. The majority of those who commented on the subject were concerned about the inability of most Zambians to access health care, education, employment, shelter, food and clean water.

The Commission also observes that while political and civil (first generation) rights have been enshrined in the Bill of Rights in all the Constitutions of the country starting with the 1964 Constitution, economic, social and cultural rights were

only included in the Chapter on Directive Principles of State Policy after the 1996 amendment to the Constitution.

The Mvunga and Mwanakatwe Commissions addressed this subject and appreciated the important role economic, social and cultural rights can play in the realisation of political and civil rights. However, the two Commissions felt that these rights could not be made justiciable because of the formidable constraints in their realisation. It is for this reason that under the current Constitution, economic, social and cultural rights are placed under the Chapter dealing with Directive Principles of State Policy and are non-justiciable. In the 1991 Constitution, before the 1996 amendment, some economic and social rights were reflected in the preamble to the Constitution.

The Commission is aware of the distinction that is normally drawn between the so-called negative rights (civil and political) which outline areas in which States are not allowed to interfere (for example freedom of expression, freedom of assembly and personal liberty) and so-called positive rights (economic, social and cultural), the rights that States are obliged to provide for citizens. Most of the negative rights provide for judicial intervention in the event of such rights being infringed. The positive rights, on the other hand, are positive obligations framed as goals or programmatic instructions to the State to take legislative and other measures to promote the realisation of these goals.

The Commission observes that those who adhere strictly to the distinction between negative and positive rights make an assumption that these rights are essentially different in nature. They also assume that positive rights are costly and that the State does not incur any economic consequences by refraining from taking actions that would otherwise infringe on the rights of individuals. The validity of this rigid distinction between positive and negative rights has, in recent years, been doubtful. Today, all categories of rights are considered to be equally necessary in ensuring dignity and peace for the individual. These rights are, in essence, indivisible and interdependent. For example, a right to education and literacy (social right) is necessary for the enjoyment of the freedom of expression (civil right). Similarly, the right to a clean environment (solidarity right) is necessary for the enjoyment of the right to health (social right) as well as the right to life (civil right). The positive rights therefore better protection.

While appreciating the reasoning of the two Commissions, it is the view of this Commission that financial constraints should not be a factor in determining whether these rights should be justiciable or not. Protection of any right has a cost, and the country should be prepared to spend resources in order to guarantee its citizens a minimum of economic, social and cultural rights. The fact that a country is poor does not constitute a legitimate excuse for it to avoid striving to ensure that its citizens enjoy economic, social and cultural rights such as the right to adequate food, education and health care.

The Commission further wishes to observe that the economic, social and cultural rights that a State Party to the International Covenant on Economic, Social and Cultural Rights (ICESCR) is required to progressively implement, as its resources permit, are spelt out in the Convention. These include:

- the right to work, which includes the right of everyone to the opportunity to earn a living by work which he/she chooses or accepts;

- the right to the enjoyment of just and favourable conditions of work which ensure fair wages, equal work for equal pay, safe and healthy working conditions, equal opportunity for promotion, rest, leisure and reasonable limitation of working hours and periodic holidays with pay as well as remunerations for public holidays;

- the right to belong to and form a trade union as well as the right of trade unions to function freely subject to limitations prescribed by law and which are necessary in a democratic society;

- the right to strike, provided that it is exercised in conformity with State laws;

- the right of everyone to social security, including social insurance;

- the right to an adequate standard of living for herself/himself and his family, including adequate food, clothing and housing;

- the right to the enjoyment of the highest attainable standard of physical and mental health;

- the right of everyone to education; and

- the right of everyone to take part in cultural life and enjoy the benefits of scientific progress.

Under Article 2 of this Convention, State Parties to the Convention undertake to take steps.

> *"individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realisation of the rights recognised in the present Covenant by all appropriate means, including particularly the adoption of legislative measures."*

Under paragraph 2 of this Article, States undertake to achieve the realisation of these rights without discrimination as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. However, developing countries may determine to what extent they would guarantee the economic rights to non-nationals.

The Commission concurs with petitioners regarding the importance of economic, social and cultural rights, in particular the right to economic empowerment, education, health care, safe and clean water, a clean and healthy environment, employment and favourable conditions of work, and the right to form or join a trade union, and consumer rights. These rights are essential for the development of the individual and the nation. They should therefore be reflected in the Bill of Rights so that the Government is obligated to ensure their progressive realisation. The Commission does not agree with the argument that financial constraints should be a factor in determining whether these rights should be justiciable or not. What is required to realise these rights is not necessarily an increase in the resources, but optimal utilisation of the resources.

The Commission also observes that there is now a trend worldwide, especially among countries that have ratified the ICESCR, to make these rights justiciable by placing them in their Bills of Rights. Examples of countries that have followed this trend are Uganda, South Africa and Ghana.

Recommendations

The Commission therefore recommends that:

- economic, social and cultural rights should be enshrined in the Bill of Rights and should be justiciable. In particular, the Constitution should provide for the right to:

    a) employment;

    b) enjoyment of just and favourable conditions of work which ensure fair wages, equal work for equal pay, safe and healthy working conditions, equal opportunity for promotion, rest, leisure and reasonable limitation of working hours and periodic holidays with pay as well as remunerations for public holidays;

    c) form or join a trade union of one's choice;

    e) free collective bargaining;

    f) withdraw labour in accordance with the law;

    g) health care services;

    h) sufficient food, safe and clean water;

    i) shelter;

    j) a clean and healthy environment;

    k) social security;

    l) education; and

    m) goods and services of appropriate quality and quantity, information necessary to gain full benefit from goods and services, the protection of health and safety, and compensation from defects that cause harm or injury.

The Commission further recommends that the Constitution should provide that the State must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.

The Commission also recommends that Parliament should enact or amend appropriate legislation relating to the minimum wage, the poverty datum line, the employment of casual workers, the right to strike, the right of workers to adequate compensation and reasonable working hours as well as the right to maternity/paternity leave, with a view to ensuring that they are in line with the provisions of the Constitution as recommended in this Report.

3.2.3.11 Marriage/Family

Submissions

Some petitioners wanted that the minimum age for marriage to be provided for in the Constitution. It was suggested that it be 21 years in order to give a girl child equal opportunity to development, in particular equal access to education (23). Two other petitioners said that the Constitution should provide for a unified system of marriage in Zambia based on written laws and that marriage should be based on free and full consent of the intending parties (2).

The two petitioners further argued that women and men should have equal enjoyment of the right to marry and equal rights in marriage and on dissolution of marriage (2).

Other petitioners said that marriage should only be between a man and a woman (58). A few among these added that homosexuality should be prohibited by the Constitution, while one petitioner supported homosexuality. Very few petitioners felt that polygamy should be outlawed (6) while one petitioner said that every Zambian should have a right to found a family (1).

There were some submissions that there should be a restriction on the number of children each couple can have (7). The suggested number was four.

Observations

The Commission observes that petitioners who made submissions on this issue were mainly concerned about early marriages and wanted to see the minimum age for marriage provided for in the Constitution. They were also concerned about the possibility of same sex marriages being contracted in the country. Further, two petitioners wanted equality of rights between parties to a marriage.

The Commission also observes that there is need to harmonise statutory and customary laws on marriage in order to provide for a uniform age of marriage, and equality of rights and obligations between parties to a marriage. This is because currently some customs allow for early marriages while statutory law considers carnal knowledge with a person under sixteen as defilement. The Commission, having recommended that the definition of a child should be persons below 18 years of age, accepts the view that the Constitution outlaw marriages below the age of eighteen years in order to give a child the opportunity to develop. Of particular importance in this regard is the need for children to be afforded the opportunity to attend and complete school.

Further, placing the minimum age of marriage at eighteen years is supported by medical evidence which indicates that girls who marry below that age risk their health because they are not mature enough to withstand the rigours associated with marriage responsibilities such as child bearing and upbringing.

The Commission further observes that constitutions of some African countries do specify the minimum age for marriage and outlaw same sex marriages. For example, the Constitution of Uganda specifies the minimum age for marriage as eighteen years. It also only recognises marriage as a union between man and woman.

Regarding the submission that polygamy should be outlawed, the Commission notes that such institutions can only be phased out through socio-cultural evolution. In any event, the abolition of polygamy would be contrary to freedoms of worship, conscience and recognition of customary law. The Commission also notes that there was another call for the Constitution to prohibit

homosexuality. The Commission is, however, satisfied that this conduct is already outlawed by the appropriate legislation.

Recommendations

The Commission therefore recommends that the Constitution should:

- provide that eighteen years be the minimum age for marriage; and

- define marriage as a union between man and woman freely contracted by both parties.

3.2.3.12 Right to Pension

Submissions

Some petitioners made submissions that the right to a pension and pension benefits should be guaranteed by the Constitution and be justiciable (48). They bemoaned the delays and non-payment of pension benefits, especially experienced by retired public service workers who have to travel to Lusaka just to spend sleepless nights at bus stops. They also expressed distress about some pensioners dying before getting their pension. They demanded interest on delayed pension payments. They also demanded that pensioners be maintained on the payroll until their benefits are paid. Many of them demanded that the Public Service Pension Fund Board be decentralised.

Observations

Although relatively few petitioners made submissions on this subject, the majority of them were concerned about the difficulties encountered by pensioners in accessing their pension benefits after retirement. They lamented that it took too long for retired persons to receive their pensions and by the time this happened, the real value of the pension would have been eroded through inflation. They therefore demanded that the right to a pension be guaranteed by the Constitution and be justiciable.

The petitioners also called for the Government to take appropriate measures to ensure that pensions are paid on time.

The Commission observes that currently the Constitution provides for pension laws and protection for Public Service employees only, especially those from the National Assembly of Zambia, and does not have any further provisions on the subject. However, the Commission agrees with petitioners that this is an issue of great concern to retired workers and needs to be addressed.

The Commission notes that constitutions of some countries such as Uganda do make provision for the payment of pensions to be prompt and regular; commensurate with rank, salary and length of service; as well as exempting such pensions from tax.

The Mwanakatwe Commission had recommended the protection of pensions in the Constitution by measures that would, among other things, ensure regular and prompt payment to pensioners; exemption of pensions from tax and a system of periodic review that would take into account levels of inflation.

Pensions are critical to the social economic development of the country in that a good portion of the population depends on savings and investments generated from this source. It is therefore crucial that pensions are protected from inflationary trends and high taxation. In view of this, the Commission agrees with the view that the Constitution provides for the protection of pensions. Further, the Commission has considered the subject in a broader perspective and has made appropriate recommendations.

Recommendations

The Commission therefore recommends that the Constitution should provide for:

- the right to a pension; and

- payment of reasonable pension and/or gratuity as is commensurate with a person's rank, salary and length of service.

The Commission further recommends that pensions and gratuity should be exempted from tax by relevant legislation.

The Commission also recommends that Parliament should, by legislation, provide for regulation of pensions and pension schemes and in particular:

- make provisions for persons over sixty years of age to receive welfare support;
- provide that all workers subscribe to pension schemes;
- provide for equitable representation of both employees and employers on pension boards or similar supervisory bodies of pension schemes; and
- provide for the prudent investment of pension funds.

3.2.4 Derogation Clauses

Submissions

A few petitioners argued that derogations from the Bill of Rights should be limited to the extent that such limitations are recognised by international human rights standards and are necessary and justifiable in an open and democratic society (10).

Two petitioners felt that derogation clauses in the Constitution should be repealed (2). This is to guarantee fundamental rights and freedoms without qualification.

Observations

Petitioners on this subject were concerned that derogations from fundamental rights and freedoms are so extensive that they virtually negate the rights and freedoms. Some of the petitioners called for limitations to rights and freedoms to conform to international human rights standards and to be permitted only to

the extent justifiable in an open and democratic society. Others wanted the rights and freedoms to be without qualifications.

The Commission observes that one of the major weaknesses of the current Bill of Rights is that there are too many limitation and derogation clauses to the guaranteed rights and freedoms. The Mwanakatwe Commission made a similar observation.

The Commission notes that the Bill of Rights is the cornerstone of democracy in any country and enshrines the rights of people as well as affirms democratic values.

The Commission is concerned that the current Constitution contains too many limitations and derogations to guaranteed rights and freedoms. It is of the view that such derogations have a tendency of reducing the value of the rights and freedoms that the Constitution seeks to protect. It agrees with petitioners that derogations from constitutional rights and freedoms should be limited to the extent recognised by international human rights instruments and justifiable in a democratic society. In the same vein, the Mwanakatwe Commission recommended that there should only be one derogation Clause to replace all current derogations. Specifically, the Commission recommended that the fundamental rights and freedoms may only be limited by law which does not negate the essential content of the right or freedom in question and makes provision which is reasonable and justifiable in an open and democratic society based on freedom and equality.

Constitutions of some countries take a two-pronged approach on this issue. Such constitutions would first specify the rights and freedoms to which no derogation is permitted, and secondly they would specify the extent to which the other rights and freedoms are protected. For example, the Constitution of South Africa does not allow derogations from the right to life and the right to human dignity.

The Constitution of Uganda prohibits derogations from freedom from torture, cruel, inhuman or degrading treatment or punishment; freedom from slavery or servitude; the right to fair hearing and the right to an order of Habeas Corpus. Both Constitutions have gone further to provide for general limitations on all other rights to the extent that these are justifiable in an open, free and democratic society. Limitations to specific rights and freedoms are minimal.

Having considered the views of petitioners and Bills of Rights in constitutions of other countries in relation to the Constitution of Zambia, the Commission is of the view that the Bill of Rights should contain only one general limitation Clause. This Clause should permit derogations from and limitations to fundamental rights and freedoms by law only in terms of general application to the extent that this is reasonable and justifiable in an open and democratic society.

Recommendations

The Commission therefore recommends that there should be one Clause of general application permitting derogations from and limitations to fundamental rights and freedoms by law which does not negate the essential content of the right or freedom in question and makes provision which is reasonable and justifiable in an open and democratic society based on freedom and equality:

- for securing to other persons enjoyment of the same rights and freedoms; or
- for imposing restrictions that are necessary in the interest of defence, public safety, public order, public morality or public health; and
- taking into account all relevant factors, including:
    a) the nature of the right;
    b) the importance of the purpose of the limitation;
    c) the nature and extent of the limitation;
    d) the relation between the limitation and its purpose; and
    e) less restrictive means to achieve the purpose.

3.2.5 Reference of Certain Matters to a Tribunal

Submissions

One petitioner said that any citizen or community that can demonstrate having been adversely affected by an Act of

Parliament, Bill or Statutory Instrument should have a right to seek reference of the same to a tribunal for determination (1).

Observations

The Commission observes that only one petitioner made a submission on this subject. This petitioner was concerned about the possibility of the law-making organs of Government enacting laws that infringe or have the effect of violating individual rights.

The Commission notes that although only one petitioner addressed this subject, the issue raised has an important bearing on the rights of individuals. The Commission agrees with the petitioner that certain laws in the form of Acts of Parliament or Statutory Instruments may infringe the rights and freedoms of the individual. However, indiscriminately allowing individuals to refer a Bill to a court or a tribunal for a determination on the question of likelihood of infringement of rights or its constitutionality would result in courts usurping legislative powers of Parliament. This would also result in undue interference with the legislative process. Therefore, individuals should only have the right to challenge the constitutionality of a Bill with the leave of the Constitutional Court.

The Commission observes that under the current Constitution, the Chief Justice is required to appoint a tribunal upon request by at least thirty members of the National Assembly to determine whether or not a Bill or Statutory Instrument would be or is inconsistent with the Constitution. The tribunal so appointed shall report to the President and Speaker of the National Assembly, stating what provisions of the Bill or Statutory Instrument were found to be inconsistent with the Constitution.

In addition, the Commission observes that a tribunal provided for under the current Constitution is required to make recommendations to the President and Speaker of the National Assembly. It is not clear what action the Speaker and President are expected to take after receiving the report. The Commission is of the view that this is not a satisfactory state of affairs because the President and Speaker may choose not to take any action and therefore the individual concerned may not receive any remedy. Reference of such Bills and Statutory Instruments to a court for determination of their constitutionality may provide a more effective remedy to the complainant.

The Commission is of the view that the National Assembly and, in the case of referral of a Bill that requires assent of the President, the President, should be vested with power to refer a Bill to the Constitutional Court for determination of its constitutionality. The essence of the referral is to assist the Legislature in determining the constitutionality of a Bill before it is enacted into law.

Recommendations

The Commission, therefore, recommends that where the National Assembly feels that a Bill or Statutory Instrument is likely to infringe on the rights of freedoms of the individual it can refer such a Bill or Statutory Instrument to the Constitutional Court for determination of its constitutionality on a resolution supported by at least 30 MPs.

The Commission also recommends that an individual should have the right to challenge the constitutionality of a Bill, with the leave of the Constitutional Court.

3.2.6 Interpretation of Bill of Rights/International Human Rights Instruments and Domestication of the Instruments

Submissions

Three petitioners were of the view that, in interpreting the Bill of Rights, regard should be given to principles found in international human rights instruments (3).

A few petitioners said that all international human rights instruments, particularly those on women's rights and children's rights, should be domesticated (5).

Observations

This issue, although addressed by only three petitioners, is a very important constitutional matter because it defines the relationship between international legal instruments and domestic law.

In Zambia, treaty-making competence follows the "dualist theory", which considers international treaties as forming part of a separate legal system as opposed to the domestic law. Under this theory, a treaty entered into by the State does not automatically become applicable in national or domestic courts. For such a treaty to be applicable, appropriate domestic legislation must be enacted incorporating the treaty in domestic laws. It follows therefore that

for international human rights instruments to be used as aids in the interpretation of the Bill of Rights, they have to first of all be domesticated. Once domesticated, they become part of the country's laws and can be used in the interpretation of all other laws, including the Bill of Rights.

The Commission observes that petitioners wanted to see a situation where treaties are implemented once they have been approved by Parliament and ratified.

Since legislative authority is exercised by Parliament, through enactment of laws, it is undesirable to have international instruments that should automatically have the force of law without being incorporated into domestic law through the legislative process. The Commission is therefore of the view that in order for international instruments to be of assistance in the interpretation of the Bill of Rights, they need to be domesticated by Parliament passing specific legislation incorporating them into domestic law.

Recommendations

The Commission recommends that unless they are incorporated into domestic law by appropriate legislation, all International Instruments to which Zambia is a State Party should continue to have no effect of law in Zambia.

CHAPTER 4

STATE OF EMERGENCY

Terms of Reference:

No. 3 Recommend appropriate ways and means of entrenching and protecting human rights, the rule of law and good governance in the Constitution;

No. 28 Examine and recommend on any subject-matter of a constitutional, political or economic nature which, in the Commission's view has relevance in the strengthening of parliamentary and multi-party democracy; and

No. 30 Examine and recommend on any matter that is connected with or incidental to the foregoing terms of reference.

4.1 Introduction

The state of emergency which existed in Zambia for twenty-seven years up to 1991, was declared by the last Governor of Northern Rhodesia, Sir Evelyn Hone, at the height of political tension just before independence to quell the Lenshina uprising in the northern part of Zambia. At independence and thereafter, the state of emergency continued to be in force under provisions of various constitutional enactments.

Article 29 (2) of the 1964 Constitution required that a declaration of a state of public emergency or threatened state of public emergency was to cease unless approved by the National Assembly within a period of 28 days. Such a declaration could be revoked by a National Assembly resolution supported by a majority of the members.

The Zambia Independence Order, 1964, which made provision for the 1964 Constitution, preserved the declaration of the state of emergency made by the Governor of Northern Rhodesia under Section 4 of the Preservation of Public Security Ordinance. By virtue of Section 7 of the Order, the declaration was deemed to have been in force from the commencement of the Order and approved by the National Assembly at the commencement of the Order.

By provision of the Constitution of Zambia Act No. 33 of 1969, which effected an amendment to the Constitution, the declaration of a state of emergency was deemed to have been approved by the National Assembly and accordingly preserved.

Section 15 (1) of the Constitution of Zambia Act No. 27 of 1973 further extended the state of emergency. It stated:

> *"Any declaration under section 29 of the existing Constitution in force immediately before the commencement of this Act shall continue in force and shall be deemed to be a declaration made under Article 30 of the Constitution and approved by a resolution of the National Assembly in terms of clause (2) thereof."*

Finally, section 15 of the Constitution of Zambia Act No. 1 of 1991 preserved a declaration of a state of emergency until the first sitting of the National Assembly under the 1991 Constitution.

Some of the findings of the 1991 Mvunga Commission were that it was the desire of the majority of the petitioners that a state of emergency should be confined to such periods and troubled areas as may be necessary, subject to parliamentary review, and that Parliament should not abdicate its residual constitutional powers by granting an indefinite extension of a state of emergency. It also found that the majority of the petitioners supported the creation of review tribunals, but felt that these tribunals should have powers to make binding decisions and to review detentions by the Executive within three months of such detentions and to make decisions that were binding on the detaining authorities.

The Commission made recommendations accordingly, which resulted in significant reduction in detention and emergency powers of the Executive in the 1991 Constitution. Under Articles 30 and 31 of the 1991 Constitution, a declaration of a state of public emergency or threatened state of public emergency ceases unless it is within seven days approved by a resolution of the National Assembly supported by a majority of all the members. Such a resolution shall continue in force until the expiration of three months or until earlier revoked, provided that in the case of a declaration of a state of emergency, the National Assembly may, by majority of all the members, extend the approval for periods not more than three months at a time. Further, Article 26 (1) (c) provides that decisions of tribunals established to review detentions be binding on the detaining authority. These provisions were not affected by the 1996 constitutional amendment.

In its report, the Mwanakatwe Commission observed that the experience of the Second Republic clearly showed that without effective checks and balances and without judicial supervision of emergency powers, it was possible to create a permanent state of emergency. Thus, among its recommendations were that:

- the President should continue to be the authority to declare a state of emergency;

- a two-thirds majority of members of the National Assembly would be required to ratify, endorse and extend further a state of emergency;

- the President's power to declare a state of emergency should be checked by obliging the President to give reasons for the state of emergency and that the courts should be competent to enquire into the validity of a declaration of a state of emergency; and

- there should be separate provisions for a state of emergency and a threatened state of emergency, but in both cases the safeguards should remain the same.

Current Constitutional Provisions

The Constitution permits the derogation from fundamental rights during times of war or when there is a declaration of a state of public emergency under Article 30.

Article 25 of the Constitution provides for the suspension of the following rights during a war or state of emergency:

- personal liberty;

- protection from deprivation of property;

- protection for privacy of home and other property;

- freedom of conscience;

- freedom of expression;

- freedom of assembly and association;

- freedom of movement;

- protection from discrimination; and

- protection of young persons from exploitation.

Whether or not these rights are suspended depends on the President, who has power to declare war or a state of emergency.

Under Article 29, the President may, in consultation with the Cabinet, declare war. A declaration of a state of war shall continue in force until cessation of hostilities. The President may make a declaration of public emergency at any time after consultation with the Cabinet and publication in the Gazette of a proclamation that a state of public emergency exits. Such a declaration shall cease to have effect after the expiry of seven days unless it is approved by a majority vote of the National Assembly. The approval by the National Assembly has the effect of extending the state of emergency for up to three months, after which the proclamation can be extended by a majority of the National Assembly for a further period not exceeding three months at a time.

South Africa has similar provisions with respect to the period for which a resolution approving a state of emergency remains in force or is extended. In the case of Ghana, a resolution of Parliament approving a declaration of a state of emergency ceases to be in force after three months unless renewed for periods of not more than one month at a time.

4.2 Submissions, Observations and Recommendations

Twenty-one submissions were received on this subject (21). The majority felt that a declaration of a state of emergency should only come into force after receiving the support of not less than two-thirds majority in the National Assembly.

Submissions

4.2.1 State of Emergency - Abuse

Three petitioners said that the provisions on state of emergency should be repealed (3). They were concerned about the likelihood of abuse of powers under these provisions. The petitioners argued, for example, that the Government could use state of emergency powers to suppress political opponents.

There was a submission that Article 30 of the Constitution should be amended to prevent a situation whereby an incumbent President could declare a state of emergency in order to cancel elections and avert defeat (1).

4.2.2 State of Emergency – Parliamentary Approval

Some petitioners argued that a declaration of state of emergency should only come into force after support by not less than a two-thirds majority vote by the National Assembly (12).

Three submissions called for the President to have power to declare a state of emergency for only seven days and that any extension should require a three-quarters majority vote in the National Assembly (3).

There was a submission that Article 30 on declarations relating to emergencies and threatened emergencies should revert to provisions of the 1964 Constitution (1). The Constitution provided, among other things, that such a declaration would cease to have effect on the expiration of 28 days unless approved by a resolution of the National Assembly and that such approval could, at any time, be revoked by the National Assembly resolution supported by a majority of all the members thereof.

One petitioner, however, argued that the current constitutional provisions regarding the state of emergency were adequate and should be maintained (1).

Observations

The Commission observes that petitioners on the subject of state of emergency were mainly concerned with the likelihood of its abuse. Some of them wanted the constitutional provisions on state of emergency to be repealed altogether whilst others called for these provisions to be amended to guard against possible abuse of emergency powers by the Executive. In particular, petitioners wanted a declaration of threatened state or state of emergency to require a resolution of the National Assembly supported by an absolute majority of all the members. The suggested majority was two-thirds for the purpose of approval and three-quarters for the purpose of extension of a declaration.

Under Article 25 of the Constitution, nothing done under the authority of any law shall be deemed to be in contravention of the Bill of Rights, provided it is shown that the measures in question were reasonably required to deal with a war or when there is a declaration of a state of public emergency under Article 30.

Under Article 29 the President may, in consultation with the Cabinet, declare war. A declaration of a state of war shall continue in force until cessation of hostilities. This declaration is not subject to approval by the National Assembly. However, by virtue of provisions of Article 25, the reasonableness of measures taken during this period that have the effect of taking away or suspending fundamental rights and freedoms can be inquired into by a court, although this is not explicitly provided for.

According to Articles 30 and 31, the President may declare a state of public emergency or threatened state of emergency, respectively, at any time after consultation with the Cabinet. Such a declaration shall cease to have effect after the expiry of seven days unless it is approved by a majority vote of the National Assembly. The approval by the National Assembly has the effect of extending

the state of emergency or threatened state of emergency for up to three months. A declaration of a state of emergency can be extended by a majority of the National Assembly for a further period not exceeding three months at a time. As in the case of measures taken during a period of war, courts implicitly have the jurisdiction to inquire into the reasonableness of the suspension or taking away of fundamental rights and freedoms. However, the reasonableness of the declaration itself cannot be questioned.

Constitutional provisions on the state of emergency are meant to enable the Executive deal with contingencies such as invasion of the country or civil strife. In cases of war or public emergency, the Executive wing of the Government may need to take urgent decisions to safeguard lives, property or other interests of the public. In such situations, it may be necessary for political and civil rights to be temporarily suspended or limited.

Petitioners felt that the Constitution should guarantee that the declaration of a state of emergency is not used arbitrarily to limit rights and freedoms of the individual guaranteed by the Constitution. In this regard, the Commission appreciates the historical background of abuse of emergency powers against which petitioners made calls for repeal or amendment of these provisions. The state of emergency was declared prior to independence and retained for a period of 27 years. Even under the democratic dispensation, in the Third Republic, there was a declaration of a state of emergency and the justification for this was questionable. These experiences show that it is possible to have a perpetual or unjustified state of emergency. Further, the Commission observes, from this country's experience, that a state of emergency can result in extreme human rights violations.

In the light of the foregoing considerations, the Commission wishes to state that, while it is necessary for the Constitution to make provision for emergency powers to deal with war situations and other emergencies, it is paramount that the rights and freedoms of the individual are protected from arbitrary curtailment by the Executive.

The Commission, in evaluating how the Constitution could guard against the abuse of emergency powers, reflected on the observations and recommendations of the Mwanakatwe Commission. This Commission concurs in particular with the observations of the Mwanakatwe Commission that the President is better placed to ascertain the existence of circumstances that necessitate the invocation of emergency powers. However, it is necessary to subject the exercise of these Executive powers to parliamentary and judicial checks and review.

The National Assembly, being the repository of the people's sovereign authority, should only approve or extend a declaration of state of emergency by an absolute majority of all the members. Although, according to current provisions of the Constitution, a declaration of a threatened state of emergency does not affect

rights and freedoms of the individual and cannot be extended beyond three months, it should be subjected to the same condition.

The courts should also have explicit jurisdiction to inquire into the validity of circumstances necessitating the declaration of a state of emergency or threatened state of emergency or measures taken thereunder.

With regard to war, the Commission wishes to state that the President, as the Commander-in-Chief of the Armed Forces, has the responsibility of ensuring the defence and security of the nation. The President is therefore privileged to know the circumstances that may lead to war or necessitate military response. However, it is important that the declaration of war or the taking of measures in response to external aggression should not be left to the exclusive jurisdiction of the President. These powers should be subject to approval or ratification by the National Assembly. In this regard, it is necessary to distinguish between a declaration of war and measures that the President may take in response to external aggression not amounting to war. Declaration of war can be anticipated because a situation leading to war takes time to evolve. Therefore, declaration of war should require prior approval by at least two-thirds of all the members, whilst measures in response to external aggression should require subsequent ratification by the National Assembly.

For comparative purposes, the Commission examined the provisions of the South African Constitution on emergency powers. The Constitution of South Africa does allow for derogations from rights and freedoms guaranteed in the Bill of Rights, but only if such derogation is strictly required by the emergency and is consistent with the country's obligations under international law. Courts may determine the validity of a declaration of a state of emergency, including measures taken thereunder.

Recommendations

The Commission recommends that the Constitution should provide that:

- the President may, in consultation with the Cabinet, declare war subject to prior approval by the National Assembly by not less than two-thirds of all the members;

- the President may take such measures as are necessary in response to external aggression, subject to ratification by the National Assembly within a period of seven days;

- a declaration of a state of emergency or threatened state of emergency shall require approval of the National Assembly within seven days by a resolution supported by not less than two-thirds of all the members;

- any extension of a State of Emergency shall require approval by the National Assembly by a resolution supported by not less than two-thirds of all the members; and

- the Constitutional Court shall have jurisdiction to decide the validity of a declaration of a state of emergency or threatened state of emergency, including the reasonableness thereof; and any extension of a declaration of state of emergency and any legislation enacted or other measures taken in consequence of such declaration.

CHAPTER 5

ENFORCEMENT MACHINERY OF HUMAN RIGHTS

Terms of Reference:

No. 2 Recommend a system of government that will ensure that Zambia is governed in a manner that will promote the democratic principles of regular and fair elections, transparency and accountability, and that will guard against the emergence of a dictatorial form of government; and

No. 3 Recommend appropriate ways and means of entrenching and protecting human rights, the rule of law and good governance in the Constitution.

5.1 Introduction

Human rights institutions are now recognised worldwide as important mechanisms for ensuring that human rights and freedoms embodied in the Constitution are realised. The Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil and Political Rights, to which Zambia has acceded, require member States to take measures which ensure that people's rights are protected through institutions that are specifically mandated to promote people's rights, advise the relevant authorities and provide effective remedies for violations of human rights.

The 1993 World Conference on Human Rights encouraged the establishment of national human rights institutions. The World Conference also reaffirmed the importance of the role played by national human rights institutions for the promotion of and protection of human rights. It also placed emphasis on the role played by these institutions, particularly in advising competent authorities, in remedying human rights violations, in disseminating human rights information and in educating the public about human rights.

Two fundamental characteristics of national human rights institutions are independence and impartiality, which are necessary in order for them to effectively monitor good governance and human rights. Other essential characteristics include broad representation and mandate. Principles relating to the status of national institutions for the promotion and protection of human rights adopted by the UN General Assembly under resolution 48/134 of 20 December

1993 state that national institutions shall be given as broad a mandate as possible which shall be clearly set forth in a constitution or legislative text, specifying its composition and its sphere of competence.

Current Constitutional Provisions

The Human Rights Commission (HRC) of Zambia was established by Article 125 of the Constitution which was introduced under the 1996 amendment to the Constitution. The institution was set up in 1997 as a permanent institution to monitor the observance of human rights in the country. Prior to its creation, the main method of redress of grievances arising out of abuse of human rights was through the courts of law. It is common knowledge that the judicial process has limitations. For example, courts cannot take the initiative of redressing human rights abuses. They have to be approached by those whose rights are infringed or about to be infringed. In any case, it is only the few who are knowledgeable and can afford the services of a lawyer who are in a position to seek the protection of the courts.

The Human Rights Commission was established as an autonomous institution to address these shortcomings. Its functions, powers, composition and procedures are provided for under the HRC Act (No. 39 of 1996).

The powers and functions of the Human Rights Commission are provided for in sections 9 and 10 of the Act. These are to:

- investigate human rights violations;
- investigate any maladministration of justice;
- propose effective measures to prevent human rights abuse;
- visit prisons and places of detention or related facilities with a view to assessing and inspecting conditions of the persons held in such places and make recommendations to redress existing problems;
- establish a continuing programme of research, education, information and rehabilitation of victims of human rights abuse to enhance the respect for and protection of human rights; and
- do all such things as are incidental or conducive to the attainment of the functions of the Commission.

The Human Rights Commission investigates complaints of abuse of human rights either on its own initiative or after receiving a complaint or allegation. On conclusion of investigations, the Commission has power to recommend the punishment of any officer found to have perpetrated abuse of human rights. It can

also recommend the release of a person from detention, payment of compensation to a victim of human rights abuse, that an aggrieved person seeks redress from a court of law and such other action as it considers necessary to remedy the infringement of a right.

The Human Rights Commission has a number of weaknesses, however. While Section 3 of the HRC Act provides that in the performance of its duties, the HRC shall not be subject to the direction or control of any person or authority, in practice, this is compromised in that the Commission operates as if it were an ordinary Government department. For instance, its budget is submitted to Parliament through the Executive.

In addition, the HRC does not have legal personality, hence it cannot own property, sue or be sued in its own name. This lack of legal capacity means that the institution has to depend on Government Ministries in respect of such matters. In countries such as Uganda, Australia, the Island of Fiji, New Zealand and the Kingdom of Nepal, legislation establishing national human rights institutions vest legal personality in such institutions.

While the HRC can investigate maladministration of justice, it lacks powers to issue coercive orders to remedy human rights violations and to prosecute.

The criteria for appointment and composition of Commissioners are not defined. Thus, it is not broadly representative of the various interest groups in society. Also, the HRC Act does not specify the qualifications of the Commissioners, apart from the Chairperson and Vice-Chairperson, who are required to be persons who have held or are qualified to hold high judicial office. This could result in the appointment of persons who are not conversant with human rights issues.

Further, provisions relating to the term of office of Commissioners are inadequate. The Act does not specify whether the Commissioners are full-time or part-time. It also does not limit the terms of office that a Commissioner may serve.

Besides the HRC, there are other public institutions which are mandated to protect and enforce human rights. These include the Police Public Complaints Authority (PPCA), the Judicial Complaints Committee (JCC) and the Victim Support Unit (VSU).

The Police Public Complaints Authority is established under Section 57 B of the Zambia Police Act through an amendment effected by Act No. 14 of 1999. Members of the Authority are appointed by the Minister responsible for Home Affairs. The Act prescribes the qualifications of the Chairperson and the term of office, which is renewable. Its functions are to investigate all complaints against Police actions and to submit its findings, recommendations and directions to the Director of Public Prosecutions for possible criminal prosecution; to the

Inspector-General of Police for disciplinary or other administrative action, or to the Anti-Corruption Commission or any other relevant authority. The directives of the Authority are binding.

The Judicial Complaints Committee is established under section 20 of the Judicial (Code of Conduct) Act, No. 13 of 1999 and consists of five members who have held or qualify to hold high judicial office. The members are appointed by the President, subject to ratification by the National Assembly. The President may remove a member on restricted specified grounds. The functions of the Committee are to receive and investigate any complaints of misconduct against any judicial officer; and submit its findings and recommendations to the appropriate authority for disciplinary or other administrative action and the DPP for consideration of possible criminal prosecution.

The Victim Support Unit is established at all Police Stations and posts under Section 53 of the Zambia Police Act, through an amendment to the Act effected by Act No.14 of 1999. Its functions are to provide professional counselling to victims of crime and offenders, and to protect citizens from various forms of abuse. The Unit is mandated to co-ordinate with civil society organisations and professional bodies in carrying out its duties.

The role of public human rights institutions that are involved in the promotion and protection of human rights is complemented by that of civil society organisations. These include the Young Women's Christian Association (YWCA), the Law Association of Zambia, the National Women's Legal Aid Clinic (NWLAC) and the Legal Resources Foundation (LRF).

In comparative terms, a number of countries in Africa have established human rights institutions. Some examples are the Uganda HRC, the Senegalese Human Rights Committee and the South African HRC.

In South Africa, the constitution makes provision for institutions supporting human rights and constitutional democracy such as the Public Protector, the Commission for the Promotion and Protection of the Cultural, Religious and Linguistic Communities, Commission for Gender Equality and Broadcasting Authority.

The Public Protector, who is appointed by the President upon recommendation of Parliament, is mandated by Parliament to investigate any misconduct in state affairs or public administration in any sphere of Government. The Public Protector is answerable to Parliament and can only be removed by a resolution of the National Assembly.

The Commission for Gender Equality is mandated to promote respect for equality and to protect, develop and attain gender equality. It is composed of members appointed by the President on recommendation of the National Assembly.

The Commission for the Promotion and Protection of the Cultural, Religious and Linguistic Communities is mandated to promote respect for the rights of cultural, religious and linguistic communities.

The Broadcasting Authority was established mainly to regulate and ensure that broadcasting promotes public interest, fairness and diversified views of all the South African people.

The Mwanakatwe Commission, in addressing this subject observed, among other things, that an effective HRC should be a check on the Executive. It should not appear to be unduly dependent on the Executive either in terms of administration or finance. The Commission therefore recommended that the Constitution should provide for the administrative and financial independence of the HRC and that it should perform its duties without direction or control of any person or authority.

5.2 Submissions, Observations and Recommendations

This subject received sixty (60) submissions. Most of the petitioners who made submissions on this subject called for the strengthening of the Commission and for it to be provided with powers to prosecute violations of human rights.

5.2.1 The Human Rights Commission

5.2.1.1 Establishment and Functions

Submissions

There was a group submission that the HRC should be established by the Constitution and not by an Act of Parliament (1). The HRC argued that its principal objectives should be set out in the Constitution and its mandate should be strengthened in order for the institution to be effective (1).

Observations

Petitioners who addressed the subject wanted to see the establishment, powers and functions of the HRC provided for in the Constitution. The rationale given by petitioners was that such a move would enhance the status of the Commission and strengthen respect for human rights. One petitioner wanted the mandate of the HRC strengthened.

The Commission observes that the HRC is established by the Constitution although its powers and functions are provided for in an Act of Parliament.

The Commission is of the view that providing the powers and functions of this Commission in the Constitution would enhance its status and also avoid the possibility of successive Governments amending the relevant legislation to suit their circumstances. The Commission therefore agrees with the HRC, which desired to see the core functions of the HRC spelt out in the Constitution. This Commission also agrees that the mandate of the HRC should be strengthened to include investigative, regulatory and monitoring powers. This Commission, however, wishes to observe that the power of the HRC to investigate any alleged maladministration of justice, as is currently provided for in the Act, seems to encompass decisions and actions of the Judiciary. This is an anomaly and therefore undesirable.

The Commission takes cognisance of the importance of international and regional human rights conventions, covenants and treaties in strengthening the rights and freedoms of the individual. These conventions also draw on a large and informative jurisprudence on the application of the rights.

This Commission, therefore, feels that monitoring of the Government's compliance with international treaty and convention obligations on human rights should be added to the core functions of the HRC to ensure that their ratification enjoy priority attention.

Recommendations

The Commission recommends that the HRC should continue to be established by the Constitution and that its core functions should also be spelt out in the Constitution.

The Commission further recommends that these functions should include to:

- investigate, at its own initiative or upon a complaint being made by any person or group of persons alleging any violation of any human right;

- establish a continuing programme of research, education, information dissemination and rehabilitation of victims of human rights abuse, to enhance the respect for and protection of human rights;

- recommend to Parliament effective measures to promote human rights, including provision of compensation to victims of violations of human rights or their families;

- promote community education and public awareness of the provisions of the Constitution as the fundamental law of the land and formulate and implement programmes intended to inculcate in the citizens awareness of their civic responsibilities and an appreciation of their rights;

- monitor the Government's compliance with international treaty and convention obligations on human rights; and

- visit jails, prisons and places of detention or related facilities with a view to assessing and inspecting conditions of the inmates and make recommendations.

5.2.1.2 Power to Prosecute/Jurisdiction

Some petitioners, including a group representing the civil society, made submissions that the HRC should be strengthened and given power to prosecute violators of human rights (18).

One group said that the jurisdiction of the HRC should be defined precisely in order for it to carry out its work, efficiently, and to avoid jurisdictional conflicts with other State institutions (1).

Two said that the HRC should help people seek redress for human rights violations (2).

Observations

Petitioners who made submissions on this subject were concerned that the HRC was not effective in addressing violations of human rights because it did not have power to prosecute violators of these rights.

The Commission observes that, under the current Constitution, any person alleging an infringement or likely infringement of her/his fundamental rights has a right to bring an action before the High Court. The right to bring an action for infringement of human rights and freedoms is therefore restricted to affected persons only.

The Commission observes that the HRC was created to investigate violations of human rights and any maladministration of justice, and to propose measures that would prevent abuses of such rights.

In this vein, the HRC is an administrative body with advisory authority and not a judicial or law making body. The HRC currently accomplishes its functions through opinions and recommendations or through consideration and resolution of complaints made by individuals or groups. However, the Commission lacks powers to issue coercive orders to remedy such violations and powers to prosecute.

The Mwanakatwe Commission, when dealing with this matter, expressed the view that it was important to extend the *locus standi* in issues of human rights to all legitimately interested parties. The Commission recommended the extension of the *locus standi* to associations acting in the interest of its members, a person acting on behalf of another, a person acting as a member or in the interest of a group or class of persons and persons acting in the public interest.

The Commission, while recognising that a national human rights institution such as the HRC cannot adequately substitute for a properly functioning court system, is aware that courts deal with all sorts of legal problems, including issues of human rights and may therefore not adequately address issues of human rights. The HRC, on the other hand, is focused on human rights issues and because it is the institution mandated to oversee human rights issues, has a legitimate right to prosecute violations of human rights. Human rights issues are not issues that affect individuals only, but are also matters of public interest. This being the case, there is need for a public institution to be responsible for prosecution of violations of human rights. Currently, in criminal matters, the office of the DPP protects the public interest by prosecuting criminal offenders. Similarly, the HRC should be mandated to prosecute violations of human rights.

The Commission further observes that giving the HRC powers to prosecute has the advantage of placing the process of prosecuting violations of human rights in the hands of persons specialised in this field instead of entrusting the responsibility to public prosecutors, who may lack the expertise.

The Commission notes that similar institutions in other countries are provided with quasi-judicial powers such as to summon persons to appear before them to question any person and require a person to disclose any information. For example, the Constitution of Uganda provides the Uganda HRC with powers of a court that include issuing summons or other orders, to question any person in respect of any subject matter under investigation, and to require

any person to disclose any information within their knowledge. At the conclusion of investigations, the Uganda HRC may make an order for the release of a person detained or restricted, for payment of compensation, or any other remedy or redress.

Recommendations

In the light of the above considerations, the Commission recommends that the Constitution vests the HRC with powers to prosecute cases of human rights violations, subject to the DPP's authority.

5.2.1.3 Appointment of Commissioners

Submissions

There was a submission that the civil society organisations, the Law Association of Zambia, church organisations and Chiefs should nominate Commissioners of the HRC in order for the composition to be broad based (1). One petitioner, on the other hand, suggested that a Parliamentary Select Committee should appoint Commissioners (1). There was also a submission that the HRC should report and be accountable to the National Assembly (1).

Observations

The Commission observes that very few petitioners made submissions on this subject. The thrust of these submissions was that petitioners wanted to see broad representation of the HRC through appointment of Commissioners from selected organisations. Two petitioners wanted Commissioners to be appointed by a Parliamentary Select Committee and the Commission to be accountable to the National Assembly.

Under the HRC Act, Commissioners are appointed by the President, subject to ratification by the National Assembly. The criteria for appointment are not defined, except for those of the Chairperson and Vice-Chairperson, who are required to be persons who have held or are qualified to hold high judicial office. Appointments to the Commission are not representative of various interest groups in society and persons conversant with the subject of human rights.

In the case of Uganda, the mode of appointment of Commissioners is stated in the Constitution. In addition, by contrast to the

provisions of the HRC Act of Zambia (which requires that Commissioners be appointed by the President, subject to parliamentary ratification) the Constitution of Uganda provides for the appointment of Commissioners by the President subject to approval by Parliament. The Constitution of Uganda goes further to provide for the qualification of the Chairperson as a High Court Judge or a person qualified to hold such office. However, as in Zambia, no qualifications are specified in relation to other Commissioners.

In the case of Ghana, the Constitution specifies the qualifications of the Commissioners. However, the Constitution gives unqualified power to the President to appoint Commissioners.

This Commission is of the view that the role of the HRC in safeguarding human rights is vital to democratic governance. Thus, it is important that the Human Rights Commission enjoys an independent and autonomous status. It is also important that the mode of appointment and qualifications of the Chairperson and Vice-Chairperson are enshrined in the Constitution. This Commission is also persuaded that, in view of the nature of its functions, the composition of the HRC should represent various interest groups, especially those concerned with the promotion and protection of human rights.

The Commission is of the view that Commissioners should be appointed by the President, subject to approval by the National Assembly. The Chairperson and Vice-Chairperson should be nominated by the Law Association of Zambia, except in the case of a serving Judge, who should be nominated by the Chief Justice. The rest of the Commissioners should be nominated by human rights organisations, as human rights is a matter of particular concern to the civil society.

The qualifications of the Chairperson and Vice-Chairperson should remain the same. The rest of the Commissioners should have qualifications and proven experience in human rights.

Judging by what seems to be the position in other countries, the Commission feels that the number of Commissioners should not exceed five.

This Commission is also in agreement with the submission that the Commission should be accountable to the National Assembly. The HRC should therefore report directly to the National Assembly.

Recommendations

The Commission recommends that provisions for the appointment of Commissioners to the HRC should be enshrined in the Constitution as follows:

- the Chairperson and Vice-Chairperson should be appointed by the President on the recommendation of the Judicial Service Commission, subject to ratification by the National Assembly;

- there shall be three other Commissioners to be appointed by the President and ratified by the National Assembly upon nomination by human rights organisations identified by the President;

- the Chairperson and Vice-Chairperson must be persons who are qualified to be appointed High Court Judge; and

- the rest of the Commissioners should have qualifications and proven experience in human rights.

5.2.1.4 Tenure

Submissions

Two petitioners argued that the HRC should have both full-time and part-time Commissioners (2). These petitioners were concerned that the Commissioners were not effective partly because they were all part-time.

Observations

The Commission notes that there were only two submissions on the subject of tenure of office of Commissioners. The two petitioners who addressed the subject were concerned that all the Commissioners in the HRC were part-time, arguing that this had a negative effect on the capacity of the institution to fulfill its mandate. The Commission observes that the HRC is charged with the onerous responsibility of ensuring that human rights are observed. This responsibility requires the undivided attention of all the Commissioners.

The Commission is of the view that the Constitution should provide that all the Commissioners to the HRC should be full-time

and serve a term of four years, subject to reappointment for one more term. Further, in order that Commissioners discharge their duties without undue influence, they should be accorded security of tenure similar to that of a Judge of the High Court. This is, for example, the case in Uganda.

Recommendations

The Commission recommends that the Constitution should provide that:

- all Commissioners on the HRC should be full-time and serve a term of four years, subject to reappointment for one more term; and

- a Commissioner shall be removed only on grounds of inability to discharge duties, whether arising from infirmity of body or mind, incompetence or misbehaviour.

5.2.1.5 Decentralisation

Submissions

Some petitioners suggested that the HRC should be decentralised to all provinces (20).

Observations

The Commission observes this call for decentralisation of the HRC's activities to all provinces. The rationale for this submission was that there was need for activities of this Commission to be brought closer to the people. In concurring with the petitioners, the Commission notes that the HRC has made efforts in this, regard though not countrywide.

Recommendations

The Commission recommends that administrative measures should be undertaken to decentralise activities of the HRC to provinces and, ultimately, to districts.

5.2.1.6 Capacity – Funding

Submissions

One group said that the Commission should be given adequate financial and human resources (1).

Observations

The group of petitioners who made this submission lamented that the HRC does not have adequate capacity to fulfill its mandate. This was attributed partly to its dependence on the Executive for funding.

The Commission observes that under the HRC Act, the funds of the HRC are appropriated by Parliament. In addition to this, the Commission is allowed to receive donations and grants, but subject to sanction by the President. The Commission is, however, aware that allocations to the HRC are subject to variation in terms of actual disbursement. In addition, disbursement is often not done on time. In order to remedy these problems, this Commission feels that expenditures of the HRC should be a charge on the Consolidated Fund of the Republic, creation of which is recommended in this Report. This is the case in Ghana and Uganda. On the issue of donations and grants, it is the view of the Commission that the HRC should be given greater autonomy, subject only to public interest.

Recommendations

The Commission, therefore, recommends that in order to enhance the effectiveness and financial autonomy of the HRC, the Constitution should provide that:

- the HRC should be self-accounting and its funds under the national budget should be adequate and allocated directly;
- once approved, its budget should be a charge on the Consolidated Fund of the Republic; and
- the HRC may receive donations and grants from sources other than the Government, subject only to public interest.

5.2.2 Human Rights Court

Submissions

Two petitioners said that a human rights Court should be established to adjudicate on human rights violations (2).

Observations

The Commission notes that the two petitioners who made submissions on this issue argued that a specialised court would help speed up the resolution of human rights disputes compared with the present practice, in which such cases are heard by ordinary courts.

Whilst the Commission sees the need for a specialised court to deal with human rights, the Commission feels that such a court should not deal only with human rights, but also other constitutional matters. The Commission has addressed this subject under the Chapter dealing with the Judiciary. The importance of the subject of violation of human rights makes it necessary that some of these cases should be referred to the Constitutional Court, which should have the necessary expertise in matters of human rights.

The Commission notes that both the Mvunga and Mwanakatwe Commissions received submissions that called for the creation of a constitutional court and that this court should have final jurisdiction on all human rights matters. The Mvunga Commission recommended the establishment of a constitutional court because this was strongly advocated by petitioners. The Mwanakatwe Commission made a similar recommendation, mainly because it felt that such a court might improve on the delivery system in as far as human rights issues were concerned.

Recommendations

The Commission therefore recommends that:

- there is no need for the establishment of a separate human rights court; and

- the Constitutional Court, recommended in this Report, should have jurisdiction over cases of human rights violations.

5.2.3 Commission for Gender Equality

Submissions

Four petitioners suggested that a Commission for Gender Equality should be established, whose functions would include the promotion of respect for and the protection of gender equality. There was a further submission that the proposed Commission should be represented in the Cabinet Office in place of the Gender in Development Division (4). These included group submissions from the women's movement.

Observations

Petitioners who made submissions on this issue called for the creation of a separate Commission charged with the responsibility of ensuring gender equality.

The Commission wishes to reiterate that gender equality is important to the achievement of sustainable human development. The Commission is therefore of the view that the subject of gender equality as a specialised area of human rights deserves the attention of a separate institution with expertise in gender. In this regard, the Commission notes that this is the trend in a number of countries. For example, South Africa and Sweden have Commissions that specifically oversee the observance of gender equality.

Recommendations

The Commission therefore recommends that the Constitution should establish a Commission for Gender Equality, whose objectives would be the protection, development and attainment of gender equality, and that the powers, functions and composition of the said Commission should be defined in an appropriate legislation.

5.2.4 Enforcement – Removal of Restrictions

Submissions

There was a submission that the limitation on the right to appeal against the determination of the High Court dismissing an application on the grounds that it is frivolous or vexatious should be removed. It was further suggested that an individual acting as an agent of the State in perpetrating the violation of the Bill of Rights should be personally accountable and punished (1).

The HRC proposed that restriction as to eligibility to seek redress against human rights violations should be removed or relaxed so that the following categories of persons qualify:

- any persons acting either in their own interest or on behalf of others who cannot act on their own behalf; and

- any person acting as a member or in the interest of a group of persons (1).

There was a further submission that the Constitution should allow public interest litigation in the area of human rights so that those that believe vital public interest is at stake should bring out an action even if they are, personally not affected. It was argued that the Constitution should allow associations to commence proceedings alleging human rights violations (1).

The Law Association of Zambia proposed that:

- contrary to the prevailing situation, a broad range of remedies should provided for in the enforcement of the Bill of Rights;

- there should be no limitation on the right of appeal against any determination of the High Court; and

- any person acting as an agent of the State, whether in an official capacity or otherwise should, if found in violation of the Bill of Rights, be personally accountable and liable to prosecution and punished if found guilty.

The Association further submitted that the law recognises the following as having *locus standi:*

- a person acting in his or her own interest;

- an association representing the interests of its members;

- persons acting on behalf of another person who is not in a position to seek such relief on his or her own behalf;

- a person acting as a member of a group or class of persons; or

- a person acting in the public interest.

Observations

The Commission observes that there was one petition that called for appeals in cases involving allegations of human rights violations not to be declined on the ground that they are frivolous and vexatious. Another petitioner was concerned that individuals acting as agents of the State who perpetrate violations of human rights are not held individually accountable for their actions or omissions. The petitioner was concerned that such individuals are shielded from responsibility by the veil of the State. This, the petitioner argued, encouraged individuals to perpetrate violations of human rights with impunity, since they did not face the possibility of individual sanctions.

The Commission notes the submission made by the LAZ calling for the extension of the *locus standi*, in cases of human rights violations, to include associations representing its members, persons acting in the public interest and persons acting on behalf of others.

On the issue of frivolous and vexatious appeals, the Commission does not agree with the rationale of this submission because if an appeal is frivolous and vexatious, it means it is without merit and should therefore not be entertained. Furthermore, this principle aims at bringing finality to litigations. However, under the Chapter dealing with the Judiciary, the Commission recommends that the Constitutional Court should have exclusive original and final jurisdiction in all constitutional cases, including human rights except parliamentary and local government election petitions, which the Commission recommends should be determined by *ad hoc* tribunals with final jurisdiction. Therefore, the question of appeal does not arise.

On the issue of individuals perpetrating violations of human rights, the Commission is of the view that unless individuals are made personally accountable for their actions and not allowed to hide behind the veil of the State or superior orders, respect for human rights would not be attained. The Commission wishes to observe also that violations of human rights are not perpetrated by abstract entities such as the State, but by individuals acting as agents of such entities and it is only by punishing the individuals that respect for these rights can be made possible.

The Commission concurs with the petitioner that one way of encouraging respect for human rights is to make individual agents of the State, both severally and jointly liable with the State and accountable for any violations of human rights.

The Commission also notes that the Mwanakatwe Commission, after considering submissions on this issue, recommended that individuals acting as agents of the State in perpetrating violations of human rights should also be punished. On the question of *locus standi*, the Mwanakatwe Commission recommended its extension to include persons acting in their own interest, associations acting on behalf of its members, a person acting on behalf of another who is not in a position to seek such redress, a person acting as a member of an interest group or class of persons, and persons acting in the public interest.

In terms of comparison, the Commission also notes that constitutions of other countries provide for broad *locus standi* that allows for persons other than those directly affected to bring actions for violations of human rights. The Constitution of Uganda, for example, permits any person or organisation to bring an action against the violation of another person's or group's human rights. India can also be cited as a unique jurisdiction that has expanded the scope of public interest litigation.

Recommendations

Bearing in mind the above observations, the Commission recommends that the Constitution:

- should make provision for any person to bring an action, in a representative capacity, on behalf of any victim of violations of human rights who is unable to bring an action on her or his own;

- permit class or group action in cases of violation of human rights in addition to the right of persons directly affected by violations of human rights to bring up actions;

- provide for public interest litigation in matters involving violation of human rights; and

- provide that any person acting as an agent of the State, whether in an official capacity or personal capacity, shall, if found in violation of the Bill of Rights, be personally accountable and liable without prejudice to the liability of the State.

CHAPTER 6

DIRECTIVE PRINCIPLES OF STATE POLICY AND DUTIES OF A CITIZEN

Terms of Reference:

No. 3 Recommend appropriate ways and means of entrenching and Protecting Human Rights, the rule of law and good governance in the Constitution; and

No. 30 Examine and recommend on any matter which is connected with or incidental to the foregoing terms for Reference.

6.1 Introduction

The Universal Declaration on Human Rights of 1948 provides for economic, social and cultural rights as an aspiration for all States. The 1966 International Covenant on Economic, Social and Cultural Rights makes these rights legally binding on State Parties, but allows a programmatic implementation. Thus, Article 2 of the Covenant provides that States should, through international cooperation and subject to the maximum attainable under available resources, achieve progressively the full realisation of the rights. Further, developing countries may determine to what extent they can guarantee economic rights to non-nationals having regard to their economies.

While the first generation (i.e. political and civil) rights generally seek to restrain a government from undue interference with an individual's liberties, economic, social and cultural rights call for definitive action and expenditure of resources for them to be realised. These rights give substance to the first generation rights which, in many instances, cannot be realised without the attainment of the latter.

In its findings and recommendations, the Mvunga Commission stated that there was considerable support for the inclusion of Directive Principles of State Policy in the Constitution in order to serve as a non-justiciable reminder to the Government of its socio-economic obligations to the people.

The Mwanakatwe Commission, in dealing with this issue, distinguished political and civil rights, which were justiciable, and social, economic and cultural rights,

which were non-justiciable. In recommending that the latter rights be non-justiciable, the Commission emphasised the Government's lack of capacity to provide the many services which are necessary for the realisation of these rights. It therefore recommended that the Constitution should devote a chapter to Directive Principles of State Policy. These principles, though non-justiciable, would serve as a reminder to the State of identified goals.

Current Constitutional Provisions

The current Constitution includes a chapter on Directive Principles of State Policy relating to economic, social and cultural rights. These principles are not justiciable, but are supposed to guide the Executive in the development and implementation of national policies, the Legislature in the enactment of laws and the Judiciary in the application of the Constitution and other laws.

Article 111 provides that these principles are not justiciable and therefore are not, by themselves, legally enforceable in courts of law and administrative tribunals. The Directive Principles of State Policy are provided for in Article 112 and include a number of principles on which many petitioners made submissions. Under this provision, the State undertakes, amongst other things, to provide clean water, adequate medical and health facilities, decent shelter, equal and adequate educational opportunities and social benefits to persons with disabilities, the aged and other disadvantaged persons.

Other countries have opted for a deliberate approach by including these rights in their Bills of Rights and thereby obligating their governments to take reasonable steps within their available resources to achieve a progressive realisation of these rights. For example, Section 27 of the Constitution of the Republic of South Africa, in guaranteeing the right to health care, food, water and social security states that:

> *"1) Everyone has the right to have access to –*
>
> *a) Health care services, including reproductive health care;*
>
> *b) Sufficient food and water; and*
>
> *c) Social security, including, if they are unable to support themselves and their dependants, appropriate social assistance.*
>
> *2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.*

3) No one may be refused emergency medical treatment."

Another example is the Constitution of Ghana which provides in Articles 24 to 27 the following socio-economic and cultural rights:

- workers' rights to a safe and healthy work environment, equal pay for equal work, rest, leisure, reasonable hours of work and to form or join a trade union of their choice;
- the right to equal education opportunities, including free and compulsory basic education and the development of a system of schools with adequate facilities at all levels;
- the right to enjoy, practise, profess, maintain and promote any culture, language, tradition or religion;
- the prohibition of dehumanising customary practices;
- the right of women to be paid maternity leave before and after childbirth; and
- the right of women to equal training and promotional opportunities.

6.2 Submissions, Observations and Recommendations

Two hundred and twenty-eight (228) submissions were received on this subject. Most of those who petitioned the Commission on this issue were not satisfied with the Directive Principles of State Policy which, in effect, are meant to serve as reminders to the Government of its long-term obligations in guaranteeing economic, social and cultural rights. These petitioners preferred constitutional provisions that would transform these into justiciable rights. After all, these rights are at the core of peoples' everyday lives and are inseparable from civil and political rights guaranteed in the Bill of Rights.

Submissions

6.2.1 Government's Obligation to Promote Development

A large number of petitioners argued that the Constitution should direct the Government to pursue policies that promote national development for the benefit of all the citizens (46). In particular, a large number of petitioners called on the Government to pursue policies that promote agriculture (123).

One petitioner suggested that the Constitution should clearly provide that Zambia should pursue policies aimed at achieving a liberal free market economy (1).

6.2.2 Equitable Distribution of National Wealth

A number of petitioners called for constitution that would guarantee equitable distribution of the national wealth to all provinces. These petitioners felt that currently not all provinces had a fair share of the "national cake" (38).

6.2.3 Gender Equality

Two petitioners said that the application of the Directive Principles of State Policy should take into account the special interests of women and should not be administered in a gender-blind manner (2).

The two organisations further suggested that all Directive Principles of State Policy should mainstream gender equality as a fundamental guiding principle of all aspects of life (2).

6.2.4 Prohibition of Corruption

Some petitioners called for the Constitution to prohibit corruption and all forms of discrimination, including nepotism or tribalism in Government (15).

6.2.5 Directive Principles – Review

There was a submission that Directive Principles of State Policy should be reviewed in order to include matters of the environment, foreign policy, culture and national ethics (1).

Observations

Petitioners who addressed the subject of Directive Principles of State Policy made a variety of submissions on issues that should be included in the Chapter of the Constitution dealing with the subject.

The majority of these petitioners favoured the inclusion of a provision directing the Government to promote development in general and agricultural development, in particular. Others favoured the inclusion of a provision that would direct the State to ensure that national resources are distributed fairly among all the provinces. Another group of petitioners favoured the inclusion of a provision requiring the State to ensure that corruption, nepotism and tribalism in Government were eliminated. Yet others wanted the application of Directive

Principles of State Policy to be gender-neutral and to be applied in a gender sensitive manner.

The Commission observes that Directive Principles of State Policy are included in constitutions merely to serve as non-justiciable reminders to governments of their social and economic responsibilities to their people.

The Commission observes that the people of Zambia face numerous socio-economic challenges that must constantly be brought to the attention of those in the Government. The Commission feels that placing these challenges under Directive Principles of State Policy would act as a guide to the Government on policies that it should pursue in order to meet national aspirations.

The Commission notes that both the Mvunga and Mwanakatwe Commissions made recommendations on this subject. The Mvunga Commission found that there was considerable support among petitioners for the inclusion of these principles in the body of the Constitution. It therefore recommended the inclusion of directive principles in the Constitution, but said that they should not be justiciable. The Government, however, rejected the Mvunga Commission recommendation and instead placed these principles in the preamble to the Constitution. The Mwanakatwe Commission, after reviewing the trend in other modern constitutions, concluded that confining these principles to the preamble was unsatisfactory and therefore recommended that the Constitution devote a Chapter to these principles. The Mwanakatwe Commission further recommended that these principles should include national unity and integration, political policy, economic policy, social policy, cultural policy, environmental policy and land policy. This Commission agrees with the recommendation that these principles should be reflected in the Directive Principles of State Policy.

The Commission is persuaded by the argument advanced by the Mwanakatwe Commission on the desirability of these principles being placed in a separate Chapter in the body of the Constitution. However, the Commission is of the view that, for the Chapter on Directive Principles of State Policy to have any meaning, it is necessary for the Constitution to obligate the Executive to report to Parliament periodically on steps that it has taken to ensure the realisation of the policy objectives.

Directive Principles of State Policy in the current Constitution include economic, social and cultural rights. However, this Commission has recommended that these be enshrined in the Bill of Rights because of their importance to the welfare of the people and to sustainable development of the country. In this regard, the Commission feels that at the present stage of the country's development, there is need to sever economic, social and cultural rights from Directive Principles of State Policy. The former should be enshrined in the Bill of Rights whilst the latter should comprise broad policy directives. The Commission is therefore of the view that the Constitution should continue to devote a Chapter to Directive Principles

of State Policy, but that this Chapter should only provide policy objectives that the State should pursue and duties of the citizen.

It is the view of the Commission that these policy objectives should include some of those proposed by petitioners, namely policy objectives that promote political, economic, social and cultural development for the benefit of all citizens, equitable distribution of national wealth to all parts of the country, eradication of corruption and similar vices, sustainable environment, foreign relations in the national interest and observance of gender equality.

Recommendations

The Commission therefore recommends that the scope of the Chapter in the Constitution on Directive Principles of State Policy and Duties of the Citizen should include non-justiciable policy objectives of the State and duties of a citizen as follows:

Political Objectives

- the motto of Zambia shall be "One Zambia, One Nation";

- the State and citizens of Zambia shall at all times defend the independence, sovereignty and territorial integrity of Zambia;

- the State shall provide a peaceful, secure and stable political environment which is necessary for economic development;

- all organs of State and citizens of Zambia shall work towards the promotion of national unity, peace and stability;

- the State shall be based on democratic principles which empower and encourage the active participation of all citizens at all levels in their own governance;

- every effort shall be made to integrate all the peoples of Zambia while at the same time recognizing the existence of their ethnic, religious, ideological, political and cultural diversity;

- all political and civic associations aspiring to manage and direct public affairs shall retain their autonomy in pursuit of their declared objectives and conform to principles of democracy, transparency and accountability in their internal organisations and practice;

- everything shall be done to promote a culture of co-operation, understanding, appreciation, tolerance and respect for each other's customs, traditions and beliefs;

- the State and citizens of Zambia shall endeavour to build a strong socio-economic and political order to avoid undue dependence on other countries and foreign institutions;

- the State shall guarantee and respect institutions which are charged by the State with responsibility for protecting and promoting human rights by providing them with adequate resources to function effectively;

- the State shall ensure gender balance and fair representation of disadvantaged groups, including the youth and persons with disabilities, in all constitutional offices and other public institutions;

- the State shall give the highest priority to the enactment of legislation establishing measures that protect and enhance the right of the people to equal opportunities in development;

- the State shall make reasonable provision for the welfare and maintenance of the aged;

- the State shall protect the doctrine of separation of powers by ensuring that the Constitution provides for balanced distribution of power and infusion of checks and balances in the exercise of these powers between all the organs of the State; and

- the State shall take all necessary measures to support the distribution of powers and functions as well as checks and balances provided for in the Constitution among various organs and institutions of government, including through the provision of adequate resources for their effective functioning at all levels.

Socio-economic Objectives

- the State shall endeavour to fulfill the fundamental rights of all Zambians to social justice and economic development;

- the State shall pursue policies that stimulate agricultural, industrial, technological and scientific development by adopting appropriate policies and the enactment of enabling legislation;

- the State shall take all necessary steps to involve the people in the formulation and implementation of development plans and programmes which affect them;

- the State shall endeavour to create an economic environment which shall encourage individual initiative and self-reliance among the people and promote private investment;

- the State shall be guided by the principle of devolution of governmental powers, functions and resources to the people at appropriate levels where they can best manage and direct their own affairs;

- the State shall endeavour to create conditions under which all citizens shall be able to secure adequate means of livelihood and opportunity to obtain employment;

- the State shall endeavour to provide clean and safe water, adequate medical and health facilities and decent shelter for all persons and to take measures to constantly improve such facilities and amenities;

- the State shall recognise the significant role that women play in society;

- the State shall endeavour to provide to persons with disabilities, the aged and other disadvantaged persons such social benefits and amenities as are suitable to their needs and are just and equitable;

- society and the State shall recognise the right of persons with disabilities to respect and human dignity;

- the State shall promote recreation and sports for its people;

- the State shall strive to eradicate illiteracy, poverty, disease, corruption, nepotism, tribalism and other vices;

- the State shall promote free and compulsory basic education;

- the State shall take appropriate measures to afford every citizen equal and adequate opportunities to attain the highest educational standard possible;

- the State shall recognise the right of every person to fair labour and employment practices and safe and healthy working conditions;

- the family is the natural and basic unit of society and is entitled to protection by society and the State;

- the State shall pursue policies that encourage food security;

- the State shall institute adequate measures for disaster preparedness and management;

- the State shall take necessary measures to bring about balanced development of the different areas of Zambia and between rural and urban areas; and

- the State shall devise land policies which recognise ultimate ownership of the land by the people.

Defence and Security Objectives

- the State shall endeavour to create enabling conditions for maintenance of the territorial integrity;

- the State shall undertake to create administrative consultative and advisory structures to meet the requirements of co-ordinated defence and security strategies;

- the State shall promote the maintenance of military traditions, customs and values of the Officer Corps of the Defence Force, such as loyalty, courage and good conduct of a commissioned officer; and

- the State shall ensure that welfare and morale of personnel is adequately maintained and that they enjoy fundamental rights and freedoms as other citizens.

Cultural Objectives

- the State shall promote different cultures of the country, consistent with the Constitution, in particular fundamental rights and freedoms, human dignity and democracy;

- the State shall take such measures as may be practically possible to promote the use, development and preservation of all local languages and shall take appropriate measures to promote the development of sign language for the deaf and braille for the blind;

- the State and citizens shall endeavour to preserve, protect and, generally, promote the culture of preservation of public property and Zambia's heritage; and

- the State shall devise cultural policies that promote Zambian art and music.

Environmental Objectives

- the State shall promote sustainable development and the utilisation of national resources of Zambia in such a way as to safeguard the bio-diversity of the country and to meet the developmental and environmental needs of present and future generations;

- the State shall safeguard the ecological balance and protect natural resources, including land, water, wetlands, minerals, oil, fauna and flora on behalf of the people of Zambia;

- the State shall, in particular, take all possible measures to prevent or minimise damage or destruction to land, forests, air and water resources and other natural resources.

Foreign Policy Objectives

The State shall pursue a foreign policy based on the principles of national interest, respect for international law and treaty obligations, regional integration, settlement of international disputes by peaceful means, promotion of a just world economic order and opposition to all forms of domination, racism and other forms of oppression and exploitation.

Public Finance and Accountability

- the State shall strive to ensure that as far as possible funds for the national budget are derived from the country's own resources;

- the State shall pursue policies that promote transparency and accountability in the management of the affairs of the nation;

- all persons in public office shall be accountable to the people; and

- the State shall take all necessary measures to expose and eradicate corruption and abuse or misuse of power by persons holding public office.

Implementation of Policy Objectives

The President shall, once a year, report to the National Assembly the progress being made in the realisation of the set objectives.

Duties of a Citizen

The exercise and enjoyment of rights and freedoms entails corresponding duties and obligations on every citizen and therefore it should be the duty of every citizen to:

- respect and defend the Constitution, its ideals and institutions;
- be patriotic and loyal to Zambia and promote its developmental and good image, and render national service whenever this may be required;
- understand the provisions of the Constitution;
- protect and promote democracy and the rule of law and respect the dignity of other citizens and the rights and legitimate interests of others;
- register as a voter and vote in national and local government elections;
- contribute to the well-being of the community where that citizen lives, foster unity and live in harmony with others;
- contribute to the creation and promotion of a clean and healthy environment for sustainable development;
- pay tax and duties legally due and owing to the State promptly; and
- assist in the enforcement of the law at all times.

CHAPTER 7

DEMOCRATIC GOVERNANCE

Terms of Reference:

No. 2 Recommend a system of government that will ensure that Zambia is governed in a manner that will promote the democratic principles of regular and fair elections, transparency and accountability, and that will guard against the emergence of a dictatorial form of government;

No. 3 Recommend appropriate ways and means of entrenching and protecting human rights, the rule of law and good governance;

No. 5 Examine and recommend the elimination of provisions that are perceived to be discriminatory in the Constitution;

No. 10 Recommend a suitable electoral system to ensure fairness in the conduct of Presidential and Parliamentary elections as well as local government elections;

No. 15 Examine Constitutional provisions relating to the settlement of election disputes following Presidential and Parliamentary elections and recommend a method of ensuring expeditious and final disposal of election petitions;

No. 16 Examine and recommend to what extent issues of gender equality should be addressed in the Zambian Constitution; and

No. 17 Examine provisions of the Constitution, which impact on Press freedom and the freedom of speech.

7.1 Introduction

The concept of constitutionalism underpins governance in so far as it relates to the political, social and legal order. Constitutionalism demands that government should respect and operate in accordance with the Rule of Law. The will of the governed therefore becomes the basis for the authority of government.

Good governance is cardinal in upholding democracy because it entails empowerment of the people, transparency, accountability, human rights, respect for the Rule of Law, separation of powers and independence of the Judiciary. Generally, democratic governance cuts across issues such as elections, the fight against corruption, the independence of investigative bodies, the independence of the Judiciary, upholding the rule of law, accountability in the Public Service, institutional linkages, capacity building and participation of all the people in the decision-making process.

Democratic governance entails the doctrine of separation of powers amongst the three organs of the State, namely the Executive, the Legislature and the Judiciary. Effective separation of powers enhances good governance and also entails effective checks and balances amongst the three organs of Government. In practice, however, the doctrine is not rigidly applied in the sense that the functions cannot be completely separated, but there is, within the scheme, power sharing and division of functions.

Other essential characteristics of democratic governance are the conduct of regular, free and fair elections; and transparency and accountability. The electoral process is evidently the cornerstone of democratic governance. Free and fair elections at periodical intervals are particularly important, as they legitimise public authority. Elections are also an important factor in promoting public accountability by enabling the electorate to vote out of office elected officials who have not performed well in the management of public affairs.

For an election to be democratic, free and fair it must satisfy the following conditions:

- the entire adult population should have the right to vote for candidates of their choice;
- elections should take place regularly and within prescribed time limits;
- no-one should be denied the opportunity to form a party and to put up candidates;
- votes should be cast freely, and counted secretly, and reported honestly, and those who win should be installed in office until their terms expire; and
- campaigns should be conducted with fairness, under the Electoral Act.

Current Constitutional Provisions

The Constitution does not explicitly deal with the subject of democratic governance. However, principles of good governance, such as separation of powers and regular and free elections, are indirectly addressed under various parts of the Constitution such as the Executive, the Legislature and the Judiciary. In addition, there are a number of statutes that deal with the subject, in particular the electoral process.

Articles 34, 63 and 67 of the Constitution deal with matters relating to presidential and parliamentary elections, respectively, including parliamentary by-elections. Article 76 establishes an autonomous Electoral Commission to supervise registration of voters, conduct presidential and parliamentary elections and to review the boundaries of constituencies. The Article provides that an Act of Parliament shall provide for the composition and operations of the Electoral Commission appointed by the President.

The Electoral Commission Act No. 24 of 1996 provides for the composition, appointment, powers and functions of the Electoral Commission. Further, the Electoral Act, Cap. 13 and amendments thereto, Act No. 4 of 2001, and the Local Government Elections Act, Cap. 282 and the amendments thereto of 1997, constitute part of the electoral code. Supplementary to these is the Referendum Act, Cap. 14 of the Laws of Zambia, which provides for matters related to the manner in which a National Referendum shall be held and matters connected with or incidental thereto.

In its Report, the Mvunga Commission recommended that a fresh electoral regulatory regime should be enacted to enhance the conduct and supervision of elections in line with the new democratic dispensation. The Commission also recommended that the electoral system with respect to the determination of a winning candidate should be reviewed to tackle the problem of a simple majority winner who could, in fact, have received a minority of votes in relation to the total number of valid votes cast.

The Mwanakatwe Commission observed that it was the wish of the governed to see the observance and protection by the State of human rights, the concept of separation of powers, the institutionalisation of popular sovereignty, accountability and transparency, regular free and fair elections and the devolution of power.

7.2 Submissions, Observations and Recommendations

Nine thousand one hundred and twelve (9,112) submissions were received on this subject. Submissions focused on the principle of separation of powers and the electoral system.

7.2.1 Separation of Powers

Submissions

A number of petitioners believed that the doctrine of Separation of Powers should be enshrined in the Constitution (46), so as to achieve independence and autonomy for each of the three organs of the State, and to enhance checks and balances.

A submission from the National Assembly called for the Speaker and Chief Justice to be of equal rank, since both of them head the other two organs of Government (the Legislature and the Judiciary, respectively (1)).

Observations

The Commission notes that the majority of petitioners on this subject called for the doctrine of separation of powers to be enshrined in the Constitution so as to promote power sharing and checks and balances between the three organs of the State. The Commission observes that petitioners made this call out of fear, arising from past experience, that the Executive may, if left unchecked by the Constitution, monopolise power and dominate the other arms of the Government.

The Commission agrees with the petitioners that the principle of separation of powers is essential in ensuring equitable distribution of power and effective checks and balances among the three arms of the Government which, in turn, enhances good governance and accountability. The Constitution should reflect the doctrine of separation of powers through balanced distribution of power and infusion of checks and balances in the exercise of these powers between all the organs of the State. In addition, the Constitution should reflect this doctrine as a policy objective or directive principle of State policy.

The Commission also notes the submission from the National Assembly that there should be equality in rank between the Speaker and the Chief Justice. The Commission observes that if the parity sought is being parallel in status, this can only be achieved in terms of conditions of service. However, so far, there does not seem to be any significant disparities in the two offices to justify any reversal.

Recommendations

The Commission recommends that:

- the Constitution should reflect the doctrine of separation of powers by balanced distribution of power and infusion of checks and balances in the exercise of these powers between all the organs of the State and that the doctrine should be enshrined in the Constitution in the Chapter on Directive Principles of State Policy; and

- the existing State order of precedence as regards the Chief Justice and the Speaker be retained.

7.2.2 Electoral System

Submissions

A few petitioners wanted the Constitution to provide for a Mixed Member Representation (MMR) system of elections as opposed to the current system of First-Past-The-Post (FPTP) (7). The main reason advanced was that a mixed system would promote fair representation of political parties, women, minorities and interest groups. Some of the petitioners referred to the South African system in this regard.

On the other hand, some petitioners called for the retention of the First-Past-The-Post simple majority electoral system (20). They argued that this system of elections was simple and well known. Others called for the Constitution to provide for a quota system of participation and representation of political parties (7).

Observations

Although relatively few petitioners made submissions on the subject of the electoral system, the Commission deliberated on the subject at length in view of its importance to democratic governance. The Commission notes that the majority of petitioners preferred the retention of the First-Past-The-Post electoral system whilst others called for the Mixed Member Representation System also known as the Additional Member System (AMS). A few others wanted the quota system of representation.

The First-Past-the-Post System, which is also known as the Winner-Take-All system, is a system whereby candidates ordinarily stand in geographically delimited single member constituencies. After voting, the candidate with the highest number of votes cast is declared winner. There is no insistence on absolute majority.

The Proportional Representation (PR) system is one where predetermined seats are allocated in proportion to the votes cast for the political parties. In this instance, parties prepare party lists of candidates earmarked to take the seats.

The AMS or MMR is a combination of both the First-Past-the-Post and the Proportional Representation systems. In this instance, a percentage of designated seats, say half, in Parliament are competed for through the single member constituencies where winning is by a simple majority. The other seats are then allocated on the basis of proportional representation based on national proportionality. This arrangement, it is argued, eliminates the distortions of the FPTP system where a candidate with minority votes can win elections in a given constituency. The proportion of FPTP to PR system seats may differ. In Germany, for example, half of the Legislature is elected from single member constituencies with the other half holding seats on the basis of the PR system. Furthermore, only parties winning over 5% of the national vote or those with three constituency seats qualify for PR seats. The adoption of thresholds has the positive effect of limiting the allocation of PR seats to serious political parties. In this way, the weak political parties are automatically eliminated.

A Quota System is where special interest groups such as persons with disabilities are given a committed number of seats. The interest groups are then allowed to democratically elect their own candidates using their own electoral college. The college can, for instance, be either at district or provincial level, depending on the arrangement.

The Commission fully evaluated the submissions calling for retention of the FPTP, adoption of the MMR and the quota system of participation and representation in the National Assembly. The Commission wishes on the outset to discard the concept of a Quota System as it is incompatible with the principle of universal adult suffrage, cumbersome and difficult to manage.

The Commission acknowledges the value of elections as fundamental to the entire democratic process. The Commission also recognises that for elections to achieve their objective of having legitimate representation, it is necessary to have an electoral system that is understood by the electorate and that facilitates their meaningful participation in the electoral process. This is especially important for people in rural areas, most of whom are illiterate.

The Commission notes that Zambia has, since independence, followed the FPTP model where voters choose their candidates by placing a mark on

the ballot paper and the candidate with the highest number of voters is declared winner, regardless of whether or not such winning candidate has obtained a majority of the votes cast. The system is commonly found in most former British colonies and protectorates, and about one-third of countries in the world use this system.

One major disadvantage of the FPTP system is that the winning candidate does not necessarily obtain the majority of the votes cast. For instance, if in a constituency of 100 voters, 20 candidates contest elections and 18 of the candidates each obtains five votes, and two obtain four and six votes, respectively, the candidate with six votes or 6% of the voters would win the election. This means that a political party can have majority seats in Parliament without majority votes and so the members may not represent the majority of the people.

Further, as a winner-take-all system, the FPTP entails that all other parties are excluded from representation even though they may have received a considerable number of votes. The FPTP system also tends to lead to the exclusion of minority political parties and fails to facilitate representation of interests such as gender, labour and socially-disadvantaged groups. The system also results in the elimination of small or new parties that may, in fact, represent progressive interests that are not reflected in established or bigger parties. Thus, only those parties that are established are likely to thrive.

Further, the system encourages parties to concentrate in those constituencies which they consider "safe" in terms of assured support, with the result that there is a higher risk of emergence of regional or ethnic based parties. This could lead to a situation where political parties and the electorate disregard policy or ideological values. The quality of representation in the Legislature could also be undermined.

In addition, the fact that the system does not reward parties other than the one that wins an election in a constituency partly accounts for the high levels of inter-party violence, as well as other electoral vices such as bribery and vote rigging.

The Commission observes that under the current system, undue pressure is exerted on MPs as a result of misconceptions about their roles and duties as MPs. Many of the expectations of constituents are of a personal nature and beyond the means of MPs.

The Commission nevertheless found some merits in the FPTP system, especially that it is simple and straightforward and easy to understand. Further, it has so far presented no major problems to the electorate, which is guaranteed a free choice of candidates. The system allows the

electorate to choose between individual candidates rather than simply parties. It also facilitates the people to have a link with the Legislature through their MP. This way, people feel truly represented. It can also be argued that the system allows for a more stable government in that usually the party in power secures a clear majority in the Legislature and is therefore able to govern with minimal problems. The system lends itself to the emergence of a main opposition party in the Legislature that can present itself to the people as an alternative government. The system can also accommodate independent candidates which provides the electorate with a choice that is not based on partisan politics.

However, in the consideration of the Commission, the disadvantages of the FPTP system outweigh its merits. In recognition of the deficiencies of the system, the Mvunga Commission called on the Government to review the electoral system, noting that in this system, a candidate can be declared winner when, in fact, he/she has not received the majority of the total number of votes cast in the constituency.

As regards the PR system, the Commission is of the view that it has some advantages. It can enhance participatory democracy for the reason that parties are allocated seats on the basis of votes that they receive in relation to the aggregate total. Thus, the Legislature is more equitably representative. The system also makes it possible for representation in the Legislature to reflect minority parties and a diversity of interests such as gender, special skills and minority groups. An inclusive Legislature can enhance power sharing in governance and the consolidation of democracy. Exclusion of political parties and other interest groups from the Legislature can be a recipe for political instability in the country.

Further, the system necessitates the electorate to vote for parties and ideologies rather than for individuals per se. This means that political parties strive to persuade the electorate that they have viable development plans. Parties are also likely to present a competitive list of potential members of the Legislature that would attract support of the electorate. The system can also discourage the emergence of a strong sense of regionalism or ethnicity in politics. The Commission notes that the PR system would also forestall the problems of by-elections, to some extent, in that parties would be entitled to replace Members of Parliament who cross over to other parties.

One of the disadvantages of this system is that the people do not directly elect the Members of Parliament. It can therefore be argued that they do not represent popular sovereignty. In addition, this system of election of MPs weakens the link between the people and the Legislature. Further, by limiting the choices of the electorate to political parties, the system excludes independent candidates.

Also, the PR system creates potential for more parties and interest groups to be represented in the Legislature and therefore minimises the likelihood of one party having a majority of seats. This could lead to instability as Government business in the Legislature, such as the passing of Bills, may be frustrated. The system also tends to give too much power to political parties in that they determine the members to represent them. Furthermore, because seats tend to be spread among many political parties, there is a likelihood that a party in power may need the support of a minority party or parties in order to govern. Ultimately, a ruling party may be held to ransom by minority parties, whose ideologies might be extremist.

In its consideration of the subject, the Commission noted the recommendations of the Electoral Reform Technical Committee (ERTC), that Zambia should adopt MMR which combines the FPTP and the PR system, with 200 Members of Parliament excluding the Speaker. The Commission further notes the recommendation by the Electoral Reform Technical Committee on the specification of the PR seats consisting of 35 women, three persons living with disabilities and two youths aged 21 to 30. The proposal that the forty PR seats should replace the eight nominated seats was equally noted.

Having considered the advantages and disadvantages of the two systems, the Commission is persuaded that the advantages of the PR system outweigh its disadvantages. However, the Commission is also of the view that the advantages of FPTP cannot be overlooked altogether. As a balanced solution, the MMR system of elections can combine the benefits of both the FPTP and PR systems to achieve inclusiveness and direct representation. The Commission is mindful that changing to the PR system would be a radical measure and that it should therefore be introduced gradually. The MMR system should be introduced with a view to ultimately graduating to the PR system. For the same reasons, the MMR electoral system should be enshrined in the Constitution, but with an option of graduating it to a PR electoral system upon two-thirds majority parliamentary vote. The Commission takes cognisance of the ERTC recommendations on the MMR Electoral System and in principle, agrees with the recommendations but is of the view that a percentage formula would be more flexible and accommodating and in this respect, 40% of the total number of seats should be allocated to the PR System. However, the modalities of catering for interest and disadvantaged groups should be left to the political party list system. To enhance the efficacy of this party list system, appropriate legislation should be enacted to provide guidance and criteria on the compilation of the party list. The Commission also notes that the nature of the PR System excludes participation of independent candidates.

Recommendations

The Commission therefore recommends that:

- the MMR electoral system should be adopted for parliamentary and local government elections as a step towards graduating to the PR system with a provision for varying this by Parliament upon a two-thirds majority, and that this should be provided for in the Constitution and electoral laws;

- 40% of the total number of seats with voting rights should be allocated to the PR System. However, the modalities of catering for interest and disadvantaged groups should be left to the political party list system; and

- to enhance the efficacy of this party list system, appropriate legislation should be enacted to provide guidance and criteria on the compilation of the party list.

7.2.3 Electoral Commission

Submissions

7.2.3.1 Independence and Autonomy

A number of petitioners said that the Electoral Commission should be independent and autonomous (219).

7.2.3.2 Functions

Two petitioners suggested that the Constitution should provide for functions of the Electoral Commission (2). A number of petitioners felt that the Electoral Commission should have power to deal with all electoral malpractices and disputes (24).

7.2.3.3 Appointment and Composition

Some petitioners made submissions on various modes of appointment and composition of the Electoral Commission suggestions included that the Commission should be:

- elected by an independent body such as the Judicial Service Commission or be appointed by Parliament and not the President (182);

- reconstituted to reflect interests of different stakeholders such as churches, opposition political parties and civil society (46);

- appointed by the President, subject to ratification by Parliament (12); and

- appointed by the Chief Justice (5).

7.2.3.4 Enforcement of Legislation

There was a submission that various pieces of legislation relating to the conduct of elections should be harmonised in order to provide a clearer mandate for systematic and effective enforcement of electoral regulations (1). There was also a submission that an appropriate parliamentary committee should oversee the operations of the Elections Office (1).

7.2.3.5 Funding

One petitioner called for subventions in favour of the Electoral Commission to be made directly to the Electoral Commission and not through the Executive (1).

7.2.3.6 Decentralisation

A number of petitioners suggested that the Electoral Commission should be reorganised and decentralised (24).

Observations

On the outset, the Commission wishes to acknowledge the importance of the Electoral Commission of Zambia to democratic governance. The role of the Electoral Commission entails that it should be independent, autonomous and transparent. The Commission observes that voters, electoral candidates, political parties, civil society organisations, churches and the citizenry at large have persistently criticised the Electoral Commission for inefficient management of elections. In this regard, the Commission also takes note of the findings of the Supreme Court in the 2002 presidential election petition that there were flaws, incompetence and dereliction of duty in the conduct of the 2001 elections on the part of the Electoral Commission of Zambia.

The Commission has often been accused of not being impartial. Some have seen the Commission as lacking independence and autonomy, while others have alleged that it is subject to manipulation and control by the

President. Yet others have seen it as unable to stop electoral malpractices and punish offenders.

The deficiencies in the Electoral system are revealed in the rising numbers of petitions after every presidential and general election. For example, in the 2001 elections, apart from the presidential election petition, 41 parliamentary seats and two local government seats were challenged in court. During the same election, the Electoral Commission of Zambia was criticised and questioned over its impartiality and competence by both local and international observer groups.

Some of the weaknesses of the Electoral Commission of Zambia relate to its lack of proper administrative structures and trained staff at provincial and district levels. In terms of functions, the Electoral Commission of Zambia lacks the legal mandate to register and regulate the conduct of political parties, observers and monitors or even to enforce its own electoral code, as it has no tribunal of its own.

The Commission, in response to the concerns raised by petitioners, wishes to state that the Electoral Commission should be autonomous, self-accounting and independent of the Executive. Such independence and autonomy should be manifested in the nature and mode of establishing the organisation, the mode of appointments, security of tenure and funding. It is this Commission's view that the Electoral Commission should be established under the Constitution, which should also prescribe its core functions, its composition, mode of appointment of its members, qualifications and their term of office. In addition, the Constitution should accord the members security of tenure to ensure that they perform their duties with the utmost professionalism and impartiality.

Petitioners to the Mwanakatwe Commission also argued that there was need to detach completely the elections office from the Executive and suggested the establishment of an independent Electoral Commission established through the Constitution and not an Act of Parliament.

The Commission notes the desire of the majority of petitioners who addressed the subject of mode of appointment of members of the Electoral Commission that in order to guarantee its autonomy and independence, an independent body such as the National Assembly should appoint the members. The Commission is, however, of the view that the appointment of members of the Electoral Commission must be transparent, open and accessible to anyone who qualifies. In this regard, this Commission is of the view that recruitment and appointment of the Electoral Commissioners should be advertised in the press and that the interviews and selection of the candidates shall be conducted by panel of independent experts consisting of one member of the Supreme and Constitutional Court

appointed by the Chief Justice, a member of the Civil Service Commission, a member of the Judicial Service Commission, a representative from LAZ and the Ombudsman. In this process, the Public shall have the right to be present during interviews. However, the Commission holds the view that in maintaining the separation of powers between the three organs of the State, the role of the National Assembly as regards appointments to public office should in general be restricted to providing checks and balances through approval or ratification of appointments made by the Executive.

In terms of qualifications, the Chairperson and Vice-Chairperson should be persons qualified to be a High Court Judge. This is because the functions of the institution require such qualifications. Other members need not have qualifications in law, but should be of integrity and high moral standing. Regarding the number of members, the Commission examined the position in other African countries such as South Africa and is persuaded that seven Electoral Commissioners would be appropriate for Zambia. Members should serve a term of five years, but be limited to two terms only. In addition, members should serve on full time basis and be amenable to removal from office only on grounds of inability to discharge their duties on account of infirmity of body or mind, or for incompetence or misbehaviour.

As regards funding, this should be through direct parliamentary appropriation and, once approved, the allocation should be a charge on the Consolidated Funds of the Republic, and allocations should be adequate.

The Commission further notes that some petitioners wanted the composition of the Electoral Commission to be reconstituted in order to reflect interests of stakeholders such as political parties, churches and civil society. Similar sentiments were expressed to the Mvunga Commission, where petitioners called for the composition to include representatives of Government, the Church and freelance journalists. The Commission is of the view that the composition of the Electoral Commission should represent various stakeholders. However, this should exclude political parties in order to avoid partisan interests in the conduct of the electoral process.

The Commission equally notes the value of and agrees with the submission calling for the harmonisation of the legislation relating to the electoral processes in order to enhance the conduct and supervision of elections. In this regard, the system of enforcement, including the powers and roles of the Electoral Commission and other agents in dealing with electoral malpractices and disputes, should be clearly defined.

Further, the Commission agrees with the submission that the operations of the Electoral Commission should be decentralised in an effort to make it more efficient.

Recommendations

The Commission recommends that the Constitution should:

- establish an independent and autonomous electoral commission under which the Electoral Office should operate;

- state that the Chairperson and the Vice-Chairperson of the Independent Electoral Commission should be Zambian citizens qualified to be Judge of the High Court;

- provide for the recruitment and appointment of the Electoral Commissioners by advertisement and selection by a panel of independent experts consisting of one member of the Supreme and Constitutional Court appointed by the Chief Justice, a member of the Civil Service Commission, a member of the Judicial Service Commission, a representative from churches and the Ombudsman;

- provide for some of the core functions of the independent Electoral Commission which should include:

    a) registering and deregistering political parties and monitoring political parties to ensure that they comply with prescribed standards;

    b) delimitation of constituency boundaries;

    c) compiling, maintaining and revising the voters' register;

    d) organising, conducting and ensuring free and fair elections and referenda;

    e) conducting educational and public awareness programmes on elections and the electoral process;

    f) hearing and determining electoral complaints before and during polling;

    g) dealing with electoral malpractices;

    h) promoting co-operation and harmony between and among political parties;

i) ensuring observance of criteria in compiling party lists; and

j) reviewing and making recommendations, when necessary, for amendment or repeal and replacement of electoral laws and regulations.

- provide that other functions of the Electoral Commission may be prescribed in an Act of Parliament;

- provide that the Chairperson and the Vice-Chairperson of the Electoral Commission should be appointed by the President from three names recommended by the Judicial Service Commission for each position, subject to ratification by the National Assembly;

- state that members of the Electoral Commission should serve on full time basis for a term of five years, limited to two terms;

- provide that members of the independent Electoral Commission should be removed only for inability to perform their duties arising from infirmity of body or mind, or for incompetence, corruption or other misbehaviour; and

- state that parliamentary appropriations in favour of the independent Electoral Commission should be made directly and, once approved, should be a charge on the recommended Consolidated Fund of the Republic and should be adequate.

The Commission further recommends the Electoral Office should be decentralised to all provinces and districts.

The Commission further recommends that in order to enhance the conduct and supervision of elections, appropriate legislation should clearly spell out the system of enforcement, including the powers and functions of the Electoral Commission and other law enforcement agents in dealing with election malpractices and disputes.

7.2.4 Voting/Voting Age

Submissions

A large number of petitioners, including the Children of Zambia and the HRC, argued that the voting age should be reduced from 18 to 16 years (207). The main reason advanced was that this is the age at which people obtain National Registration Cards and that this is the age of maturity. On the other hand, a few petitioners said that the voting age should be retained

at 18 years (6). However, others (6) said that voting age should be increased to between 20 and 21 years.

Some petitioners thought that voting should be compulsory. Reasons included the need to promote civic duty and increase political participation (22).

There was a group submission from organisations representing persons with disabilities that there should be adequate voting provisions for persons with disabilities (1).

Observations

The Commission considered the submissions and arguments advanced by petitioners who called for the voting age to be reduced to sixteen years. The Commission is not persuaded that issuance of national registration cards at sixteen years of age implies that this is the age of maturity. On the contrary, the issuance of national registration cards is essentially for purposes of identity. As already recommended by the Commission in this Report under the Chapter dealing with human rights, anyone below the age of 18 should be regarded as a child.

It is important that children are given the opportunity to develop into adulthood free from all forms of pressure. Allowing children to vote at the age of 16 would open doors to schools being turned into grounds for political party activities. This would interfere with school programmes and have a negative impact on children, who would be vulnerable to political manipulation.

The Commission also observes that the minimum age for voting in many countries is 18 years.

On the submission calling for compulsory voting, the Commission, whilst noting that voting is a civic duty of every citizen, is however of the view that it would be undemocratic and a violation of rights and freedoms of the individual to compel citizens to vote. Further, it would be difficult to enforce observance of this civic duty.

Regarding voting facilities for persons with disabilities, the Commission agrees that these should be made available to the extent possible.

Recommendations

The Commission therefore recommends that:

- the minimum voting age of 18 years should be maintained;
- voting should not be compulsory, although the Constitution should guarantee and protect the right of every eligible citizen to vote and remove all impediments to voting;
- the duty of every citizen to register as a voter and to vote should be reflected in the Constitution in the Chapter on Directive Principles of State Policy and Duties of a Citizen; and
- electoral laws should provide that, to the extent possible, adequate voting facilities should be made for persons with disabilities.

7.2.5 Election Date

Submissions

An overwhelming number of petitioners, including the Electoral Commission of Zambia, made submissions that the date of presidential and parliamentary elections should be enshrined in the Constitution (1,380). Proposals included the months of September, October and November, as well as simply "not during the rainy season". The main reason advanced was that during the rainy season people are busy in the fields and some parts of the country are not accessible. Petitioners further argued that determination and announcement of the date of elections should not be manipulated to suit the ruling party to the disadvantage of other parties.

Some petitioners argued that the Electoral Commission should determine and announce the date of elections (45), whilst one petitioner suggested that the election date should be announced 90 days before elections (1). Two petitioners said that an independent body should announce the date of elections (2). Two others, however, called for the date of elections to be announced by Parliament (2) while another two said that the Chief Justice should announce the election date (2).

However, there were a number of petitioners who felt that the present practice of the President announcing the date of elections should continue (39)

Some petitioners proposed that days on which elections are conducted should be declared national holidays (89).

Another petitioner said that the Electoral Commission should have power to vary the dates of elections by not more than 14 days when there are prevailing conditions, such as natural disasters, which are not conducive for the conduct of elections (1).

Observations

The Commission notes the overwhelming number of submissions calling for the date of presidential and parliamentary elections to be enshrined in the Constitution. The Commission is in agreement with the submissions because such a provision would ensure proper and adequate planning and preparations for elections by all stakeholders, and stimulate the interest of the electorate in elections. As petitioners have argued, a predetermined date would ensure that democracy is not circumvented by allowing the ruling party to manipulate the election date to their advantage. In the same vein, this Commission does not favour the idea that the Electoral Commission or some other authority should determine the election date, as this could compromise electoral fairness.

Petitioners to the Mwanakatwe Commission also called for a constitutionally fixed date for the conduct of presidential elections along the model of the Constitution of the United States of America. These petitioners argued that the election of a President was a matter of great constitutional importance and should not be left to the discretion of the reigning Executive. Consequently, the Mwanakatwe Commission recommended that presidential elections should be held on the first Thursday of September after every five years.

However, whilst this Commission is convinced that the date of elections should be specified in the Constitution, the Electoral Commission should have the power to vary election dates within a fixed period due to unforeseen circumstances. There is also need for the dates of by-elections to be determined by the Electoral Commission, but this should be within a specified time frame, that is 90 days as, currently provided for in the Constitution. Further, with regard to the announcement of election dates, the Electoral Commission should have the mandate to do this as a matter of routine in the management of elections.

The Commission has also evaluated the proposal that elections should not be held during the rainy season, but on a specific date during the dry season. Again, this has been received favourably by this Commission, noting that such a move would enhance the level of participation in the elections. Declaring the dates for presidential and parliamentary elections national holidays would have the same advantage.

Recommendations

The Commission therefore recommends that the Constitution should provide that:

- presidential, parliamentary and local government elections should be held on the last Wednesday of September after every five years;

- the Electoral Commission should have power to vary the dates of elections by not more than 14 days when prevailing circumstances justify this;

- in the case of by-elections, the Electoral Commission of Zambia should determine the date of elections, but this should be within 90 days of the seat falling vacant; and

- the date for general elections should be declared a public holiday.

7.2.6 Period of Voting: Timing for Presidential, Parliamentary and Local Government Elections

7.2.6.1 Same Day/Separate Days

Submissions

A large number of petitioners called for the holding of presidential, parliamentary and local government elections on the same day (250). One of the reasons advanced was to reduce costs.

Other petitioners said that presidential elections should not take place on the same day as parliamentary and local government elections (50).

Others said that presidential and parliamentary elections should not be held at the same time as local government elections (37).

A few petitioners said that presidential and parliamentary Elections should take place on different days (15).

A few others felt that presidential, parliamentary and local government elections should not take place on the same day (9).

The main reason advanced by petitioners who wanted the elections to be held on separate days was that holding these

elections on the same day creates confusion and increases the risk of irregularities.

Observations

The Commission notes that there were various permutations of submissions on the question of whether presidential, parliamentary and local government elections should be held on the same or a different day.

The majority of petitioners preferred the three elections to be held on the same day. The main reason advanced was that it was expensive to hold separate elections and that this could lead to election fatigue and apathy. Furthermore, petitioners argued that if elected first, the President could influence the election of MPs and that generally the outcome of a presidential election could influence the outcome of parliamentary elections held subsequently.

The Commission also considered the arguments of those petitioners who wanted the elections to be held on separate days. Petitioners argued that holding more than one election at a time has potential for creating confusion and could lead to electoral inefficiencies and irregularities. For example, people who are not very conversant with the electoral process may not understand that they are expected to vote in more than one election at the same time. Others were of the view that presidential elections were of paramount importance and should therefore be accorded a separate date.

In evaluating petitioners' submissions, the Commission noted that the Mvunga Commission found no overwhelming evidence for or against the arrangement whereby the President's and Parliament's terms were coterminous. That Commission noted that the arrangement had not caused any problems to require departure and argued that this arrangement reduced expenses on elections. It thus recommended that the presidential term of office be coterminous with that of the National Assembly, implying a desire for holding presidential and parliamentary elections on the same date.

After a careful analysis of the two scenarios, the Commission is of the view that there are more advantages than disadvantages in holding all the three elections on the same day. In arriving at this, the Commission was particularly persuaded by the argument

that this would be cost-effective, especially considering the economic and financial constraints prevailing in the country.

Historically, presidential and parliamentary elections have been held on the same day and on occasions, presidential, parliamentary and local government elections have been conducted at the same time. From this experience, it can be said that the electorate is adequately conversant with the system of conducting more than one election at the same time.

However, the Commission acknowledges that there is need to strengthen the capacity of the Electoral Commission to enable it manage the three elections more efficiently.

Recommendations

The Commission recommends therefore that the Constitution should provide that presidential, parliamentary and local government elections should be held on the same day.

7.2.6.2 Duration of Voting

Submissions

A number of petitioners called for elections to be conducted over a period of two to three days (89). Others maintained that elections should be held in one day (58). Those who called for an extension of voting days argued that one day was not enough for all voters to cast their vote, especially in rural areas where people travel long distances to polling stations.

A few petitioners wanted voting hours to be increased (7).

There was a submission that the Electoral Commission should have power to determine the duration of elections (1).

Observations

The Commission notes that a number of petitioners wanted the duration of voting to be increased. Among these, the majority suggested that the period should be increased to two or three days whilst many others wanted elections to continue to be held in one day. Others simply wanted the voting hours to be increased.

Most petitioners who wanted the duration of voting to be increased spoke from past experience. They cited instances when some people failed to cast their vote due to time constraints and others when the voting period had to be extended.

The Commission appreciates the reasons advanced for the call and acknowledges that, judging from past experience, one day is not enough, especially in rural areas where people have to travel long distances to polling stations. However, due to economic considerations and the need to avoid suspicion and the possibility of rigging, the Commission feels that it is better to address the problem by improving the management of elections, and provision of more accessible polling stations.

Regarding calls for voting hours to be increased and the Electoral Commission to determine the duration of elections, it is this Commission's view that the Electoral Commission should not have power to determine the duration of elections as doing so would create uncertainty in the electoral process.

Recommendations

The Commission recommends that the electoral laws and regulations should provide that the duration of presidential, parliamentary and local government elections should be one day.

The Commission further recommends that necessary administrative measures should be taken to improve the management of elections and provision of accessible polling stations so as to enable voters to cast their votes within one day.

7.2.6.3 Voting and Election Results

Submissions

Some petitioners said that the period of voting, counting of votes and announcement of results should be clearly stated to avoid rigging of elections (46). They further said that election results should not be announced while voting is continuing in other parts of the country.

Observations

The Commission considered the petition that the period of voting and announcement of results should be clearly defined and

separated. Petitioners felt that in order to avoid influencing the voting patterns the announcement of results should be done after voting throughout the country has come to an end.

The Commission, however, feels that delaying the announcement of election results until voting in the whole country has ended could lead to unnecessary anxieties and suspicions about the accuracy and credibility of the election results.

The Commission observes that petitioners did not address the role of election monitors. However, on account of the importance of this subject, the Commission wishes to provide certain guidelines. In this regard, the Commission is indebted to the Electoral Reform Technical Committee, whose recommendations on this subject the Commission agrees with entirely. The Electoral Reform Technical Committee recommended that election results should be countersigned by election monitors and polling agents before they are sent to the Electoral Commission. However, the Commission notes that there are practical limitations in ensuring that election monitors and polling agents countersign the election results.

Recommendations

The Commission recommends therefore that the electoral laws should provide that:

- the votes cast shall be openly counted, tabulated and the results announced promptly by the presiding officer at the polling station; and

- the results from polling stations shall be openly and accurately collated and promptly announced by the Returning Officer.

7.2.7 Election Disputes/Petitions

7.2.7.1 Determination of Petitions – Limited Period

Submissions

A large number of petitioners called for election petitions to be determined within a limited period (431). These included group submissions. The period suggested ranged from one month to two years (for presidential petitions). The most popular period was three months.

7.2.7.2 Mode of Settlement of Petitions

Submissions

A large number of petitioners felt that election disputes, including petitions, should be determined by a special court or tribunal (273). A submission from the Judiciary called for the amendment of Article 41(2) to replace the full Bench of the Supreme Court with an Electoral Tribunal of an odd number of seven or nine members, presided over by the Chief Justice. The submission also called for the decision of the tribunal to be final and not subject to challenge in any court of law (1). The Law Association of Zambia suggested that a constitutional court should be established to, amongst other functions, deal with electoral disputes. A few petitioners said that ordinary courts should deal with these cases (6).

On the other hand, one petitioner argued that presidential election petitions should be heard by the High Court in the first instance and that the Supreme Court should only hear appeals (1).

Observations

The Commission notes that on the subject of determination of election disputes, the majority of petitioners called for election petitions to be determined within a specified period, and many of them suggested 90 days. These petitioners argued that, currently, determination of election petitions takes a long time, with the result that, in a number of cases, especially presidential election petitions, these are rendered merely an academic exercise.

Many other petitioners wanted election petitions to be determined by a special court or tribunal. In this regard, the Judiciary suggested that election petitions should be determined by an electoral tribunal of an odd number of seven or nine members presided over by the Chief Justice. On the other hand, the Law Association of Zambia felt that election petitions should be determined by a constitutional court. The argument for a special court or tribunal to deal with election petitions is that ordinary courts are congested, leading to delays in the determination of these petitions.

The Commission also wishes to acknowledge submissions by the few petitioners who said that ordinary courts should continue to determine

election petitions. One petitioner suggested that presidential election petitions should be heard by the High Court in the first instance.

First and foremost, the Commission wishes to state that delays in the disposal of election petitions undermine the concept of representative democracy. The Commission is in agreement with the majority of petitioners that the period within which election petitions should be determined should be specified in the Constitution and is of the view that the suggested period of three months is appropriate.

In this regard, the Commission has also taken into account the observations of the Supreme Court on the subject in its judgment in the presidential election petition of 2002. The Supreme Court observed that limiting the time within which election petitions should be disposed of would, in practice, lead to absurdity in that the Court would be forced to abandon a case midstream because it had not heard all the evidence. The Commission, whilst acknowledging the constraints faced by the ordinary courts in the disposal of cases, is of the view that if election petitions are determined by a special court or tribunal it is practically possible to meet a specified time frame.

In concurring with petitioners' views, the Commission is of the view that special courts or tribunals should be established to settle these petitions. Exception should only be made in the case of presidential election petitions, which should be heard and determined by the full bench of the Constitutional Court, that is, five Judges including three specialised in constitutional and human rights law. This is because a presidential election petition is of great importance and has far reaching implications for governance of the country.

One of the advantages of an *ad hoc* tribunal is that it is not permanent. A special court, on the other hand, is established permanently. An *ad hoc* tribunal would be convenient because the volume of election petitions cannot justify the establishment of a permanent court. Further, the Commission is of the view that in order to render efficacy to the process of determination of election petitions, two separate tribunals should be established to deal with parliamentary and local government elections, respectively. Further, decisions of these tribunals should be final because this mode of settlement of election petitions is intended to render both expedition and finality to the process. This practice would not be unique to Zambia, as it is already practiced in a number of other countries.

Regarding the jurisdiction and composition of these tribunals and mode of appointment of the members, this Commission is generally in agreement with the recommendations of the Electoral Reform Technical Committee.

In reaching its conclusion on the subject, the Commission also reflected on the recommendations of the Mwanakatwe Commission that presidential election petitions should be determined by the full bench of the Supreme Court. The Commission also took special note of the recommendation of the Judiciary that an electoral tribunal presided over by the Chief Justice should replace the full bench.

Further to the issues raised by petitioners on the subject of settlement of election disputes, the Commission considered the related issue of the period within which electoral complaints should be lodged. In particular, the question was considered whether electoral complaints should be lodged before, during or after elections. The Commission notes that in a number of election petitions, grounds for these petitions arise well before elections are conducted. These include allegations of bribery, use of State resources, publication of false information to the effect that an opponent has withdrawn her/his candidature or that she/he is no longer a member of the party sponsoring the candidature. In the Commission's view, it is in the interest of justice that such complaints are lodged and dealt with by the Electoral Commission when they arise. However, where an election petition is based on complaints of electoral malpractices which could have been known before, during and after elections, but were not reported, it should be barred.

On the other hand, the Commission is aware that some causes of election disputes cannot be established until after the election results. For example, it is difficult to ascertain rigging of elections until the conclusion of elections. Thus, there should be provision for electoral complaints or disputes to be lodged before, during and after elections.

In this regard, the Commission examined the practice in Ethiopia where, if there is an electoral irregularity or malpractice, the Electoral Board has to investigate the matter within 24 hours. In such cases, the Electoral Board has power to cancel election results and order a fresh election where it is evident that the scope or nature of any fraudulent practice is such that it is bound to affect the outcome of elections. The petitioners are required to report any malpractices within five hours of their occurrence.

In the case of complaints or disputes lodged before or during elections, the Electoral Commission should have power to deal with the dispute and, where necessary, disqualify candidates or their agents if found guilty of electoral malpractices. The Electoral Commission should also have power to cancel an election or election results and order a fresh election if the extent of the electoral malpractice is such that it would affect the results. The decision of the Electoral Commission should be made within 24 hours subject to judicial review whenever appropriate. Election petitions should be lodged after elections.

Recommendations

The Commission recommends that the Constitution should provide that:

- presidential election petitions shall be heard and determined by the full bench of the Constitutional Court, that is, five judges including the three who are specialized in constitutional and human rights law;

- parliamentary election petitions shall be heard by an *ad hoc* Parliamentary Election Tribunal which shall be presided over by a High Court Judge appointed by the Chief Justice, sitting with four other members appointed by the Chief Justice, who shall be persons who have held the office of High Court Judge or are qualified to be High Court Judge;

- local government election petitions should be heard and determined by an *ad hoc* election tribunal which shall be presided over by a Magistrate of the First Class appointed by the Chief Justice sitting with two other members. Other members of the tribunal shall be appointed by the Chief Justice from among retired professional magistrates of the First Class or lawyers;

- decisions of both tribunals shall be final; and

- election petitions shall be determined within a period of 90 days.

The Commission further recommends that electoral laws should make provision for settlement of electoral complaints and disputes as follows:

- complaints shall be lodged with the Electoral Commission immediately after noticing the malpractice; and election petitions based on complaints of malpractices which could have been known before or during the election, but were not reported shall be barred;

- the Electoral Commission shall have power to determine electoral complaints or disputes brought before it and, in this regard, to disqualify candidates, or their agents found guilty of electoral malpractices and to cancel an election or election results and order a fresh election if the extent of the electoral malpractice is such that it would affect the results;

- the Electoral Commission shall determine electoral complaints or disputes lodged before or during elections within twenty-four hours;

- decisions of the Electoral Commission on electoral complaints or disputes shall be subject to judicial review where appropriate; and

- election petitions shall be lodged after elections results have been declared.

7.2.8 Use of Public Resources

Submissions

Some petitioners said that the use of public resources such as motor vehicles, personnel and funds by the ruling party during election campaigns should be prohibited by the Constitution (139). The reason advanced was that this gives undue advantage to the ruling party.

Others argued that development programmes should not be initiated or implemented during the period of elections, as this tends to influence the electorate in the manner they vote (6). In addition, a few petitioners said that public institutions should not, at any time, give donations to any political party (4). One other petitioner said that there should be no distribution of relief food during the period of elections except in cases of extreme need. In such cases, one petitioner suggested that the distribution should be done by independent and non-partisan organisations (1)

7.2.9 Participation in By-Election Campaigns - President and Vice-President

Submissions

Some petitioners said that the President and Vice-President and Ministers should not participate in by-election campaigns (166), arguing that holders of these offices have tended to use public resources to the disadvantage of opposition candidates. The other reason advanced was that the President and Vice-President should project a national image.

However, there were two petitioners who called for the President and Vice-President to be allowed to participate in by-election campaigns (2).

Observations

The Commission notes that a number of petitioners were concerned about what they perceived as rampant misuse of public resources during election campaigns. The resources cited by petitioners included motor vehicles, civil servants, finances, relief food and donations made to the ruling party by public institutions.

The Commission further notes that some petitioners wanted the President and Vice-President not to be involved in by-election campaigns. They argued that the holders of these offices use public resources to support candidates of the ruling party. Others argued that in any case, by reason of the high profile of these offices, the holders had an influence on the electorate. Some were of the view that the President and Vice-President should not be associated with partisan politics and that they should project a national image. On the other hand, the Commission also notes that two petitioners were of the view that the President and Vice-President should be allowed to participate in by-election campaigns.

In their submissions, the majority of petitioners passionately argued that the practice of using public resources during campaigns had resulted in an uneven electoral playing field where the ruling party enjoyed advantage over opposition parties. They maintained that because of this culture, elections could not be deemed to be free and fair. Petitioners said that the use of public resources during elections was not only misuse of public resources, but also amounted to electoral corruption, bribery and fraud. They reasoned that under this prevailing atmosphere, it was a mockery and a waste of public resources to continue holding elections as it was inconceivable that the ruling party could lose an election.

The Commission further observes that concerns on the subject have persistently been raised by various stakeholders during and after presidential and parliamentary elections. This was a major subject of the 2001 presidential election petition. In its judgment, the Supreme Court stated that because the President and Vice-President are permitted by law to use public resources during election campaigns, those who use public resources by or as a result of accompanying these office holders cannot be held to be in contravention of the law.

The Commission is in total agreement with the majority of petitioners and feels that if not dealt with, the problem of use of public resources during election campaigns could undermine the principle of free and fair elections and democracy. On the other hand, since Zambia has a presidential executive system, it is not practical to bar the President and Vice-President from participating in election campaigns. Further, the Commission is of the view that when the President or Vice-President participate in an election campaign, the use of public resources, such as Government vehicles, is inevitable. However, this should be restricted to what is necessary for their transportation, security and sustenance.

Recommendations

The Commission recommends that the Constitution should provide that:

- the use of public resources for election campaign purposes should be prohibited except as provided for in the Constitution in relation to funding of political parties by the State;

- the President and Vice-President may participate in election campaigns and that they are entitled to such public resources as are reasonably necessary for their transportation, security and sustenance;

- development projects should not be initiated or implemented during the official period of campaign beginning after nominations, but this should not affect ongoing projects;

- public institutions should not, at any time, give donations to any political party;

- relief food and other material should not be distributed during the period of official campaign and elections except in the case of extreme need in which case the distribution should be done by independent and non-partisan organisations; and

- "official period of campaign" shall mean the period from nomination of candidates to and inclusive of the day before elections.

7.2.10 Corruption and Electoral Malpractices

Submissions

Some petitioners wanted the use of gifts such as T-shirts, chitenge and other materials during election campaigns to be outlawed and for any election candidate found guilty of such practices to be disqualified from contesting (40). The reason advanced was that these constitute inducements to voters.

Other petitioners felt that electoral rules should be tightened in order to curb electoral corruption and malpractices (67). Others went further to suggest that cases of electoral corruption and malpractices should attract stiff penalties (9).

Observations

The Commission notes the concerns of some petitioners, who made submissions on the subject of electoral corruption and malpractices, that voting patterns of the electorate were influenced through inducement, bribery and other forms of corruption. The Commission agrees with these petitioners that these practices are a serious danger to democracy and good governance. If left unchecked, these practices can plunge the electoral system into chaos and put the governance of the country at risk of being hijacked by unscrupulous people.

The Commission therefore agrees with the recommendations of the Electoral Reform Technical Committee that, in order to curb electoral corruption, there should be one body to oversee and supervise the enforcement of the electoral code of conduct.

Regarding calls by some petitioners on the use of gifts such as T/shirts, chitenge material and other related campaign material, the Commission is persuaded that these materials are necessary in election campaigns for identification of political parties and election candidates. However, to prevent abuse in the use of campaign material, legislation should regulate and prescribe what material should be allowed.

Recommendations

The Commission recommends that:

- the use of campaign materials should be allowed, and appropriate legislation should regulate and prescribe the form of such campaign materials;

- electoral rules should be tightened to curb corruption and malpractices;

- cases of electoral corruption and malpractices should attract stiff penalties and the electoral code of conduct should be streamlined and vigorously enforced; and

- the Electoral Commission should have power to oversee and supervise the enforcement of the Electoral Code of Conduct by all concerned.

7.2.11 By-Elections

Submissions

A very large number of petitioners, including the National Assembly, argued that, as a general rule, there should be no by-elections except where a vacancy is due to the death, incapacitation of an MP or nullification of an election (1,265). Of these petitioners, 990 made submissions on parliamentary elections, 79 on local government elections, whilst 196 addressed the subject in general terms. A few petitioners said that by-elections should only be held when an independent MP dies (4). Major reasons advanced by the petitioners included the need to:

- cut down the cost of by-elections;
- discourage defections, which petitioners described as "political prostitution"; and
- avoid undermining democracy.

Alternative methods suggested were that vacancies should be filled by the runner-up in the previous election or a replacement provided by the party that held the seat.

An overwhelming number of petitioners, including the National Assembly, said that an MP who resigns from a party or is expelled from a party or crosses the Floor should lose the seat and not be eligible to contest elections (2,567). The suggested period of ineligibility varied as follows:

- the duration of that Parliament (most popular submission);
- five years;
- ten years; and
- life.

Similarly, some petitioners said that a Councillor who resigns or is expelled from a party should lose the seat and not be allowed to recontest the seat for the duration of that term (78). The reason advanced by most of the petitioners on this issue was that it would deter members from resigning from their parties for selfish reasons. They added that it would guard against unnecessary expenditure being incurred through by-elections.

On the other hand, many petitioners said that an MP who crosses the Floor or is expelled from a party should be allowed to recontest the by- election or retain the seat as an independent MP (382). In respect of local government elections, two petitioners said that a Councillor who resigns or is expelled from a party should be allowed to recontest the seat (2). Retention of the seat was particularly suggested in the case of an expelled MP. Other petitioners, including the National Assembly, felt that an MP whose party is dissolved should retain the seat.

Five petitioners said that a Councillor who resigns or is expelled from a party, but does not join another party should retain the seat as an independent (5). One petitioner said that an independent MP who joins a party should retain the seat (1). Another petitioner said that an independent candidate who joins a political party should not be allowed to contest the seat for the life of that National Assembly (1).

The Electoral Commission of Zambia proposed that Article 67 (2) of the Constitution on by-elections should be amended so that the Electoral Commission, and not Parliament, prescribes the manner in which by-elections are held (1).

Observations

The Commission notes that an overwhelming majority of petitioners were not in favour of by-elections. Among these, many expressed the view that by-elections should only be held where a vacancy arises due to death or incapacitation of an MP or nullification of an election. A few added that elections should be conducted when an independent MP dies. An even more overwhelming number of petitioners, including the National Assembly, said that an MP who resigns from a party or is expelled from a party or crosses the Floor should lose the seat and not be eligible to contest future elections.

The Commission, however, notes that, on the other hand, a relatively small number of petitioners called for by-elections to continue and for an MP or Councillor who resigns or is expelled from a party to be allowed to re-contest elections. Some of these petitioners suggested that such an MP should retain the seat as an independent. The Commission as an alternative also notes that some petitioners called for an MP or Councillor whose party is dissolved to retain the seat as an independent. These petitioners included the National Assembly.

The overwhelming majority of petitioners on the subject made strong representations and expressed concerns about the frequency of by-elections and associated costs. They also argued that the constitutional

provision for by-elections encouraged defections by MPs and Councillors from one party to another, which they termed as "political prostitution", at public expense. In particular, petitioners complained that defections from opposition parties to the ruling party in search of Executive posts undermine democracy.

Petitioners further suggested that alternative modes of filling vacancies should be considered. These were mainly that the party which previously held the seat should nominate a replacement or that the runner-up in the previous election should assume the seat.

The Commission concurs with the views of the majority of petitioners about the need to do away with by-elections, except in a few deserving and specified circumstances. These are where a vacancy arises due to death, incapacitation of an MP, nullification of an election or where a vacant seat was held by an independent. Further, the Commission is of the view that an MP or Councillor who resigns from a party or crosses the Floor should be barred from contesting any by-elections for the duration of that Parliament.

The Commission is also of the view that where a party represented in the National Assembly or a council is dissolved, an MP or Councillor holding a seat on account of that party should retain the seat as an independent since such an MP or Councillor cannot be held responsible for the predicament in which he/she finds herself or himself. However, if a seat is held by such MP or Councillor on the basis of the system of Proportional Representation, the seat should be reallocated on the basis of that system.

The Commission is also in agreement with petitioners who favoured the idea of an expelled MP retaining the seat as an independent, to avoid the tendency of political parties victimising their MPs. It is the view of the Commission that an expelled MP should be given every possible opportunity to contest the expulsion without vacating the seat and, if wrongly expelled, should retain the seat as an independent MP.

Regarding alternative means of filling vacancies, the Commission is of the view that the party that held a vacant seat should nominate a replacement. The Commission feels that the suggested alternative of the runner-up in the previous election assuming the seat is not practical, as the runner-up may not be available. Further, to give the seat to the runner up would prematurely deprive the party that won the seat.

Recommendations

The Commission therefore recommends that the Constitution should provide that:

- in the case of seats held on the basis of the First-Past-The-Post electoral system, by-elections should not be allowed except where the vacancy is due to the death, incapacitation of an MP or Councillor, nullification of an election or where a vacant seat was held by an independent MP;

- an expelled MP shall be at liberty to contest the expulsion before a tribunal and if found to have been wrongfully expelled, such an MP shall retain the seat as an independent MP;

- an MP or Councillor who resigns from a party or crosses the Floor should lose the seat and not be eligible to contest elections for the duration of that Parliament or council;

- an MP or Councillor whose party is dissolved should retain the seat as an independent where such MP holds the seat on the basis of an election conducted in a constituency on the basis of the First-Past-The-Post electoral system;

- the seat of an MP or Councillor whose party is dissolved should be re-allocated on the basis of Proportional Representation if that seat was held on the basis of that system; and

- any vacancy arising otherwise shall be filled by the party that held the seat.

7.2.12 Participation in Politics – Age Limit

Submissions

Some petitioners argued that the Constitution should place an upper age limit on eligibility for appointment to elective office and participation in politics (13). The suggested age limit was between 55 and 70 years. One petitioner said that terms of all elective offices should be limited to two only (1). These petitioners were against the practice of "recycling" the same politicians.

Observations

The Commission notes that the relatively few petitioners who addressed this subject were concerned that there was a tendency in the country for certain politicians to perpetuate their participation in politics and stay in

elective and Executive offices. Petitioners reasoned that this practice, which is commonly known as "recycled politicians", deprives the country of the opportunity to have new and more dynamic leadership. They therefore felt that placing an upper age limit on eligibility for election or appointment to public office could stop this.

The Commission's view on the subject is that such a measure would be discriminatory, undemocratic and contrary to human rights and freedoms. Besides, this could lead to loss of qualified and experienced persons in the public service. The question of choice of candidates in relation to age should be left to the wisdom of the electorate.

Recommendations

The Commission therefore recommends that there should be no upper age limit on a person's eligibility to seek elective office.

7.2.13 Access to the Media During Elections

Submissions

A number of petitioners made submissions that the public media should accord equal coverage to all political parties prior to and during election campaigns to prevent the ruling party from monopolising public media coverage and to facilitate a level playing field for all political parties (138). A few petitioners said that the President should not appoint chief executive officers of public media institutions. They argued that an independent body should do this (4). There was also a submission that Parliament should appoint heads of media institutions and that their operations should be overseen by an appropriate parliamentary committee (1).

Observations

On the subject of media coverage during elections, the Commission notes that a number of petitioners expressed concern that public media coverage during election campaigns was monopolised by the ruling party and excluded opposition parties almost entirely. Petitioners strongly argued that this practice was a mockery of democracy and created an uneven playing field in favour of the ruling party. They also felt that it was an indirect misuse of public resources by the ruling party.

In relation to the subject of media coverage of political parties, a few petitioners called for Chief Executives of public media institutions not to be appointed by the President, but by the National Assembly or other independent bodies.

In its consideration of the subject, the Commission noted that the Electoral (Conduct) Regulations, Statutory Instrument No. 179 of 1996 provides for fair and balanced reporting of the activities of all registered political parties, accurate reporting, making objective editorial comments and conducting interviews with fairness and the allocation of equal airtime to parties for their political broadcast.

The Commission, in concurring with the views of petitioners, observes that the public media has failed to comply with these provisions of the law. The Commission also observes from experience that the practice by the public media of biased coverage in favour of the ruling party has led to persistent complaints that elections are not free and fair. In a number of cases, this has been a subject of election petitions. During election campaigns, opposition parties often raise complaints of biased public media coverage in favour of the ruling party.

In addition to the conduct of the public media during elections, the Commission evaluated broadly the role of the public media in governance and national development. The Commission wishes to observe that public media concentrate almost exclusively on activities of the Government to the exclusion of all other stakeholders and actors in development. Further, the coverage is often biased in favour of the Government and lacks balanced professional analysis. Thus the citizenry, who are the owners of the public media, are deprived of broad-based and balanced information covering all areas of development. This undermines their effective participation in and contribution to development.

On the subject of the appointment of public media Chief Executives, the Commission is, however, of the view that the National Assembly would not be the appropriate institution to make these appointments. The Commission notes that appointments to these offices are made by respective Boards of Directors and that this is appropriate.

Recommendations

The Commission therefore recommends that the Constitution should provide that:

- the public media should accord equal and balanced coverage to all persons and political parties participating in elections prior to and during election campaigns; and

- complaints of failure by the public media during elections to abide by electoral regulations regarding media coverage of political parties should be determined by the Electoral Commission, which

should immediately take appropriate action where these complaints are substantiated.

The Commission further recommends that the Independent Broadcasting Authority Act and other relevant laws should empower the Authority and other appropriate bodies to receive and determine complaints of biased or unprofessional coverage by the public media and enforce sanctions, which should include, where appropriate, barring a media practitioner or institution from operating.

In addition, the Commission recommends that statutes regulating the various public media should provide that the respective Boards of Directors should appoint Chief Executives of public media institutions.

7.2.14 Right to Vote Anywhere in Zambia

Submissions

There were some submissions that registered voters should have a right to vote anywhere in the country (15). The reason advanced was to ensure that citizens exercise their franchise even when they have moved to another place following registration.

7.2.15 Right to Vote By Zambians Living Abroad

Submissions

There were a few submissions that Zambians living abroad should be accorded an opportunity to vote in presidential and parliamentary elections (11). The reason advanced was that Zambians living abroad should not be disenfranchised and that it is a practice in many countries to provide their citizens living abroad with postal votes.

Observations

The Commission observes that though relatively few petitioners addressed this subject, voting is a fundamental right of every citizen of voting age. The Commission is of the view that it would be ideal for citizens to exercise their right to vote by voting anywhere in the country. However, practically it is not feasible for this to be achieved in the foreseeable future in view of logistical constraints.

The Commission is unanimous that it is the duty of every citizen to register as a voter and to vote, and that the State has a duty to facilitate the exercise of this right, including for persons in those institutions where the movement of persons is restricted and controlled, such as hospitals and schools, with the exception of prisons. Similarly, the Government should facilitate the exercise by Zambians

living abroad of the right to register as voters and to vote. The Commission observes that it is now common practice in many countries to enable citizens living abroad to vote.

In conclusion, it is the Commission's view that failure by the State to provide facilities to enable all Zambians to vote amounts to disenfranchisement of citizens.

Recommendations

The Commission therefore recommends that the Constitution provide that:

- Zambians should continue to vote in respective polling stations where they are registered as voters;

- the State should make available facilities to enable Zambian citizens living abroad or visiting to register as voters and to vote in elections; and

- the State should facilitate those in institutions (other than prisons) to register as voters and vote.

7.2.16 Voters' and National Registration Cards

Submissions

Some petitioners, including the Electoral Commission of Zambia, said that the registration of voters should be a continuous process (72). On the other hand, a number of petitioners were of the view that national registration cards, passports, driving licences and birth certificates should be used in place of voters' cards (29). However, a few petitioners proposed that voters' cards should be used during elections and not national registration cards (5).

Some petitioners also said that national registration cards should not be issued during elections to avoid rigging of elections (19). A few petitioners said that there should be no collection of voters' cards during elections (7).

Observations

On the subject of voters' cards and national registration cards, the Commission notes that a number of petitioners spoke on a range of issues.

Some of these petitioners felt that the State should facilitate the exercise of citizens' right to vote by enabling them to register at all times and allowing the alternative use of identity documents for the purpose of

voting. However, there were those petitioners who did not want voters' cards at all and argued that registration of voters should be done away with and citizens should use other forms of identity instead.

The Commission notes that relatively few petitioners insisted that voters' cards should be used for voting purposes.

The Commission also notes that some petitioners argued that national registration cards should not be issued during elections, whilst others were of the view that voters' cards should not be collected during elections

The Commission, in its consideration of the subject, acknowledged that for some time, particularly during the Third Republic, the subject of voter registration and voters' cards has been emotive and controversial. Some of the petitioners who preferred the use of other forms of identity indicated their lack of confidence in the current system of voter registration and were suspicious that the system is used to rig elections. These petitioners also argued that public resources would be spared if voter registration were done away with. Others who were opposed to the practice of issuing national registration cards and collecting voters' cards during elections were equally of the perception that this could be used to rig elections.

Although the Commission appreciates the concerns of petitioners on the subject of voter registration and voters' cards, it is the considered view of the Commission that the use of documents other than the voters' cards could render the system even less credible. It is not possible to prepare an impeccable voters' roll on the basis of national registration cards, passports or other forms of identity, because a key requirement for registration on the voters' roll is that the voters must be registered in their voting districts where they ordinarily reside. The voter's residential address supplied on the application form helps to ascertain the correct voting district, which cannot be captured on the national registration cards or passports. Besides, a voter's card is perforated once a person has voted to prevent the person from voting again. This cannot be done if a national registration card is used. However, it is possible to use other forms of identity (such as passports) alongside voters' cards for voting. Alternatively, the features of voters' cards can be improved to capture those found on national registration cards. This would do away with the requirement of the national registration card for the purpose of voting.

With regard to continuous voter registration, the Commission is of the view that this is necessary if the country is to enhance representative democracy. However, in an effort to remove doubts about the credibility of the system, voters' cards should not be collected during the day of election. Similarly, national registration cards should not be issued during the period of election.

Recommendations

The Commission therefore recommends that electoral laws should provide that:

- voters' cards should be issued continuously;
- voters' cards should not be collected during election day;
- a national registration card or passport should be used alongside a voter's card for the purpose of voting;
- the features of the voter's card should be enhanced to bear the picture of the voter and other essential details; and
- national registration cards shall not be issued during the period starting 30 days prior to and up to the time of elections.

7.2.17 Elections – Threshold of Registered Voters

Submissions

A small number of petitioners were of the view that presidential and parliamentary elections should be held only after at least 80% of the eligible voters had been registered (3). The petitioners were concerned that people's opportunity to exercise their right to vote should be enhanced and that winning elections should be based on a reasonable mandate of the people.

Observations

The Commission notes that very few petitioners wanted presidential and parliamentary elections to be conducted only after at least 80% of eligible voters had been registered.

Although the Commission recognises the concern of these petitioners that there is need to enhance representative democracy and the exercise of citizens' right to vote, the Commission feels that this is not feasible. Citizens cannot be compelled to register as voters against their will, as this would be a violation of their fundamental rights and freedoms.

The Commission observes, from previous experience, that the registration period has many times had to be extended in order to allow more people to register as voters. It is, however, the Commission's view that continuous registration of voters, which it has recommended, would lead to an increase in the number of registered voters. It is also important that the

Electoral Commission of Zambia and civil society organisations conduct civic education programmes aimed at encouraging people to participate in elections and to exercise their right and duty to vote.

Recommendations

The Commission therefore recommends that:

- presidential, parliamentary and local government elections should be held on due dates, regardless of the number of registered voters; and

- in order to encourage people to participate in elections and to exercise their civic duty to register as voters and to vote, the Electoral Commission of Zambia and civil society organisations should undertake continuous voter education programmes regarding the right and duty of every citizen to fully participate in the electoral process.

7.2.18 Transparent Boxes and Braille Papers

Submissions

A number of petitioners argued that ballot boxes should be transparent to avoid chances and suspicions of rigging (198). A few others, including organisations representing persons with disabilities, called for the introduction of braille ballot papers in order to enable the blind who can read Braille to vote unaided (7).

Observations

The Commission notes that a number of petitioners called for the use of transparent ballot boxes during elections, arguing that this would reduce suspicions of rigging.

Other petitioners, including those representing persons with disabilities, wanted Braille ballot papers to be introduced into the electoral system in order to enable literate blind persons to vote without requiring the assistance of other persons.

The Commission has no difficulties agreeing with these submissions. Transparent ballot boxes are commonly used in a number of other countries and would reduce suspicions of electoral malpractices. Braille ballot papers would empower literate blind persons to vote without the aid of other persons. Similarly, to the extent possible, facilities to assist other persons with disabilities to vote should be made available.

Recommendations

The Commission, therefore, recommends that electoral laws provide that:

- ballot boxes should be transparent and serially marked;
- braille ballot papers should be used for the blind who can read braille; and
- persons living with other physical disabilities, such as dismembered arms or inability to read Braille, should be assisted by a person of their choice to cast their votes.

7.2.19 Participation and Representation in Governance – Women, Persons with Disabilities and the Youth

Submissions

Some petitioners expressed the view that there should be gender equality in participation and representation at all levels of the three organs of Government (143). Petitioners added that there should be a minimum quota of 30% to 50% parliamentary seats as well as ministerial positions reserved for women. Others added that the same should apply in relation to representation in political parties. The main reason advanced was the need to redress the gender imbalance.

A few petitioners said that persons with disabilities should participate equally and have representation at all levels of governance (7). There were also other petitioners who felt that youth representation should be enshrined in the Constitution (7).

Observations

On the subject of gender equality in governance, the Commission notes that a number of petitioners called for a constitutional provision to guarantee equality of the sexes in participation and representation at all levels of Government. Some of these petitioners called for a minimum quota of 30% to 50% parliamentary seats and ministerial positions to be reserved for women. Others said that representation in political parties should reflect the principle of gender equality.

The Commission also notes that, though relatively few, some petitioners called for equal representation of persons with disabilities and the youth at all levels of governance.

The Commission concurs with the views of the petitioners on the need for representation in public offices, both elective and otherwise, and political parties to reflect gender balance. Political parties must have similar provisions because they constitute the potential resource pool from which government can be formed. This is necessary in order to redress historical imbalances that have disadvantaged women. However, it is important that gender balance should be based and implemented on merit.

Similarly, the Commission is in agreement with the principle of having other disadvantaged groups, such as persons with disabilities and the youth, equitably represented at all levels of government.

Recommendations

The Commission recommends therefore that the Constitution should have a general provision to guarantee balanced gender representation at all levels of:

- the three organs of Government, taking into account merit; and
- political party structures.

The Commission further recommends that the Constitution should guarantee that persons with disabilities and youths should be equitably represented at all levels of governance.

7.2.20 Scrutiny of Presidential and Parliamentary Candidates

Submissions

Two petitioners said that all presidential and parliamentary candidates should be scrutinised and that their curriculum vitaes should be published (2).

Observations

On this subject, the Commission notes that the few petitioners who addressed the subject were concerned that presidential and parliamentary candidates are not subjected to scrutiny prior to elections to ensure that the electorate make informed choices.

Whilst the Commission appreciates the concerns of these petitioners, it is practically not possible to obtain thorough and accurate information on candidates. In any case, such an exercise could lead to speculative and inconclusive information being published, as well as distortions that could

prejudice innocent candidates. Further, the majority of Zambians do not have access to the media.

Therefore, the Commission is of the view that it is better to have prescribed qualifications which are easier to ascertain. In addition, in order for any interested persons to access the declarations made by presidential and parliamentary candidates, all the qualifications to and disqualifications from election to the respective offices should be included in the declaration forms used for nomination purposes. Also, the law should require that declarations made by presidential and parliamentary candidates be widely publicised through the media.

Recommendations

The Commission recommends that the Constitution and relevant electoral laws should:

- reflect all the qualifications and disqualifications in the declarations made for nomination purposes; and

- require the Electoral Commission to ensure that the information given by presidential and parliamentary candidates in these declarations is widely publicised through the media.

7.2.21 Establishment of Council [sic] of State

Submissions

The Zambia Congress of Trade Unions (ZCTU) proposed that a body to be known as "Council of State" should be established and vested with specific powers, such as summoning the President to answer charges, removing the President from office, appointing persons to constitutional offices and making recommendations regarding the exercise of the prerogative of mercy (1).

The ZCTU further suggested that the composition of the proposed body should include the Judiciary and interest groups such as traditional rulers, the labour movement, the LAZ and NGOs (1).

7.2.22 House of Eminent Persons

Submissions

One petitioner made a submission that a House of Eminent Persons should be established to arbitrate in the event of constitutional crises (1).

Observations

The Commission, in its response to the submission made by the ZCTU, observes that the concept is alien and was not adequately articulated. The Commission understood "Council of State" to mean Council of State such as it exists in Ghana. The Council of State of Ghana is appointed by the President in consultation with Parliament. It is composed of a former Chief Justice, a former Chief of Defence Staff, a former Inspector General of Police, the President of the House of Chiefs, regional representatives and eleven others appointed by the President.

The functions of the Council of State include giving advice to the President in respect of constitutional appointments and making recommendations on any matter being considered or dealt with by the President, Minister or Parliament or any other authority established by the Constitution. Therefore this body performs advisory functions. The President is not bound to follow the advice or recommendations of the Council.

The Commission observes that the ZCTU submission on the composition and functions of such a body would result in the usurpation of constitutional powers, particularly of the National Assembly and the President. It is inconceivable for a body other than the people's representative body to impeach the President. Similarly, it would be highly irregular to vest powers of appointment of constitutional office holders in such a body.

Similarly, the Commission is of the view that the Constitution should make adequate provisions and safeguards to ensure the peaceful resolution of constitutional crises through democratically established institutions. Therefore, the creation of a "House of Eminent Persons" is not only unnecessary but undesirable.

Recommendations

The Commission recommends that the "Council of State" and "House of Eminent Persons" should not be established.

7.2.23 Oath of Office

Submissions

Eight petitioners expressed the view that the Constitution should stipulate that the oath of allegiance to be sworn by holders of public offices such as the Speaker, MPs, the Chief Justice and other constitutional office holders should be to the people and the Constitution of Zambia as opposed to swearing allegiance to the President who is also a public office holder (8).

One petitioner suggested that the content of the oath of office of the President, Vice-President, Speaker and Members of Parliament should be reviewed and enshrined in the Constitution (1).

Another petitioner felt that the oath of office of the Chief Justice, Judges and Attorney-General should be administered by the Speaker (1).

Observations

Though not many petitioners addressed the subject of oath of office, the Commission notes that those who did were mainly concerned that the oath of office should be to the Constitution of Zambia rather than to another office. In this regard, some petitioners felt that in order to ensure that the content of oaths relating to public offices are standard and not subject to change to suit those in Government, they should be prescribed in the Constitution. Some petitioners felt that allegiance to the Constitution by constitutional office holders should be guaranteed by not having the oaths of certain office bearers, such as the Chief Justice and the Speaker, administered by the President.

In its evaluation of the matter, the Commission examined some historical material on the subject, and consulted the practices in other jurisdictions. The oath of office has been in existence since time immemorial. Although the content of oaths has varied with time and the nature of the office, the significance placed upon it has remained the same. According to one standard definition, an oath is "a solemn appeal to God to witness the truth of a statement or the sincerity of a promise, coupled with an imprecation of divine judgement in the event of falsehood or breach of obligation". It is "a statement to perform to the best of one's ability, a sense of honour and an acknowledgement of the consequences of failing to live up to one's word".

Although in contemporary governance the oath of office may not carry with it divine fear, its essence still remains to make a promise or pledge of duty to discharge the responsibilities of office with honesty, utmost good faith and honour, and to be held accountable for failure to live up to this promise. Therefore, the significance of oath of office is that it binds the maker to some form of allegiance. The form of oath of public office is important to governance in that it prescribes how the affairs of that office would be conducted and to whom the office bearer would be accountable.

Some constitutions prescribe, in specific terms, the forms of oath for certain offices such as the President, Vice-President, Speaker, Chief Justice and Ministers. An example of this is the Constitution of South Africa, which prescribes forms of oath for various offices, all of which bear allegiance to the Constitution. The Constitution of Ghana follows a

similar approach. Other Constitutions leave the details of oath to Acts of Parliament. This is the case with the Constitution of Zambia.

The advantage of a constitution prescribing the contents of oath of office is that it is standardised and it is not subject to change.

Recommendations

The Commission recommends that:

- the content of the oath of office of the President, Vice-President, Speaker, MPs and other constitutional office holders should be reviewed so that the oath is not to the President, but to the Constitution and the country; and

- the format and content of oaths of the various constitutional offices should be appended to the Constitution.

7.2.24 Commissions of Inquiry – Reports

Submissions

Two petitioners were of the view that the Constitution should compel the Government to release results of Commissions of Inquiry within a specified time (1). A period of three months was suggested (1).

Observations

Though only one petitioner addressed the subject of timely release of reports of Commissions of Inquiry, the Commission notes that the subject is of considerable relevance to good governance.

The Commission wishes to observe that in the past there have been inordinate delays or failure by the State to publish reports of Commissions of Inquiry. This state of affairs leads to loss of confidence by the people in Government's commitment to address the issues involved. People have often expressed their disillusionment by making accusations of dishonesty on the part of the Government, which they accuse of merely wanting to pacify the people at public expense.

The Commission is of the view that the Government should fulfill its responsibility to the citizens through honest and transparent conduct of inquiries. In the same vein, reports of these inquiries should be released without delays. Access to reports of Commissions of Inquiry would promote goodwill and understanding between the State and the people, and contribute to peace and stability in the nation.

Recommendations

The Commission recommends therefore that the Constitution should provide that the Government should release and publish reports of Commissions of Inquiry and other similar bodies within reasonable time and that this should be included in the Article on right of access to public information.

CHAPTER 8

THE EXECUTIVE

Terms of Reference:

No. 2 Recommend a system of government that will ensure that Zambia is governed in a manner that will promote the democratic principles of regular and fair elections, transparency and accountability, and that will guard against the emergence of a dictatorial form of government;

No. 7 Examine and recommend the composition and functions of the organs of government and their manner of operating, with a view to maximizing on checks and balances and securing, as much as possible their independence;

No.10 Recommend a suitable electoral system to ensure fairness in the conduct of Presidential and Parliamentary elections as well as local government elections;

No. 12 Recommend a system of a smooth transfer of power by the outgoing administration to the incoming administration following an election; and

No. 23 Examine and recommend whether Cabinet should be appointed from outside the National Assembly or from the National Assembly.

8.1 Introduction

The Executive is an important organ of the Government that undertakes the function of governing through the implementation of laws and policies. Public policies are mainly initiated and enforced by the Executive, which is responsible for the management of national affairs such as defence and security, foreign policy, taxation and other critical tasks essential for the smooth running of the country.

Many African countries tend to vest broad executive powers in the presidency. The concentration of executive power in the President has been justified on the grounds that it is necessary for governance and the promotion of national unity. However, it has been argued that the immense powers given to the presidency create a potential loophole through which arbitrariness, abuse and misuse of power may occur. The challenge therefore for many countries is to ensure that such executive powers are used for the common good of society, regardless of which personality is in office.

There are two main types of executive systems; presidential and parliamentary.

In the presidential system, the President is both Head of State and Head of Government. The President is not a member of the Legislature, but is directly elected by the people. He/she has a fixed term in office and may only be removed before the expiry of the term on restricted conditions such as impeachment. Cabinet Ministers are appointed from outside the Legislature. They serve at the pleasure of the President and are not accountable to the Legislature. The United States of America has a presidential executive system.

In the parliamentary system, the Prime Minister is the Head of Government whilst another figure, such as a Monarch or elected President, serves as titular Head of State. Tenure of office of the Head of Government is flexible. The Head of Government and the Cabinet are constituted from the Legislature and they serve subject to the Legislature's confidence. Britain is an example of a country with a parliamentary executive system.

Some countries have mixed presidential and parliamentary systems. A typical example is France, where the President serves as Head of State but also has important political powers, including the appointment of a Prime Minister and the Cabinet.

Zambia, like many other African countries, has a unique executive system that mixes both the presidential and parliamentary systems. The President functions as both Head of State and Head of Government. The President is part of the Legislature and appoints the Cabinet from the Legislature. However, the President and the Cabinet do not serve subject to the Legislature's confidence.

Some of the recommendations of the Chona Commission were that:

- the President should be eligible to stand for a second term, after which he/she shall not be eligible for a period of five years; thereafter he/she shall be eligible to stand for a further term of five years;

- the Prime Minister should have power to appoint and dismiss members of the Cabinet and need only consult the President;

- a person acting as President shall not revoke any appointment made by the President and shall not have powers to dissolve Parliament;

- where possible, some Ministries should be headed by professionally qualified persons (Ministers);

- Deputy Ministers should deputise and attend Cabinet meetings in the absence of their Ministers; and

- the Cabinet should resign during parliamentary elections and that all Executive power and administration of government should vest in the President, who may recall the outgoing the Cabinet in the event of a national crisis.

Among the issues dealt with by the Mvunga Commission were the type of presidency; election and term of office of the President, and powers of the President relating to appointments to various public offices; declaration of a state of emergency; dissolution of the National Assembly; establishment of a "President's Advisory Council"; re-establishment of the Office of the Vice-President; mode of election of the Vice-President; composition, size and functions of the Cabinet; and dissolution of the Cabinet through a vote of no confidence by the National Assembly. The Commission recommended that:

- Zambia should have an executive President;

- the winning presidential candidate should receive at least 51% of the votes cast. Failure to attain 51% would lead to a rerun between the top two contenders. In the event of a tie between the two, such a tie would be resolved by Parliament;

- the term of office of the President should be limited to two five-year terms;

- appointments to constitutional and other key public offices should be subject to parliamentary ratification, but that ratification should not be unreasonably withheld;

- the declaration of a state of emergency should be subject to parliamentary ratification and periodic review;

- the President should have power to dissolve the National Assembly if the latter makes it unmanageable for the President to govern;

- a "President's Advisory Council" should not be established, as there was no justification for it;

- the Office of Vice-President should be re-established in the place of that of the Prime Minister demanded by the majority of petitioners;

- although there was merit in the submission that the Vice-President should be elected by direct popular vote as a running mate to the President, considering the Zambian circumstances the Vice-President should be appointed by the President, subject to parliamentary ratification in order to enhance the authority of the President over the Vice-President;

- contrary to the majority view that the Cabinet should be constituted from inside Parliament, to enable a President with a minority in Parliament to appoint the Cabinet from outside instead of from a potentially hostile opposition, the Cabinet should be appointed from either outside and/or inside Parliament and in the case of Ministers appointed from outside Parliament, this should be subject to ratification by the National Assembly;

- the size of the Cabinet should be determined by the President, but that it ranges between 12 and 18 Ministers;

- as regards the functions of the Cabinet, its opinions on any issue should be merely advisory to the President; and

- the Cabinet should not be subject to dissolution on a vote of no confidence by the National Assembly, as the President is elected by the people and, in turn, appoints the Cabinet.

Some of the Mwanakatwe Commission recommendations on the subject of the Executive were that:

- there should be an executive President who should be the Head of State and Government, as a titular President was likely to be a political and economic liability;

- a presidential candidate must be a Zambian, born in Zambia and with both parents born in Zambia;

- the winning presidential candidate should receive at least 51% of the votes cast. Failure to attain 51% would lead to a rerun between the two top contenders. In the event of an equality of votes in that election, the National Assembly should elect the President;

- presidential candidates not sponsored by any political party (independent presidential candidates) should be eligible to contest elections;

- presidential candidates should be allowed to contest parliamentary elections to afford losing candidates an opportunity to represent their parties in the National Assembly, but a winning presidential candidate who also wins a parliamentary seat should relinquish the parliamentary seat upon assumption of the Office of President;

- the term of office of the President should be limited to two five-year terms;

- there should be a 30-day period of smooth transfer of power during which period the incumbent President should be in charge of routine administration, but would make decisions on important matters only with the consent of the President-elect;

- the Vice-President should be elected by popular vote as the running mate of the President;

- the Cabinet should be appointed from outside the National Assembly in order to ensure effective checks and balances in the Government and to uphold the independence of each of the three organs of Government;

- the Constitution should provide for a number of not more than 18 Cabinet Ministers; and

- decisions of the Cabinet should be merely advisory to the President.

Current Constitutional Provisions

Article 33 of the Constitution of Zambia, like many other African Constitutions, vests executive power in the President, who is the Head of State and Government and Commander-in-Chief of the Armed Forces. Specific powers and functions of the President include establishing and dissolving Government Ministries and Departments as well as appointing senior public officers. Other powers are to:

- be the Commander in Chief of the Defence Forces;

- be responsible for the establishing and dissolving of Government ministries and departments;

- create public offices and appoint officers to these offices;

- negotiate and sign international agreements and delegate the power to do so;

- appoint key constitutional office holders such as the Chief Justice, Attorney-General and the Director of Public Prosecutions, subject to parliamentary ratification;

- appoint members of the Cabinet;

- sign and promulgate any proclamation which, by law, he/she is entitled to proclaim as President;

- initiate, in so far as the President considers it necessary and expedient, laws for submission and consideration by the National Assembly;

- assent to all Bills made by Parliament and exercise veto power; and

- exercise the prerogative of mercy.

Article 34 (3) requires, among other qualifications, that a presidential candidate be a Zambian citizen and that both parents be Zambian by birth or descent. The same Article requires that presidential candidates be sponsored to contest elections by political parties and that the winning candidate should receive a simple majority of the total votes cast. The Article further provides for the President-elect to be sworn in and to assume office immediately after the declaration of election results, but not later than 24 hours. It also provides that the procedural and administrative handing over process should be completed within fourteen days after the date of swearing in the President.

With regard to Presidential election petitions, Article 41 of the Constitution states:

> *"(2) Any question that may arise as to whether –*
>
> *(a) Any provision of this Constitution or any law relating to election of a President has been complied with;*
>
> *(b) any person has been validly elected as President under Article 34;*
>
> *shall be referred to and determined by the full bench of the Supreme Court."*

Unlike the 1964 Constitution, the current Constitution does not make provision for an event where a presidential election results in a tie of votes between candidates. Whereas the 1991 Constitution addressed this, the 1996 amendment to the Constitution left a vacuum.

Article 35 provides that the President shall hold office for a period of five years, but disqualifies a person who has twice been elected President from contesting

presidential elections. Article 50 states that the Cabinet's functions are to formulate policies of Government and advise the President on the same.

Articles 45, 46 and 47 provide for the President to appoint the Vice-President, Cabinet Ministers and Deputy Ministers from the National Assembly. The Constitution does not specify or limit the size of the Cabinet.

8.2 Submissions, Observations and Recommendations

Eight thousand six hundred and sixty-six (8,666) submissions were received on his subject.

Submissions received on this subject centred on whether Zambia should continue with an Executive President or have a Titular President and whether presidential powers should be reduced or retained. The submissions also addressed the threshold of votes required for the presidential candidate to win elections, presidential election petitions, the term of office of the President, handover following change in the Office of President, and the mode of election or appointment of the Vice-President.

8.2.1 Type of Presidency

Submissions

A number of petitioners said that the Constitution should provide for an executive President who should be both Head of State and Head of Government (41).

Other petitioners wanted the President to be a titular Head of State (24). Some of these petitioners suggested that executive power be vested in a Prime Minister.

Observations

Petitioners who made submissions before the Commission on the subject, though relatively few, preferred an executive type of presidency.

Zambia has a hybrid system of government in which the presidency is tailored along the presidential system of government. The President is directly elected by the people and is both Head of State and Head of Government. This system has been in place and institutionalised since attainment of independence in 1964.

The argument in favour of an executive President is that a ceremonial presidency is more appropriate for countries with established monarchies, because they have clearly defined functions that have evolved through

traditions and customs, as well as refined systems of power sharing. The latter attribute is also cited for successful models in States that are not monarchies, but have a titular Head of State, including those that have a split executive model such as France. It is argued that in a young democracy such as Zambia, it would be difficult to define and separate the functions of a Head of State from those of a Head of Government.

On the other hand, those who advocate a titular Head of State reason that it offers a means of deconcentrating power from one Office. The weakness of this reasoning is that it assumes the absence of other means of achieving the same end.

Although it is argued that a titular President would be a neutral figure who could symbolise unity and stability, and mediate in the event of a political crisis, there is a counter argument that having a ceremonial Head of State and a Head of Government creates a possibility for power struggle between the two. Further, in a situation where a political crisis is a remote possibility, it would be an unnecessary safeguard.

Indeed, Zambia's experiment with a split executive system under the 1973 Constitution, in which an executive President surrendered some administrative and government functions to the Prime Minister, does not offer any helpful lesson, as the executive powers were still concentrated in the presidency.

Moreover, both the Mvunga and Mwanakatwe Commissions recommended the retention of an executive President in line with petitioners' views. The major reason was the need to have a presidency with sufficient powers and control over affairs of the State to maintain stability and prevent anarchy.

In the light of these considerations, the Commission is of the view that the potential economic and political cost of having a titular Head of State outweighs any perceived benefits. In addition, the executive type of presidency has been institutionalised and there is clear preference for it.

Recommendations

The Commission, therefore, recommends retention of the executive type of presidency.

8.2.2 Election of President

8.2.2.1 Qualification/Disqualification

Submissions

8.2.2.1.1 Parentage Clause

Some petitioners wanted the provision requiring both parents of a presidential candidate to be Zambian by birth or descent to be repealed, as it was discriminatory (151). Some petitioners said that the Clause should be retained in order to prevent a situation whereby a person whose allegiance is to another country becomes President of the country (91).

8.2.2.1.2 Other Qualifications/Disqualifications

An overwhelming number of petitioners said that there should be minimum qualifications for a presidential candidate (488). They proposed that presidential candidates should:

- be a Zambian citizen by birth;
- have a Grade 12 certificate (most popular);
- have a college diploma;
- have a university degree;
- have at least one parent who is a Zambian citizen by birth;
- have parents who are citizens by birth;
- be aged between 25 and 80 years;
- have been residing in Zambia for a continuous period of at least 10 years;
- have served as a Member of Parliament;
- be financially sound;
- be mentally and physically fit;

- not hold a foreign bank account;
- have a minimum number of supporters from each province (one example given was 200 supporters from each province);
- have a traceable village and Chief in Zambia;
- not have previously served as President;
- have tax clearance; and
- not have a criminal record.

Observations

Most of the petitioners who addressed the subject of the parentage clause in the qualifications for presidential candidates demanded that the provision be repealed because it was discriminatory. Similarly, petitioners demanded that the provision that relates to domicile of a candidate be repealed or that the minimum period be reduced to 10 years in order not to exclude Zambians who are domiciled outside the country.

Many others advanced the point that whoever aspires for presidency of the country must demonstrate understanding of matters of State either through sound education or through experience in public life. A candidate must be a mature person of known integrity, in good health and a respected citizen of Zambia. These demands were motivated by a desire that the people of Zambia should be assured of stable and sound leadership.

The Commission observes that in Zambia prior to 1996, qualifications of a presidential candidate as prescribed in the Constitution did not attract any controversies, although in its report the Chona Commission observed that a number of petitioners who spoke on the subject submitted that the post of President should be restricted to "true Zambians" because the Head of State should have no other home to run to in times of crisis.

In 1996, qualifications were introduced in relation to the Zambian parentage and domicile of a presidential candidate. The current Constitution, under Article 34, states that both parents of a candidate must be Zambians by birth or descent. It also provides that the candidate should have been domiciled in the country for a period of at least 20 years.

In the 1996 presidential petition, the Supreme Court expressed misgivings and doubted the constitutional validity of the parentage clause requiring parents of a presidential candidate to be Zambian by birth or descent.

In many countries, the qualification for presidency or position of Prime Minister in relation to citizenship is confined to the candidate. In some countries where citizenship may be acquired by registration, the type of citizenship is qualified. This is, for example, the case in Ghana, Nigeria and Uganda, where qualification is restricted to citizens by birth, the United States of America, which restricts this to a natural born citizen and Sweden, where the Constitution requires that in order to be a Minister one should have been a citizen for at least 10 years.

Some of the petitioners who were in favour of the parentage clause in the Constitution cited the example of a country where a serving President who was ousted by civil uprising defected to another country of which he claimed to be a citizen and that country refused to surrender him on account of that citizenship. This is especially instructive to Zambia in view of the high standards of accountability and transparency being set for the presidency and other key public offices.

Although the subject did not attract many submissions to this Commission, the Commission also reflected on submissions made by petitioners to the Chona Commission, as already alluded to. This Commission further considered submissions made to and recommendations of the Mwanakatwe Commission on the subject. The majority of petitioners to the Mwanakatwe Commission on the subject of citizenship of a presidential candidate felt that the citizenship of a presidential candidate ought to be qualified. The petitioners wanted the presidency restricted to candidates who were Zambians by birth and both of whose parents were also Zambian by birth. They further wished that presidential candidates should be Zambians whose ancestors had villages in Zambia. The Commission recommended that in order to qualify to contest for the Office of President, a candidate must be a citizen born in Zambia and that his/her parents must be Zambians born in Zambia of Zambian citizens.

The Commission is also aware that the prevailing political circumstances at the time the parentage clause was introduced in the Constitution in 1996 led to perceptions that it was targeted at preventing the first President, Dr Kenneth Kaunda, from contesting elections.

In its consideration of the subject, the Commission noted that term of reference No. 5 of its terms of reference enjoins the Commission to examine and recommend the elimination of provisions which are perceived to be discriminatory in the Constitution. The Commission finds

that the parentage Clause is commonly perceived as discriminatory and feels that the serious concerns expressed that the Clause is potentially divisive are valid.

The Commission also finds that requiring a presidential candidate to prove that he/she has a traceable village and Chief in the country would be an unnecessary barrier, particularly now that the country is highly urbanised.

With respect to the qualification relating to the domicile of a presidential candidate, the Commission feels that the qualification should be in respect of residence and not domicile and that the period should be reduced to 10 years.

The Commission, however, finds the qualifications advanced in respect of minimum education achievement and medical and physical fitness and the arguments thereof sound. A number of Constitutions in Africa have a provision requiring that a candidate should be literate and conversant with the official language of the respective country. In the case of Uganda and Nigeria, the constitutions specify the minimum level of education.

A declaration of unsoundness of mind is a ground for disqualification found in many constitutions. Mental or physical incapacity is also a common ground for removal from office of a President and other elective offices. Therefore, mental incapacity should be a ground for disqualification from contesting for the Office of President, as is provided for in the current Constitution, while physical or mental incapacity should continue to be grounds for removal of a President from office.

In some states, such as Ghana, tax clearance is a requirement in order for a person to contest presidential or parliamentary elections. The Commission, however, is of the view that such a qualification could prove discriminatory against certain classes of the population or difficult to meeting. Similarly, there should be no requirement that a candidate should have a public service record.

The Commission evaluated the submission and argument that the minimum age qualification should be reduced to 25 years in order to allow youths to contest for the Office of President. The Commission, however, notes that the majority of petitioners favoured a minimum age ranging between 35 and 40, emphasising that the responsibilities of the Office demanded maturity and experience in public affairs. The Commission agrees with this reasoning, which seems to explain the fact that the minimum age of 35 years currently provided for is found in many constitutions. In the case of Nigeria and Uganda, the minimum age qualification is 40 years.

Recommendations

In respect of qualifications, the Commission recommends that the Constitution should provide that a presidential candidate should be a Zambian citizen by birth or descent.

The Commission further recommends that the Constitution should provide that a presidential candidate should:

- be at least 35 years of age;
- have a minimum education attainment of Grade 12 or its equivalent (to be clearly defined) and be conversant with the official language of the country;
- be a member of or be sponsored by a political party, or be an independent candidate;
- have been ordinary resident in Zambia for a continuous period of 10 years; and
- be supported by at least 1,000 registered voters.

With regard to disqualifications, the Commission recommends that in addition to the existing disqualifications in respect of candidature for the presidency, there should be added in the Constitution another ground, that a person shall not be eligible to contest presidential elections if he or she has dual citizenship.

8.2.3 Scrutiny of Presidential Candidates

Submissions

A few petitioners called for the background of presidential candidates to be scrutinised and their curriculum vitae to be published before elections (4). This is in order to enable the electorate to make informed choices and to ensure that candidates qualify to contest.

Observations

Very few petitioners made submissions on the subject of scrutiny of presidential candidates. The argument advanced was the need for the electorate to be informed about the background of candidates and to exclude persons who do not qualify.

The Commission, in its evaluation of this submission and arguments advanced, observed that in terms of enforcement of provisions relating to qualification and disqualification, the electoral laws of Zambia governing filing of nominations do not specify these in detail. A candidate is merely required to make general declarations, which are then given local publicity as well as through the Government Gazette. Making a false declaration constitutes an offence, the penalty for which is a fine or imprisonment or both.

Judging from past experience, the State neither has the capacity nor interest to probe candidates' declarations. These matters are left to those with interest to prove in a court of law, as happened in the election petition against former President, Dr. Frederick Chiluba, in which one of the grounds was that one of his parents was not a Zambian.

On the other hand, a requirement for scrutiny and verification of a candidate's background in our country may prove too onerous to achieve. There are no means by which the State and the electorate can access impeccable information on the background of candidates due to the inadequacy of information systems. Communication facilities are inaccessible to most Zambians. There is also a likelihood that such a provision would invite inconclusive speculations and distortions.

In the circumstances of these considerations, the Commission is of the view that it is better to have prescribed qualifications which are easier to ascertain. A more practical form of scrutiny of candidates under the circumstances is through public opinion of the electorate based on information available to them.

Recommendations

The Commission recommends that the *status quo* should be maintained, namely that scrutiny of candidates should not be a requirement for contesting presidential elections. The Commission, however, also recommends that in order for any interested persons to access the declarations made by presidential candidates, the constitution and relevant electoral laws should:

- reflect all the qualifications and grounds for disqualification in the declarations made for nomination purposes; and

- require the Electoral Commission to ensure that the information given by presidential candidates in these declarations be widely publicised through the media.

8.2.4 Independent Presidential Candidates

Submissions

A number of petitioners said that the Constitution should allow independent candidates to stand for presidential elections (28). A few petitioners, on the other hand, were of the view that presidential candidates should be sponsored by political parties (8).

Observations

Although relatively few petitioners made submissions on this important subject, the majority of those who addressed themselves to it felt that presidential candidates not sponsored by any political party (independent presidential candidates) should be eligible to contest elections.

The Commission acknowledges that in a multiparty democracy, an executive President is usually elected on account of a party manifesto through which pronounced policies and programmes are sold to the electorate. This is the basis on which the Mvunga Commission recommended that a presidential candidate should be sponsored by a political party.

The Commission, however, observes that a party manifesto is an expression of intent and political promises that are often forgotten as soon as an election victory is achieved. It is also not uncommon for political parties, whose strengths cannot be measured by any tangible means, to be formed purely for the purpose of providing sponsorship to their preferred candidates.

In any case, in a system where the Cabinet is drawn from outside Parliament, an independent President is not likely to face insurmountable hurdles. The Commission acknowledges that for practical reasons, such a President would need to have a clear vision and programme and forge alliances with MPs. However, such issues, in the Commission's view, should best be determined by the electorate.

The Commission further notes that the Mwanakatwe Commission recommended that independent presidential candidates should be eligible to contest elections.

The Commission observes that independent candidates are allowed in parliamentary elections. The rationale for such permissiveness in a democratic society should be extended to independent presidential candidates. Indeed, in a democracy, the question whether the Office of President should be held by a person who has party support or not is best

left to the wisdom of the electorate. This will strengthen democracy and perhaps explains why many multiparty democracies do not have this restriction.

Recommendations

The Commission recommends that the Constitution should permit independent presidential candidates to contest elections.

8.2.5 Election of President - System of Election and Winning Threshold

Submissions

A very large number of petitioners were of the view that for a presidential candidate to be declared winner, he/she must obtain at least 51% of the votes cast. If this is not achieved, a rerun should be conducted between the top two contenders (713). The main reason advanced was that a President should have a mandate of the majority of the electorate.

Very few petitioners were of the view that provisions of the 1964 Constitution on election of the President indirectly through parliamentary elections should be restored (8). Some petitioners also suggested that presidential candidates should be allowed to contest parliamentary elections (16).

Some petitioners proposed that a presidential candidate should win in at least five or six provinces to be declared winner (12), while others called for the current system of First-Past-the-Post (simple majority) to continue in order for the nation not to incur additional costs associated with a re-run, and in view of the large number of presidential candidates which makes it difficult for one candidate to obtain an absolute majority (20).

One petitioner was of the view that a Presidential candidate should secure at least a two-thirds majority of votes cast before being declared winner (1).

Observations

Submissions before the Commission were overwhelmingly in favour of a requirement that in order to be declared winner, a presidential candidate should obtain at least 51% of the votes cast and that failure to attain this should lead to a re-run between the candidates who obtain the highest numbers of votes. Some petitioners were, however**,** opposed to this system on account of the unaffordable costs that a re-run would attract.

In evaluating the submissions made on this subject, the Commission observes that in a democracy, a simple majority vote is acceptable in respect of matters that are not so fundamental as to raise serious questions of popularity. An executive President is entrusted with the discharge of sovereign functions on behalf of the people. It is therefore a universally accepted principle that only a person who enjoys popular support of the electorate should occupy the Office of President.

Many countries with executive Presidents, such as the United States of America, Ghana and Uganda, have an absolute majority vote requirement for the presidency. One common threshold is more than 50% of the valid votes cast.

The Commission acknowledges that under the current electoral regime where there is no restriction on the number of candidates, there is a likelihood that a requirement for an absolute majority of votes would almost invariably lead to a re-run each time there is a presidential election. The Commission is, however, of the view that the dictates of democracy and the need to have a President with a popular mandate outweigh the cost implications.

Regarding the question of a minimum threshold of votes in at least five or six provinces and securing at least two-thirds of the votes cast, as favoured by a few petitioners, the Commission observes that it would be unnecessary to subject presidential candidates to such a requirement, particularly where an absolute majority of 51% of the votes cast is a necessity.

Very few petitioners favoured a system whereby the President is elected indirectly through parliamentary elections, as was provided by the 1964 Constitution. The Commission finds this unfavourable because in a presidential executive system, election by direct popular vote is preferable

The Commission also notes that the Mvunga and Mwanakatwe Commissions recommended that the winning presidential candidate should receive at least 51% of the votes cast and that the 1991 Constitution made provision for a minimum threshold of more than 50% of the valid votes cast. The 1996 Constitution amendments, however, changed the requirement to a simple majority.

In arriving at an appropriate recommendation, the Commission notes that the desire was to have a popularly elected President with the majority of votes. It is perhaps this consideration that influenced the requirement of a minimum threshold of more than 50% in the 1991 Constitution. In this vein, the Commission notes that 51% is more than the minimum majority

of 50%. If the latter can possibly minimise reruns then it would be a preferable cost saving measure**.**

Further, it is desirable that the period within which a re-run should be conducted should be 30 days in order to expedite the process. This would compare favourably with a number of other countries with such a system of election a President.

Recommendations

In the light of these observations, the Commission recommends that in order to avoid problems associated with a minority President whose legitimacy and mandate would be in doubt, and as a cost saving measure, the Constitution provide that:

- a winning presidential candidate should receive a minimum of more 50% plus one of the valid votes cast and that failure by any of the candidates to attain this threshold should lead to a rerun, within 30 days, between the candidates who receive the two highest numbers of the valid votes cast;

- if in the re-run election none of the candidates receives more than 50% plus one of the valid votes cast, the Speaker should summon Parliament to elect the President between the candidates with the two highest numbers of the valid votes cast, and the candidate who receives the highest number of valid votes cast by the members shall be declared President; and

- in the event of a tie between candidates with the highest number of parliamentary votes, the Speaker or Presiding Officer shall have a casting vote.

8.2.6 Returning Officer

Submissions

Some petitioners, including the Judiciary, said that the Chief Justice should not be a Returning Officer in presidential elections (49). These petitioners argued that since the Chief Justice is part of the Supreme Court that determines presidential election petitions, it is undesirable for her/him to be Returning Officer. In addition, the Judiciary reasoned that the Chief Justice does not preside over the electoral process. Some of these petitioners suggested that the Chairman of the Electoral Commission should be the Returning Officer during presidential elections (15). Two petitioners favoured the current practice where the Chief Justice acts as Returning Officer (2).

Observations

Although relatively few petitioners addressed this subject, the majority, who included the Judiciary, spoke against the Chief Justice being Returning Officer, because of the conflict of interest which would arise from the fact that the Chief Justice would also preside over a presidential election petition in the event of the validity of the election being challenged in court. In addition, the Judiciary reasoned that the Chief Justice does not preside over the electoral process, as the conduct of elections and the entire electoral process falls within the jurisdiction of the Electoral Commission of Zambia.

Petitioners suggested that the Chairperson of the Electoral Commission, who presides over the electoral process, should instead be the Returning Officer in Presidential elections.

The Commission has no difficulty in appreciating the arguments against the Chief Justice being the Returning Officer and agrees with the submission that the Chairperson of the Electoral Commission of Zambia, who is in charge of the conduct of the elections and the entire electoral process, should be the Returning Officer in presidential elections.

The Commission notes that in other African countries such as Ghana and Nigeria, the Constitutions provide that the Electoral Commission Chairman declares election results. The Constitution of Uganda simply provides that the Electoral Commission declares the winning presidential candidate.

Recommendations

The Commission accordingly recommends that the Constitution should provide that the Chairperson of the Electoral Commission will be the Returning Officer.

8.2.7 Handover/Transitional Period

Submissions

A large number of petitioners said that the Constitution should provide for handover or transitional arrangements following presidential elections (564). The suggested period of hand over included one day, two weeks, one month, two months, three and six months. Of those who submitted on this subject, the majority suggested a transitional period of three months before a President-elect assumes office. The reason advanced for this submission was that this would strengthen multiparty democracy and

facilitate a smooth handover of Government administration after a change of Government. This would also avoid a situation where development projects are disrupted due to the sudden change of personnel at the helm of ministries.

A number of petitioners expressed the view that the Chief Justice should act during the transition period (82). On the other hand, there was a submission that the Chief Justice should not act as President during the transition period. This is because the Chief Justice swears in the President when he/she takes office, is the Returning Officer, and presides over Presidential Election petitions (1).

Some petitioners said that in the event of all presidential candidates failing to obtain 51% of the votes cast, the Chief Justice should act as President (20).

A number of petitioners felt that the President and the Cabinet should vacate office three months before elections (38). One petitioner said that the President should proceed on leave during the period of campaign (1).

Observations

A majority of petitioners before the Commission wanted a smooth handover period and this varied in duration, with 90 days being the most popular. Petitioners argued that entrenching a system of handover of government administration in the culture of the nation would strengthen multiparty democracy. They also reasoned that a handover period would facilitate a smooth change of Government and minimise disruptions in the operations of the Government.

On the other hand, some petitioners wanted both the President and the Cabinet to vacate office three months before elections and that until a President-elect is sworn in, the Chief Justice should act as President.

It is clear that people want a reasonable handover period after a presidential election. Article 34 (10) of the current Constitution requires the outgoing President to hand over the Office of President immediately upon the President-elect being sworn in, and to complete the administrative procedures within 14 days from the day of swearing in.

The Commission shares the petitioners' views and notes that a number of democratic countries have a tradition whereby a reasonable period of time is given for handover of government administration. The current practice of immediate handover and swearing in of the President-elect does not provide adequate time for the outgoing President to brief the incoming President.

In its consideration of the subject, the Commission recalled that lack of proper handover arrangements has in the past resulted in haphazard departure from and assumption of the Office of President and other Executive offices. There have been allegations and counter-allegations of improper conduct of the affairs of the State between outgoing and in-coming administrations. Some of these allegations could not be investigated due to absence of handover records. It is also true that if a mechanism for handover existed, some wild allegations, which have tended to embarrass the country, could have been avoided. Besides, the quick handover does not provide for time to prepare a dignified State ceremony befitting such an occasion.

On the other hand, the Commission acknowledges that it is necessary for a mechanism of handover of Government to guarantee the safety of records. This implies that the time of handover should not be unnecessarily long. The suggested period of 90 days is, in the opinion of the Commission, appropriate. However, in the event of there being a presidential petition where the incumbent is a litigant, he/she should not continue in office, in which case the Speaker should discharge the functions of the presidency until the next President is elected.

The Commission notes that the Mwanakatwe Commission recommended a 30 day period of smooth transfer of power during which the incumbent President would be in charge of routine administration, but would make decisions on important matters only with the consent of the President-elect. It is the view of this Commission, however, that the President-elect should only take charge of government administration after being sworn in at the end of the handover period.

On the question of whether there should be an interim President pending elections and swearing in of a President-elect, the Commission observes that having an interim President would lead to an undesirable and unnecessary vacuum and disruption in the running of Government. The standard practice is that the incumbent President hands over to the President-elect. In any case, it would be desirable for the presidency to remain within the realm of the Executive, in line with the principle of separation of powers.

Recommendations

Accordingly, the Commission recommends that the Constitution should:

- provide for a period of handover of the presidency from the out-going President to the President-elect and that this should be 90 days; and

- maintain the current provision and practice of the incumbent President continuing in office until the President-elect takes over.

The Commission further recommends that the outgoing President and President-elect should be obligated to comply with handover requirements and that, in order to give effect to this provision, these arrangements should be made formal.

8.2.8 Swearing in of President-elect

Submissions

A number of petitioners said that the President-elect should be sworn in between one and 90 days after elections (92). However, a large number expressed the view that in the event of an election petition, the swearing-in of the President-elect should not take place until the petition has been disposed of (306). These petitioners also called for a time limit for determination of election petitions, and the majority suggested a period of 90 days. The main reason advanced for this submission was that it is necessary to allow for a period of verification of election results as well as settlement of any petitions that may be brought before courts of law. Some added that it was not proper to have a President in office when her/his legitimacy was still subject of court proceedings.

A few petitioners said that in the event of a presidential election petition, the Chief Justice should act as President in the interim (6), while others felt that the incumbent should continue to hold office until the petition is settled (4). One petitioner, on the other hand, argued that in such event, presidential power should vest in the Speaker until determination of the case, which should be within 90 days (1).

A few petitioners called for the President to hand over power immediately upon the announcement of results (5).

Observations

The Commission observes that the majority of petitioners who made submissions on this subject said the President-elect should not be sworn in if there is an election petition until the matter is disposed of, because until the matter is determined the legitimacy of the President-elect would be in question. A few petitioners added that the Chief Justice should act as President in the interim, whilst a few others were of the view that the incumbent President should continue in office until the petition is settled. Some petitioners further said that a President-elect should be sworn in after a certain period has lapsed in order to allow for verification of results

and any election petition to be settled. To this end, the majority of these petitioners suggested a period ranging between 14 and 90 days.

The Commission concurs entirely with the submission that the President-elect should not be sworn in if there is an election petition pending in court, and agrees with the rationale given. The Commission also acknowledges that it is improper and awkward to have a President in office whose election is the subject of a petition. It is therefore necessary that a time limit be set for determination of election petitions, as demanded by petitioners.

The Commission also reiterates that, in any case, adequate time should be given to allow for preparations for the swearing in ceremony. Article 34 (9) of the current Constitution provides that the President-elect shall be sworn in and assume office immediately, but not later than 24 hours from the time of declaring the election results. This time frame is inadequate, even in the event where the incumbent is the President-elect and there is no election petition.

The Commission further feels that in the event that an incumbent President is the petitioner or is petitioned, then the sitting Speaker should be the Interim President. In the event that the Speaker is unable to act as President, the Chief Justice should be the Interim President.

The Commission, however, feels that the Chief Justice should continue swearing in the President-elect after the prescribed period has matured as there is no conflict of interest.

Recommendations

The Commission, accordingly, recommends that the Constitution provide that:

- a President-elect should be sworn in on the last day of the handover period;

- in the event of an election petition, the President-elect should not be sworn in until the petition has been disposed of and if the petition is determined in favour of the President-elect, the handover period shall, thereupon, commence retrospectively from the date of elections;

- a presidential election petition should be concluded within 90 days of declaration of election results;

- in the event of an election petition where the incumbent President is either the petitioner or is petitioned, the Speaker of the National Assembly should assume the Office of President as Interim President. If the Speaker is unable to do so, the Chief Justice should be the Interim President; and

- the Chief Justice should swear in the President-elect.

8.2.9 Powers of the President

8.2.9.1 Vesting of Executive Power

Submissions

One petitioner said that the executive power should be reposed in the President, acting in consultation with the Cabinet (1).

Observations

The Commission considered this submission and reiterates its observation that the system of government in Zambia is aligned to the presidential executive system and, in this system, executive power is vested in the President, who is directly elected by the people. Indeed, in a system where the Cabinet is appointed from outside the National Assembly, it would be absurd for the executive power to be vested in the President acting in consultation with the Cabinet. In the South African model, executive power is vested in the President, but the President exercises the power together with the Members of Cabinet. The variation may be explained by the fact that the President is not directly elected by the people, but by the National Assembly.

The Commission also notes that the Mvunga and Mwanakatwe Commissions recommended that Cabinet decisions be merely advisory to the President.

Recommendations

The Commission recommends that since Zambia has substantially adopted a presidential executive system and this system has been institutionalised, with no significant demands for its change in this arrangement, executive power should continue being vested in the President.

8.2.9.2 Appointments

Submissions

Under this topic, there were two trends; those who wanted the powers of the President to be reduced and those who wanted the *status quo* to be maintained. These submissions have been dealt with under appointments to specific offices.

A large number of petitioners felt that holders of constitutional offices should be appointed by Parliament and not by the President (588).

Two petitioners suggested that Government appointments should reflect tribal balancing (2).

A number of petitioners were of the view that the President should not appoint constitutional office-holders and other high ranking officials such as the Chief Justice, Attorney-General and Director of Public Prosecutions (105). These petitioners suggested that an independent body should make the appointments and that the National Assembly should ratify such appointments. The reasons advanced included the need to reduce presidential powers, enhance checks and balances and avoid a situation whereby the officers owe blind loyalty to the appointing authority. On the other hand, some petitioners said that the President should continue appointing holders of constitutional offices, subject to ratification by Parliament (27). One of the petitioners further said that holders of constitutional offices should be properly qualified and experienced (1).

A few petitioners expressed a view that constitutional office holders should be guaranteed security of tenure so as to enable them exercise the functions of their offices independently (9). One of these petitioners further urged that in this regard Article 122 of the constitution, as applies to the Auditor-General, should apply to all constitutional office holders.

A number of petitioners said that the President should not appoint the Chief Executives of parastatals. Some of these suggested that such officers should be appointed by Parliament or an independent body (37).

Ten petitioners argued that the President should not have veto powers on appointments that require parliamentary ratification, as Parliament should have the final say on these appointments (10).

They further argued that it was anomalous for the Constitution to require the appointments to be ratified by Parliament but still allow the President to go ahead with the appointment when ratification is denied.

Observations

The Commission notes that a majority of petitioners did not want holders of constitutional offices and other high ranking officials to be appointed by the President. They preferred these appointments to be made by the National Assembly or some other independent body, with parliamentary ratification. This is to reduce the powers of the President, enhance checks and balances and promote professional independence and impartiality in the discharge of functions of these offices. The Commission also wishes to note that the demand is premised on the desire for impartiality and independence of these offices, but these attributes should also take into account the age and experience of the office holders.

A few petitioners felt that the President should not override a decision of the National Assembly on appointments requiring ratification by the National Assembly.

The Commission observes that the reasons given in the submissions suggest serious loss of confidence in the Office of the President resulting from past experience. It is acknowledged that apprehensions that reposing excessive powers in the President is not in conformity with democracy and good governance are well founded. However, the Commission considered the fact that in a presidential executive system, it is the inherent power of the President to make such appointments, since appointees are agents of the Executive in the discharge of executive functions.

The Commission further observes that checks and balances cannot only be achieved by trimming the President's powers of appointment, but also by enhancing powers of other organs of the State. In this regard, the Commission also observes that if the oversight role of Parliament is strengthened, it would effectively provide such checks and balances and that ratification of appointments by Parliament does or can provide the desired checks and balances.

The Commission nevertheless notes that a significant number of these constitutional offices fall under the jurisdiction of other organs of Government and as such ought to be independent of the Executive in order to be effective in the discharge of their

functions. Although petitioners insisted that the President should not override a decision of the National Assembly, the Commission feels that the concerns can be addressed by infusing adequate checks and balances in the process of appointment, otherwise there would be no finality in the process.

In its evaluation of the submissions, the Commission examined constitutions of other countries. The Constitution of the United States of America confers powers on the President to nominate and, with the advice and consent of the Senate, to appoint high ranking officials such as Ambassadors and Judges of the Supreme Court. The Constitution also states that the Congress may, by law, vest the appointment of such inferior officers as it thinks proper in the President alone, in the Courts of law or in the Heads of Department. In the case of Uganda, Ghana and South Africa, the constitutions provide for the President to appoint certain high ranking public officers on the advice of, or in consultation with appropriate Commissions or other authorities and with the approval of Parliament. The Constitutions accord these officers security of tenure.

Recommendations

The Commission accordingly recommends that:

- the President should, in appropriate cases, retain the power to make such appointments subject to parliamentary ratification;

- where necessary, the President should be required to make such appointments, on the advice of or in consultation with service commissions or similar institutions, as appropriate;

- where the Executive has exclusive jurisdiction over an office, the President should have power to override a decision of the National Assembly, but where the Executive does not have such exclusive jurisdiction, the decision of the National Assembly should prevail;

- to the extent desirable, these offices should be guaranteed security of tenure; and

- the holders of these offices should have sufficient experience and be of minimum age of 45 years.

8.2.9.3 Other Powers

Submissions

Some petitioners stated in general terms that the President's discretionary powers as provided for under Article 44 of the Constitution should be reviewed (4). It was argued that this Article gives too much power and discretion to the President.

A few petitioners said that the President should seek approval from Parliament before declaring war, rendering military assistance to other countries, or sending peacekeeping missions outside the country (8).

Another petitioner felt that the President should not have the powers of prerogative of mercy. The petitioner argued that vesting such powers in the President leads to excessive presidential powers (1). It was suggested that an independent and impartial tribunal should handle the pardon of convicted persons. One petitioner proposed that the prerogative of mercy should be restricted to specified types of crimes, such as treason, and should not be exercised in relation to murder cases (1).

There was yet another submission that the power of prerogative of mercy should be exercised more often than is the case now (1).

Observations

The Commission observes that, consistent with the general desire to have the powers of the President reduced and to provide checks and balances, a few petitioners specifically called for the review of the powers of the President under Article 44 of the Constitution, arguing that these powers are excessive. On the prerogative of mercy, the Commission observes that the few petitioners who addressed this subject wanted the power of prerogative of mercy restricted to a certain category of offences, such as treason, and demanded that the power should not be vested in the President but instead in an impartial tribunal to avoid its abuse.

The Commission appreciates the principle that checks and balances between the Executive and Parliament over matters falling beyond the jurisdiction of the Executive should be enhanced through power sharing. The Commission also considered the fact that the powers conferred upon the President

by Article 44 are too wide and, in part, so vague as to render interpretation difficult. In other constitutions, provisions conferring powers on the presidency or other offices are concise. Therefore there is need to redefine the President's powers in terms of Article 44 of the Constitution.

The Commission observes that petitioners' insistence that the President should not override decisions of the National Assembly was extended to declaration of war, rendering of military assistance and peacekeeping missions to other countries. As earlier observed, these submissions point to the mistrust in the Office of the President by the people. This has developed over the years since attainment of independence. This mistrust has been fuelled by the fact that decisions concerning rendering of military assistance and peacekeeping missions to other countries have been made without the involvement of the National Assembly. In some cases, lives have been lost and substantial national resources spent.

On the power of prerogative of mercy, the Commission notes that conventionally and by practice, in Commonwealth countries the power of prerogative of mercy is vested in the Head of State. In Zambia, the President exercises this power on the advice of an advisory committee established under Article 60 of the Constitution.

Further, the Commission feels that there is no compelling reason for the Constitution to vest the power of prerogative of mercy in a body other than the President, as the trial of all offences and the determination of guilt is the preserve of the courts. It is also not appropriate to restrict the offences to which the prerogative of mercy should apply.

Recommendations

In the light of the above observations, the Commission recommends that the Constitution should provide that:

- prior approval of the National Assembly by a two-thirds majority should be obtained in matters of declaration of war, rendering of military service and peacekeeping missions to other countries; and

- the President should have power to take any necessary measures in defence of the country in circumstances not amounting to a declaration of war, and these measures

should be subject to ratification by the National Assembly within seven days.

The Commission also recommends that the power of prerogative of mercy should continue to be vested in the President unconditionally.

8.2.10 Term of Office

Submissions

An overwhelming number of petitioners wanted the term of office of the President to be limited (419). The suggested limits included the following:

- one term or part thereof;
- one 4-year term;
- two 4-year terms;
- two 5-year terms (majority of petitioners);
- four 5-year terms;
- one 5-year term;
- two terms;
- one 7-year term;
- one 8-year term;
- one 10-year term;
- one 20-year term; and
- one 7-year term plus 5 years.

The main reason advanced by most petitioners who called for the President's term of office to be limited was that an unlimited term tended to result in the President adopting dictatorial tendencies. Another reason was that a President should be given a limited time within which to contribute to national development, after which other capable citizens should be given an opportunity to do the same.

Some petitioners felt that there should be no limitation on the tenure of office of the President (37). Two petitioners said that a former President should be eligible to recontest after five years of staying out of office (2).

Observations

It can safely be stated that there has been virtual unanimity on the need to limit the term of office of the President, as illustrated by the number of petitioners in favour as compared to the extremely small number of petitioners against it. The most popular maximum limit suggested by petitioners was two terms of five years, as per the current constitutional provision. The Mvunga and Mwanakatwe Commissions also recommended an upper limit of two five-year terms.

The main reason given by petitioners for wanting a limited term of office for the President is to avoid dictatorial tendencies. This argument is consistent with term of reference number 2, which enjoins the Commission to recommend a system of government that will ensure that Zambia is governed in a manner that will promote democratic principles of regular and fair elections, transparency and accountability and that will guard against the emergence of a dictatorial form of government. The Commission also agrees with the observation of the Mwanakatwe Commission that the presidency, being the highest constitutional office, should be available to as many citizens as possible and hence there was no need for former Presidents to recontest after five years of staying out of office.

Recommendations

Accordingly, the Commission recommends retention of the current constitutional provision, which limits the presidential term of office to two five-year terms only.

8.2.11 Salary, Gratuity and Pension

Submissions

A few petitioners said that the salary of the President and other constitutional office holders should not be adjusted during their term of office (7). The reason advanced was to avoid abuse of authority through award of excessive remuneration.

Two petitioners wanted clarification of the provisions on gratuity of a retired President so that a retired President is entitled to gratuity whether he/she has served two terms or not (2).

Three petitioners felt that a retired President should be entitled to a pension, irrespective of whether he/she has returned to active politics or not (3).

Observations

Very few petitioners made submissions on this subject. Those who did demanded that the salary of the President and other constitutional office holders should not be adjusted during their term of office in order to prevent award of excessive remuneration. Others sought clarity with respect to the question of entitlement of a former President who continues in active politics. Yet others sought clarity as to whether gratuity should be paid to a former President who has served only one term or only to a former President who has served the maximum term, i.e. two terms.

The Commission observes that although the argument for the need to guard against misuse of power in award of remuneration to the President and other leaders is sound, under the current system prohibition against adjustment of remuneration during their term of office may lead to an absurd situation of stagnation, ignoring inflationary trends during the currency of the tenure of office.

The Commission further observes that gratuity is paid on services rendered. It is earned and is not a donation or ex-gratia payment. Not taking part in active politics is, therefore, an extraneous consideration to rendering service. However, for a living allowance, the Commission is of the view that this is premised on the acceptance that a former President has retired from active politics. If such former President decides to re-engage in active politics, this entitlement should be forfeited. In addition, a former President who has been impeached or removed from Office in accordance with the provisions of the Constitution, or who has been convicted of an offence for anything done or omitted to be done during tenure of the Office of President should not be entitled to a living allowance.

The Commission also observes that it appears that there is a perception that gratuity is synonymous with pension and should therefore be paid on condition of retirement. Further, the use of the term “pension” in the Constitution is misleading, as it suggests a pension scheme to which an employee and employer contribute

during employment and from which pension is paid to the employee upon retirement. Whilst noting that the language used in the Constitution on benefits of a former President is found in many other constitutions, particularly in Africa, the Commission feels that clarity is essential.

Recommendations

The Commission accordingly recommends that there should be no prohibition against upward adjustment of remuneration of the President and other constitutional office holders during their term of office, but that instead the Constitution should provide that remuneration of these office holders shall be determined by the National Assembly on the recommendation of the National Fiscal and Emoluments Commission, to be established as recommended in Chapter 21 of this report.

The Commission further recommends that the Constitution should provide that a former President shall be entitled to:

- gratuity at the end of each term of office, in accordance with the normal practice in employment on fixed term contracts;

- receive a living allowance during her/his lifetime and any other benefits as may be prescribed by an Act of Parliament, with an exception that a former President who has been impeached or removed from Office in accordance with the provisions of the Constitution, or who has been convicted of an offence for anything done or omitted to be done during tenure of the Office of President should not be entitled to a living allowance; and

- all the benefits except for a living allowance, irrespective of participation in active politics.

8.2.12 Presidential Immunity

Submissions

A number of petitioners said that the President should lose immunity upon leaving office (52). The reason advanced for this view by some of these petitioners was that an erring President should be made to account for mistakes committed while in office and should not be shielded from prosecution if need arises. On the other hand, other petitioners were of the view that the immunity of

the former President should not be removed upon leaving office (26).

Some petitioners felt that the President should have no immunity at all (13). A few petitioners expressed the view that presidential immunity should not extend to criminal activities or crimes committed in a personal capacity (5). Only two petitioners believed that the President should not easily lose immunity (2).

The ZCTU proposed that the Constitution should vest the power to remove a President's immunity in the "Council of State", subject to parliamentary approval (1).

One petitioner said that the status quo should be maintained (1).

Observations

Though relatively few petitioners made submissions on the subject, the majority of those who did wanted loss of immunity immediately upon a President vacating office in order to make former Presidents accountable for offences committed while in office. A few petitioners wanted retention of immunity upon a President leaving office whilst a few others demanded that the President should not enjoy any immunity at all.

A submission from ZCTU called for the power to remove a President's immunity to be vested in the "Council of State", subject to parliamentary approval. The Commission reiterates its view that power to remove a former President's immunity should be vested in the people's representative body – the National Assembly.

The Commission further observes that over the recent past, some voices have called for immunity to be restricted to a serving President because of perceived abuse.

The Commission observes that immunity of a President against legal proceedings is a universal practice and that, in Zambia, it has existed since the attainment of independence in 1964. This immunity is intended to shield the President from undesirable disruptions in the performance of functions of the Office.

In a number of other countries, some limited immunity has been extended to former Presidents. In the case of Ghana and Uganda, for example, a former President is protected against civil or criminal proceedings in respect of acts done or omissions made in

her/his official capacity during the term of office. In terms of Article 43 (3) of the Constitution of Zambia, the protection is in respect of criminal proceedings against anything done in a personal capacity. This immunity may, however, be removed by the National Assembly if such removal would not be contrary to the interests of the State.

The Commission observes that the Mvunga Commission had recommended absolute immunity of a President for all official acts or omissions during the tenure of office and also recommended impeachment before prosecution.

In the light of the above considerations, the Commission makes a further observation that the trend should not be to harass former Presidents, instilling fear in their successors that the same would happen to them. The adverse effect of this would be to impair the function of a President who is afraid of her/his fate after leaving office. This situation should be avoided. However, with regard to acts or omissions, civil or criminal, of a private nature, a former President should be liable to legal proceedings and immunity should not be extended beyond tenure of office. The Commission, however, acknowledges the difficulty of distinguishing between official and private capacity. This, being a matter of fact, should be determined by courts of law.

The Commission feels that whilst it is necessary for a serving President to retain the immunity as currently provided by the Constitution, there is need to redefine the immunity of a former President to bring it into conformity with standard practice so that it serves the intended purpose and the procedures and conditions under which it may be removed. The procedures and conditions should be such that immunity cannot be lifted very easily, but at the same time, it should not be too difficult for the National Assembly to do this.

The current provisions of the Constitution on the lifting of immunity make this very easy to achieve, which could lead to a situation where former Presidents are vulnerable to undue harassment. The procedures do not provide for a mechanism for hearing of the allegations to determine the merits or otherwise and for the former President to be heard. The Commission is also not clear as to whether or not the lifting of immunity is restricted to the acts or omissions that are alleged. Further, under the provisions of the current Constitution, a former President may be stripped of immunity by a simple majority of the members.

The above short-comings should be addressed by a requirement for a Select Committee to hear the matter before a report is tabled before the National Assembly, and for the former President to be given an opportunity of being heard by the Committee. The resolution should be passed by at least two-thirds of all the MPs. The lifting of immunity should be restricted to the grounds on which the immunity is removed and the immunity should be restored if the former President is acquitted of charges or is not prosecuted within 90 days, the immunity should be restored.

Recommendations

The Commission recommends that immunity of a serving President from legal proceedings should be retained.

Further, the Commission recommends that the Constitution should provide that:

- a former President should enjoy absolute immunity from legal proceedings only in respect of civil and criminal proceedings for acts committed or omissions made in the course of duty;

- a former President shall enjoy immunity from civil and criminal proceedings for acts committed or omissions made in their private capacity, but this immunity may be removed by the National Assembly on a resolution supported by at least two-thirds of all MPs;

- the allegations in respect of which it is proposed to remove a former President's immunity should be heard by a Select Committee which should table a report before the House;

- the former President should be given an opportunity to be heard by the Committee;

- the lifting of immunity should be restricted to the grounds on which the immunity is lifted and the immunity should be lifted if the former President is acquitted of the charges or is not prosecuted within 90 days; and

- the power to remove a former President's immunity continues to be reposed in the National Assembly, which represents popular sovereignty.

8.2.13 Rotation of the Presidency

Submissions

Some petitioners proposed that the presidency should rotate among the nine provinces or the seven major tribes of Zambia (18). These petitioners argued that in order to maintain national unity, the presidency should rotate among the major tribes so that no single tribe is seen to monopolise the position.

Observations

The Commission notes that the submission, which was made by relatively few petitioners, has been repeated from previous Commissions. It was prompted by concerns of long standing disadvantages experienced by some provinces and tribes, which feel that without special provision on the subject, nobody from these provinces or tribes is likely to become President of Zambia.

The Commission is, however, of the view that a system of rotational presidency is not practical and that the idea is inconsistent with the majority view of the electorate. Further, imposing such a system on the country would run counter to democracy, as it would stifle competition. There are no known examples of democracies where such a system is practised.

The Commission concluded that the issue of rotation is best left to the wisdom and choice of the electorate, which is exercised through the ballot.

Recommendations

The Commission recommends that the current system of election of a President should be maintained.

8.2.14 Republican President to Vacate Party Presidency

Submissions

Some petitioners called for a constitutional provision that would compel a Republican President to vacate party presidency (24). They argued that the President should not participate in partisan politics upon assuming office. They further argued that this would help reduce the misuse of public resources on party programmes.

Petitioners emphasised that the Republican President is President for all citizens.

Observations

Although the Commission appreciates the misgivings expressed by petitioners in a presidential system, it is not practical to sever the bearer of the Office of President from party office or functions.

Recommendations

Accordingly, the Commission recommends the retention of the system whereby a Republican President may hold a political party office.

8.2.15 Removal from Office for Incapacity

Although there were no submissions on this subject, the Commission wishes to observe that a resolution by the Cabinet that the question of the physical or mental capacity of the President ought to be investigated should be by at least two-thirds majority, as opposed to the simple majority provided in the Constitution so that the matter is firmly established.

The Commission also feels that at the stage of the National Assembly, the resolution should only require a simple majority and not a two-thirds majority, as provided in the current Constitution. Further, the National Assembly should not have the option of rejecting the medical report and cause a further inquiry. This is because by this stage, the issue would have been subjected to adequate testing through Cabinet and the Medical Board.

Recommendations

The Commission, therefore, recommends that provisions of the current Constitution should be varied so as to provide that:

- the Cabinet may by a resolution of at least two thirds of the members decide that the question of physical or mental capacity of the president should be investigated; and

- the resolution of the National Assembly should be by simple majority. Further, there should be no provision in the Constitution for the National Assembly to reject the medical report and cause a further inquiry.

8.2.16 Impeachment

Submissions

8.2.16.1 Simplification of Impeachment Procedure

Very few petitioners proposed that the impeachment procedure for a President should be reviewed and simplified (3). It was suggested, for example, that a President should be deemed removed once a tribunal finds that the allegations of violation of the Constitution or misconduct are substantiated without further reference to the National Assembly for a resolution. One petitioner, on the other hand, said that the provisions for impeachment of a president should be strengthened and refined so as to prevent abuse (1).

8.2.16.2 Powers to Impeach

Another submission was that the power to impeach the President should be vested in Parliament (1). Two petitioners, on the other hand, called for the power to impeach the President to be vested in Parliament and the House of Chiefs jointly (2).

One petitioner proposed that members of the National Assembly should be empowered to convene the National Assembly whenever necessary, to consider a motion to impeach the President (1).

8.2.16.3 Limit on Impeachment Motions

One petitioner said that only one impeachment motion should be allowed within any single term of office of the President (1).

8.2.16.4 Recall Election

Some petitioners said that the impeachment of the President should be substituted with a recall election (18). This is similar to a vote of no confidence in which the electorate would be invited to indicate approval or disapproval of the President's performance.

Observations

The Commission observes that very few petitioners addressed the subject and that of those who did the majority expressed the view that impeachment should be substituted with recall election. Some wanted the procedures for impeachment of a President to be simplified, whilst two petitioners called for the strengthening of the procedures and for a limitation on impeachment motions to prevent abuse. Others called for the power to impeach a President to be jointly shared by Parliament and the House of Chiefs.

There was also a call for the National Assembly to have power to convene whenever necessary, to consider an impeachment motion.

The Commission finds no compelling reason for or advantage in substitution of impeachment with recall election. To the contrary, a recall election would be more of a liability, as it would lead to protracted disruption in the function of the Office of President and unnecessary expenditure. It should suffice that the electorate is able to exercise its choice of rejecting an unsuitable President at the end of the five-year term whilst reposing the power to remove a President through impeachment in the people's elected representatives in the National Assembly.

The Commission further observes that, whilst provision for impeachment of a President is a necessary check against abuse of power and misconduct, it is at the same time important to provide safeguards against abuse of the power of impeachment.

The Commission notes that the current provisions state that upon a notice supported by not less than one-third of all the MPs, the Speaker is obligated to cause an impeachment motion to be considered by the National Assembly within a specified period, whether or not the National Assembly is in recess or prorogued. As a necessary check, upon the motion being supported by not less than two-thirds of all MPs, it shall be passed and the Chief Justice shall appoint a tribunal to investigate the allegations. If the tribunal finds that the allegations are not substantiated, the proceedings shall terminate. If the allegations are substantiated, the report is referred to the National Assembly for final determination. The National Assembly may then, on a three-quarters majority of all MPs, pass a resolution impeaching the President.

The Commission considered the suggestion that there should be no requirement for a resolution of the National Assembly for impeachment of a President once a tribunal finds that the allegations are substantiated. The Commission, however, is of the contrary view that ending the process with a tribunal would not only have the effect of subjecting a popularly elected

President to removal by an organ inferior to the people. It would also spell danger to the security of tenure of a President.

The Commission also examined the provisions of other constitutions, including those of Ghana, India, Nigeria, South Africa and Uganda, and established that the procedures are substantially similar to those in the Constitution of Zambia, with some significant differences only in the case of South Africa. In the case of South Africa, the National Assembly simply considers and passes the resolution on a two-thirds majority of all the members of the National Assembly. In India, two Houses of the National Assembly are involved in the impeachment process of the President. One House initiates the motion to impeach while the other investigates the allegations against the President. Once the investigations are substantiated, the matter is referred back to the House that initiated the motion for a final resolution of impeachment. The safeguard in this arrangement is that there are two Houses of the National Assembly involved in the impeachment process.

The Commission, however, feels that a two-thirds majority of all the MPs, instead of three-quarters, should suffice to pass an impeachment motion.

In concluding its consideration of the subject, the Commission also notes that although the subject attracted very few submissions it is nevertheless an important one.

Recommendations

The Commission accordingly recommends that:

- impeachment should not be substituted with a recall election;

- procedures for impeachment of a President as contained in the current Constitution should be retained, with the exception that the requirement that an impeachment motion must be passed by a three-quarters majority of all MPs should be replaced with a two-thirds majority of all MPs as is the standard practice in many countries; and

- the power to impeach a President should continue to be vested in the National Assembly which is the repository of popular sovereignty.

8.2.17 Vacancy in the Office of President

8.2.17.1 Acting in Event of Impeachment, Resignation, Absence, Incapacity or Death

Submissions

One petitioner proposed that whenever a vacancy arises in the Office of President, the Vice-President or, in the absence of the Vice-President, a member of the Cabinet elected by the Cabinet should perform the functions of the President, until a person elected as President within 90 days from the date of the Office becoming vacant assumes office (1). The petitioner argued that it was necessary to remove from the provision specific circumstances leading to a vacancy arising.

Similarly, the petitioner proposed that whenever the President is absent from Zambia or, by reason of illness, is unable to perform her/his functions, the Vice-President or (where the Vice-President is incapable of discharging his functions), such member of the Cabinet as the Cabinet shall elect should perform the functions of the President (1). The petitioner argued that it is undesirable and undemocratic for the Constitution to provide that the President may appoint "any other person" to act as President.

On the other hand, one petitioner said that where neither the President nor Vice-President is able to discharge functions of the Office, the Speaker and not just any member of the Cabinet should assume Office for the 90 days until such a time as a person is elected into Office (1).

Some petitioners said that in case of removal, resignation or death of the President, the Vice-President should complete the remainder of the term (23). However, one petitioner was of the view that the Vice-President should act for only a limited period, after which elections should be held (1). This petitioner argued that the Vice-President should not be allowed to act as President for a long period without seeking the mandate of the people. Other petitioners felt that the Vice-President, when acting as President, should have limited powers, for example, he/she should not appoint persons to public office or terminate appointments (4).

One petitioner said that if the Office of Vice-President is not replaced by that of Prime Minister, the Speaker and Chief

Justice should be in line to act as President instead of the Vice-President (1).

A few petitioners suggested that the National Assembly should elect an acting President (5). A few other petitioners preferred the Chief Justice to act as President (5).

Observations

Although the subject attracted relatively few submissions, the majority of these wanted the Vice-President to complete the remainder of the term in the event of a vacancy in the Office of the President. The Commission notes that this submission was made against the background of a popular demand that the Vice-President should be popularly elected as a running mate to a presidential candidate. The Commission accordingly concurs with the justification.

Similarly, some petitioners said, in the context of the prevailing arrangement, that the Vice-President should act only for a limited period, after which an election should be held. Petitioners added that in such event, the Vice-President should have limited powers because the Vice-President lacks popular mandate.

There was also a submission that in the absence of the Vice-President or if the Vice-President is unable to discharge the functions of the Office of the President, the Cabinet should elect a member of the Cabinet to perform the functions of the Office of the President. The Commission does not find merit in this submission and is of the view that the Cabinet should not have power to elect a Minister to act as President, because it is composed of persons not elected by the people.

The Commission considered the submission that the National Assembly should elect an acting President and the suggestion that the Chief Justice should act. There was also a submission that the Speaker of the National Assembly should discharge the functions of the Office of the President where the Vice-President is absent or unable to do so. It is the Commission's view that the discharge of the functions of the Office of the President should be a preserve of the Executive, as this is consistent with the principle of separation of powers, exceptions being only in justified and specified circumstances. The Speaker of the National Assembly should act under such circumstances. Therefore, the Judiciary should as much as

possible be shielded from politics, the Chief Justice should not in any circumstances act in the Office of the President. Where the Speaker is unable to act, the First Deputy Speaker should do so.

The Commission further observes that there was a call that specific circumstances leading to a vacancy in the Office of the President should not be specified in the Constitution. The Commission finds it difficult to achieve this, as it is necessary to deal with all circumstances when the Office of President shall fall vacant.

Recommendations

The Commission accordingly recommends that the Constitution should provide that:

- in the event of a vacancy in the Office of the President, arising out of resignation, death or impeachment, the Vice-President, who should be popularly elected as running mate to the presidential candidate, should assume the Office of President for the remainder of the term;

- in the absence of the President, the Vice-President should act as President;

- if the President is incapable of discharging the functions of the office, the Vice-President should act as President;

- if both offices are vacant, the Speaker of the National Assembly should act as President until elections are conducted to fill the vacancies within 90 days. Where the Speaker is unable to discharge the functions of presidency, the First Deputy Speaker should do so;

- if both the President and Vice-President are incapable of performing the functions of the Office of President, the Speaker of the National Assembly or, in the absence of or event that the Speaker is unable, the First Deputy Speaker shall perform the executive functions until the President resumes Office or the Vice-President assumes the functions of the Office;

- at no time should both the President and Vice-President be out of the country; and

- for the avoidance of any doubt, reference to vacancies in the Office of the President and Vice-President includes vacancies that may arise due to the death, incapacitation or inability of the President-elect or Vice-President-elect to assume office, in which case the vacancy relating to the President-elect will be filled by the Vice-President-elect who shall be sworn in as President. In the case of the Vice-President-elect, the President shall nominate a person to be sworn in as Vice-President, subject to ratification by Parliament.

8. 2.18 Nullification of Election

Submissions

The Judiciary wanted the Constitution to provide that, in the event of nullification of the election of a President-elect, presidential elections should be held within 90 days and that the Chief Justice should act as President in the interim (1).

On the other hand, another petitioner said that the Speaker of the National Assembly should take over as President if presidential elections are nullified (1).

Observations

The Commission observes that the subject did not attract submissions from a significant number of petitioners. However, the Judiciary called for an election to be conducted within 90 days in the event of nullification of a presidential election. The Judiciary further proposed that in the interim the Chief Justice should act, whilst another petitioner said that the Speaker of the National Assembly should act.

The Commission observes that the Court determining the validity of a presidential election does not have express power under the Constitution to nullify the election.

The Commission notes that nullification of a presidential election, particularly in a system where the Vice-President is a running mate and the Cabinet is appointed from outside the National Assembly, entails that the entire Executive is incapacitated. It is therefore important that the Constitution makes provision for interim arrangements in respect of discharge of the functions of Office of the President and for the conduct of elections.

The Commission further observes that the suggested period of 90 days when the Office falls vacant due to other reasons appears reasonable and conforms with the period prescribed for elections.

With respect to the discharge of the functions of the Office of the President, the Commission is of the view that where the incumbent President is a litigant to the presidential petition, the Speaker of the National Assembly, who presides over the people's elected body, should act as President. In the absence of the Speaker or if the Speaker is unable to act, then the First Deputy Speaker should act.

Recommendations

The Commission therefore recommends that the Constitution should:

- provide that in the event of nullification of a presidential election, the Speaker should discharge the functions of the Office of President. Where the Speaker is unable to discharge the functions, the First Deputy Speaker should discharge the functions of Office of President;

- expressly provide for nullification of a presidential election by the court determining the validity of such election; and

- provide that in the event of nullification of a presidential election, an election shall be conducted within 90 days to fill the vacancy.

8.2.19 Office of Vice-President

Submissions

8.2.19.1 Election - Universal Adult Suffrage

An overwhelming number of petitioners said that the Vice-President should be popularly elected through direct universal adult suffrage (653). The majority amongst these suggested that the Vice-President should be a running mate to the presidential candidate, whilst others were of the view that the Vice-President should be elected in her/his own right.

The main reason advanced for these submissions was that since the Vice-President may be required to assume the Office of the President in the event of death or incapacitation of the incumbent, it is necessary that he/she has the mandate of the people. Others were of the view that leaving the appointment of the Vice-President to the discretion of the President may result in

the appointment of a person who was rejected by the electorate at earlier elections.

On the other hand other petitioners proposed that the runner-up in the Presidential election should, automatically, be the Vice-President (108).

8.2.19.2 Appointment - *Status Quo*

A large number of petitioners said that the Vice-President should be appointed by the President from amongst elected Members of Parliament or nominated from outside Parliament as is the case currently (172). It was argued that having the Vice-President elected by universal adult suffrage would make it difficult for such a person to be removed and may promote insubordination.

8.2.19.3 Election - National Assembly

Some petitioners were of the view that the Vice-President should be elected by the National Assembly from amongst Members of Parliament (49). There were others who felt that the-Vice-President, should be appointed by the President subject to ratification by Parliament (13).

8.2.19.4 Appointment - Opposition in Parliament

A few petitioners proposed that the Vice-President should be appointed from opposition parties represented in Parliament (10). However, two petitioners suggested that the leader of the party with the largest number of seats in Parliament should be appointed Vice-President (2).

8.2.19.5 Qualifications for Election

Two petitioners proposed that qualifications for election to the Office of Vice-President should be the same as those applicable to the election of the President (2).

8.2.19.6 Eligibility for Appointment – Nominated MPs

Some petitioners said that a nominated MP should not be appointed Vice-President (16). It was argued that this measure was necessary to prevent the appointment of persons who do not have support in any constituency.

8.2.19.7 Duties

A few petitioners said that the Office of the Vice-President should have specific duties assigned to it (7).

8.2.19.8 Number of Vice-Presidents

There was a single submission to the effect that the Constitution should establish two positions of Vice-President one being reserved for a man and the other for a woman (1).

8.2.19.9 Replacement with Office of Prime Minister

Some petitioners submitted that the post of Vice-President should be replaced with that of Prime Minister (17). There was a submission that the Prime Minister should be elected from opposition MPs in the National Assembly (1).

Observations

The Commission observes that petitioners addressed a range of subjects in this area.

On the mode of election or appointment of the Vice-President, an overwhelming majority of those who made submissions favoured election of the Vice-President by universal adult suffrage (direct popular vote) as running mate of a presidential candidate. The Commission also notes that a number of petitioners preferred retention of the current system of the President appointing the Vic-President.

The Commission observes that the current constitutional arrangement where the choice of Vice-President is left entirely to the wisdom of the President is seriously flawed. For example, a person who was rejected in an election or who may not have requisite qualifications to hold the Office of the President may be appointed.

With regard to qualifications and duties of the Office of Vice-President, the Commission concurs with the views of petitioners that the qualifications should be the same as those applicable to presidential candidates and that the duties of the Office should be prescribed by the Constitution. The Commission is also of the view that the Vice-President shall be an ex-officio member of the National Assembly for purposes of conducting Government business in the House and as leader of Government business in the House, but shall have no vote.

The Commission is further persuaded by the argument that a Vice-President who is likely to act as President should derive her/his legitimacy directly from the people.

Potential rivalry between the two offices and the likelihood of insubordination on the part of a Vice-President in a situation where the Vice-President is elected as a running mate to the President was the basis of the recommendation made by the Mvunga Commission that the Vice-President, be appointed by the President subject to parliamentary ratification.

The Commission's view on potential rivalry is that specifying functions of a Vice-President would avoid frictions and minimise this. These functions should include that of Leader of Government Business in the House, acting as President in the absence of the incumbent or in the event of a vacancy in the Office, and such other functions as may be assigned by the President. Both the Chona and Mvunga Commissions included similar duties to these in their recommendations on specific duties of a Vice-President. The added advantage is that the Vice-President would provide a link between the Cabinet and the National Assembly. The argument that an elected Vice-President will be too powerful to be removed and may tend to be insubordinate can be taken care of by constitutional provisions governing misconduct and removal from office similar to those applicable to a President. Besides, the Vice-President would have sworn allegiance to the Constitution which created his position, and any act of insubordination would be a reason for his removal.

The Commission further notes that the system of electing a Vice-President as a running mate is practised in other democracies, for example, the United States of America, Nigeria and Ghana.

Regarding petitioners who felt that the National Assembly should elect the Vice-President from amongst MPs and those that were of the view that the Vice-President should be appointed from opposition parties represented in Parliament, the Commission is of the view that these submissions are inconsistent with the presidential executive system and multiparty democracy.

The Commission also considered an isolated view that there should be two positions of Vice-President, one for a man and another for a woman, but finds no justification for this submission.

The Commission further notes that both the Mvunga and Mwanakatwe Commissions addressed the question of mode of election of the Vice-President. Whilst the Mvunga Commission recommended that the Vice-President should be appointed by the President, subject to parliamentary ratification, the Commission also observed that if a Vice-President is a running mate then such a Vice-President could succeed the President for the unexpired presidential term because of the popular mandate of the people.

The Mwanakatwe Commission recommended that the Vice-President should be elected by popular vote as a running mate to the President. The Commission

further recommended that in the event of a vacancy arising in the Office of the Vice-President, the President elect should appoint a suitable person to the Office of the Vice-President, subject to parliamentary ratification, and that such a nominee should meet the same qualifications as a presidential candidate. The Commission agrees with these recommendations.

This Commission acknowledges that the concept of the Vice-President being elected as a running mate to the President-elect would create disruptions in the event of the office becoming vacant. In such an event, the President should nominate a Vice-President, subject to approval by a two-thirds majority of all the members of the National Assembly, to act for the remainder of the term, as is the case in the Constitutions of Ghana, Nigeria and the United States. In the event that the Vice-President is absent from the office or, for any reason, is unable to perform the functions of the office, the President should appoint someone from the Cabinet, subject to ratification by the National Assembly.

On the submission made in favour of substitution of the Office of the Vice-President with that of Prime Minister, the Commission finds this to be incompatible with the presidential executive system as earlier observed.

Recommendations

The Commission recommends that the Constitution should provide that:

- qualifications for election to the Office of the Vice-President should be the same as those applicable to the Office of President;

- the Vice-President should be elected by universal adult suffrage as running mate of a presidential candidate;

- duties of the Vice-President should include:

    (a) acting as President in the absence of the incumbent President and in the event that the Office of President becomes vacant;

    (b) that of being ex-officio member of the National Assembly for purposes of Government business in the House and Leader of Government Business in the House; and

    (c) such other functions as may be assigned to the Office by the President.

- the Constitution should make provision for removal from office of a Vice-President in circumstances similar to those prescribed for removal of a President;

- in the event of a vacancy arising in the Office of the Vice-President, the President should nominate a Vice-President who shall assume office upon approval by two-thirds majority of all MPs for the remainder of the term of office; and

- in the absence of the Vice-President or if the Vice-President is for some reason unable to discharge the functions of the Office, the President should appoint, subject to approval by the National Assembly, a member of the Cabinet to discharge the functions of the Office.

8.2.20 Cabinet

Submissions

8.2.20.1 Mode of Appointment

8.2.20.1.1 Appointment from Outside Parliament

A very large number of petitioners argued that the Cabinet should be appointed from outside the National Assembly in order to enhance the separation of powers between the Executive and Legislature (933). In addition, it was argued that this would allow for the development of professional competence among Ministers, as well as enable MPs to concentrate on their parliamentary duties.

8.2.20.1.2 Appointment from Inside Parliament

A relatively large number of petitioners felt that the Cabinet be formed from among Members of Parliament (748). The main reason advanced was that MPs have the mandate of the people and it can be assumed that they would discharge their ministerial responsibilities in the interest of the electorate. The other reason was to avoid nepotism, tribalism and corruption in appointments.

Some of these petitioners felt that nominated MPs should not be appointed to ministerial positions (218), but some took the opposite view (13).

8.2.20.1.3 Appointment from Outside and Within Parliament

A number of petitioners said that the Cabinet should be formed from both outside and within the National Assembly (161).

8.2.20.1.4 Ratification by Parliament

Some petitioners called for all appointments to the Cabinet to be ratified by Parliament (17).

Observations

There were a number of submissions on the mode of appointment of the Cabinet. However, two major views emerged. There was the majority view that the Cabinet should be appointed from outside the National Assembly. It was argued that this would enhance the separation of powers and thereby strengthen the role of Parliament in providing checks and balances. MPs would no longer clamour for ministerial appointment, which compromises the effectiveness and independence of Parliament. Other reasons included the need to promote professional competence and efficiency among Ministers, and to enable MPs to concentrate on parliamentary duties.

The other relatively popular view was that the Cabinet should be appointed from among MPs. The main reason given was that they have the mandate of the people in representing their interests. Another reason was to avoid nepotism, tribalism and corruption in ministerial appointments.

The other view, which was advanced by a minority of petitioners, was that the Cabinet should be formed from both outside and inside the National Assembly.

The Commission is of the view that the merits of forming the Cabinet from outside Parliament advanced by petitioners were valid and that this practice is consistent with the presidential executive system. Such a mode of appointment of Ministers would also discourage defections, which are prompted by invitations to the Cabinet, and reduce by-elections. It will also curb the system of MPs leaving their constituencies on appointment.

From the point of view of separation of powers it is noted that historically in Zambia, appointments of Ministers and Deputy Ministers have comprised about 43% of Members of Parliament, bringing them into the sphere of collective responsibility and therefore diluting the effectiveness of checks and balances.

The Commission nevertheless notes that since independence, Zambia has had the Cabinet appointed from within the National Assembly. The main argument against a strict separation of powers between the Executive and Parliament and the appointment of the Cabinet from outside has been of the likelihood of friction arising from the fact that the President is not represented in Parliament to defend the policies of Government and to direct policy programmes through the legislative process. Such representation is also conducive for a good working relationship between Parliament and the Executive.

In addition, it has been argued that Ministers' interaction with their Constituencies adds value to their participation in Cabinet decisions. Further, the current arrangement presents the President with a reservoir of persons approved by the people for leadership positions.

The Commission further acknowledges that the country is yet to develop a mechanism and conventions to minimise strains and stresses which are likely to result from strict separation of powers between the Executive and Parliament.

The Commission, is, however, of the view that the demerits of a Cabinet appointed from outside are mitigated by a number of factors. Ministers appointed from outside would have requisite qualifications, as opposed to political allegiance, and would be held accountable to the President. The Ministers will, of course, be ex-officio Members of Parliament for purposes of Government business in the House, but will have no vote. Further, they may attend proceedings of the National Assembly when invited to answer queries by Members of Parliament.

The Commission also feels that the Executive should strive to have a comfortable number of seats in the National Assembly and that this should enable them to pass motions. This is better than maintaining a system that dilutes the checks and balances between the Executive and Legislature.

As for the fears that the President may abuse the powers of appointing the Cabinet from outside, the Constitution can safeguard against vices such as nepotism, tribalism and corruption in such appointments.

On the question of parliamentary ratification of ministerial appointments, the Commission is of the view that these appointments should be within the exclusive jurisdiction of the President, but the National Assembly should have power to censure Ministers as recommended elsewhere in this Report.

The Chona Commission appears to have only dealt with the subject indirectly by considering submissions by petitioners that only technocrats with relevant qualifications should be appointed as Ministers. It recommended that where possible, some Ministries should be headed by professionals.

The Mvunga Commission addressed the subject of mode of the appointment of the Cabinet and recommended that it should be left to the discretion of the President whether to appoint the Cabinet from outside or inside the National Assembly or both, and that in the case of appointment from outside the National Assembly, this should be with ratification of the National Assembly. The Mwanakatwe Commission recommended that the Cabinet be appointed from outside the National assembly, arguing that this would strengthen the separation of powers and checks and balances. The Commission also reasoned that this would afford the President a larger pool of competent and capable Zambians from all corners of Zambia. The arguments advanced by petitioners then to the two previous Commissions were the same as those advanced to the present Commission.

In concluding its consideration of the subject, the Commission observes that there has been persistent and consistent demand for appointment of the Cabinet from outside the National Assembly from a significant number of petitioners dating as far back as 1990.

Recommendations

The Commission recommends that the Constitution should provide that Cabinet Ministers and Deputy Ministers should be appointed from outside the National Assembly.

The Commission also recommends that members of such Cabinet shall when necessary or whenever required to do so, attend proceedings of the National Assembly.

8.2.21 Appointment of Opposition Members of Parliament, Defectors and Losing Candidates

8.2.21.2.1 Appointment of Opposition MPs and Defectors

A number of petitioners argued that opposition MPs should not be appointed to the Cabinet (195). Some of these petitioners felt that all appointments to the Cabinet should be from among members of the ruling party. In addition, some petitioners said that MPs who resign or are expelled from their political parties and join the ruling party should not be appointed to ministerial positions (14).

On the other hand, others felt that opposition MPs should be eligible for appointment to ministerial office (63). Some added that this should be done in consultation with and with the approval of the MPs' political parties.

8.2.21.2.2 Appointment of Losing Election Candidates

Submissions

Some petitioners said that losing presidential or parliamentary candidates should not be appointed to ministerial positions or Office of Vice-President (60). The main reason advanced was that these were rejected by the people and would therefore not represent the people's interests.

Observations

The Commission notes that previous Commissions, starting with the Chona Commission, have addressed this subject. The trend has been that objections have been raised against the nomination of MPs to the National Assembly and the appointment of such MPs to the Cabinet.

The Commission is of the view that the rationale for the submissions that Opposition MPs and defectors and losing parliamentary candidates in an election should not be appointed to

Cabined is justified. In particular, submissions in respect of losing parliamentary candidates remains valid even if the Cabinet is appointed from outside the National Assembly, in that the people have expressed rejection of such a person. It is also a question of principle that those who want to vie for election to the National Assembly should not at the same time vie to be appointed to the Cabinet

Recommendations

The Commission therefore recommends that a losing presidential or parliamentary or local government election candidate should not be eligible for appointment to the Cabinet.

8.2.21.3 Vote of No Confidence by Parliament

Submissions

A few petitioners thought that Parliament should have power to pass a vote of no confidence in individual Cabinet Ministers (4).

Observations

Although the need to address misconduct or incompetence of Ministers is appreciated, the Commission observes that this submission is inconsistent with the presidential executive system. The National Assembly, however, plays its oversight role over Government conduct through parliamentary committees.

Recommendation

The Commission recommends that the National Assembly should not have power to pass a vote of no confidence in the Cabinet Ministers and that the National Assembly should play its oversight role of evaluating the performance of Government Ministries and institutions through parliamentary committees.

8.2.21.4 Size of the Cabinet

Submissions

A large number of petitioners said that the size of the Cabinet should be reduced and that the number of Ministries should be explicitly stated in the Constitution (399). This would discourage the mischief of each Government creating Ministries at whim and reduce public expenditure. The suggested number of ministries

ranged from eight to 21. The most popular suggestion was that the Cabinet should be limited to 18 Ministers.

Very few petitioners felt that the size of the Cabinet should be increased (4).

Observations

The Commission in its consideration of this subject observed that the number of Ministries has varied from time to time without justification. In a number of instances, Ministries have not been related to specific social and economic sectors.

The Commission notes that, under Article 44 of the 1964 Constitution, the number of Ministers was limited to a maximum of 14. The current Constitution, under Article 44 (2) (e), gives discretion to the President in that it does not limit the number of Ministries. Article 46(1) also provides no limitation on the number of Ministers to be appointed. The Commission further observes that the Mvunga and Mwanakatwe Commissions recommended a limit on the number of Cabinet Ministers, i.e. between 12 and 18, and not more than 18, respectively. Petitioners have been persistent and consistent in demanding a reduction and limit in the number of ministries.

It is the Commission's view that if the National Assembly exercised its power of approving the establishment and dissolution of Government Ministries and Departments under Article 44 (2) (e), the number of Government Ministries would be kept in check. However, this power should be extended to any increase in the existing number of Cabinet Ministers and Deputy Ministers. In its consideration of the matter, the Commission felt that rigidly prescribing a limit on the number of Cabinet Ministers and Ministries in the Constitution might have a detrimental effect on Government operations, as many factors that need to be taken into account are dynamic. To tie the hands of the President without the benefit of future consideration is unrealistic.

Recommendations

The Commission, therefore, recommends that the current constitutional provision requiring that the President establishes or dissolves Government Ministries and Departments, subject to the approval of the National Assembly, should be retained and that this should be extended to any increase above or reduction below 21 in the number of Cabinet Ministers or Deputy Ministers.

8.2.22 Gender Representation

Submissions

Some petitioners proposed that there should be equitable gender representation in the appointment of Ministers (8).

Observations

The Commission considered the principle of equitable gender representation and took into consideration the universal standards on the subject of promoting equal participation of men and women in the public sphere of life. The Commission also took into account the historical gender imbalances and inequalities which continue to affect women adversely, noting that women constitute at least half of the country's population.

In this regard, the Commission notes the long standing commitments made by Zambia at national, regional and international levels to promote the participation and advancement of women in politics and decision-making by enshrining appropriate provisions in the Constitution and other laws.

Recommendations

The Commission therefore recommends that the Constitution should stipulate that neither gender should constitute less than 30% of the Cabinet.

8.2.23 Term of Office

Submissions

A few petitioners suggested that Cabinet Ministers should serve a maximum of two five-year terms (8).

Observations

The Commission observes that in a presidential executive system, Ministers serve at the pleasure of the President. Further, it would be practically difficult to define what constitutes a term of office for Ministers, as they serve at the pleasure of the appointing authority. In any case, the mischief of persons being recycled is likely to reduce with Ministers being appointed from outside the National Assembly, as a larger pool is assured.

Recommendations

The Commission recommends that there should be no limit on the term of Office of Ministers.

8.2.24 Office of Deputy Minister

Submissions

8.2.24.1 Abolition of Office

Some petitioners wanted the post of Deputy Minister to be abolished (180). These petitioners argued that currently the functions of this office are not clearly defined and that it is therefore difficult to justify Government expenditure on this office. They further suggested that whatever responsibilities were attached to this office could be performed by Permanent Secretaries. A few petitioners took the opposite view and felt that the position of Deputy Minister should be maintained (10).

8.2.24.2 Reduction in Number

A number of petitioners suggested that the total number of Deputy Ministers should be reduced to one per ministry (71). Two petitioners proposed that only strategic ministries, such as Finance and National Planning, Health, Education, and Agriculture and Co-operatives should have two Deputy Ministers (2).

8.2.24.3 Acting as Cabinet Minister

There were submissions that the Deputy Minister should act as Cabinet Minister in the absence of the latter, as the Office is currently under-utilised (28).

8.2.24.4 Provincial Deputy Minister

A number of petitioners felt that the position of Deputy Minister responsible for a province should be elevated to full Cabinet Minister (81), whilst others said that the Office of the Provincial Deputy Minister should be abolished (8). Some petitioners, however, said that the Office of Provincial Deputy Minister should be retained (33).

Some petitioners felt that Provincial Deputy Ministers should be elected by popular vote in their respective provinces (40). Others

suggested that the Office of Provincial Deputy Minister should be replaced by that of Provincial Commissioner or Provincial Administrator (13).

A few petitioners thought that the position of Provincial Deputy Minister should be changed to Provincial Prime Minister and be popularly elective (10).

Observations

The Commission notes that past experience shows that Deputy Ministers have no job descriptions or functions and do not even act in the absence of their Ministers.

The Commission also observes that it is common practice in the Commonwealth for Deputy Ministers or Assistant Ministers not to act in the absence of their Ministers. In this regard, the Commission notes that elsewhere where the concept of acting has been tried, it has been found to be a source of friction between the Minister and the Deputy Minister.

The Office of Deputy Minister and, previously, that of Minister of State, has been the subject of contentious submissions to all the Constitution Review Commissions. The trend has been that some petitioners have called for reduction in the number whilst others have called for these Deputy Ministers to act in the absence of their Ministers. Others have argued that the Office serves no purpose and is an unnecessary drain on public resources.

The majority of those who addressed the Commission on this subject preferred that the Office be abolished, as its continued existence could not be justified. A smaller number favoured its retention, with some calling for a reduction in the number. Some among those who preferred its retention called for the office holders to act in the absence of their Ministers.

The Commission finds the arguments in favour of abolition of the Office of Deputy Minister persuasive, especially in view of the need to reduce public expenditure and for want of any job description for the office. The Commission nonetheless notes that the abolition of the Office may create an undesirable vacuum, particularly when a minister who is absent from Office is summoned by Parliament. In such a situation, the Permanent Secretary in the ministry would not be a substitute. This notwithstanding, there should not be more than one Deputy Minister in any Ministry. The Commission also appreciates the argument that Ministries should have Deputy Ministers who should deputise in the absence of their Ministers.

However, on account of confidentiality, secrecy, continuity and collective responsibility, it is not possible for Deputy Ministers to sit in the Cabinet.

As regards the Office of Provincial Deputy Minister, the majority favoured its retention and among these petitioners, most called for elevation of the Office to full Cabinet Minister. This is in view of the functions that the Office is entrusted with and the fact that the office holders are not supervised by a Minister in the day-to-day discharge of their duties.

The Commission notes that it would be logistically and financially difficult for Provincial Ministers to attend Cabinet meetings that are held at regular intervals in Lusaka. However, this could be mitigated by an administrative requirement that they should only be required to attend Cabinet meetings affecting their provinces.

Some of the petitioners, however, called for the Office of Provincial Deputy Minister to be elective through universal adult suffrage under a devolved system of government. A few merely wanted the Office to be abolished and replaced with that of a civil servant.

The Commission is in agreement with the majority of the petitioners and is of the view that the continued existence and elevation of the Office of Provincial Deputy Minister is justified and will add value to the devolved system of local government.

Recommendations

The Commission recommends that:

- the Office of Deputy Minister be should retained, but that there should not be more than one Deputy Minister in any Ministry and that the current arrangements of deputising be retained; and

- the post of Provincial Deputy Minister should be elevated to that of Cabinet Minister.

8.2.24.5 Coalition Government and Government of National Unity

Submissions

Some petitioners felt that the Constitution should make provision for a coalition government or a government of national unity (24). They observed that there was a possibility that, in future, no single party would have a clear majority and that the Constitution should provide for such an eventuality.

Among these, some suggested that the party with the largest number of seats in Parliament should form a coalition government. If a political party falls short of an overall majority in the National Assembly, it should be compelled to form a coalition with other parties.

There was a contrary submission that the Constitution should not make a provision for a coalition government or government of national unity (1).

Observations

The Commission observes that under the current arrangement, the potential need for a coalition government is a reality. The Commission further notes that even in a presidential executive system where the Cabinet is drawn from outside, a President with a minority in the National Assembly may need a coalition to enable bills and other Government business initiated by the Executive to be passed in the House.

The Commission, however, acknowledges that formation of a coalition government is a matter to be dealt with by political parties informally and strictly speaking, does not require to be enshrined in the Constitution or legislated for. On the other hand, the Commission observes that attempts at forging alliances between the Government and opposition political parties have been a source of controversies. This is partly because, in the absence of a permissive provision, such attempts have been perceived by some to undermine principles of multiparty democracy and the spirit of the multiparty constitutional dispensation.

Recommendations

In the light of the above considerations, the Commission recommends that the Constitution should have a provision that permits the formation of a coalition government.

CHAPTER 9

THE LEGISLATURE

Terms of Reference:

No. 2 Recommend a system of government that will ensure that Zambia is governed in a manner that will promote the democratic principles of regular and fair elections, transparency and accountability, and that will guard against the emergence of dictatorial forms of government;

No. 3 Recommend appropriate ways and means of entrenching and protecting human rights, the rule of law and good governance in the Constitution;

No. 7 Examine and recommend the composition and functions of government and their manner of operating, with a view to maximizing on checks and balances and securing, as much as possible their independence;

No. 10 Recommend a suitable electoral system to ensure fairness in the conduct of Presidential and Parliamentary elections;

No. 14 Examine and recommend the status of a Member of Parliament who joins another political party or is expelled from the member's political party, whether or not such a member should vacate the seat in Parliament;

No. 16 Examine and recommend to what extent issues of gender equality should be addressed in the Zambian Constitution;

No. 17 Examine and recommend whether international agreements should be considered and ratified by the National Assembly prior to Zambia's ratification of those agreements; and

No. 24 Examine and recommend whether the number of nominated Members of Parliament should be increased or reduced in the light of past experience and if so, recommend a suitable number.

9.1 Introduction

The Legislature plays a key role in providing checks and balances on the other organs of the State. It plays its role through three main functions, namely:

- representing the people in Parliament;
- legislating;
- vetting and approving the budget; and
- overseeing public policy and Government conduct.

The role of the Legislature is founded on the premise that it is composed of representatives of the people, in most cases elected directly by the people. Thus, it represents popular sovereignty and is the medium through which the people and the Government relate to each other. In some countries such as the United Kingdom and Sweden, the Legislature is superior to the other organs of the State in recognition of its status as the people's representative body. In this regard, it is also observed that some Constitutions such as those of Uganda and South Africa, allocate the Chapter on the Legislature before those relating to the Executive and Judiciary in the order of arrangement of Chapters to signify the Legislature's superiority over the two other organs of the State.

In carrying out its functions, the Legislature should express the will and aspirations of the people. It should strive to ensure that the Government is responsive to their priorities and that it is transparent and accountable in its policy pursuits, resource allocation and utilisation. Although functions of the Legislature entail power-sharing with the Executive, such as in vetting the budget and in the legislative process, the functions of the two organs are separate in that the Executive initiates and implements policy while the Legislature scrutinises and approves these initiatives and monitors the Government's performance.

In order to carry out its functions of checking the Executive effectively, the Legislature requires to be independent of the Executive and to be in control of its own resources. It is also necessary that the Legislature should have adequate constitutional mandate. In addition to such mandate, the Legislature should have resource capacity, including institutional, financial and human resources, at its disposal. The political will and capacity of the members of the Legislature are also important in determining its performance.

The people, as the repository of government authority, still remain a key factor in influencing and defining the legislative function. The electorate exercises its authority through the ballot, normally exercised through regular elections. However, in some countries such as in the United States of America (for example, the State of California), the people have power to recall their legislators before expiry of their term if their performance is unsatisfactory. Under the good governance dispensation, the idea has been to bring Parliament closer to the people. This has been achieved by allowing the public to attend committee hearings and broadcasting parliamentary proceedings through the electronic media.

There are two main types of legislatures; unicameral (composed of one chamber) and bicameral (composed of two chambers).

Bicameral legislatures are more commonly found in federal states such as India, Nigeria and the United States, where one chamber represents States or regions and the other chamber consists of representatives directly elected by the people. In South Africa, the bicameral legislature integrates provincial legislatures.

Bicameral legislatures are deliberately designed to represent diverse interests and facilitate internal checks and balances in the legislative process. On the other hand, unicameral legislatures are perceived to offer simpler, speedy and cost-effective functions, particularly in representing smaller, non-diverse populations.

Among the notable recommendations made by the Chona Commission on the Legislature of Zambia were the following:

- retention of a unicameral Legislature should be retained;
- a parliamentary candidate must have attained the age of 18 years;
- a candidate defeated in the current election should not be nominated or appointed MP;
- the Speaker should be elected from outside Parliament by MPs;
- offices should be provided for all MPs in their constituencies;
- MPs should continue to receive salaries;
- when a Bill referred back to the National Assembly for further consideration has been passed by two-thirds majority of all MPs, the President should be obliged to give his assent to it; and
- all Bills should be assented to by the President within 21 days of their being presented to him.

The Legislature, the Mvunga Commission also made a number of recommendations on this subject, including the following:

- there should be a bicameral legislature comprising the National Assembly and Chamber of Representatives, the latter to comprise three representatives and two Chiefs from each province;
- Parliament should enact legislation submitted to it by the Executive as well as initiate its own legislation;

- Parliament should approve the Budget, but without altering the total figure, control public expenditure and in camera scrutinise defence, security and any special expenditure;

- Parliament should have power to impeach the President;

- Parliament should ratify all appointments to constitutional offices whose independence is guaranteed by the Constitution, but should that ratification be withheld for the second time, the President's decision will be overriding;

- Parliament should ratify international treaties;

- Parliament should have power to dissolve itself; and

- there should be no limit on the number of terms an MP should serve.

Recommendations of the Mwanakatwe Commission on the subject of the Legislature included the following:

- the Legislature should be called the National Assembly;

- the Legislature should continue being unicameral, but there should be a constitutional provision for possible conversion of the National Assembly into a bicameral legislature should the need arise;

- the legislative power of the State should be vested in the National Assembly;

- the number of constituencies should remain at 150, but the National Assembly may, on the recommendation of the Delimitation Commission, at any time increase the number of constituencies;

- Chiefs should be free to contest elections to the National Assembly, provided that they resign their chieftaincy;

- civil servants should not be allowed to contest elections to the National Assembly, unless prior to that they resign or retire;

- the system of election of MPs should be First-Past-The-Post;

- an MP who crosses the Floor or is expelled from a party should lose the seat;

- there should be no provision in the Constitution for nominated MPs;

- by-elections should continue to be held to fill up vacancies;
- both the Speaker and Deputy Speaker should be elected from among MPs;
- there should be no limit on the number of terms an MP should serve; and
- the electorate should have a right to recall an MP for failure to perform, but only after serving for at least two years.

Current Provisions of the Constitution

In Zambia, the Legislature is unicameral. Article 62 defines Parliament as the President and the National Assembly. This is a legacy of the 1964 Constitution. In a number of other African countries, however, such as Ghana, Nigeria and Uganda, the President is not part of the Legislature. This is in keeping with the principle of separation of powers.

The President appoints the Vice-President, Ministers and Deputy Ministers from the National Assembly. (Articles 45 (2); 46 (2); and 47 (2))

The National Assembly is made up of 150 elective seats based on constituencies (Article 63 and 77(1)). In addition, the Constitution provides for not more than eight seats based on nomination by the President. Nominated members serve at the pleasure of the President and their appointment may be terminated at any time.

The National Assembly elects the Speaker from outside, who then becomes a member of the National Assembly (Article 69). The only constitutional requirement for election of the Speaker is that the candidate should be qualified to be elected as a member of the National Assembly, although not a member of the National Assembly at the time of election of Speaker.

The Constitution also provides for the election of a Deputy Speaker by the members of the National Assembly from among themselves. The Speaker and Deputy Speaker are elected in accordance with the procedural rules of the National Assembly.

The Constitution (Article 77) provides for delimitation of constituencies by the Electoral Commission. This may be done provided that the prescribed number (150) is not varied and that there are at least ten constituencies in each province. The primary consideration in altering boundaries of a constituency is the population quota (calculated by dividing the total number of inhabitants of the country by the prescribed number of constituencies) (150).

The legislative authority of the State is vested in Parliament. It is exercised through Bills passed by the National Assembly and assented to by the President (Article 78). Article 44 (3) (b) of the Constitution confers power on the President to initiate laws for submission to and consideration by the National Assembly. However, members of the National Assembly are at liberty to initiate their own Bills. This power is not explicitly provided in the Constitution of Zambia. Certain Bills with financial implications may, however, only be introduced on the recommendation of the President (Article 81). In practice, the Executive usually initiates Bills.

The effect of Article 78 is that where the President withholds assent to a Bill:

- he/she may return the Bill to the National Assembly for the latter's re-consideration. If it is passed by a two-thirds majority of all MPs, with or without amendments, the President must assent to it within 21 days of its presentation or dissolve the National assembly; and

- notwithstanding the provision for reference of a Bill back to the National Assembly, where a Bill has not been assented to by the President, whether after it has been referred back to the National Assembly or after being presented for assent for the first time, the Constitution unconditionally permits such withholding of assent.

These provisions have been inherited from the 1964 Constitution, except for the latter part which was introduced in the 1996 Constitution amendment. Constitutions of some countries such as the United States of America, Sweden, Uganda, Ethiopia and Ghana give the Legislature power to override the power of assent of the Head of State. For example, the Constitution of Uganda states in Article 91 (5) that:

> *"Where the President returns the same Bill twice…and the Bill is passed for the third time, with the support of, at least, two-thirds of all members of Parliament, the Speaker shall cause a copy of the Bill to be laid before Parliament and the Bill shall become law without the assent of the President."*

In the case of Ethiopia, Article 57 provides that:

> *"….The President shall sign law submitted to him within fifteen days. If the President does not sign the law within fifteen days it shall take effect without his signature"*

The National Assembly is vested with power to approve the estimates of revenue and expenditure presented by the Government, and it exercises this power by passing Appropriation Bills (Article 117).

Other powers enjoyed by the National Assembly include:

- impeachment of a President for violation of the Constitution or gross misconduct. A motion to this effect requires a two-thirds majority and, when passed, the Chief Justice shall appoint a tribunal to investigate the allegation. If the tribunal finds that the allegation is substantiated, then the President shall be impeached from office on a three-quarters majority vote (Article 37);

- ratifying appointments to certain public offices as required by the Constitution and other laws. The Constitution provides that when such appointment is made by the President, it shall not be unreasonably withheld. Also, if the National Assembly refuses to ratify a second appointment, the third appointment shall take effect irrespective of ratification (Article 44 (4));

- such powers, privileges and immunities as may be prescribed by an Act of Parliament (Article 87); and

- determining its own procedures (Article 86 (3)).

The term of a National Assembly is five years from the date of its first sitting, after which it stands dissolved. However, the President may at any time prorogue or dissolve the National Assembly. The National Assembly may, by a two-thirds majority, dissolve itself. The term of the National Assembly may be extended by the President for not more than 12 months at a time, such extension not to exceed five years, when the Republic is at war. The President may also recall a dissolved Parliament owing to the existence of a state of war or a state of emergency. (Articles 44 (a) and 88 (5), (6), (7), (8) and (9))

Whenever the National Assembly is dissolved, there shall be presidential elections and elections to the National Assembly. The first session of the new Parliament shall be held within three months from the date of dissolution (Article 88 (7)).

According to the provisions of the Constitution (Article 71 (2)), if an elected Member of Parliament joins another party, or if he/she, having been elected as an independent, joins a party (or vice versa), the member vacates the seat. A member who is expelled from the party of which he/she was candidate when elected, also vacates the seat. The status of a member whose party is dissolved is not specified. In the event of a vacancy arising, the Constitution provides that it shall be filled within 90 days through a by-election (Article 67). The member who has lost the seat is free to contest by-elections, except if he or she bas been barred from contesting by order of a court. The frequency of such by-elections has engendered resentment among the people, who feel that the system has exposed them to

political adventures of individual MPs and internal political party instabilities and that it is a cost to the nation.

Members of the National Assembly are eligible for re-election to the House at the expiry of their term and there is no limit as to how many times an MP may seek re-election.

The Constitution also provides for the Office of the Clerk of the National Assembly and such other offices under the Clerk as may be prescribed by law (Article 73)). The Constitution does not, however, make specific provisions for appointment of the Clerk of the National Assembly and tenure of office.

9.2 Submissions, Observations and Recommendations

This subject received eight thousand six hundred and fifty-two (8,652) submissions.

Most of the petitioners who addressed the subject of the Legislature made submissions largely within the context of the existing constitutional framework. Nevertheless, there were notable submissions, such as creation of an upper chamber, which suggested a departure from the existing legislative arrangements.

Submissions

9.2.1 Type of Legislature

Some petitioners addressed the subject of the type of Legislature Zambia should have (36). Among these, some called for the Constitution to provide for a bicameral Legislature with a lower and upper house.

A few other petitioners, however, called for the Constitution to provide for a three-tier Legislature comprising the National Assembly, House of Representatives and Provincial Assemblies (3).

9.2.2 Composition of Parliament – Upper and Lower House

Some petitioners called for a Parliament composed of two chambers, a National Assembly and a House of Representatives, commonly known as the lower and upper house, respectively (24). Some added that the upper House should be composed of Chiefs and eminent persons while others suggested that the House of Chiefs should be the upper chamber of Parliament (9). Yet others called for Parliament to incorporate provincial legislatures (3).

Observations

The Commission considered the submissions and arguments for a unicameral Legislature and a bicameral Legislature. Although the Commission notes that few petitioners made submissions on the subject, it nevertheless observes that all the three previous Commissions had also dealt with this subject.

Whilst petitioners to the Chona Commission favoured a unicameral Legislature on considerations of cost, some petitioners to the Mvunga and Mwanakatwe Commissions favoured a bicameral type of Legislature. However, unlike the Mvunga Commission, the Mwanakatwe Commission recommended retention of the unicameral system. The argument against the bicameral Legislature was that such a system of representation and the cost implications could not be justified in Zambia's social, cultural, political and economic context. Notwithstanding this, the Mwanakatwe Commission recommended the retention of the 1991 constitutional provision for possible conversion of the National Assembly into a bicameral Legislature in case need arose.

The Mvunga Commission recommended a bicameral Legislature comprising the National Assembly and a Chamber of Representatives, with the latter being the Upper House. This led to the 1991 Constitution having a provision for possible conversion of the National Assembly which was later repealed in 1996.

Other notable recommendations of the Mvunga Commission on the subject include the composition of the House of Representatives, which was to be made up of provincial representatives elected by direct popular vote in each province and Chiefs elected by the Provincial Council of Chiefs in each province. Its powers and functions were to include vetting legislation of the lower house, ratifying international treaties, ratifying appointments to constitutional offices, and impeaching the President.

In its deliberations on the subject, the Commission considered the potential role of an upper chamber of Parliament in providing the needed checks and balances.

An argument was advanced that such a chamber would accommodate diverse interest groups not represented in the National Assembly, such as Traditional Rulers. This would enable them to be involved in the governance of the country at national level where decisions affecting their subjects are made. The House could also be partially composed of elected persons of high standing in society, who could serve to ensure quality in the Bills passed by both Houses. The House, it was further argued, would be more politically neutral in vetting Bills and ratifying international agreements and appointments to public offices.

The Commission, on the other hand, considered the argument that a bicameral system of representation in Parliament is suited to federal states such as the United States of America, India and Nigeria and/or States that are vast, densely populated and have diverse populations in terms of culture, such as South Africa. The Commission notes that there are about ten bicameral legislatures in Africa and that the composition of these and their roles vary according to the respective needs of the countries concerned.

The Commission agrees with the argument that the country's socio-economic background, at the moment offers no compelling grounds for bicameral representation. Accordingly, the Commission observes that the socio-cultural diversity of the country could, with relative ease, be accommodated in a unicameral Legislature through a suitable electoral system.

The Commission also feels that the National Assembly, which is composed of representatives elected by the people, is the repository of the people's will. It should thus not abdicate its sovereign function in favour of a House of Representatives composed of narrowly selected interest groups.

In addition, the Commission feels that the trend for the future development of the country should be in favour of the devolution of power, functions and responsibilities to lower levels of government, instead of a concentration of these in institutions at the national or central level.

However, the Constitution should make provision for the creation of another Chamber of Parliament if circumstances justify this. Such a decision should require a resolution of the National Assembly by a two-thirds majority and should be subjected to a national referendum, which should also determine the powers, functions and composition.

Recommendations

Accordingly, the Commission recommends retention of the unicameral Legislature.

Further, the Commission recommends that the Constitution should make provision for any possible future exigencies by stating that Parliament may by enactment create another Chamber of Parliament and determine its powers, functions and composition on a resolution of a two-thirds majority of all the MPs, subject to a national referendum.

9.2.3 The President and Parliament

9.2.3.1 Eligibility to Contest Parliamentary Elections

Submissions

A few petitioners argued that the President and Vice-President should be Members of Parliament (6). There were a few submissions, including one from the National Assembly, calling for an amendment to the current Article 65 (2) of the Constitution in order to allow a presidential candidate to qualify for election as a member of the National Assembly (16).

Observations

The Commission notes that few petitioners addressed this subject. Of these, some (including the National Assembly) wanted a presidential candidate to qualify to contest parliamentary elections. A few simply said that the President and Vice-President should be MPs.

On the question of their eligibility of presidential candidates to contest parliamentary elections, the Commission notes the reason advanced by petitioners was that this would give an opportunity to losing presidential candidates to lead their parties in Parliament. The Commission considered practices in other countries with presidential executive systems or mixtures of presidential and parliamentary systems. Constitutions of some countries in Africa, such as Ghana, Kenya and Uganda, do not disqualify a presidential candidate from contesting parliamentary elections. In Kenya, a presidential candidate who is elected both as President and as an MP vacates the parliamentary seat upon assuming the Office of President.

The Commission, however, observes that it is neither practical nor appropriate for a President to be an MP and that the option of a President-elect vacating a parliamentary seat would create unnecessary inconvenience. As a matter of principle, one should choose whether to contest presidential or parliamentary elections. Consequently, the need to amend Article 65 falls away.

In the light of the foregoing, the Commission concludes that there is no compelling advantage to be gained by the electorate from an arrangement where presidential candidates qualify to contest parliamentary elections.

Recommendations

Accordingly, the Commission recommends that a presidential candidate should not qualify to contest parliamentary elections.

9.2.3.2 The President as part of the Legislature

Submissions

Some petitioners said that in order to enhance the separation of powers, the President should not be part of the Legislature (9). The LAZ argued that the Constitution should vest legislative power in the National Assembly and not Parliament, which comprises the President and National Assembly (1). This is to reflect the primary role played by the National Assembly in the legislative process.

Observations

Some petitioners were opposed to the idea of the President being part of the Legislature, as is currently the case. They argued that separating the President from the Legislature would enhance checks and balances. The Commission notes that for the same reason, the LAZ wanted the legislative power of the State to be vested in the National Assembly.

In considering this subject, the Commission observes that the current constitutional provision defining the Legislature as comprising the President and the National Assembly is a legacy of the 1964 Constitution. The Constitution was adopted from the Westminster model, where the Queen is part of the Legislature. The rationale is that the Head of State is unavoidably part of the legislative process because he/she assents to Bills. The Head of State also performs other important legislative functions, such as summoning, proroguing and dissolving Parliament. It is therefore not practicable to completely separate the President from the Legislature.

The Commission, however, notes the fact that in some countries, the President or Head of State is not part of the Legislature, notwithstanding the fact that he/she assents to Bills. This is, for instance, the case in the United States, Sweden, Ghana, Nigeria and Uganda.

In this connection, the Commission also considered the related subject of power of assent of the President. It observes that under the current constitutional provisions, upon a Bill being presented

for assent, the President may return the Bill to the National Assembly for reconsideration. If the Bill is passed by a two-thirds majority of all the MPs, with or without amendments, the President must assent to it within 21 days of its presentation or dissolve the National assembly. Notwithstanding this provision, if the President has not assented to any Bill, it cannot be presented to the President for assent again. This implies that such a Bill lapses.

The Commission examined provisions of constitutions of other countries such as the United States of America, Sweden, Uganda, Ethiopia and Ghana. In those countries, constitutions give the Legislature power to override the Head of State's power of assent. In South Africa, the President may only refer a Bill back to the National Assembly on a question of constitutionality. On a Bill being presented to the President a second time, if he/she does not assent to the Bill or refer it to the Constitutional Court for a decision on its constitutionality, which has final determination on the matter, the President is obliged to assent to the Bill. The Commission is persuaded by this arrangement and is of the view that the principle of referring a Bill to the Constitutional Court should be extended to members of the public, in which case the President should not assent to the Bill until the Court has determined the same.

The Commission acknowledged the principle that legislative authority should vest in the people's legislative assembly. Although the President may be part of the legislative process by virtue of exercising the power of assent, and summoning and dissolving Parliament, as prescribed by the Constitution, legislative authority should substantively be exercised by the National Assembly and this should be reflected in the procedure of assent to Bills. However, legislative power should be vested in Parliament.

The Commission also took into consideration the recommendations of previous Commissions on the subject. The Chona Commission recommended that when a Bill referred back to the National Assembly for further consideration had been passed by a two-thirds majority of all MPs, the President should be obliged to give his assent to it. The Mwanakatwe Commission recommended that the legislative power of the State be vested in the National Assembly.

Recommendations

In the light of the above considerations, the Commission recommends that the Constitution should state that:

- the President shall continue to be part of Parliament for purposes of assenting to Bills, summoning and dissolving Parliament as prescribed by the Constitution. Parliament shall consist of the National Assembly and the President;

- Parliament shall be the highest legislative body and should enact legislation submitted to it as well as initiate its own legislation at public expense to avoid the burden of privately initiated Bills being financed privately;

- legislative power shall be vested in Parliament;

- when a Bill is presented to the President for assent, he/she shall assent to it within 21 days, unless he/she sooner refers it back to the National Assembly for reconsideration; and

- when a Bill referred back to the National Assembly for further consideration has been passed by a two-thirds majority of all MPs, the President should be obliged to give his assent to it unless the President's reservation is on a question of constitutionality, in which case, he/she shall refer it to the Constitutional Court, whose decision shall be final and binding.

9.2.2.3 Functions of the National Assembly

Submissions

The LAZ said that some functions of the National Assembly should be to:

- impeach the President for gross misconduct, commission of a criminal offence or violation of the Constitution;

- scrutinise and approve the national budget and make alterations without increasing or reducing the total figure;

- scrutinise public expenditure as well as defence, constitutional and special expenditures;

- ratify the declaration of a state of emergency and approve its extension;

- ratify international treaties entered into on behalf of the country; and

- dissolve itself.

Observations

The Commission notes that specific functions of the National Assembly are reflected under the relevant parts of the Constitution. Article 37 of the Constitution provides for impeachment of the President for violation of the Constitution or misconduct, whilst the power to ratify declarations of emergencies is provided for under Articles 30 and 31. The power of the National Assembly to dissolve itself is provided for under Article 88 of the Constitution. The power to ratify international treaties is currently vested in the President by Article 44 of the Constitution. The process of considering and approval of estimates of expenditure falls under Part X of the Constitution, though the process is impeded by many limitations, as discussed under Chapter 21, Public Finance and the Budget.

The Commission, in reaction to the LAZ submission, agrees that these functions, as enumerated, should be included in the functions of the National Assembly. Changes to some provisions of the Constitution on these functions have been discussed and recommended under Chapters 7, 8, 9 and 21 of this Report.

The Commission also feels that Parliament may make laws with retrospective effect only if such laws will not operate retrospectively to impose any limitations on, or to adversely affect the personal rights and freedoms of, any person or to impose a burden, liability or an obligation on any person.

Recommendations

The Commission therefore recommends that the Constitution should provide that the core functions of the National Assembly should be to:

- amend the Constitution (other than the entrenched provisions, which are subject to Referendum);

- pass Bills which shall become laws;

- summon the National Assembly;
- scrutinise Government policies, performance and conduct;
- scrutinise estimates of revenues and expenditure of Government and management thereof;
- approve and monitor public debt;
- impeach the President;
- elect the Speaker and Deputy Speaker;
- ratify appointments of Ministers and Deputy Ministers;
- ratify or approve appointments to and removal from public offices as may be required by the Constitution and other laws;
- approve the creation and dissolution of Government ministries and departments;
- approve increases in the existing number of Cabinet Ministers and Deputy Ministers;
- approve emoluments of the President, Vice-President, Speaker, Chief Justice, Judges, Ministers and Deputy Ministers, Attorney-General, Auditor-General, Director of Public Prosecutions and other holders of constitutional offices, on the recommendations of the National Fiscal and Emoluments Commission;
- approve international treaties and agreements before ratification, accession or adhesion by the Executive;
- approve, ratify, extend and revoke, as applicable, a declaration of war, state of emergency, threatened state of emergency, military assistance and peacekeeping missions to other countries; and
- dissolve the National Assembly.

The Commission further recommends that the Constitution should provide that Parliament may make laws with retrospective effect only if such laws will not operate retrospectively to impose any

limitations on, or to adversely affect the personal rights and freedoms of, any person or to impose a burden, liability or an obligation on any person.

9.2.2.4 The National Assembly – Constituencies

Submissions

A number of petitioners called for an increase in the number of constituencies (211). The suggested numbers included 165, 175, 200, 270 and 300. Suggestions also included subdividing the present constituencies and standardising the number of constituencies to at least 20 per province. Petitioners lamented that some constituencies, especially in rural areas, are too vast for meaningful representation.

On the other hand, some petitioners called for a reduction in the number of constituencies as a cost-saving measure (29).

Yet others said that the number of elected MPs should be retained at 150 (6).

There were two submissions to the effect that the Constitution should not fix the number of constituencies (2). There were also two submissions that called for an equal number of seats for all provinces (2).

Observations

The majority of petitioners who made submissions to the Commission on this subject wanted the number of constituencies to be increased. These submissions were especially made by petitioners in rural constituencies. They complained that meaningful representation is hampered by the vastness of constituencies, coupled with lack of communication and transport. Petitioners suggested that large constituencies should be subdivided to create more constituencies and that the minimum number should not be less than 20 per province. The Commission notes that petitioners to all the three previous Commissions persistently and consistently called for an increase in the number of constituencies, particularly in rural areas. The reasons advanced were the same.

The Commission, having toured the provinces, appreciates the concerns expressed by petitioners. In particular, many constituencies in rural areas are remote from main centres of socio-

economic activities. They also lack transport and communication facilities, making outreach by MPs difficult. The Commission is, however, persuaded that impediments in effective representation of the people in Parliament are not supported by the population factor, which is a major determinant in delimitation of constituency boundaries.

The Commission considered the current provisions of the Constitution on the number of constituencies. The Commission observes that the Constitution, under Articles 63(1) (a) and 77, prescribes the number of constituencies at 150 and provides that constituencies shall not be less than 10 in each province. The Commission considered the rationale for prescribing limits on the number of constituencies. The need to prescribe these limits in the Constitution was inspired by fear that if left to ordinary legislation, which could be easily amended, this could lead to arbitrary and unjustified or ill-motivated changes in the boundaries and number of constituencies.

The Commission, on the other hand, considered the minority view that the number of constituencies should be reduced in order to minimise costs. It is the considered view of the Commission, however, that taking into consideration other important factors, reducing the number of constituencies would not be justified from the viewpoint of adequate representation of the people.

Currently, representation in the Zambian Parliament through elective seats, i.e. constituencies, is approximately one seat to 73,000 people. For comparative purposes, representation in the Ugandan Parliament is one seat to 81,000 people, in Kenya it is one seat to 139,000 people and in Tanzania it is one seat to 136,000 people. Uganda has 25 million people and 300 seats. Kenya, with a population of over 31 million people, has 224 seats, while Tanzania, with the population of over 37 million people, has 274 seats. The population of Zambia is much less than the population of these countries. In addition, the economy of Zambia does not compare favourably with the economies of these countries.

Therefore, when viewed against the population and economic factors, increasing the number of seats in the National Assembly would not be justified. It is emphasised, however, that although the population and economic factors are major determinants, effective representation should take into account other relevant considerations. These include the extent of people's representation at lower levels of government, geographical and demographic

features of the various parts of the country, means of transport and communication, and facilities available to MPs to carry out their functions.

Therefore, the number of seats in Parliament should, by and large, respond to all relevant factors. The argument for increasing the number of constituencies appears convincing on account of the vastness and growing population in certain constituencies, but considering that the Proportional Representation system of elections has been recommended, there may no longer be any justification for increasing the number of constituencies. This is because proportional representation can supplement the existing deficits.

In concluding its consideration of this subject, the Commission felt constrained in that technical expertise is required for the Commission to objectively prescribe a specific number or range of numbers of constituencies. Nevertheless, in principle, the Commission is in favour of the idea of the Constitution prescribing a lower and upper limit on the number of constituencies at national level. It has also concluded that the number of constituencies should take into account the recommended Proportional Representation system of elections. The Commission also notes the envisaged improvements in the functioning of Parliament at national and constituency levels under the Parliamentary Reforms Programme, which should contribute to improved representation of the people in the National Assembly.

Recommendations

Accordingly, the Commission recommends that:

- the principle of delimitating constituency boundaries and prescribing provincial and national limits on the number of constituencies in the Constitution should be upheld; and

- the total number of elective seats under the FPTP should not be less than 150 and not more than 200;

- 40% of the total number of seats shall be allocated to the PR System.

9.2.2.5 Representation in Parliament

Submissions

9.2.2.5.1 Gender Representation

A number of petitioners who addressed this issue called for equitable gender representation in Parliament (19). One line of submission proposed that there should be a provision that women's representation should be at least 30%, while another was that it should not be less than 50%. Petitioners lamented the under-representation of women in Parliament. However, the National Assembly in its submission was of the view that the targeted 30% representation for women in Parliament should not be embodied in the Constitution, since the need for such an affirmative action is not permanent and may change from time to time.

A few other petitioners said that parliamentary seats should be equally shared between men and women (8).

There was yet another submission that gender equality should not preclude competition through elections (1).

9.2.2.5.2 Representation of Interest Groups

A number of petitioners said that there should be seats in Parliament specifically reserved for interest groups such as women, youth, persons with disabilities, the clergy, Chiefs, trade unions and defence and security personnel (45). It was further suggested that representatives should be elected by their own electoral colleges. In all these cases, there was a complaint regarding lack of or extreme under-representation of these groups of persons.

9.2.2.5.3 Proportional Representation

Some petitioners wanted proportional representation in Parliament in order to cater for minority parties and special interests (22). Petitioners argued that this system was more democratic, as it assured inclusive representation based on the percentage of votes received by political parties in relation to the number of seats in Parliament. They considered the current

system of "winner-takes-all" to be undemocratic, particularly in the modern context where inclusive governance is emphasised.

Two petitioners argued that there should be 150 constituency-based seats where winners will be elected on simple majority, and 36 additional seats allocated to political parties on the basis of the proportion of votes received in the First-Past-The-Post constituency elections (2).

Observations

The Commission considered submissions made on various issues related to representation, in the National Assembly and the electoral system.

The Commission observes that there were calls for equitable gender representation with some suggesting a minimum of 30% seats for women whilst others argued for equal representation in terms of gender. The Commission also notes the dissenting views of a petitioner who was against equitable gender representation to the exclusion of competition.

The Commission also considered the views of petitioners who called for equitable representation of the youths, persons with disabilities and other interest groups such as Chiefs, the Clergy and trade unions.

The Commission has no difficulty appreciating the need for equitable gender representation and representation of the youth and persons with disabilities, these being groups that have historically been disadvantaged and require special measures to enable them participate in public service. In this regard, the Commission notes that this is a universal trend in modern democracies.

On the question of an electoral system that would best guarantee democratic representation and suit the needs of the country, the Commission reiterates its earlier observations and recommendations on the subject of the electoral system made under the Chapter dealing with Democratic Governance (Chapter 7).

The Commission is persuaded by the arguments in favour of the system of Proportional Representation. Apart from the principle that simple majority does not truly represent the majority, the Commission took into account the need for inclusive representation in the Legislature in order to enhance checks and balances. The Commission also considered the advantage that Proportional Representation would enable political parties through the

party list system to represent various interest groups and society through broad-based selection of MPs.

In addition, the Commission is persuaded that, although petitioners did not adequately articulate themselves specifically on the subject, the system of Proportional Representation would help solve some of the concerns that have been repeatedly expressed by petitioners, namely the need to promote national unity, and reduce defections and by-elections.

The Commission also observes that there is an advantage in not having an MP directly elected, as this would minimise the misconceptions about the role of MPs regarding the responsibilities and duties expected of them, and unnecessary pressure exerted on them far beyond their means and mandate.

The Commission acknowledges the fact that the system of Proportional Representation will strengthen party politics in Parliament. This could further be enhanced by making necessary provisions in the Constitution guaranteeing MPs' liberty to speak and vote freely.

The Commission further took into account the views of petitioners to the Mwanakatwe Commission, who called for the system of Proportional Representation, although in the final analysis the Commission recommended retention of the system. The Commission justified this by arguing that Proportional Representation was not well understood in Zambia and that the system was too sophisticated for countries that are not developed and/or do not have a homogeneous and advanced society. The Commission also expressed fear of representation in Parliament disregarding ethnic considerations and possible dominance by some ethnic groups.

The Commission appreciates the fact that the system is new and not well understood in Zambia. However, in reality, the system is not complicated and in any case what is paramount is the potential benefits from the system which justify change. However, this change should be gradual for people to appreciate and accept it.

The Commission has also looked at the recommendations of the Electoral Reform Technical Committee in respect of the Mixed Member Representation system. Apart from the question of detail, in principle the Commission is agreeable to the concept. Adopting the Mixed Member Representation system as a first step towards ultimately graduating to the Proportional Representation system will give the electorate time to adjust.

Recommendations

In the light of the above considerations, the Commission recommends that:

- a Mixed Member Representation system, consisting of the First-Past-The-Post system in respect of constituencies, and Proportional Representation in respect of additional seats to be allocated on the basis of the national aggregate votes received by political parties, should be adopted with a view to graduating to the Proportional Representation system. This electoral system should be provided for in the Constitution, but the details should be in electoral laws;

- the Constitution should provide that neither gender be represented by less than 30% of all elective seats and that details of the formula be prescribed by the electoral laws; and

- 40% of the number of the total number of seats shall be allocated to the PR System.

9.2.2.5.4 Election to the National Assembly – Qualifications/Disqualifications

Submissions

A large number of petitioners argued that there should be qualifications to stand for election as an MP (330). The suggested qualifications included the following:

- being Zambian by birth;

- having both parents as Zambians;

- being certified physically and mentally fit;

- having a minimum education of grade nine, 12, diploma or degree (Grade 12 being the most popular);

- being 18 years and above;

- being not more than 55, 60 or 70 years of age;

- having no criminal record;

- having a traceable village and Chief in Zambia;

- being supported by at least 500 to 1,000 registered voters in the constituency;

- being financially sound;

- being literate and conversant with the official language;

- having been cleared by law enforcement agencies;

- not having been convicted of electoral fraud or malpractice; and

- having a record of public service.

One petitioner said that the current constitutional provisions as regards qualifications for elections to the National Assembly should be maintained (1).

An equally large number of petitioners added residence in a district or constituency as a qualification for parliamentary elections (306). Some of these further added that the period of residence should be at least 5, 10 or 15 years. Other petitioners suggested that, as an alternative or in addition, an MP should have a house or development project in the constituency as a demonstration of commitment to serve that constituency. The main reason advanced was that the electorate felt abandoned by MPs who never visited their constituencies after elections, but shifted to Lusaka and stayed there permanently until the next elections. Some added that MPs should continue residing in their respective constituencies or districts.

Observations

Petitioners who spoke on the subject of qualification for and disqualification from contesting parliamentary elections either reiterated existing provisions or suggested variations, whilst others called for additional provisions.

The Commission finds that extending Zambian citizenship requirements to parents of a parliamentary election candidate would be discriminatory as already observed in relation to qualifications for contesting elections to the Office of President. Similary, requiring that a parliamentary candidate should have a traceable village and

Chief in the country would constitute an unnecessary barrier. Disqualification on financial grounds would also be discriminatory and, in any case, difficult to define and regulate.

With respect to age and, for the same reason stated with regard to presidential candidates, the Commission is of the view that a minimum age qualification of 18 years would be unsuitable because at that age candidates would not have had enough experience or attained such maturity as is necessary to represent the interests of the electorate. In addition, the Commission feels that the Constitution should not prescribe an upper limit on the age of a parliamentary candidate, as this should be left to the judgment of the electorate.

On the proposed requirement that a parliamentary candidate should be supported by at least 500 to 1,000 registered voters in the constituency, the Commission observes that this would amount to conducting a preliminary election, which is not necessary.

The Commission appreciates the submissions that in order to have sound leadership, candidates should be subjected to a minimum education requirement. In concurring with petitioners, the Commission reiterates its views earlier expressed in respect of presidential candidature.

The Commission finds no difficulty in including mental incapacity among grounds for qualification from contesting parliamentary elections. The Commission is, however, of the view that a parliamentary candidate need not have experience in public service.

The Commission observes that petitioners were passionate about the issue of residence of a parliamentary candidate. Petitioners were emphatic that a parliamentary candidate should be a resident in the constituency or district in which he or she is contesting. Some suggested residence for a minimum of five to 15 years, whilst others added that a candidate should have some development project as a measure of commitment to the constituency. Petitioners strongly objected to the practice of MPs, once elected, shifting to Lusaka and never visiting them until the next elections.

On a comparative note, the Constitution of Ghana provides that a parliamentary candidate should hail from the constituency in which he or she is contesting or should have been resident there for a period of not less than five years within the 10 year period immediately preceding the election.

The Commission appreciates the misgivings expressed by petitioners on the question of residence of a parliamentary candidate. The Commission observes that in addition to a requirement that a parliamentary candidate should be a resident of the constituency or district in which he/she is contesting, these concerns could be mitigated by a system whereby Cabinet is appointed from outside the National Assembly, as recommended in this Report. This will enable the MPs to concentrate on their constituencies.

The Commission also acknowledges that there are misconceptions about the role of MPs which result in undue social and economic pressures of a personal nature being placed on them by constituents. Matters of development should be addressed more vigorously and adequately in the recommended devolution structure, which cannot be left to an individual MP.

Recommendations

In the light of the foregoing, the Commission recommends that, taking into account the recommended Mixed Member Representation system, current constitutional provisions should be retained with modifications, by addition of new qualifications as follows:

- a minimum education certificate of Grade 12 or its equivalent; and

- a minimum of three years residence in the constituency or district.

9.2.3.5.5 Independent MPs

Submissions

Five petitioners said that the Constitution should not provide for independent MPs, as they are unlikely to have an alternative development programme to offer (5). On the

other hand, three petitioners said that independent candidates should be eligible to stand in parliamentary elections in order to enhance democracy (3).

There was a submission that independent candidates should not be allowed at any level of elections (1).

Observations

The Commission observes that, in the light of its recommendation that a Mixed Member Proportional Representation be adopted, the concept of independent MPs could still be accommodated. Further, it is consistent with democratic principles that a citizen should have the right to vote or to be voted for, as observed and recommended in this Report in respect of presidential candidature.

Recommendations

Accordingly, the Commission recommends that the constitutional provision allowing independent candidates to contest parliamentary elections should be retained in the context of a Mixed Member Representation system.

9.2.3.5.6 Winning Threshold

Submissions

Some petitioners called for a winning candidate to obtain at least 51% of the votes cast (11). Three petitioners, however, said that MPs should be elected on the basis of a simple majority (3).

Observations

The Commission observes that only an insignificant number of petitioners addressed the subject, indicating that it is not a subject of controversy. Previous experience has shown that parliamentary candidates can be voted on a simple majority basis to avoid expenses likely to be incurred in rerun elections.

Recommendations

The Commission recommends the retention of the *status quo*, that is, MPs representing constituencies should be elected on the basis of simple majority.

9.2.3.5.7 Constituency Offices

Submissions

A number of petitioners called for a provision in the Constitution that would require offices to be established for MPs in their constituencies to enable them communicate more effectively with the electorate (102).

Observations

The desire expressed by petitioners to have constituency offices established is a reflection of their desire for improved contact and communication with their representatives in Parliament. The demand for constituency offices is a long standing one, as illustrated by submissions made by petitioners to the Chona Commission on the subject and the recommendation made by that Commission. The Commission appreciates the need for constituency offices as part of the effort of bringing Parliament closer to the people. The Commission therefore urges that the ongoing programme of putting in place and funding these offices should be strengthened and completed.

In its deliberations on this subject, the Commission took note of the fact that there is a trend currently within the Commonwealth to move towards bringing Parliament closer to the people. This trend should be encouraged and achieved through appropriate measures.

Recommendations

The Commission recommends that:

- the current parliamentary reforms programme should be enhanced to ensure the necessary contact between MPs and their constituencies; and

- constituency offices should be established.

9.2.3.5.8 Term of Office

Submissions

Some petitioners said that the term of office of MPs should remain unchanged at five years (7). However, other petitioners were of the view that the term of office for MPs should be reduced from five to four or three years (14).

A very large number of petitioners argued that the term of office of an MP should be limited (360). Some added that an MP who has served the maximum term should be eligible after a break of at least one term. Others suggested that an MP should become ineligible only after serving the stipulated consecutive terms. Some of the suggested limits were:

- one four-year term;

- one five-year term;

- two four-year terms;

- two five-year terms (most popular); and

- three five-year terms.

The reason given was that MPs should not monopolise parliamentary seats so that opportunity is given to other citizens.

Some petitioners, on the other hand, felt that there should be no limit on the term of office of an MP (28).

Observations

Petitioners who made submissions on this subject wanted MPs' term of office limited, and the majority of these favoured a limit of two five-year terms. On the other hand, other petitioners called for a reduction of the term from five years to four or three years. The Commission notes that these submissions were aimed at dealing with what petitioners referred to as "the syndrome of recycled politicians".

In considering the subject, the Commission observes that limiting the term of office of MPs is not a common practice in the Commonwealth, Africa or elsewhere in the world. In the context of Zambia, such a limitation may have the effect of reducing the quality of representation in Parliament. In any case, the electorate should address the issue of recycled politicians, instead of the Constitution. The Commission also took into account the fact that the mischief intended to be addressed by these submissions would be mitigated by some related recommendations made under different subjects. These include the recommendations that the Cabinet should be appointed from outside the National Assembly and that a Mixed Member Representation system and ultimately Proportional Representation system should be adopted in respect of parliamentary elections. These systems would take care of the difficulty expressed.

Recommendations

The Commission therefore recommends that the status quo be should retained, that is, that there be no limit on the term of office of MPs.

9.2.4 By-Elections

Submissions

9.2.4.1 Crossing the Floor, Expulsion, Death or Nullification

A very large number of petitioners, including the National Assembly, argued that, as a general rule, there should be no by-elections except where the vacancy is due to the death or incapacitation of an MP or nullification of an election (1,186). A

few petitioners said that by-elections should only be held when an independent MP dies (4).

Major reasons advanced by the petitioners included:

- to cut down on costs;
- to discourage defections, which petitioners described as "political prostitution"; and
- to avoid undermining democracy.

Among these, some suggested that other methods be used to fill vacant seats in Parliament. It was suggested that vacancies should be filled by the runner-up in the previous election or by a replacement provided by the party that held the seat.

An overwhelming number of petitioners, including the National Assembly, said that an MP who resigns from a party, or is expelled from a party or crosses the Floor, should lose the seat and not be eligible to contest elections (2,567). The suggested period of ineligibility varied as follows:

- the duration of that Parliament (most popular submission);
- 4 years;
- 10 years; and
- life.

The reason advanced by most of the petitioners on this issue was that it would deter members from resigning from their parties for selfish reasons. They added that this would also guard against unnecessary expenditure being incurred through by-elections.

On the other hand, many petitioners felt that an MP who crosses the Floor or is expelled from the party should be allowed to recontest the by elections or retain the seat as an independent MP (382). Retention of the seat was particularly suggested in the case of an expelled MP. One petitioner said that an independent MP who does not join a party should retain the seat (1). Another petitioner suggested that an independent candidate who joins a political party should not be allowed to recontest the seat for the life of the National Assembly (1).

A number of petitioners were of the view that an appropriate parliamentary committee should be empowered to determine the merits or otherwise of expulsion of an MP from a political party, on the basis of which the MP should vacate the seat or retain it as an independent MP (24). This, they argued, would avoid MPs being victimised by their parties.

A number of petitioners said without any elaboration that an MP who crosses the Floor should vacate the seat (37).

Some petitioners argued that an MP who has been expelled from a party and has challenged the expulsion in a court of law should retain the seat until the matter is determined (11).

One petitioner was of the view that an MP who is expelled from a party should vacate the seat, but the expelling party should be barred from recontesting the by-election (1). Another petitioner said that an MP who crosses the Floor should be fined (1), whilst another said that such an MP should be compelled by law to fund the by-election (1).

A number of petitioners proposed that by-elections should continue to be held within 90 days after the seat falls vacant, as stipulated in Article 67 of the current Constitution (33). One petitioner, however, said that by-elections should only be held mid-term, in order to cut down on costs and the frequency of by-elections (1).

Seven petitioners said that there should be no by-elections within the last two years of the life of Parliament to cut down on costs and to avoid electing an MP who would only serve for a short period before another election (7).

9.2.4.2 Dissolution of a Party

Three petitioners said that an MP whose party is dissolved should retain the seat as an independent (3). This included a submission from the National Assembly to the effect that where a party dissolves itself, its members of Parliament should retain their seats in the House as independent members until the next parliamentary elections. The National Assembly reasoned that this would stop unnecessary expenses incurred by the State on by-elections to fill vacant seats arising from dissolution of parties.

Another rationale is that a member is elected to Parliament by the people from a constituency and, as such, the member has the people's mandate to represent their interests in the House. Therefore, upon dissolution of a party, this mandate from the people must continue.

Observations

This subject attracted submissions from an overwhelming number of petitioners. These petitioners were opposed to the current constitutional provision which requires that by-elections be held whenever there is a vacancy in the National Assembly. Petitioners expressed their strong objection to this system, mainly on account of the resulting high frequency of by-elections and the expenditure of public resources at the expense of other developmental needs. Further, they lamented that the system encourages what they term "political prostitution" among MPs, that is, defections from one party to another, in total disregard of the interests of the electorate.

On the other hand, a very small minority called for the current system of conducting by-elections to be maintained.

The Commission is in agreement with the submissions made by the overwhelming majority of petitioners that there should be no by-elections except in the event of death or incapacity of an MP or nullification of an election, or in the event where a vacant seat was held by an independent MP. Similarly, the Commission concurs with the overwhelming majority of petitioners who called for an MP who resigns from a party or crosses the Floor to be barred from contesting by-elections for the remainder of the life of that Parliament.

Some petitioners favoured the idea of an expelled MP retaining the seat as an independent, in order to avoid the tendency of political parties victimising their MPs. On this note, the Commission is of the view that an expelled MP should be given every possible opportunity to contest the expulsion without vacating the seat and, if wrongfully expelled, should retain the seat as an independent MP.

A few petitioners called for by-elections to be held only once in the life of Parliament or in the first half of the life of Parliament in order to reduce costs. The Commission notes that these submissions were offered in an effort to find a solution to the vexing problem of by-elections.

Some petitioners, who included the National Assembly argued that an MP whose party is dissolved should retain the seat as an independent. Though petitioners who addressed this subject were few, the Commission appreciates the predicament of an MP whose party is dissolved. Under the current electoral system, it would be justified for such an MP to retain the seat as an independent. The status would be the same under a Mixed Member Representation system in respect of seats held by MPs directly elected by the people. However, seats allocated on the basis of Proportional Representation should be reallocated to other parties on the same basis.

Concurring with the views of the overwhelming majority of petitioners on the subject, the Commission observes that the problem of by-elections could be mitigated by the introduction of the Mixed Member Proportional Representation system already recommended in this Report. In addition, the Commission notes that the recommendation already made in this Report, to the effect that the Cabinet should be appointed from outside the National Assembly will have the effect of discouraging defections, as it is observed that to a great extent MPs are lured by the prospect of ministerial appointments.

With regard to the option of the runner-up in the previous election assuming the seat, the Commission is of the view that this would not be suitable as sometimes a runner-up may not be available due to death, absence or other reasons. Further, it would be depriving the party that held the seat of the opportunity to continue holding it until the expiry of the parliamentary term.

In concluding its consideration of the subject, the Commission reiterates the need for an electoral system that would address the concerns of the people by ensuring minimal by-elections.

Recommendations

In the light of the grave misgivings expressed by petitioners and the arguments in support of these submissions, the Commission recommends that the proposed electoral system, which should be prescribed in the electoral laws, should be designed in such a way that:

- where a vacancy arises due to nullification of an election, death, incapacitation of an MP or where a vacant seat was held by an independent MP, a by-election should be held;

- an MP who resigns from a party or joins another party should lose the seat and not be eligible to contest by-elections for the duration of that Parliament;

- an MP of a dissolved party should retain the seat as an independent where such MP holds the seat on the basis of the First-Past-The-Post electoral system;

- the seat of an MP whose party is dissolved should be reallocated on the basis of Proportional Representation if that seat was held on the basis of that system; and

- any vacancy arising otherwise should be filled by the party holding the seat. In the case of an expelled MP who contests the expulsion, he/she should continue until the matter has been determined and, if found to have been wrongfully expelled, such an MP should retain the seat as an independent MP, and that this should be determined within 90 days.

9.2.4.3 Election Petitions

Submissions

Some petitioners said that in the event of an election petition, an MP-elect should not assume office until the matter is determined (93).

A few petitioners felt that an MP who loses an election petition should be disqualified from contesting subsequent elections (13).

One petitioner called for the suspension of any MP facing an election petition until the matter is determined (1).

Two petitioners proposed that Article 71 of the current Constitution that provides for vacation of parliamentary seats should include, "if the MP's election has been nullified by a court of law" (2).

Observations

Petitioners on this subject were concerned that an MP whose election has been petitioned assumes the seat before determination of the petition. In cases where such an MP loses a petition, he/she will have unjustly benefited from the privileges and benefits that

go with the office of MP. Often, these petitions are disposed of only after a long time.

The Commission acknowledges the legitimacy of this submission and observes that, in many instances where an MP has lost an election petition in the High Court, the MP is granted stay of execution of the High Court judgment, pending appeal to the Supreme Court.

On the other hand, the Commission considered the possibility that a constitutional provision barring a petitioned MP-elect from assuming office might result in a virtual halt or considerable disruption in the functioning of Parliament. The Commission notes that the status of a declared winner is that of an MP until proved otherwise. A better option would be to provide a time limit within which election petitions should be disposed of.

On the question of nullification being stipulated explicitly in the Constitution as one of the grounds for vacating a parliamentary seat, the Commission finds this superfluous, as the nullification of an election, in effect, means that the person was not an MP.

Further, the Commission notes that the status of the winner is that of MP until the court nullifies the election, as it would be unfair to deprive the electorate of representation.

Recommendations

The Commission accordingly recommends that the Constitution should provide that:

- an MP-elect whose election has been petitioned should take up the seat in the National Assembly pending the outcome of the petition;

- the time within which parliamentary election petitions should be determined should be limited to 90 days; and

- nullification of election should result in by-elections.

9.2.4.4 Handover

Submission

One petitioner proposed that there should be a handover period before an MP assumes office to facilitate continuity of developmental projects in the constituencies (1).

Observations

The Commission observes that a handover period of the Office of an MP might be necessary, particularly when constituency offices take root. However, this is an administrative matter that should be dealt with at the local level.

Recommendations

The Commission recommends that this matter be dealt with administratively.

9.2.5 Nominated MPs

Submissions

9.2.5.1 Nomination

Some petitioners said that seats for nominated MPs should be shared by political parties represented in Parliament on a pro rata basis (18). One petitioner argued that the nomination of MPs should be extended to the political party that comes second in the presidential and parliamentary elections (1). There was also a submission that the National Assembly should nominate MPs and have the power of withdrawing the nomination (1). It was felt that nominated MPs should not serve at the pleasure of the President.

A few other petitioners said that nominated MPs should be ratified by Parliament (5).

9.2.5.2 Criteria for Nomination

A few petitioners wanted that the Constitution to clearly spell out, in detail, the criteria for the nomination of MPs (10).

9.2.5.3 Ineligibility

A number of petitioners said that unsuccessful candidates in the residential and parliamentary elections should not be nominated to the National Assembly (31).

One petitioner said that an MP who crosses the Floor should not be eligible for nomination to Parliament (1).

9.2.5.4 Eligibility - Clarity of Language

Two petitioners said that the language of the Constitution regarding criteria and eligibility for nomination of MPs under Article 68 of the current Constitution should be unambiguous (2). It was proposed that the word "may" should be replaced by "shall" and the words "special interest" and "special skills" should not be used as they are not easy to define. There was a submission from the National Assembly that the terms "general" and "presidential" elections need to be clarified in the Constitution, in the context of nomination by the President (1).

9.2.5.5 Number of Nominated MPs

A large number of petitioners called for an increase in the number of nominated MPs so as to provide for interest groups such as Chiefs, women, the youth and persons with disabilities (397). Suggested numbers were:

- nine;
- ten;
- eleven;
- twelve (majority of petitioners);
- fifteen;
- eighteen;
- twenty;
- twenty-one;
- twenty-five; and

- forty.

Some of these petitioners suggested that 50% of the nominated MPs should be women.

The call for an increase in the number of nominated MPs was closely contested by a large number of petitioners who wanted the number to be reduced (355). Suggested numbers were:

- two;
- four;
- five (majority of petitioners);
- six; and
- seven.

Some added that nominated MPs should be non-partisan. The main argument advanced in favour of reducing the number was that nominated MPs do not represent the electorate, but the appointing authority.

Others said that the status quo should be maintained, that is eight nominated MPs (124).

9.2.5.6 Representation

A number of petitioners submitted that nominated MPs should represent special interest groups such as women, the youth, persons with disabilities, Chiefs and professional bodies (105).

Some petitioners said that there should be gender balance in the number of nominated MPs (33), whilst others said that all nominated MPs should be women (5).

A large number of petitioners argued that there should be provision for nine nominated MPs to represent the nine provinces (60).

9.2.5.7 Vote

One petitioner said that nominated MPs should have no vote in the House (1).

9.2.5.8 Term of Office

Two petitioners proposed that nominated MPs should only serve one term and should not be eligible for renomination (2).

9.2.5.9 Removal of Nominated MP

A few petitioners said that nominated MPs should not be liable to removal by the President (9). On the other hand, other petitioners felt that nominated MPs should only be removed on specified grounds such as inefficiency, incompetence, incapacitation or misconduct (3).

9.2.5.10 Provision to Nominate

Many petitioners argued that the provision to nominate MPs in the Constitution should be repealed (255). It was felt that retention of this provision would give the President greater advantage and influence. These petitioners also argued that the concept of nominated MPs is used merely to increase the number of members of the ruling party in the National Assembly.

Observations

Under the subject of nominations, petitioners made submissions on a number of issues. Some petitioners wanted the number of nominated MPs increased, with suggested numbers varying from 9 to 12, the latter being the most popular. They argued that nominated MPs should represent a wider range of interest groups, which should include women, youths and persons with disabilities.

Some petitioners said that nominated MPs should represent each of the provinces. Others called for gender balance in the nomination.

Other petitioners, on the other hand, said that the number of nominated MPs should be reduced, arguing that these MPs do not represent the electorate but serve the interest of the appointing authority, namely the President. These petitioners suggested that the number should be reduced to five. Yet others went further and proposed that the provision for nomination of MPs should be repealed altogether, as it serves only to strengthen the influence of the President and the ruling party in the National Assembly.

Some petitioners called for political parties represented in Parliament to nominate MPs on a pro rata basis. Others wanted the National Assembly to nominate the MPs instead of the President, whilst others felt that these MPs should not serve at the pleasure of the President. They suggested that a nominated MP should only be removed on specified grounds such as incompetence, incapacity arising from

infirmity of body or mind, or for misconduct. The concerns which petitioners sought to address were similar to those expressed by petitioners who either wanted the number reduced or the provision repealed.

Other petitioners called for the criteria for nomination of MPs to be clearly spelt out in the Constitution. They demanded that Article 68 (1) be repealed so that nomination is not based on "special interests or skills" as determined by the appointing authority, which petitioners felt could not be easily questioned. They also argued that nominated MPs should represent clearly identified interest groups and that these should include disadvantaged groups, such as women, youths and persons with disabilities.

The Commission appreciates the misgivings expressed by petitioners who were not in favour of the concept of nominating MPs. The concept is perceived as not being in conformity with ideals of competitive democracy and the sovereign will of the people. The Commission notes that in countries where this concept exists, it is used either to enhance the strength of the ruling party in Parliament and/or integrate targeted minority or disadvantaged groups. In the Zambian situation, the provision appears to have been used more to enhance the strength of the Executive both in the Cabinet and in Parliament. Further, when viewed especially against the background of dominance by the ruling party in Parliament, this provision seems intended to tilt the balance in favour of the ruling party. The existing provisions of the Constitution, however, envisage the tapping of expertise and special skills and interests which may not be found in elected MPs.

In concluding its consideration of the subject, the Commission notes that the majority of petitioners to the Chona and Mvunga Commissions were not in favour of the concept of nominated MPs. In the same way as petitioners to this Commission, they argued that nominated MPs did not represent any constituency, but the interests of the Executive. Though petitioners to the Mwanakatwe Commission appear to have been divided on the issue, the Commission observed that the practice tended to give leverage to the Executive in the National Assembly and weakened democracy. It therefore recommended that the provision for nominated MPs be repealed.

This Commission is of the view that if the concept of nominated MPs were to be retained, the current provisions would require modification in order to address issues raised by petitioners, i.e. the number, criteria for nomination, nominating authority and grounds for removal. However, the provision should be done away with, particularly in view of the Commission's earlier recommendation that minority and disadvantaged groups be allocated special elective seats in Parliament.

Recommendations

The Commission recommends that the constitutional provision for nominating MPs should be repealed.

9.2.6 Ex-Officio MPs

Submissions

One person suggested that Cabinet Ministers appointed from outside the National Assembly should be ex-officio MPs (1).

A few petitioners said that the Leader of the main opposition party should automatically be an MP and appointed the Leader of the Opposition in the National Assembly (5).

One petitioner proposed that former Republican Presidents should be ex-officio MPs for life (1).

A few petitioners said that the two runners-ups in presidential elections should automatically be MPs for the life of that Parliament (5).

Observations

The Commission notes that p very few petitioners spoke on this subject. These petitioners wanted the Constitution to make provision for ex-officio MPs and proposed specific classes of persons.

The Commission is of the view that it is necessary that Cabinet Ministers appointed from outside the National Assembly should be ex-officio MPs for the purpose of conducting business in the House. As ex-officio MPs, they should not vote or be remunerated.

The Commission also finds no justification for the submission that runner-ups in presidential elections be ex-officio MPs. The Composition of the National Assembly should be on the basis of competitive democratic elections.

With regard to former Presidents, the Commission is of the view that these belong to a different category of leaders and should be allowed to contribute to national development in other areas.

Recommendations

Accordingly, the Commission recommends that the Constitution should not allow run-ups in presidential elections or former Presidents to be ex-officio MPs.

9.2.7 Powers and Privileges

9.2.7.1 Power to Summon Parliament

Submissions

The National Assembly proposed that power to summon Parliament for the official opening of Parliament, new sessions, as well as special sittings of Parliament should be vested in the President, while power to summon Parliament for purposes other than these should be vested in the Speaker (1).

Observations

The Commission notes that only the National Assembly made a submission on the subject. The Commission deliberated on the subject at length.

The submission was substantially in favour of retention of the status quo in relation to the summoning of Parliament. However, the submission of the National Assembly called for the vesting of this power in the Speaker for purposes other than those envisaged under the current provisions.

The Commission observes that the effect of Article 88 (1), (2), (3) and (4) is that the President has the power to summon the National Assembly for its first sitting, the first sitting of each session and for special meetings.

In addition, the President may summon a Parliament that has been dissolved in circumstances of war or a state of emergency, as provided for under Clause (9).

The only exception when the Speaker may summon Parliament is in the event of impeachment proceedings against the President, as provided for under Article 37 (1) of the Constitution. The National Assembly only has power to regulate its sittings within a session, i.e. after commencement of a session.

In terms of Clause (2), a session is to be held at least once every year, provided that an interval of 12 months does not lapse before the next session. This means that the National Assembly can be held in suspense by the President for up to a year after the end of a session. The Speaker of the National Assembly, under such circumstances, has no power to summon the National Assembly.

In considering the subject, the Commission examined provisions of other Constitutions.

In South Africa, the President of the Constitutional Court determines the time and date for the first sitting of the National Assembly, while the National Assembly may determine the time and duration of its other sittings and recess periods. The President may summon the National Assembly to an extraordinary sitting at any time to conduct special business.

In the case of Ghana, power to summon Parliament is essentially vested in the Speaker. Similarly, in Uganda, with the exception of the first sitting of a new Parliament, the Speaker summons Parliament. In both Ghana and Uganda, MPs may request the Speaker to summon Parliament on a specified majority, and the Speaker is obligated to do so within a specified period.

The Commission observes that power to summon Parliament is an essential instrument in the exercise of functions of the Legislature. In a democratic dispensation, it is important that this power rests with the National Assembly. Vesting this power in the President poses the risk that the Executive, particularly in situations of friction, may deliberately hamper the functioning of the National Assembly. On the other hand, it is also necessary to guard against the likelihood of a hostile National Assembly using the power to frustrate Government programmes. In addition, the vesting of such power should take into account the likely need for the Executive to move the National Assembly to conduct special business.

Recommendations

Accordingly, the Commission recommends that the Constitution should provide that:

- the President shall summon the National Assembly for the first sitting of each Parliament following dissolution of the National Assembly and that the

President may summon a dissolved National Assembly in situations of war or a state of emergency;

- the President may request the Speaker, in writing, to summon the National Assembly for a special sitting to conduct extraordinary or urgent business, and when so requested the Speaker shall summon the National Assembly within a period not exceeding 14 days;

- the Speaker shall summon the National Assembly for its ordinary sessions;

- the Speaker shall, in other circumstances specified by the Constitution, have power to summon the National Assembly;

- in any other instances, the National Assembly shall, on a two-thirds majority, have the power to summon itself; and

- where the Speaker fails to summon the National Assembly in circumstances where the Constitution requires her/him to do so, the National Assembly may proceed on its own motion and elect one among its members to preside over the motion of summoning.

9.2.7.2 Quorum

Submissions

One petitioner said that the quorum for the National Assembly should be half the number of MPs (1) while another said that the quorum should be three-quarters (1).

Observations

On this subject, the Commission observes that there were two submissions, with one petitioner calling for the quorum of the National Assembly to be half of all the MPs and the other calling for the quorum to be three quarters of all the MPs.

The Commission observes that currently Article 84 (4) of the Constitution provides that the quorum for a meeting of the National Assembly shall be one-third of all MPs. This seems to be standard practice in many countries. Though it is ideal that decisions of the National Assembly are seen to be taken by a

majority of the members, a strict requirement for an absolute majority may impede the functioning of the National Assembly. It should suffice that the Constitution safeguards the need for certain resolutions of the National Assembly to be passed by an absolute majority.

Recommendation

Accordingly, the Commission recommends retention of the provision that one-third of all the members of the National Assembly shall constitute a quorum.

9.2.7.3 Liberty to Speak and Vote

Submissions

Three petitioners said that the Constitution should protect the freedom of MPs to speak and vote on any issue in the House according to their conviction, without fear of reprisal from Government or their parties (3).

Observations

On this subject, the Commission notes that petitioners, though few, wanted the liberty of MPs to speak and vote according to their conscience protected. These petitioners were concerned that currently MPs risked being disciplined by their parties, or, in the case of members of the Executive, by the appointing authority, for expressing views and voting against positions taken by their parties. They were also concerned that the Constitution imposed collective accountability to the National Assembly on Ministers and Deputy Ministers. This, they reasoned, tends to dilute the effectiveness of the National Assembly in providing the necessary checks and balances.

The Commission observes that it is essential for MPs to be guaranteed the liberty to debate and vote on any issue in the National Assembly without fear. The Commission notes that this freedom has progressively been eroded, particularly since the Second Republic. On the other hand, the Commission appreciates that in order for the Executive as a whole to be accountable to the National Assembly, Ministers need to speak collectively. It further observes that this is a common practice, particularly within the Commonwealth. The negative implication of this in terms of checks and balances in the National Assembly is seen as a consequence of the parliamentary system.

In examining this issue, the Commission notes that the Chona Commission had recommended that the Constitution guarantee the liberty to speak and vote freely sought by petitioners to that Commission. Although this recommendation was made in the context of the one-party State, it is still valid today in the light of the need to strengthen the role of the National Assembly in providing effective checks and balances. It is important that this ideal is not superseded by partisan considerations.

Recommendations

The Commission therefore recommends that the liberty of MPs to speak and vote freely should be explicitly enshrined in the Constitution.

9.2.7.4 Voting-Secret Ballot

Submissions

One petitioner proposed that voting in the House on constitutional matters should be by secret ballot, while on any other matter it should be by division of the House (1).

Observations

Although the subject only attracted one submission, the Commission gave consideration to its weight.

The Commission observes that voting by division of the House is intimidating and does not guarantee the necessary freedom with which members should express themselves. However, the Commission also notes that this is a matter of procedure not specifically enshrined in the Constitution. It is instead dealt with under procedural rules of the National Assembly, as determined by the National Assembly under article 86 (1) of the Constitution. Currently, voting in the National Assembly is by voices of "Aye" for those in favour and "No" for those against, or otherwise by division of the House. The major problem with this method is that it lacks confidentiality.

The Commission observes that constitutions rarely make provision for the form of ballot in parliamentary proceedings. One such rare case is the Constitution of Ghana, which provides that voting in proceedings for the removal of a President from office shall be by secret ballot.

The Commission is also of the view that it would not be practical to distinguish matters that are constitutional from those that are not. It is easier to specify instances where voting by secret ballot is required, as in the case of Ghana.

Recommendations

The Commission recommends that the Constitution should specify instances when a vote should be taken by secret ballot, and that these should include:

- proceedings for conduct of elections of the Speaker;
- impeachment or removal from the Office of the President or Vice-President; and
- removal of immunity of a former President.

9.2.7.5 Committee System - Strengthening

A few petitioners felt that the parliamentary committee system should be strengthened in order to carry out legislative and oversight roles more effectively (3).

9.2.7.6 Investigative Powers

Two petitioners said that Parliament should have power to investigate any public office (2).

Observations

Submissions on the strengthening of parliamentary committees and investigative powers were extremely few. Nevertheless, the Commission acknowledges the legitimacy of the submissions and notes that the issues raised are important for the effective functioning of the National Assembly.

The Commission considered the needs of the National Assembly in the work of the parliamentary committee system, starting with an enabling constitutional mandate, as is the case in a number of countries where the system has been instituted. These include Sweden, Ghana and Uganda. The Commission also considers important the provision of skills training to MPs and staff, and adequate financial and human resources to be important.

In concurring with the views of petitioners on the subject, the Commission observes that, currently the National Assembly in general and the MPs in particular are not sufficiently equipped to effectively play the oversight role. The Commission, however, notes that the Committee system is currently undergoing reforms aimed at making it more effective. In this regard, departmentally-related committees have been established to oversee and scrutinise Government policies and performance.

The Commission notes that currently while Article 86 (3) of the Constitution seeks to ensure that there is equitable representation of political parties or groups represented in the National Assembly on Committees, the Constitution falls short of specifying the powers and functions of these Committees. Although it may be argued that these can be or are adequately provided for under the Rules of the National Assembly, this has the effect of diluting the mandate of these Committees. This is especially so in regard to the work of these Committees in checking the performance of the Executive, as the latter may not be compelled to take the desired action. The possibility of this is even higher in a system where the Cabinet is drawn from outside the National Assembly, as recommended in this Report.

With regard to the related issue of the investigative powers of the National Assembly, the Commission observes that although this submission was an isolated one, it touched on one of the important functions of Parliament. In this regard, the Commission notes that currently the powers and privileges of Parliament, as conferred on the National Assembly by Article 87 of the Constitution and prescribed in the National Assembly (Powers and Privileges) Act, Cap. 12, include powers to conduct inquiries into conduct of public offices and records.

However, the Commission also observes that these powers are limited to some extent in that the National Assembly may not examine certain matters or records. In addition, decisions of the National Assembly are not enforceable. There is need, therefore, to re-examine these provisions and ensure that the Constitution guarantees that the National Assembly is able to carry out investigations without undue impediments and that its decisions are enforceable. In this connection, the Commission is of the view that the powers of the National Assembly should be complemented with those of a Parliamentary Ombudsman, as is the case in a number of Scandinavian countries.

Recommendations

The Commission recommends that the Constitution should make provision with respect to strengthening the parliamentary committee system as follows:

- the National Assembly shall appoint standing committees and other committees necessary for the efficient discharge of its functions;

- the members of Standing Committees shall be elected from among Members of Parliament during the First Session of Parliament;

- the rules of procedure of the National Assembly shall prescribe the manner in which the members and chairpersons of committees are to be elected;

- the functions of Standing Committees shall, among others, include discussing and making recommendations on all Bills laid before the National Assembly; initiating any Bill within their respective areas of competence; assessing and evaluating estimates of revenue and expenditure, including the management thereof by the Government and other activities of the Government as well as other public institutions; carrying out relevant research in their respective fields; and reporting to the National Assembly on their functions;

- in the exercise of its functions under this Article, a Committee of Parliament:

    a) may call any Minister or any person holding public office and private individuals to submit memoranda or appear before it to give evidence;

    b) may co-opt any Member of Parliament or employ qualified persons to assist it in the discharge of its functions;

    c) shall have the powers of the High Court in enforcing the attendance of witnesses and examining them on oath, affirmation or otherwise; and

    d) shall have power to compel the production of documents and to issue a commission or request to examine witnesses abroad.

- the provisions made here shall not have the effect of taking away any other powers or functions conferred on the National Assembly or its committees under any other law; and

- in order for the parliamentary committee system to be effective, the Government shall render necessary support, including through the provision of adequate financial, human and institutional resource capacity.

The Commission further recommends that:

- the Constitution should provide that decisions of the National Assembly shall be enforced and that Parliament shall enact a law to this effect, providing penalties for failure to comply; and

- as recommended under Chapter 18 on the subject of Parliamentary Ombudsman, an Office of Parliamentary Ombudsman should be established under the Constitution and be vested with powers to investigate public institutions for actions or omissions in contravention of the law, and that decisions of the Office shall be coercive.

9.2.7.7 Control of the Executive and the Judiciary

A number of petitioners called for the National Assembly to have control over the Executive and Judiciary (9). It was said the power of the National Assembly over the Executive should include the power to summon the President to appear before it and power to pass a vote of no confidence in the President, Vice-President or Prime Minister and individual Cabinet Ministers, as the case may be. Upon a vote of no confidence, the office-bearer should vacate office. The reason for this submission was that the National Assembly represents popular sovereignty and should therefore be superior to the other two arms of the Government.

9.2.7.8 Question Time - Attendance by President

Two petitioners said that the Constitution should make provision for the President to attend Parliament at prescribed times to answer questions (2).

Observations

A few petitioners called for Parliament to have supremacy over the Executive and the Judiciary. In particular, petitioners wanted the National Assembly to have power to summon the President, Vice-President and Ministers to appear before it and to pass a vote of no confidence in a President or individual Ministers. Others wanted the President to appear before the National Assembly to answer questions from MPs in the same manner as Prime Ministers and Ministers do in parliamentary executive systems. The reason advanced was that Parliament represents popular sovereignty.

The Commission evaluated these submissions against a number of considerations.

The Commission observes that although Parliament represents the sovereign will of the people, it can be argued that in a presidential executive system, the President also enjoys the mandate of the people since he/she is popularly elected by direct vote of the people. The President and Ministers appointed by her/him cannot therefore be subject to the control of the National Assembly. However, it is essential that the Executive is held accountable to the National Assembly on behalf of the people. The principle of separation of powers in the relationship between the two arms entails checks and balances rather than control of one by the other.

In line with this, it is common practice in countries with presidential executive systems or mixed presidential and parliamentary executive systems of government for Ministers to be summoned by Parliament in relation to the execution of their duties. However, Parliament may not pass a vote of no confidence in the Ministers. In recognition of the need for Parliament to provide effective checks and balances, modern constitutions are increasingly providing for a motion of censure against an erring Minister. Such censure does not automatically result in the dismissal of a Minister, but such a decision is left purely to the discretion of the President. Examples are the Constitutions of Ghana, South Africa and Uganda.

On the control of the Judiciary by the National Assembly, the Commission notes that this was not adequately articulated. However, such control, the Commission notes, is not compatible with the doctrine of separation of powers and specifically the independence of the Judiciary, particularly so in our situation, where all the three organs of the State are subject to the Constitution.

Recommendations

In view of these considerations, the Commission recommends that:

- the National Assembly should not have power to summon the President or pass a vote of no confidence in the President;

- there should be no provision requiring the President to attend the National Assembly, but that he/she should do so at her/his pleasure;

- the National Assembly should have no power to pass a vote of no confidence in Cabinet Ministers;

- the Constitution should provide that the National Assembly shall have power to censure a Minister, but no more; and

- The National Assembly should not have power to control the Judiciary, but only to provide checks and balances.

9.2.7.9 Emoluments

Some petitioners said that MPs' allowances and gratuity should be commensurate with the country's economic performance (12). Others were of the view that MP's salaries and gratuities should be replaced with nominal sitting allowances (8).

Two petitioners submitted that MPs should not determine their own emoluments (2). They suggested that an objective and independent system of determining emoluments should be established.

Two other petitioners were of the view that MPs' emoluments should not be increased during their term of office (2).

Some petitioners felt that MPs should not receive a mid-term gratuity (19).

Observations

On this subject, petitioners were mainly concerned that MPs determine their own emoluments without subjecting their decision to any independent authority. In this regard, there were perceptions that MPs award themselves excessive salaries, gratuities and other forms of emoluments, without due consideration to the poor performance of the economy. Petitioners were incensed that this was being done against a background of extreme poverty in the country and many developmental demands competing for meagre resources.

Although petitioners who addressed this subject were few, the Commission considered the legitimacy of the submissions.

The Commission notes that, whilst some petitioners wanted the emoluments to be commensurate with the country's economic circumstances, others demanded that MPs be entitled to allowances only. Others demanded that MPs should not determine their own emoluments and suggested that this should be done by an independent body. While some petitioners called for MPs' emoluments not to be increased during their term of office, others demanded that they should not receive a mid-term gratuity.

The Commission notes that petitioners were reacting to the apparent lack of accountability in a system where the MPs are allowed to determine their own remuneration, in disregard of the fact that they have an interest in the

matter. Whether they are in fact objective or not in their decisions, accountability, transparency and checks and balances are questionable.

Although the Commission concurs with the views of petitioners, it observes that this practice is universal and it is founded on the principle that Parliament must be free from control and be in charge of its own affairs.

However, the Commission observes that although the autonomy of Parliament is important, good governance demands that there should be accountability, transparency and checks and balances. Determination of MPs' emoluments should not be an exception to these cardinal principles. It is necessary, in keeping with these principles, that MPs' emoluments, like those of constitutional offices and others, be recommended by an independent body. This is the practice in some countries, such as South Africa, Britain and Nigeria.

Regarding the mid-term gratuity, the Commission agrees with the petitioners and is of the view that the practice was introduced for the convenience of serving MPs and lacks legal basis.

Recommendations

The Commission recommends that:

- the National Fiscal and Emoluments Commission, establishment of which is recommended in this Report, should be mandated to evaluate and recommend for the approval of the National Assembly, remuneration of MPs and holders of other constitutional offices. These should include the President, Vice-President, Ministers, Judges, Chairpersons and members of constitutional and service commissions, Attorney-General, Solicitor-General, DPP, Secretary/Deputy Secretary to the Cabinet, Auditor-General, Permanent Secretaries and others;

- the proposed institution should not be subject to the control of any person or authority and should be capable of analysing and synthesising demand for remuneration packages with other relevant considerations, such as rational utilisation of available resources, equitable treatment of holders of constitutional offices, and remuneration of officers at other levels of the public service; and

- a mid-term gratuity should not be paid to MPs.

9.2.7.10 Checks and Balances

Submissions

One petitioner said that since a stronger Parliament is envisaged, the Constitution should provide adequate checks and balances to avoid abuse of parliamentary powers and privileges (1).

Observations

The Commission acknowledges that checks and balances against and within Parliament are essential to safeguard against abuse of power. This is especially so in a situation where Parliament assumes more powers, as envisaged in this Report. The Commission is, however, of the view that safeguards against excesses and abuse would generally be taken account of in the allocation of powers to all the organs of Government and other related institutions.

The Commission notes the immense powers and privileges of Parliament vis-a-vis citizens, who have no right of criticism of or reply to deliberations of the National Assembly. Since the National Assembly derives its ultimate authority from the people, the right of a citizen to criticize or reply to parliamentary debates is paramount and cannot be subjected to contempt powers of the House, just as this Commission has observed in respect of the contempt of powers of courts vis-à-vis the rights of citizens.

Recommendations

The Commission recommends that:

- in general, the subject of control of parliamentary powers should be addressed in the allocation of functions to the three organs of the State under the Constitution;

- the right of the citizen to comment on deliberations of the National Assembly should be guaranteed by the Constitution; and

- the National Assembly (Powers and Privileges) Act should be amended so that the power of citizens to comment, generally and fairly, on any subject debated in the National Assembly, including the right of reply, is not subject to contempt powers of the National Assembly.

9.2.8 Financial Autonomy

Submission

Only the National Assembly addressed this subject (1). The National Assembly proposed that Parliament should have financial autonomy and be able to prepare its own budget which, once approved, should not be subject to any alteration by the Executive.

Observations

The Commission considers the submission made by the National Assembly to be legitimate. The submission is founded on the rationale that the independence of Parliament entails that it should not be under the control of the Executive in its administrative and financial operations. The Commission, however, observes that Parliament may not determine its own budget without the involvement of the Executive. This is because, whereas the National Assembly vets and approves the budget, the latter is responsible for revenue measures and expenditure.

In Zambia, as in a number of other countries, the practice is that the National Assembly and other arms of the Government submit their estimates of revenue and expenditure to the Ministry responsible for finance, which finally determines proposed allocations and submits this budget to the National Assembly. Although the budget process is undergoing reforms to accommodate input from the people and institutional stakeholders, to date the process does not allow for meaningful input and evaluation of the National Assembly before the estimates are tabled before the House. The process of debate and approval in the National Assembly is restrictive and does not allow for decrease in the allocations. The result is that the allocations are almost exclusively determined by the Executive.

In an effort to find a balance that reflects the role of Parliament in the budgetary process and the need for the National Assembly, the Judiciary and other independent institutions of the Government to attain a measure of independence from the Executive in the preparation of their budgets, there is currently in a number of countries a move towards a more participatory budget process. Increasingly, other State organs, constitutional offices and selected institutions are preparing their own budgets, which are then negotiated with the Executive in the interest of transparency and power sharing. In this respect, the Constitution of Uganda is instructive.

Recommendations

The Commission recommends that in order to guarantee the financial and administrative autonomy of the National Assembly, the Constitution should provide that the National Assembly shall prepare its own budget estimates which should be subjected to negotiations with the Executive. This process shall take into account the principles of accountability, transparency and equitable sharing of resources, and estimates, once approved, should be released quarterly in advance.

9.2.9 Consideration and Ratification of International Agreements

Submissions

Many petitioners who addressed the subject argued that the National Assembly should approve all International Treaties and Agreements before their ratification, accession or adhesion (365). This is to ensure participation of MPs, especially considering the social and economic implications of some Agreements.

There was a further submission from the National Assembly that these Agreements should be treated in the same manner as Bills, by referring them to relevant Committees for discussion, after which the Committees should produce a report (1). It was also suggested that competent technical staff should be employed to assist Committees on such issues. The National Assembly also said that there should be a provision in the Constitution for Parliament to revisit or review such Agreements.

There were, however, few petitioners who saw no need for Parliament to ratify International Agreements (10).

One petitioner felt that the Constitution should provide for the automatic domestication of all International Agreements, once ratified (1).

Observations

This subject attracted a sizeable number of submissions. The overwhelming majority of petitioners wanted the National Assembly to approve international treaties and agreements before their ratification, accession or adhesion. This is in order for the National Assembly, which is the representative body of the people, to provide checks and balances against the Executive in the exercise of the delicate function of committing the country to international obligations, some of which have serious socio-economic implications.

The National Assembly was of the view that Parliament should have the power to review and evaluate international agreements in the same way that it deals with Bills and that in order to be effective, it should have human resource expertise at its disposal.

A small minority of petitioners felt that ratification of international agreements should be exclusively a function of the Executive. There was also one submission that the Constitution should provide for the automatic domestication of international Agreements, once ratified.

The Commission notes that currently Article 44 of the Constitution vests the power to ratify agreements exclusively in the President, who may delegate it.

The Mvunga Commission, in its report, recommended that Parliament should approve international agreements.

The Commission appreciates the rationale behind the submission that the National Assembly should approve international agreements before ratification, as it is in line with the concept of power sharing and checks and balances. The Commission is, however, of the view that such agreements should be incorporated into domestic law through legislation in view of the "dualist" system that Zambia follows, by which legislative power is exclusively vested in Parliament.

Recommendations

Accordingly, the Commission recommends that:

- the National Assembly should approve International Treaties or Agreements before ratification, accession or adhesion; and

- the dualist system whereby international treaties and agreements, once ratified or acceded to, require to be incorporated into domestic law through legislation in order to have the effect of law should be maintained.

9.2.10 Parliamentary Proceedings - Powers of Courts to Adjudicate

Submissions

It was proposed by the National Assembly that where it is contended that Parliament had acted ultra vires the Constitution, the courts should have jurisdiction over parliamentary decisions and actions (1). Furthermore, the courts should have power to undertake judicial review of the process by which the Legislature arrives at a particular decision, but not the decision

itself. In other words, the courts should have the right to satisfy themselves that, in arriving at a decision, Parliament adhered to established rules and procedures.

Observations

The Commission notes that the submission from the National Assembly on judicial review of decisions of Parliament was, in effect, a restatement of the power of judicial review of administrative action of public institutions, as exercised by courts under the existing law. This power derives from the inherent jurisdiction of courts to administer justice. This jurisdiction includes checking abuse of administrative powers by public authorities. Further, superior courts are empowered to interpret the Constitution, and hence have the power to declare an Act of Parliament unconstitutional.

The Commission is of the view that while it may be useful, for the avoidance of any doubt, to enshrine this power in the Constitution, it is unnecessary to state this power, let alone its scope. In particular, its scope should be left to the evolving wisdom of the courts, as demonstrated by authoritative decisions on the subject taken by courts since time immemorial. Any attempt to define the scope as proposed by the National Assembly would constitute an encroachment on the jurisdiction of courts.

Recommendation

Accordingly, the Commission recommends that the power of courts to review decisions of Parliament as it presently exists should be maintained and enshrined in the Constitution.

9.2.11 Recall Election - MPs

Submissions

A large number of petitioners argued that the electorate in a constituency should have power to recall a non-performing MP through a vote of no confidence (626). A few suggested that this could be done through a petition signed by at least two-thirds of the registered voters in a constituency.

One petitioner said that the exercise of power to recall should only be done by popular ballot (1) whilst another said that the recall should only be invoked at least two years after elections (1).

Another petitioner proposed that in order to check arbitrariness, a member on whom a motion of recall has been initiated should be given the right of hearing at the Constitutional Court (1).

There was a submission that there should be no provision for constituencies to recall MPs because it could be abused mostly by those who lost elections (1).

Observations

The subject of the recall of an MP attracted a considerable number of submissions. Petitioners complained that the lack of a provision in the Constitution giving the electorate power to recall an MP who does not perform to expectations had contributed to the tendency of MPs abandoning or not working with their electorate to bring development to their constituencies. The Commission notes that, starting with the Chona Commission, petitioners have persistently called for the right of recall of an MP who does not perform to the expectation of the electorate. The Mwanakatwe Commission recommended that the Constitution should provide for this right and prescribed the procedure for recall. It also recommended that, taking into account the need to safeguard against arbitrariness, an affected MP should have the right of hearing.

The Commission notes that petitioners further suggested that a recall of an MP could be initiated by a petition signed by a two-thirds majority of registered voters in the affected constituency. There was another suggestion that a right of recall should only be exercised after a minimum period of the term of office of an MP. At the same time, concern was expressed that there should be a safeguard against potential abuse of such power.

The Commission appreciates the concerns of petitioners on this subject and notes that some constitutions reserve the power of the electorate to recall an MP for various reasons, such as incapacity, failure to perform functions, misconduct or desertion from their constituency. This is the case in a number of states in the United States of America and in Uganda. On the other hand, the Commission acknowledges the need to ensure that the electorate does not abuse.

In the case of Uganda, a recall is initiated by a petition in writing setting out the grounds relied on and signed by at least two-thirds of the registered voters in the constituency affected. The petition is delivered to the Speaker who in turn, within a specified period, causes the Electoral Commission to conduct a public enquiry into the petition and report to the Speaker thereon. The Speaker acts according to the findings of the Electoral

Commission to either declare the seat vacant or declare that the petition was unjustified. The procedure is prescribed by law.

Having considered the subject in principle, the Commission is, however, of the view that in a Mixed Member Representation system, the power of recall may only apply to constituency seats held on the basis of the First-Past-The-Post electoral system. As such, the recall power can only apply to this latter electoral system.

In making provision to recall, appropriate legislation should also spell out functions of an MP in order to dispel misconceptions about these functions. The Commission also feels that it is necessary to deal with the problem of misconceptions of the electorate regarding the functions and duties of an MP. These should be prescribed in an appropriate instrument and be made accessible to the people.

Recommendations

The Commission recommends that the Constitution should provide that:

- the electorate shall have power to recall an MP who is elected on the basis of the First-Past-The-Post electoral system on grounds of failure to perform;

- a recall shall be initiated by a petition in writing setting out the grounds relied on and signed by at least half of the registered voters in the constituency who voted in the last election in the constituency;

- the petition shall be presented to the Chairman of the Electoral Commission who shall appoint a tribunal to inquire into the matter;

- the Chairman of the Electoral Commission shall act in accordance with the findings of the tribunal whether to declare the seat vacant or the petition as unjustified;

- an MP who has been petitioned shall have the right of hearing and to be present during the conduct of the inquiry, either by himself in person or through a lawyer representing her/him or both;

- the composition of a tribunal appointed for this purpose and other procedural details shall be prescribed by an Act of Parliament;

- the functions and duties of an MP should be prescribed in an appropriate piece of legislation and be made accessible to the people so that they understand the role of an MP.

The Commission further recommends that the Constitution should specifically stipulate the grounds on which an MP may be removed and state that Parliament may by an Act of Parliament provide further grounds on which an MP may be recalled.

9.2.12 Election of Speaker and Deputy Speaker

Submissions

9.2.12.1 Election from Outside/Within the National Assembly

A number of petitioners, including the National Assembly, argued that the Speaker should be appointed from outside the National Assembly (28).

A small number of petitioners said that the Speaker and Deputy Speaker should be elected from among the Members of Parliament (6).

A few petitioners, however, called for the Speaker and Deputy Speaker to continue being elected in accordance with the current provisions (8).

9.2.12.2 Procedure – Secret Ballot

There were two submissions, including one from the National Assembly, that the election of the Speaker should be by secret ballot (14). This is to allow MPs to vote according to their conscience. Election details in this regard should be stipulated in the rules of the National Assembly.

9.2.12.3 Mode of Election

Some petitioners said that the Speaker should be elected by universal adult suffrage and by secret ballot (12).

One petitioner said that a "Counsel of State" should nominate candidates for the Office of Speaker (1). In addition, the petitioner said that candidates should be subjected to public scrutiny and debate (1).

The petitioner further proposed that the runner-up in the election of Speaker should automatically become the Deputy Speaker (1)

9.2.12.4 Qualifications

A few petitioners called for qualifications for election to the Office of Speaker (5). They suggested that these should include:

- both parents being Zambian by birth or descent;
- prescription of a minimum age, e.g. (40 years);
- prescription of a maximum age; and
- knowledge of Government procedures.

The National Assembly said that qualifications for election to the Office of Speaker should not be academic or professional, but based on experience in parliamentary business, and that this should be stipulated in the Constitution (1).

The National Assembly further said that at the time of assuming office, one of the three - the Speaker, Deputy Speaker or Assistant Speaker should be conversant with parliamentary work (1).

9.2.12.5 Attributes of a Speaker

The National Assembly proposed that, in addition to stipulated qualifications, a Speaker should have the following attributes (1):

- impartiality;
- an ability to follow debates and make reasonable, fair and quick judgment or decision;
- a tendency not to be easily swayed;
- previous experience of high public office; and
- the ability to preside.

9.2.12.6 Political Affiliation

Some petitioners said that the Speaker should not belong to a political party (6).

9.2.12.7 First and Second Deputy Speakers

The National Assembly proposed that the position of Deputy Chairman of Committees should be redesignated as "Second Deputy Speaker" with power to preside over the House in the absence of the Speaker and "First Deputy Speaker" (1).

The reason advanced was that, in practice, the Deputy Chairman of Committees is elected to preside over the House in the absence of the Speaker and Deputy Speaker, as provided for in the Rules of the National Assembly. However, this is not provided for in the Constitution.

The National Assembly further said that procedures for election of the First and Second Deputy Speakers should follow the same procedures as those for electing the Speaker (1).

Observations

Relatively few petitioners made submissions on the subject of election of the Speaker and Deputy Speaker of the National Assembly. However, the Commission notes that the National Assembly made submissions on various aspects of the subject.

The Commission further notes that, of the petitioners who addressed the question as to whether the Speaker should be elected from among MPs or from outside the National Assembly, the majority favoured a Speaker from outside the National Assembly. The major consideration was the need to ensure that the Speaker is neutral. Another reason was that the Speaker should be non-partisan and should therefore be seen not to have any party affiliations. The majority of petitioners favoured a Deputy Speaker elected from among the MPs, as is currently provided for in the Constitution.

The Commission has no difficulty concurring with the views of petitioners that the Speaker should be elected from outside the National Assembly by MPs, noting that this is obviously accepted by the majority of the people. Similarly, preference for the office of Deputy Speaker to be held by a person elected by MPs from among themselves is acceptable. However, the Commission feels that this should only apply to the election of a Second Deputy Speaker as discussed below.

In addressing the question as to whether or not the Constitution should concern itself with the political affiliation of candidates, the Commission was guided by the fact that the National Assembly is a political institution. Neutrality of a Speaker can be secured by the requirement that the Speaker should be elected from outside the National Assembly. However, it would be stretching the

principle of neutrality too far to also require that a candidate should not be known to have any political affiliation.

On qualifications for election to the Offices of Speaker and Deputy Speaker, a few petitioners wanted to vary these by including a requirement that both parents be citizens of Zambia by birth or decent, and that the minimum age should be 40 years whilst an upper limit should also be prescribed. Petitioners also wanted knowledge of Government procedures to be a qualification. Petitioners reasoned that persons whose Zambian citizenship is not firmly established should not hold either of the two offices. They also argued that holders of these offices should be mature persons with knowledge and experience in the conduct of Government business.

The National Assembly, whilst proposing that candidates or at least one of the office-bearers of the three offices of Speaker and Deputy Speakers should be conversant with parliamentary business, argued that no academic qualifications should be attached to the offices. The justification given was that this was not common practice, particularly in the Commonwealth. Instead, the National Assembly favoured the prescription of attributes including impartiality, the ability to follow debates and make reasonable, fair and quick judgement, a tendency not to be easily swayed, previous experience of high office, and the ability to preside.

On qualifications for contesting elections to the office of Speaker, the Commission, for reasons already dealt with under the subject of election of President in Chapter 8, observes that it would be undesirable to extend the requirement for Zambian citizenship to parentage of a candidate. On the issue of minimum age, the Commission is persuaded that the age of 21 currently required in respect of parliamentary candidates is too low for the two offices, in view of the onerous duties and responsibilities placed on these offices. With regard to these qualifications, the Commission notes, for example, that the Speaker may be required to act as President of the country. However, there is no necessity for an upper age limit although the Commission has recommended that the Speaker and First Deputy Speaker should retire at 75 years of age.

The Commission further notes that it is not essential that the Speaker should be experienced and have sound knowledge of parliamentary business and Government functions. The Commission is also of the view that the attributes proposed by the National Assembly are elusive and may not be easily ascertained. It would therefore be unwise to use these as a standard in determining the suitability of a candidate.

The submission that the Speaker should be elected from outside the National Assembly implies that the candidate need not have been an MP through which office he or she would have acquired knowledge of parliamentary business. Further, to require a Speaker to have knowledge of Government functions would confine the reservoir of candidates to civil servants or those who would have

served in ministerial positions. Past experience shows that all previous Speakers did not have these qualifications, and yet they served very ably.

On the question of mode and procedure of election of Speaker and Deputy Speaker, the majority of petitioners assumed the current system of election by MPs. There were, however, a few petitioners who submitted that the Speaker should be elected by universal adult suffrage, whilst one petitioner (ZCTU) called for the Speaker to be elected by a "Counsel of State", which institution was proposed by the petitioner to be established. There was an isolated submission that the runner-up in the election of Speaker should automatically become Deputy Speaker.

Some petitioners, who included the National Assembly, said that MPs should elect the Speaker and Deputy Speaker by secret ballot.

The Commission is of the view that the mode of election of Speaker and Deputy Speaker is fairly well established and common among many countries, especially in the Commonwealth. The Speaker and Deputy Speaker are essentially elected to preside over proceedings of the Legislature. It follows logically that members of the Legislature should elect them. The principle of electing the two office bearers by secret ballot is justified, as already alluded to in this Chapter. This is because it would enable MPs make their choice freely.

The National Assembly further proposed that the Constitution should change the Office of Deputy Speaker to that of First Deputy Speaker and provide for the Office of Second Deputy Speaker, the latter to be held by the officer currently designated Deputy Chairperson of Committees. The National Assembly argued for the necessity of creating the latter office in the light of practical implications arising from the discharge of the functions of the Deputy Chairperson of Committees, as provided for under the Rules of the National Assembly. The office-holder presides over the proceedings of the National Assembly in the absence of the Speaker and Deputy Speaker, although the Office does not have a constitutional mandate to do so.

The Commission deliberated at length on the need for the Constitution to establish two offices of Deputy Speaker. The arguments advanced by the National Assembly in favour of this were critically evaluated against other considerations. In particular, the Commission was concerned that this would lead to the establishment of offices for two full-time Deputy Speakers.

The Commission understands that under the existing arrangement the Office of Deputy Speaker is full-time. In this regard, the Commission observes that, although the Deputy Chairperson of Committees has a significant amount of work, the workload is only heavy when both the Speaker and Deputy Speaker are absent, which ought to be rare. In concluding its deliberations, the Commission was nevertheless persuaded that it would be appropriate for the Constitution to

establish two offices of Deputy Speakers. This is in order to ensure that there is a Second Deputy Speaker with a constitutional mandate to preside in the absence of the Speaker and the First Deputy Speaker. The First Deputy Speaker should act in the Office of Speaker in the event of a vacancy, or absence of the substantive office holder or inability to perform the functions of the Office. In the event of vacancies arising in both Offices, or absence of the office holders or inability to perform the functions of the Office of Speaker, the Second Deputy Speaker should act.

Further, the Commission feels that the First Deputy Speaker should be elected from outside the National Assembly in the same manner the Speaker shall be elected. This is so that in the event of dissolution of the National Assembly, both the Speaker and the First Deputy Speaker, who shall not be ordinary MPs, shall not vacate office in order to ensure continuity.

Recommendations

In the light of the above considerations, the Commission recommends that the Constitution should provide as follows:

- the Speaker shall be elected by MPs from outside the National Assembly as is currently the case;

- qualifications for or disqualifications from election to the Office of Speaker shall be the same as those applicable to the election as an MP, with modifications that the candidate should:

    (a) be a Zambian citizen by birth or descent and not have dual citizenship;

    (c) be at least 45 years of age; and

    (d) have been ordinarily resident in the country for a period of at least 10 years preceding the election.

- there shall be one office of First Deputy Speaker and another of Second Deputy Speaker;

- the First Deputy Speaker should act in the Office of Speaker in the event of a vacancy, or absence of the substantive office holder, or inability to perform the functions of the Office;

- in the event of the Speaker and First Deputy Speaker being absent or being unable to perform the functions of the Office of Speaker, the Second Deputy Speaker should preside over proceedings of the National Assembly;

- the First Deputy Speaker shall be elected by the National Assembly from outside the National Assembly;

- qualifications/disqualifications for election to the Office of First Deputy Speaker shall be the same as those for election to the Office of Speaker;

- the Second Deputy Speakers shall be elected by MPs from amongst themselves;

- the Speaker and Deputy Speakers shall be elected by secret ballot; and

- in the event of dissolution of the National Assembly, both the Speaker and First Deputy Speaker should not vacate office.

9.2.13 Swearing-in and Oath of Office - Speaker/Deputy Speaker

Submissions

One petitioner said that the Speaker and Deputy Speaker should be sworn in by the Chief Justice (1). Two others proposed that the Speaker and Deputy Speaker should be sworn in by the President (2). A few other petitioners were of the view that the Speaker should be sworn in by a person other than the President (3).

Some petitioners said that the Oath of Allegiance to be sworn by the Speaker should be to the Constitution and the people and not to the President (4).

The reason advanced by these petitioners was that the current practice makes the office holders owe allegiance to the President as opposed to the Constitution and the people.

Observations

The Commission notes submissions made by a few petitioners that the Speaker and Deputy Speaker should not be sworn in by the President and that their Oaths of Office should be to the Constitution and the people.

The Commission observes that the Constitution does not specify the content of the Oath or that it is to be sworn before the President. In this regard, the Commission notes that some modern constitutions, such as those of Ghana, South Africa and Uganda, prescribe the content of Oaths of Office. This is intended to ensure that the content reflects a standard that is not subject to change to suit the taste of those in Government administration. Therefore, although Oaths of Office and Allegiance can

be prescribed by an Act of Parliament, the standard could be prescribed by a constitution.

However, on the issue of the President swearing-in the Speaker and other holders of public office, this is a ceremonial function that need not entail allegiance to the President. The President is Head of State elected by the people. It is therefore appropriate that he/she swears in the Speaker.

Recommendations

Accordingly, the Commission recommends that:

- the content of Oaths for various public offices, as already recommended in this Report, shall also apply to the Speaker and Deputy Speaker (s); and

- the Speaker and Deputy Speaker(s) should be sworn in by the President as is the current practice, but that this should be specified in an Act of Parliament.

9.2.14 Tenure of Office - Speaker/Deputy Speaker

Submissions

Four petitioners called for the Speaker's term to be limited to one five-year term (4), while two others proposed a limit of two five-year terms (2). The National Assembly said that the Constitution should not limit the term of the Speaker (1). However, they were of the view that the Speaker's term should coincide with the life of Parliament. This was supported by another petitioner who said that the term of office of the Speaker and Deputy Speaker should coincide with the life of the National Assembly (1).

Three petitioners proposed that the post of Deputy Speaker should be full-time (3).

Observations

The Commission considered petitioners' views on the tenure of office of the Speaker and Deputy Speaker.

Though few, these petitioners wanted the term of office to be limited, either to the life of Parliament or to two terms of Parliament. The National Assembly argued that it should not be limited, though each term should terminate with the life of Parliament.

The reason advanced by those petitioners who wanted a limited term was that the same principle as applies to the Office of the President should apply to the Office of the Speaker. The Commission is persuaded by the argument that the terms of office of Speaker and Deputy Speaker should not be limited but that they should be eligible for re-election after the expiry of the term of Parliament. However, in the case of the Speaker and First Deputy Speaker, this should be subject to retirement on attaining the age of 75 years. The Commission has taken into consideration that these offices require wisdom, experience and knowledge. In any case, the question of re-election of a Speaker or Deputy Speaker should be determined by the National Assembly.

Further, although there was no the submission on the removal of the Speaker, the Commission observes that on constitutional offices, the Constitution provides for security of tenure and grounds for removal from office, but not in the case of the Speaker. The Commission notes that this is an obvious omission or oversight. In this regard, the Commission is of the view that the Speaker should only be removed on grounds of violation of the Constitution, incapacity due to infirmity of body or mind or misconduct.

In addition, the Commission considered the need for the Constitution to provide for the Speaker's entitlement to receive emoluments and terminal benefits.

Recommendations

Accordingly, the Commission recommends that the Constitution should provide that:

- a Speaker and the Deputy Speakers shall serve for a term to coincide with the life of Parliament and that they shall be eligible for re-election for one more term only;

- a Speaker shall be entitled to such salary, gratuity, retirement benefits and other emoluments as may be prescribed by an Act of Parliament, on the recommendations of the proposed independent National Fiscal and Emoluments Commission;

- a Speaker may only be removed from office on grounds of violation of the Constitution, incapacity to discharge the duties of the Office due to infirmity of body or mind, or for misconduct; and

- the Speaker and First Deputy Speaker shall retire at 75 years of age.

9.2.15 Leader of Government Business in the House

Submissions

One petitioner said that the Leader of the House should be elected by MPs (1). Another proposed that the Leader of Government Business in the House should be an elected MP (1).

Observations

The Commission observes that election of Leader of Government Business in the House would be inconsistent with the presidential executive system, as the Vice-President, who is a running mate, would have already been elected by the people.

Recommendations

As already recommended, the Vice-President should be Leader of Government Business in the National Assembly.

9.2.16 Official Opposition

Submissions

Some petitioners called for the Constitution to provide for the Office of Leader of the Opposition in the House at the level of Cabinet Minister (6). Some petitioners expressed the view that the Leader of the main opposition party in Parliament should automatically be appointed Leader of the Opposition, while others proposed that the runner-up in the Presidential election should automatically become an MP and Leader of the Opposition (6).

One petitioner said that opposition MPs should elect the Leader of the Opposition in Parliament (1).

The National Assembly felt that there should be conditions set out in the Constitution for the recognition of the Leader of the Opposition in the House (1). The conditions suggested were as follows:

- having a distinct ideology and programme of work, which party members use for their election and formation as a political party;

- having an organisational structure both inside and outside the House capable of being used to canvas public opinion on all important issues; and

- commanding a strength of not less than the quorum fixed to constitute a sitting of the House under Article 84(4) of the current Constitution.

Observations

The Commission notes petitioners' views that the Constitution should provide for the Office of Leader of the Opposition at the level of Cabinet Minister. The Commission considered the view that the Leader of the main opposition party in Parliament should be Leader of the Opposition.

The Commission is in agreement with petitioners that the Constitution should provide for the Office. However, it is of the view that, consistent with the practice in other Commonwealth countries, the main opposition party should provide the name of the MP to be designated Leader of the Opposition.

The Commission considered the submission made by the National Assembly, but is of the view that conditioning the designation of Leader of the Opposition on criteria other than constituting numbers not less than the quorum of the House would create unnecessary barriers that would make it difficult for any opposition party in Parliament to qualify. The overriding consideration is that having a Leader of the Opposition in Parliament is a functional ideal which the Constitution should strive to meet. If any single opposition party cannot meet the quorum criterion, two or more opposition parties can combine in numbers and provide a Leader of the Opposition.

Recommendations

The Commission accordingly recommends that the Constitution should provide that the Opposition Party having the highest number of seats in Parliament should provide a Leader of the Opposition, provided that where the party is unable to constitute the quorum of the House, two or more opposition parties shall combine to form the quorum and provide the Leader.

9.2.17 Appointment of the Clerk of the National Assembly

Submissions

Very few petitioners said that the Speaker should appoint the Clerk of the National Assembly and that the National Assembly should ratify the appointment (5). On the other hand, there were a few other submissions to the effect that the National Assembly should appoint the Clerk (3). Three

other petitioners suggested that the President should appoint the Clerk of the National Assembly (3).

Observations

The Commission considered the submissions made by some petitioners on the subject. Some petitioners wanted the Speaker to appoint the Clerk of the National Assembly with parliamentary approval, whilst others wanted the National Assembly to be the appointing authority. There were also those who wanted the President to appoint the holder of the Office.

The Commission agrees with the view that since the Office falls exclusively within the jurisdiction of the National Assembly, the Parliamentary Service Commission should appoint the office-bearer, subject to the House ratifying the appointment. A service commission is a more appropriate appointing authority as in other instances of appointments to public office.

The Commission, however, observes that the Office should be accorded security of tenure similar to that enjoyed by the Auditor-General, in order for the office-bearer to discharge her/his duties with utmost professional competence and conviction. The Commission also feels that qualifications for the appointment to this Office should be prescribed and should include relevant experience and minimum age.

Recommendations

The Commission recommends that the Constitution should provide that:

- the Clerk of the National Assembly shall be appointed by the Parliamentary Service Commission, establishment of which is recommended in this Report under the Chapter dealing with the Public Services (Chapter 19);

- appointment of the Clerk of the National Assembly shall be subject to ratification by the National Assembly;

- qualifications for appointment to the Office of Clerk of the National Assembly shall include being a citizen of Zambia; aged at least 45 years and; having such academic qualifications, experience and skills in such relevant fields as may be prescribed by the National Assembly; and

- a Clerk of the National Assembly may be removed from office only on similar grounds as those stipulated in the Constitution for

the position of the Auditor-General and in accordance with the procedures in Article 122.

9.2.18 Public Participation in the Legislative Process

Submissions

Some petitioners proposed that the Constitution should provide that, as a general rule, proceedings of Parliament be open to the public (4). These petitioners argued that people should participate in the legislative process.

It was the view of some petitioners that parliamentary proceedings should be broadcast live and otherwise made accessible through the media so that people are informed and educated (3).

The National Assembly said that in order to enhance public participation in the legislative process there should be a notification period for ordinary Bills, as is the case with constitutional Bills (1).

It was suggested that at least two weeks' notice should be given from the date of depositing a Bill with the Clerk of the National Assembly.

The National Assembly also submitted that Bill drafters should use the simplest possible language that would be easily understood by the majority of Zambians (1). It was further suggested that the Government should use utility bills (such as electricity and water bills) to give notice of upcoming parliamentary Bills, since the Government Gazette is not easily accessible to most Zambians.

Observations

Though only a few petitioners made submissions on the subject, the Commission gave it due consideration having regard to its importance. Petitioners wanted a transparent, participatory Parliament. In this regard, some called for a requirement that parliamentary proceedings be held in public to be enshrined in the Constitution. Others called for parliamentary proceedings to be broadcast and otherwise made accessible through the media. The National Assembly also called for notification periods for Bills in order to engage public participation. They also called for the legislative language to be simplified. The Commission notes that some petitioners to the Mwanakatwe Commission made similar demands.

The Commission finds no difficulty with these principles, which relate to transparency and accessibility to parliamentary proceedings. This is in line with democratic ideals of representative and participatory governance. In this vein, the traditional notion of strangers to the House should be

discarded, for the electorate cannot be strangers as they are masters of their representatives who are servants of the people.

However, for practical purposes, the Commission finds the suggestion from the National Assembly that notification of Bills be done using utility bills unworkable. This is because the processing and delivery of utility bills takes a long time and institutions issuing such bills may not want the added and unrelated burden of being agents of parliamentary notices.

Recommendations

The Commission recommends that the Constitution should provide that:

- as a general principle, parliamentary proceedings shall be open to the public, exception to be made only on narrowly defined security considerations;

- there should be two weeks' notification for Bills other than constitutional Bills, through both the Gazette and other easily accessible media; and

- that the language of all Bills and legislation should be plain and easy to understand.

- Further, the Commission recommends that Parliament should take appropriate measures to facilitate utmost accessibility by the people to parliamentary proceedings.

9.2.19 Language

Submissions

Two petitioners said that local languages should be used in parliamentary proceedings in addition to the official language (2).

Observations

The Commission considered this isolated submission that parliamentary proceedings should also be in local languages. Although the Commission appreciates this view, this is not currently feasible.

9.2.20 Declaration of Assets

Submissions

A few petitioners said that the Constitution should provide for parliamentary candidates to declare their assets before elections and that, if elected to office, they should also declare their assets at the end of their term of office (5). One of the petitioners further said that the National Assembly should enact comprehensive legislation to govern the declaration of assets by leaders (1).

Observations

The few petitioners who submitted on this subject wanted the Constitution to provide that, as a requirement for contesting parliamentary elections, candidates should declare their assets and liabilities and, further, that at the end of their term of office they should again make these declarations to reveal how much wealth or assets had been acquired during their tenure of office.

The Commission observes that the declaration of assets is provided for under the Parliamentary and Ministerial Code of Conduct Act enacted under provisions of Article 52 of the Constitution. The Commission feels that the provisions of this Act should be extended to parliamentary candidates. Article 52 of the Constitution and this Act should, therefore, be appropriately amended. In addition, for this provision to be effective, there should be a requirement for an MP to make a declaration at the end of her/his term, or upon vacating the office.

Recommendations

Accordingly, the Commission recommends that:

- as part of the qualifications for contesting parliamentary elections, the Constitution should require a candidate to declare their assets and liabilities; and

- the Constitution should extend the provisions of Article 52 to MPs ,and the Parliamentary and Ministerial Code of Conduct Act should be amended to provide that MPs should declare their assets and liabilities at the beginning and end of their term of office, or upon vacating office.

9.2.21 Dissolution of Parliament

Submissions

A few petitioners who addressed themselves to this issue said that the Constitution should explicitly provide for a specific date for the

dissolution of Parliament to pave way for elections (9). The reason advanced was the need for the President and the Cabinet to vacate office in order to create a level playing field. The suggested time was three months before elections.

Another petitioner said that the President should not have the power to dissolve or prorogue Parliament (1).

The reason advanced for the President not to have the power to dissolve Parliament was that this vests too much sovereign power in the presidency. The petitioners argued that this tends to weaken Parliament.

Observations

Though few petitioners addressed this subject, the Commission gave it due consideration in view of its importance.

The Commission evaluated the submission that the President should not have power to dissolve Parliament because this makes Parliament subservient to the President. According to Article 44 (2) (a) and (2) (4) (c), the President may, at any time, dissolve Parliament. Also, by implication, under Article 78 (4) the President may dissolve Parliament in order to avoid assenting to a Bill presented to her/him a second time.

Thus the President enjoys tremendous power over Parliament, as its continued existence is greatly dependent on her/him. It can therefore be argued that the threat of dissolution of Parliament by the President is there at all times. For example, a President could exercise this power to avoid being impeached or to get rid of a Parliament which he/she finds difficult to function with. Thus, it can be said that this power enables the President indirectly to influence the conduct of business of Parliament.

On the other hand, it may also be argued that, since the President has the popular mandate of the people through the direct vote, it is appropriate that he/she enjoys this power. The exercise of such power may, for instance, be justified in circumstances where Parliament makes it difficult for the Executive to govern. In this regard, the Commission notes that it is for this reason that the Mvunga Commission recommended that the President should have power to dissolve Parliament.

In addition, it should be pointed out that under the current constitutional provisions, the dissolution of Parliament would necessitate that the President vacates office (Article 35 (4) (c). This provision may act as a check against abuse of this power. The President is unlikely to use it unless he/she is hard pressed. It can also be said that so far the relationship between the Executive and Parliament has not been so

strained as to create the necessity of resorting to the use of this power. On the other hand, it can be said that Parliament has been largely under the control of the Executive, either because of strength of numbers or otherwise.

Whilst in some countries the President may dissolve Parliament, in others this is a preserve of Parliament. In yet others, Parliament only stands dissolved at the expiry of its term or upon the first sitting of a successive Parliament. This is the case with Ghana and Uganda. The disadvantage of this arrangement is that it does not anticipate the need for dissolution of Parliament, for instance in a crisis.

In the case of South Africa, the Constitution provides, in respect to dissolution of the National Assembly before expiry of its term, that the President must dissolve the National Assembly on a resolution of the National Assembly supported by the majority of its members and after three years have passed since its election.

What emerges clearly is the need to have a balanced arrangement that guarantees that the President does not have unfettered power to dissolve Parliament.

The Commission also considered the view that Parliament should be required to dissolve itself to pave way for elections. Currently, Article 88 (6) (b) of the Constitution provides that the National Assembly may, by a two-thirds majority of the members, dissolve itself.

In considering the submission, the Commission evaluated the argument advanced by petitioners that when Parliament is thus dissolved, then the President and the Cabinet must vacate office in order to create a level playing field, as they shall then not have access to public resources. Although the need to avoid the use of public resources by members of the Executive is appreciated, the Commission notes that in an arrangement where the Cabinet is appointed from outside the National Assembly, this problem would be minimised. In any case, this could be dealt with by means other than dissolution of Parliament.

The Commission also took into account that ordinarily Parliament should be allowed to serve its full term, subject to prorogation if the need arises, such as in the event of impending elections. Similarly, the Commission feels that the President should not vacate office until he/she hands over to a newly elected President to avoid a vacuum in the management of the State.

Recommendations

The Commission recommends that the Constitution should provide that:

- the only instance when the President may dissolve Parliament and call for elections is where the situation is such that the President and the Executive cannot govern with the existence of the current Parliament;

- in the exercise of these powers, the President should make referral to the Constitutional Court, which shall determine whether the situation referred to exists; and

- the National Assembly should stand prorogued 90 days before parliamentary elections and dissolved at the expiry of its term or on the date of elections for the next Parliament, whichever is the earlier.

CHAPTER 10

THE JUDICIARY

***Terms of Reference**:*

No. 6 Recommend provisions to ensure the competence, impartiality and independence of the Judiciary, and access of the public to justice; and

No. 7 Examine and recommend the composition and functions of the organs of government and their manner of operating, with a view to maximizing on checks and balances and securing, as much as possible their independence.

10.1 Introduction

It is well known that the predominant role of the Judiciary in any State is to interpret the laws of the land fairly, and to dispense justice impartially, without fear or favour, between individuals or the individual and the State.

In this way, the Judiciary makes a meaningful contribution to the maintenance of law and order and consequently the maintenance of peace within a State, and enhances checks and balances in any democratic state.

For the Judiciary to play its role effectively, it is imperative that it should enjoy an entrenched independent status. Its independence is essential in the impartial administration of justice and adherence to the rule of law, and for the separation of powers.

In every government, there are three types of interrelated organs, namely the Executive, the Legislature and the Judiciary. Democratic governments the world over are based firmly on the principle of separation of powers. This principle does not mean that the three organs of Government should be wholly separated from each other. On the contrary, they should operate in concert, but with "checks and balances" that ensure that none of them encroaches on the legitimate domain of the other.

The practice in Commonwealth countries is that separation of powers is seen in the independence of the Judiciary. The source of this independence, in most

states, is constitutional provisions outlining the qualifications for Judges, their mode of appointment, security of tenure, remuneration and provision of resources.

As the judicial organ of the Government, the Judiciary should inspire confidence in the people it serves. It should, therefore, not only be independent, but should be seen to be independent.

The Chona Commission recommended the following on the Judiciary:

- the Court of Appeal should become the Supreme Court of Zambia and that it should be the final court of appeal in the Republic, as time had come for Zambia, as a sovereign State, to remove even the permissive references to the appellate jurisdiction of the Judicial Committee of the Privy Council;

- the retirement age for High Court Judges should be raised to 65 years;

- the minimum number of years of service for appointment to the post of Judge should be seven years; and

- the title of Local Court President should be changed to Senior Local Court Justice.

Some of the recommendations of the Mvunga Commission on the Judiciary were as follows:

- the Judiciary should be delinked from the Ministry responsible for justice in order to ensure true autonomy of the Judiciary and separation of powers;

- the tenure of office of the Chief Justice should be the prerogative of the appointing authority;

- supreme Court and High Court Judges should be appointed by the President, subject to ratification by Parliament;

- the Industrial Relations Court should not be part of the Judiciary as it is a quasi-judicial tribunal as reflected in its membership and procedures; and

- there should be established a constitutional court with both original and final jurisdiction in all constitutional matters.

The Mwanakatwe Commission made the following recommendations, among others:

- the Constitution should specifically state that the judicial powers of the Republic shall vest in the Courts;

- the Judiciary should be independent and impartial and only subject to the Constitution and the law and, as such, the Constitution should spell out clearly that no person or organs of the State should interfere with the Judges and other judicial officers in the performance of their functions;

- the Constitution should provide for security of tenure for Judges;

- the finances of the Judiciary should be appropriated directly by the National Assembly;

- there should be established a constitutional court to deal with constitutional matters and that the court should be inferior to the Supreme Court, that is to say there should be a right of appeal to the full bench of the Supreme Court; and

- the Industrial Relations Court should be part of the Judiciary and should enjoy exclusive jurisdiction over all employment and industrial disputes.

Current Constitutional Provisions

Article 91(1) of the Constitution establishes a Judiciary for the Republic comprising the Supreme Court, the High Court, the Industrial Relations Court, the Subordinate Courts, the Local Courts and such lower courts as may be prescribed by an Act of Parliament.

The Judges, members, magistrates and justices, respectively, are required by Article 91(2) to be independent, impartial and only subject to the provisions of the Constitution. In addition, Clause (3) of the same Article provides that the Judiciary shall be autonomous and shall be administered in accordance with an Act of Parliament.

The Chief Justice, the Deputy Chief Justice and the Judges of the Supreme Court are appointed by the President subject to ratification by Parliament (Article 93 of the Constitution). Judges of the High Court, the Chairman and the Deputy Chairman of the Industrial Relations Court are appointed by the President on the advice of the Judicial Service Commission.

Article 98 of the Constitution provides for tenure of office for all Judges of the Supreme Court, High Court and Industrial Relations Court. These Judges will vacate office only after attaining the age of 65 years. It provides that the President may appoint a Judge for a further period not exceeding seven years.

The importance of the concept of the independence of the Judiciary has been internationally recognised, as is shown by Article 2 of the United Nations Basic Principles of the Independence of the Judiciary (1985). Article 2 provides that:

"The judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influence, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason."

Modern constitutions of some countries such as Ghana, Uganda and South Africa specifically vest judicial power in the courts and emphasise that the Judiciary shall be independent and subject only to the Constitution and the law. Article 127 of the Constitution of Ghana states in part that:

"(1) In the exercise of the judicial power of Ghana, the Judiciary, in both its judicial and administrative functions, including financial administration, is subject only to this Constitution and shall not be subject to the control or direction of any person or authority.

(2) Neither the President nor Parliament nor any person acting under the authority of the President or Parliament nor any other person whatsoever shall interfere with judges or judicial officers or other persons exercising judicial power, in the exercise of their judicial functions; and all organs and agencies of the State shall accord to the courts such as the courts may reasonably require to protect the independence, dignity and effectiveness of the courts, subject to this Constitution."

As regards funding of the Judiciary, the Constitutions of Uganda and Ghana provide that all expenses of the Judiciary, including salaries, allowances, gratuities and pensions, shall be charged on the General Revenues of the Republic.

As the judicial organ of the Government, the Judiciary should inspire confidence in the people it serves. It should not only be independent, but also be seen to be independent and not subject to control by the other two arms of the Government. This independence can be attained through the manner of appointment and removal of Judges.

10.2 Submissions, Observations and Recommendations

One thousand seven hundred and forty-five (1,745) submissions were received on this subject.

10.2.1 Independence of the Judiciary

Submissions

A number of petitioners proposed that the Constitution should guarantee the independence of the Judiciary, especially from the Executive (109). The LAZ and another petitioner specifically recommended that:

- the judicial power of the Republic should vest in the courts;
- courts should be independent and subject only to this Constitution and the law; and
- no member of the Executive or Legislature or any other person shall interfere with the Judges or judicial officers in the exercise of their judicial functions, and all organs of the State should accord such assistance as courts may require to protect their independence, dignity and effectiveness, subject to the terms of this Constitution or any other law.

10.2.2 Budget

Submissions

Two petitioners proposed that the budget for the Judiciary should be prepared and submitted to the National Assembly independently of the Executive (2). One petitioner said that the budget of the Judiciary should be determined by Parliament (1).

Five petitioners, including the Judiciary, proposed that in order to ensure and enhance the independence, impartiality, dignity and efficiency of the Judiciary, the budget of the Judiciary should be paid from the national Budget in such a manner as to distinguish the institution as a separate arm of the Government and, in any case, not disadvantage it in proportional terms of the budgetary allocations made to the Legislature and the Executive. In this respect, it was suggested that Article 91 of the Constitution be amended (5).

Observations

The principle of independence and impartiality is the cornerstone of the Judiciary in its administration of justice. In a democracy, courts play a key role in protecting the rule of law, human rights and good governance. In line with the submissions made to the Mvunga and Mwanakatwe Commissions, petitioners wanted the Judiciary to be truly independent and impartial and that this should be reflected in its being explicitly vested with the judicial power of the State,

complete delinkage from the Executive, administrative and financial autonomy, and freedom from political interference.

The Commission also notes the submission from the Judiciary that its allocation from the national budget ought to reflect its independent status and, accordingly, the allocation by Parliament ought to be reasonable in proportion to the allocations given to the other two arms of the Government.

The emphasis placed on the principle of independence and impartiality entails that although the Judiciary derives its judicial authority from the Constitution, the judicial service should enjoy freedom from interference by the other organs. Checks and balances are assumed to be inherent in the very character of the institution of courts and evidenced in the instruments and processes that define their functions.

However, it can be argued from practical experience that although, by and large, courts have maintained their integrity and good conduct, they are administered by human beings and are therefore susceptible to weaknesses. Besides, democracy and good governance demand that for purposes of accountability and transparency, no public institution should escape public scrutiny. The form that this takes should not, however, amount to putting pressure on or influencing the Judiciary.

The Commission would like to take this opportunity to expound further on the principle of the independence and impartiality of the Judiciary. The rationale for this principle is that Judges should not feel inhibited in arriving at just and fair judgments. In so doing, the Judiciary contributes effectively to upholding the rule of law. However, the rule of law is not the rule of Judges for were it to be so, then it would be justice according to Judges, but not justice according to the law. To ensure the tenets of justice, our judicial system allows for a hierarchy of appeals, ending in the Supreme Court, which is the final court in the land.

The corollary to this principle of independence and impartiality is that it must not be susceptible to abuse by judicial personnel. This principle is not a shelter to incompetence, prejudice and abuse by judicial personnel at any level of the judicial structure. Even when the right of appeal ends in the Supreme Court, the finality of the process should achieve justice. But finality in the Supreme Court does not mean that this Court is at liberty to arrive at any decision, simply because such decision cannot be overturned. The citizen is entitled to a fair hearing and an impartial well-reasoned judgment, even at this final level. The Commission therefore feels that all these sentiments must be assured, guaranteed and protected by the Constitution.

Article 91 (3) of the Constitution provides that the Judiciary shall be autonomous and shall be administered in accordance with an Act of Parliament. The Judicature Act, Cap. 24, was enacted in 1994 and its objectives are, in the main, to provide

for the administration of courts and to confer on the Judicial Service Commission the power to appoint staff of the Judicature. However, the major weakness of the Act is that, instead of giving effect to the autonomy of the Judiciary as stipulated in the Constitution, it clearly and loudly makes the Judiciary subservient to the presidency in matters related to administration in general, the appointment of certain members of the Judicature and staff, terms and conditions of service, and the exercise of disciplinary powers. It can also be said that Section 5 of the Service Commissions Act, Cap. 259, which subjects the Judicial Service Commission to such general directions as the President may consider necessary and requires the Commission to comply, is in direct conflict with the Constitution.

In terms of Government funding, the budget of the Judiciary, like that of any other Government institution, is subject to superintendence and prescription by the Ministry responsible for finance before submission of the estimates of revenue and expenditure by the Government to the National Assembly. This is on the premise that the Ministry is in control of Government revenue and expenditure. Once approved by Parliament, only a portion is released and this is done through the Ministry in charge of finance.

In the light of the above considerations, the Commission is of the view that the Constitution should enhance the independence and impartiality of the Judiciary in unequivocal terms. This independence and impartiality should also reflect that the Judiciary is accountable to the people in the manner in which it administers justice. This is important in the promotion of justice and the rule of law. In this regard, the Commission notes that the Mwanakatwe Commission, in its recommendations, emphasised that the Constitution should clearly state that no person or organ of the State should interfere with the Judiciary in the performance of its functions, and that the finances of the courts ought to be given directly to the Judiciary by the National Assembly.

Recommendations

The Commission recommends that the Constitution should explicitly provide that:

- the judicial power of the State shall vest in the courts;

- in the exercise of its judicial power, the Judiciary, in both its judicial and administrative functions (including financial administration) is subject only to this Constitution and shall not be subject to the control or direction of any person or authority;

- no member of the Executive or Legislature or any other person shall interfere with the Judges or judicial officers or other persons exercising judicial power, in the exercise of their judicial functions, and all organs of the State shall accord such assistance as courts may require to protect their independence, dignity and effectiveness, subject to the Constitution;

- the Judiciary shall prepare its own budget estimates, whose determination shall be subject to negotiations with the Ministry responsible for finance, and that this process shall take into account the principles of accountability, transparency and equitable sharing of resources;

- the Judiciary shall be adequately funded and its allocations shall be released directly to the Judiciary; and

- the approved budget allocation shall be a charge on the Consolidated Fund of the Republic, whose establishment has been recommended in Chapter 21 of this Report.

10.2.3 Appointment of Chief Justice, Deputy Chief Justice and Other Judges

Submissions

A large number of petitioners argued that the President should not appoint the Chief Justice and other Judges (971). Many of these petitioners said that Judges should be nominated by an independent body such as the Judicial Service Commission and appointed by the National Assembly. Some petitioners said that Judges should be appointed by an independent body such as the Judicial Service Commission, subject to ratification by the National Assembly. Yet others wanted the Judicial Service Commission to appoint all Judges other than the Chief Justice.

On the other hand, a number of petitioners said that the President should appoint the Chief Justice and other Judges (108). Many of these, however, added that the appointment should be on the recommendation of the Judicial Service Commission and subject to ratification by the National Assembly.

A few petitioners said that the President should appoint the Chief Justice while the Judicial Service Commission should appoint other Judges (7).

A number of petitioners proposed that the Chief Justice should be elected (126). Some suggested election by universal adult suffrage while others suggested an electoral college composed of the LAZ and civil society organisations and/or other Judges. One petitioner further said that the Chief Justice and Deputy Chief Justice should be elected by a Council of Judges of the High Court and Supreme Court, subject to ratification by the National Assembly (1).

A few petitioners said that the Chief Justice should be appointed through a transparent and competitive process (9).

A few other petitioners argued that the National Assembly should appoint the Chief Justice and other Judges (9).

One petitioner said that Judges of the High Court should be appointed by the Judicial Service Commission, subject to ratification by the National Assembly (1).

Observations

This subject attracted a sizeable number of submissions. Petitioners expressed various views on the mode of appointment of Judges. However, what emerged clearly was that an overwhelming majority of them did not want the President to appoint Judges. They conceived this from the point of view of the principle of separation of powers and the independence and impartiality of the Judiciary in the dispensation of justice. Petitioners wanted any influence of the Executive over the Judiciary, real or perceived, removed.

Many of these petitioners wanted the Chief Justice and other Judges of the Supreme Court and High Court to be nominated by an independent body, such as the Judicial Service Commission and appointed by the National Assembly, whilst others said that Judges should be appointed by the Judicial Service Commission, subject to ratification by the National Assembly. Yet others wanted the Chief Justice to be elected by universal adult suffrage or an electoral college comprising either Judges of the Supreme Court and High Court or representatives of the Law Association of Zambia and civil society organisations.

The Commission agrees that the issue of appointment of Judges is intricately linked to the fundamental principle of independence and impartiality of the Judiciary. However, whilst noting the concerns of petitioners, the Commission is of the view that although the National Assembly can approve or ratify appointments for the purposes of providing checks and balances, it would be improper for it to make appointments directly. This would offend the doctrine of separation of powers, in that one organ of the State would predominantly be controlling the other by way of appointments.

Election of the Chief Justice by universal adult suffrage or civil society organisations would throw the Office into the political arena and impair the independence and impartiality of the Judiciary. Election by other Judges would dilute the superiority and supervisory function of the Office.

In evaluating the submissions, the Commission also looked at what is prevailing in other countries.

In the United States of America, as already stated, the President nominates and, with the advice and consent of the Senate, appoints Judges of the Supreme Court. This means that the Senate not only has influence in the choice of Supreme Court Judges, but also has the final say. In some of the States though, Judges are selected through a general election. In comparison to Zambia, this practice may be distinguished by the fact that this position in the USA is in a well-developed and refined political and socio-economic context, which is not the case in Zambia.

In Uganda, the President appoints the Chief Justice, the Principal Judge, Justices of the Court of Appeal and High Court Judges on the advice of the Judicial Service Commission. The Constitution also explicitly excludes the Chief Justice, Deputy Chief Justice and Principal Judge from membership of the Judicial Service Commission, whose Chairperson and Deputy Chairperson are persons qualified to be Supreme Court Judges. The Judiciary is directly represented on the Judicial Service Commission by one Supreme Court Judge.

The Constitution of South Africa provides that the President appoints the Chief Justice and the Deputy Chief Justice after consulting the Judicial Service Commission and leaders of parties represented in the National Assembly. The President appoints the President and Deputy President of the Supreme Court and Court of Appeal after consulting the Judicial Service Commission. Judges of the Constitutional Court are appointed by the President after consulting the Chief Justice and the leaders of parties represented in the National Assembly. The Judicial Service Commission prepares the list from which the candidates are picked. All other Judges are appointed by the President on the advice of the Judicial Service Commission.

In the case of Ghana, the Constitution provides that the President shall appoint the Chief Justice acting in consultation with the Council of State and with the approval of Parliament. The President appoints other Supreme Court Judges on the advice of the Judicial Council, in consultation with the Council of State and with the approval of Parliament. The President appoints other Judges on the advice of the Judicial Council.

In the examples given above, it is clear that Judicial Service Commissions or their equivalent and the Legislature play a prominent and important role in judicial appointments.

The Commission also considered the views and recommendations of previous Commissions on the subject. It notes that in its findings, the Mvunga Commission stated that there was consensus of opinion that the President, on the recommendation of the Judicial Service Commission,

appoints Supreme Court and High Court Judges. The Commission recommended appointment of the Chief Justice and Judges by the President, subject to ratification by the National Assembly.

The views expressed by petitioners to the Mwanakatwe Commission were similar to those advanced by petitioners to this Commission. Petitioners felt that the Executive should have no hand in the appointment of the Chief Justice, Deputy Chief Justice and other Judges. The Mwanakatwe Commission, however, recommended that the Chief Justice be appointed by the President, subject to ratification by the National Assembly, arguing that this was in line with the principle of checks and balances. With respect to other Supreme Court Judges, the Commission recommended that they be appointed by the President on the recommendation of the Judicial Service Commission.

The 1964 Constitution provided for the appointment of Judges of the Court of Appeal and the High Court by the President acting in accordance with the advice of the Judicial Service Commission. This was changed by the 1973 Constitution, which provided that the Chief Justice and other Judges of the Supreme Court be appointed by the President, and Judges of the High Court be appointed by the President acting in accordance with the advice of the Judicial Service Commission. The Commission notes that the Industrial Relations Court (IRC) is a much later creation. Surprisingly, the National Assembly plays no role in the appointments of the Chairperson and Vice-Chairperson. The Commission notes that this is an oversight or omission. Accordingly, this should be cured by a requirement that the appointments be ratified by the National Assembly. In any case, this would be taken care of by the Commission's recommendation that the IRC should be a Division of the High Court.

This Commission's view is that the principle of checks and balances is defeated if the President can override a decision of the National Assembly refusing ratification.

In the light of the foregoing considerations, what is required in order to achieve the desired end, is that the President should not enjoy exclusive or overriding power in the appointment of Judges, and to ensure that they have security of tenure. This would safeguard their independence, impartiality and autonomy.

Recommendations

The Commission recommends that the Constitution should provide that:

- the President, after consulting the Judicial Service Commission and with the approval of the National Assembly, shall appoint the Chief Justice, Deputy Chief Justice and Judges of the Supreme and Constitutional Court and Court of Appeal;

- acting appointments of serving Judges to higher offices shall be made by the President in consultation with the Judicial Service Commission; and

- Judges of the High Court shall be appointed by the President on the recommendation of the Judicial Service Commission and with the approval of the National Assembly.

The Commission further recommends that the composition of the Judicial Service Commission should be reviewed and enshrined in the Constitution to ensure that it is broad-based, impartial and independent. The composition of the Judicial Service Commission is discussed subsequently under this current Chapter.

10.2.4 Qualifications

Submissions

The LAZ proposed that qualifications for appointment as Judge of the High Court should include:

- high moral character;

- experience in law practice as counsel in a court having unlimited jurisdiction in civil and criminal matters in Zambia, or in any other country with a system of law equivalent to that of Zambia for not less than 10 years; and

- eligibility to practice as such counsel (1).

The Association further said that the present arrangement in respect of appointment of Judges to the Supreme Court should be maintained (1) and another petitioner said that qualifications for appointment as Judge of the Supreme Court and High Court should be retained (1).

Observations

The Commission notes that the main petitioner on the subject was the LAZ. However, the Commission has given the subject due consideration in light of its importance and the fact that the petitioner was representing the views of the legal fraternity.

In its consideration of the subject, the Commission further notes that Article 97 of the Constitution, which stipulates the qualifications for appointment as Judge of the Supreme Court, High Court and as Chairman and Deputy Chairman of the Industrial Relations Court, provides that the minimum period for which the person should have held the prescribed qualifications may be dispensed with. The matter is left to the discretion of the President or the Judicial Service Commission, as the case may be. The Commission, however, observes that this provision was made in order to avoid an otherwise possible crisis in the Judiciary resulting from failure to attract persons with the requisite qualifications. This is due to the poor conditions of service for Judges. Under the prevailing circumstances, this provision is justified, although quality may be compromised. In order to redress this problem, the conditions of service for Judges should be made attractive.

The Commission, however, finds the qualification of "high moral character" proposed by the LAZ to be difficult and elusive to define or ascertain objectively.

In concluding its deliberations, the Commission considered it befitting, in view of the responsibilities and duties imposed on high judicial offices and the high standard expected of their performance and conduct, that there should be a minimum age qualification. The Commission observes that the Mwanakatwe Commission had recommended a minimum age of 40 years.

Recommendations

The Commission therefore recommends that:

- the constitutional provision permitting dispensing with minimum period for which a person should have held the prescribed qualifications, namely 15 years or 10 years in the case of appointment as a Supreme Court Judge or High Court Judge, respectively, should be repealed;

- the Constitution should provide that Judges appointed to specialised courts should have expertise in the respective areas in which these courts are specialised; and

- there should be a minimum age qualification of 45 years stipulated in the Constitution.

10.2.5 Office of Deputy Chief Justice

Submissions

The LAZ proposed that the Office of Deputy Chief Justice should be abolished to avoid, as far as possible, division in the bench in the event that there is a vacancy in the Office of Chief Justice and the Deputy Chief Justice is not appointed as the successor (1). The Association also argued that this would provide the appointing authority with a larger pool from which to appoint the Chief Justice. The appointing authority would select the Chief Justice on merit from a pool of Supreme Court Judges and not have her/his hands tied to one office of the Deputy Chief Justice. Examples of Ghana, Namibia and USA were given.

Two petitioners said that in the event of a vacancy arising in the Office of the Chief Justice, the Deputy Chief Justice should automatically assume the Office (2).

Observations

The Commission considered the subject in the light of the submission from the LAZ calling for abolition of the Office of Deputy Chief Justice. The Commission finds merit in the argument advanced by the Association. The petitioner who suggested that the Deputy Chief Justice should automatically assume the Office of Chief Justice in the event of a vacancy arising illustrates that this may be the normal expectation.

Therefore, in a situation where a Deputy Chief Justice is not the best candidate, the appointing authority would be in a predicament. It can therefore be argued that it is unnecessary to maintain the Office of Deputy Chief Justice unless there is particular advantage in so doing. There are many examples of countries that do not have this Office. However, it is also important to note that the substantive Office of Chief Justice needs a Deputy who should act in the absence of the holder of this Office. The Commission would like to draw the conclusion from this that the Office of Deputy Chief Justice was not solely established for the purposes of the holder of the office succeeding the Chief Justice.

In this regard, the Commission also notes that by virtue of Article 92 (3), the Office of Deputy Chief Justice cannot be abolished while there is a substantive holder.

Recommendations

The Commission recommends that:

- the Office of Deputy Chief Justice should be retained; and
- the Constitution should provide that where the Office of the Chief Justice is vacant or where the Chief Justice is, for any reason, unable to perform the functions of the office, then until a person has been appointed to and has assumed the functions of that office or until the Chief Justice has resumed the performance of those functions, those functions shall be performed by the Deputy Chief Justice.

10.2.6 Tenure of Office

Submissions

10.2.6.1 Security of Tenure - Emoluments

Some petitioners said that the Chief Justice and other Judges should have security of tenure (10).

One petitioner said that salaries and conditions of service of Judges should be determined and approved by the National Assembly (1), while the LAZ and another petitioner proposed that the salaries and conditions of service should be determined and approved by the National Assembly in consultation with the Judicial Service Commission (2). They argued that the independence and impartiality of Judges is inextricably linked to the conditions of service.

A small number of petitioners felt that salaries and conditions of service for Judges should be determined by Parliament (4).

The Judiciary proposed that:

- holders of judicial office should receive a salary, pension, gratuity or other allowances as may, from time to time, be determined by Parliament;

- their emoluments should not be reduced during their tenure of office without their consent and shall be increased at intervals so as to retain original value; and

- these should be a charge on the General Revenues of the Republic.

Some petitioners proposed that salaries and conditions of service for the Judiciary should be determined by the Judicial Service Commission or another independent body (3).

Others argued that the President should not determine Judges' remuneration because that compromises their independence and impartiality (3).

Observations

Though petitioners on this subject were very few, the Commission noted that the LAZ and the Judiciary made a number of submissions. In summary, petitioners wanted security of tenure of Judges to be guaranteed by the Constitution, in order to ensure the independence and impartiality of the Judiciary. In this regard, the LAZ and the Judiciary proposed that the salary, pension, gratuity, any other allowances and conditions of service of holders of judicial office should be determined by Parliament. A few other petitioners proposed that the Judicial Service Commission or other independent body should do this. The Judiciary added that emoluments of judicial officers should not be reduced during their tenure of office and that these should be a charge on the General Revenues of The Republic.

Petitioners viewed the issue of conditions of service as inseparable from security of tenure, the independence of the Judiciary and the impartiality of judicial officers.

Petitioners to the Mvunga and Mwanakatwe Commissions shared similar views as those advanced by petitioners to this Commission.

The Commission observes that the Constitution does not make any provision with respect to emoluments, pensions and other conditions of service for Judges. These are dealt with by the Judges (Conditions of Service) Act, Cap. 277. Section 3 of the Act states that there shall be paid to a Judge such emoluments as the President may, by statutory instrument, prescribe. Further, the Act, inter alia, empowers the President to prescribe

conditions of service for Judges. It is the Commission's view that this state of affairs compromises the independence and impartiality of the Judges at least in the minds of the people.

Recommendations

The Commission recommends that the Constitution should provide that:

- the emoluments, pensions and other conditions of service of Judges shall be reviewed and recommended in the first instance by the Judicial Service Commission, and submitted to an independent National Fiscal and Emoluments Commission, which shall make its recommendations to the National Assembly for approval. Upon approval, these shall be prescribed by an Act of Parliament;

- the emoluments of Judges shall not be reduced without their consent during their tenure of office; and

- the emoluments, gratuity, pensions and other dues under the conditions of service shall be a charge on the Consolidated Fund of the Republic.

10.2.6.2 Term of Office – Chief Justice and Deputy Chief Justice

Some petitioners argued that the Chief Justice's term of office should be limited. The suggested term was 5 or 10 years (17). Petitioners felt that this standard should be applicable to all high ranking offices in the Public Service.

10.2.6.3 Security of Tenure - Removal of Judges

One petitioner said that in the event of misconduct, a tribunal should be set up by the Judicial Service Commission to hear the disciplinary case and that the tribunal should report to a Committee of Parliament (1).

The LAZ and another petitioner proposed that the National Assembly, and not the Executive, should be responsible for appointing a tribunal to recommend removal of the Chief Justice (2).

Other petitioners felt that the President should have no role in the removal of the Chief Justice and other Judges (10).

Observations

The Commission has considered the rationale for the demand that the term of office of the Chief Justice should be limited.

The Commission observes that petitioners to the Mvunga Commission also made this submission. The Mvunga Commission recommended that this should be left to the discretion of the appointing authority. Similarly, the Mwanakatwe Commission recommended that each President should have the prerogative of appointing a Chief Justice. This Commission is of the view that such a situation would compromise the Office and impair the independence and impartiality of the Judiciary.

The Commission would like to make the observation that current provisions do not provide for the removal of the Chief Justice and Deputy Chief Justice after appointment. The Commission is of the view that the Office of Chief Justice and Deputy Chief Justice should like other Judges be accorded security of tenure.

Petitioners to the Commission on the subject of the removal of Judges, who included the LAZ, wanted the Executive, in particular the President, removed from the process of removal of a Judge. This is on account of the principle of independence and impartiality of the Judiciary, and the related issue of security of tenure.

The Commission observes that under the provisions of Article 98 (3) of the Constitution, the President is the authority that considers the question of removal from office of a Judge of the Supreme Court or High Court. If the President deems it necessary, he/she appoints a tribunal according to whose advice he/she must act. The President may suspend a Judge pending investigations of a tribunal. This provision has been the same since the 1964 Constitution. The Commission observes further that the grounds for removal from office have also remained the same since 1964.

It is the Commission's view that the current provision is in conflict with the principle of independence, impartiality and security of tenure of the Judiciary. The perceived impact of this is even greater when viewed against the fact that the President also enjoys substantial power of appointment of Judges. It is necessary to infuse checks and balances into the procedure.

In evaluating the submissions, the Commission observed that petitioners to both the Mvunga and Mwanakatwe Commissions expressed similar views as those advanced by petitioners to this Commission on the subject. In particular, petitioners were insistent that Judges should only be removed

by the National Assembly and on restricted specified grounds. The Mwanakatwe Commission recommended retention of the existing provision. However, whilst recommending that each President should have the prerogative of appointing a Chief Justice, the Commission further recommended that an outgoing Chief Justice should not be removed from the office of Judge of the Supreme Court. As already stated, this Commission is of the view that this would undermine the independence of the Judiciary and impartiality of the Chief Justice and, in turn, the Judiciary.

The Commission wishes also to add that unreasonable delays in the delivery of judgments should be a ground for the removal of a Judge from office.

Recommendations

The Commission therefore recommends that the Constitution should provide that:

- the Chief Justice and Deputy Chief Justice shall vacate office upon attaining the retirement age, which is 75 years, subject to an option to retire at the age of 65 years;

- removal of a Chief Justice, Deputy Chief Justice or Judge shall be only on grounds of:

  (a) inability to perform the functions of the Office, whether arising from infirmity of body or mind, incompentence, misbehaviour or misconduct, bankcruptcy or insolvency; and

  (b) undue and unreasonable delays in the delivery of judgments.

- the Judicial Complaints Commission shall initiate the process of the removal of a Judge by referring the matter to the President, where the Commission finds that the complaint has merit. The President shall then refer the matter to the National Assembly, which shall appoint a tribunal, receive the report of the tribunal and determine the matter.

10.2.6.4 Security of Tenure - Retirement Age

Submissions

The LAZ proposed that the retirement age for Judges should be raised from 65 to 70 because currently almost all Judges are given seven-year contracts, rendering the 65 years retirement age a fallacy (1). It was

further proposed that a Judge may opt for early retirement after attaining the age of 65 years, but before turning 70 years.

Two petitioners, including LAZ, said that the President should not be empowered to renew the contracts of Judges who have attained retirement age (2).

Observations

The Commission observes that the submission by the LAZ that the retirement age be raised from 65 to 70 years is a response to the practice of retaining Judges after they have attained the retirement age through the discretionary award of contracts by the appointing authority. There is a perception that this may compromise Judges. The Association and another petitioner said that no contracts should be awarded to Judges after they have attained retirement age.

Although the Commission appreciates the argument advanced by petitioners on this subject, it is of the view that this practice may be necessitated by difficulties encountered in recruiting Judges. The Commission is nevertheless concerned that the dignity and integrity of Judges should be preserved. Retention of retired Judges would be unnecessary if conditions of service for Judges were made attractive.

The Commission also notes that the Mwanakatwe Commission recommended that retirement should be compulsory at the age of 70 years. This Commission is, however, of the view that the compulsory retirement age of judges should be 75 years because the country should derive optimal benefit from their experience, knowledge and wisdom.

Recommendations

The Commission recommends that the Constitution should provide that:

- Judges be retired at the age of 75 and that a Judge shall have the option of early retirement after attaining the age of 65; and

- for the avoidance of any doubt, a person who has retired as a Judge shall not be eligible for reappointment as a Judge.

10.2.7 Appointment of Magistrates and other Judicial Officers

Submissions

The Judiciary proposed that Article 95 of the Constitution should be amended to make provision for Magistrates and other judicial officers to be appointed by the Judicial Service Commission, and that they should hold office until the age of 55, unless appointed as High Court Judges, with the proviso that Local Court Justices should hold office until the age of 75 unless removed in accordance with Article 98 (1).

Observations

The Commission considered the submission from the Judiciary with respect to the appointment of magistrates and other judicial officers. The Judiciary wishes to have the Constitution amended in order to provide that these officers be appointed by the Judicial Service Commission.

The Commission notes that whereas the composition of the Judicial Service Commission and other related matters are provided for under the Service Commissions Act, Cap. 259, its powers and functions are not clearly defined by this statute. Section 9 (1) of the Act vaguely states that:

> *"Subject to the Constitution, power to appoint persons to hold or act in any office in the public service…and to remove any such person from office shall vest in the President."*

However, Section 4 (1) of the Judicature Administration Act confers on the Judicial Service Commission power to appoint the Registrar, Deputy Registrar, Assistant Registrar, Magistrates and other judicial officers. Sub-section (3) states that these officers shall hold office on such terms and conditions as the Commission may determine with the approval of the President.

In the light of the above considerations, the Commission is of the view that in order to protect the independence, impartiality, integrity, dignity and transparency of the Judiciary, the Constitution should make clear provision with respect to the appointment, and terms and conditions of service of other judicial officers. In its consideration of the subject, the Commission examined related provisions in other constitutions.

The Constitution of Uganda provides that the Judicial Service Commission may appoint judicial officers other than those specified in the Constitution. Further, the Constitution confers on the Commission the function of reviewing and making recommendations on the terms and conditions of service of Judges and other judicial officers. The

Constitution of Ghana not only makes provision with respect to power of appointment of other judicial officers, but also states that the terms and conditions of service of these officers shall be prescribed by regulations made by the Judicial Council, acting in consultation with the Public Service Commission and with the approval of the President.

With respect to the retirement age, the Commission concurs in principle with the view of the Judiciary that these officers should retire at the normal retirement age in the Public Service. Whereas currently this retirement age is 55 years, the Commission has recommended that it be increased to 60 years with an option for early retirement at 55 years or after 25 years of continuous service, subject to an agreement with the employer.

The Commission also agrees that an exception to this should be made in the case of Local Court Justices, whose retirement age should be 75 years. This is because these officers are regarded as a reservoir of customary law.

The Commission is also of the view that the capacity of Subordinate Courts and Local Courts should be strengthened. In this regard, the Commission observes that these courts handle most of the criminal and civil cases, but they do not have adequate competence and capacity. There is need to improve the conditions of service for staff in these courts in order to attract competent and properly qualified personnel. It is also essential that Local Court Justices should be experts in the traditions and customs of the specific communities in which they serve. Therefore, they should be recruited from the local community, with the approval of the area Chief.

Recommendations

Accordingly, the Commission recommends that the Constitution should provide that:

- the Judicial Service Commission shall appoint, exercise disciplinary control over and remove judicial officers other than those whose appointment is otherwise prescribed by the Constitution; and

- the Judicial Service Commission shall review and recommend to such independent Emoluments Commission as may be established by an Act of Parliament, the terms and conditions of service of non-constitutional judicial officers.

Further, the Commission recommends that appropriate legislation should provide that:

- qualifications for appointment to the various positions of Magistrates shall include that the person should be a qualified legal practitioner with a minimum period of five years' experience in the case of a Principal Resident or a Senior Resident Magistrate; three years in the case of a Magistrate Class II, and one year in the case of a Magistrate Class III;

- with the exception of Local Court Justices, other judicial officers shall retire at 60 years of age unless earlier appointed as Judge;

- qualifications for appointment as Local Court Justice shall include expertise in the traditions and customs of the specific area and that, in rural areas, such persons shall be recruited from the local community, with the approval of the area Chief;

- in the case of an urban community, a person should be an expert in most of the customary laws applicable to the people in that community in order to be appointed Local Court Justice; and

- in order to be appointed Local Court Justice, a person shall be at least be 45 years of age and shall be required to retire at 75 years of age.

The Commission also recommends that:

- the conditions of service for Magistrates and Local Court Justices should be improved to make these positions attractive; and

- the civil and criminal jurisdiction of Magistrates Courts should be enlarged.

10.2.8 The Judicial Service Commission

Submissions

Two petitioners said that the Judicial Service Commission should be established by Parliament (2).

A few petitioners proposed that the legal fraternity and not the Chief Justice should be responsible for the appointment of the Chairperson of the Judicial Service Commission (4).

Observations

Though very few submissions were made on the subject of the Judicial Service Commission, the Commission considers the institution important in the administration of justice.

Contrary to the petitioners' view that the Judicial Service Commission should be established by Parliament, the Commission is of the view that its establishment by the Constitution would be better. As a matter of fact, the composition of the Judicial Service Commission, in the Commission's view, should not include representation of the National Assembly because it ratifies recommendations of the former. The Commission further observes that the Constitution does not specify the composition and key functions of the Judicial Service Commission. This has been left to legislation. The Service Commissions Act has made provision with respect to the composition of the Commission, which is chaired by the Chief Justice.

As already alluded to above, with respect to the powers and functions of the Commission, legislation may not adequately deal with the subject, and this may have a negative impact on the administration of the Judiciary. Among the functions of the Judicial Service Commission should be supervision of the operations of the Judiciary. On the call that the legal fraternity and not the Chief Justice should be responsible for the appointment of the Chairperson of the Judicial Service Commission, the Commission is of the view that the Chief Justice, being the supervisor of the Judiciary, should chair the Judicial Service Commission.

Recommendations

Accordingly, the Commission recommends that establishment of the Judicial Service Commission by the Constitution should be retained and that its composition and tenure of office of its members should be specified by the Constitution as follows:

- the Judicial Service Commission shall consist of the following persons who shall be appointed by the President with the approval of the National Assembly:

    a) the Chairperson who shall be the Chief Justice;

    b) the Attorney-General;

    c) one person nominated by the Civil Service Commission;

d) the Permanent Secretary responsible for public service management;

e) one Judge of the Supreme Court nominated by the Chief Justice;

f) one Judge of the Court of Appeal nominated by the Chief Justice;

g) a member nominated by LAZ to represent the Association who has been in practice for at least 15 years;

h) one member nominated by the HRC;

i) the Dean of the Law School of any public university;

j) a representative of Magistrates nominated by a body representing Magistrates; and

k) the person responsible for the administration of local courts.

The Commission further recommends that the powers and functions of the Judicial Service Commission should be provided for in the Constitution to include:

- supervision of the operations of the Judiciary;

- advising the Government on the administration of justice. On matters relating to the Judiciary the Constitution should provide that Cabinet Ministers appointed from outside the National Assembly shall be ex-officio MPs with no vote and that they shall not receive remuneration as ex-officio MPs;

- advising the President in the exercise of the President's power to appoint persons to hold or act in any office specified in this Constitution or other law, which includes power to confirm appointments, to exercise disciplinary control over such persons, and to remove them from office;

- subject to the provisions of this Constitution, reviewing and making recommendations on the terms and conditions of service of Judges and other judicial officers; and

- performing any other function prescribed by this Constitution or by an Act of Parliament.

The Commission further recommends that appropriate legislation should make provision that:

- the Chief Administrator of the Judiciary shall be the Secretary to the Judicial Service Commission;

- except for a person whose membership is by virtue of holding a prescribed office, a member of the Judicial Service Commission shall hold office for a term of four years, after which he or she shall be eligible for reappointment for one more term; and

- a member of the Judicial Service Commission shall vacate office at the expiry of the term of office or if he/she is elected or appointed to any office determined by an Act of Parliament that is likely to compromise the independence of the Judicial Service Commission.

10.2.9 The Supreme Court, High Court and Magistrates Courts- Decentralisation

Submissions

A few petitioners proposed that the Supreme Court, High Court and Magistrates Courts should be decentralised to provinces and districts including rural areas (9). This is to enhance people's right to access to justice.

Observations

The Commission notes the concerns of petitioners with respect to accessibility to courts, particularly the Supreme Court and High Court at provincial and district levels, especially in rural areas.

The Commission observes that the High Court has permanent presence in Lusaka, Ndola, Kitwe and Livingstone, whilst it conducts circuit court sessions in the rest of the provinces. The Supreme Court has no permanent presence in any of the provinces apart from Lusaka and only conducts circuit court sessions in Kabwe, Ndola and Kitwe. Whilst accessibility to these courts is desirable, in the case of the Supreme Court it is not technically practical for the Court to be permanently established in all the provinces, in view of the composition of the bench. However, in the Commission's assessment, it is justified that the High Court should be

permanently established in all the provinces and that the Supreme Court should conduct circuit court sessions in all the provinces.

Further, since the majority of the people access lower courts, it is a primary necessity to enhance the capacity of these lower courts in terms of infrastructure, jurisdiction, human resources, office equipment and other material and financial resources.

The Commission is also of the view that while the principle of accessibility to courts, including the superior courts, should be enshrined in the Constitution, details should be addressed by ordinary legislation and administrative measures.

Recommendations

The Commission recommends that appropriate legislation should be enacted to provide for:

- accessibility to the Courts at the lowest levels to the extent possible;
- the establishment of a permanent High Court in each of the provinces;
- the conduct of Circuit Court sessions by the Supreme Court in all provinces; and
- enhancement of the capacity of Magistrates Courts and Local Courts in terms of jurisdiction, infrastructure, human resources, office equipment and other material and financial resources.

Further, the Commission recommends that appropriate administrative measures should be taken to enhance infrastructure, office equipment and the human and financial resources of subordinate courts.

10.2.10 Constitutional Court and Court of Appeal - Establishment

Submissions

10.2.10.1 Court of Appeal

Two petitioners said that a Court of Appeal should be re-established and be placed between the Supreme Court and High Court (2). The reason advanced for this submission was that there was a need for at least two stages of appeal from the High Court. The other reason was that the Supreme Court

handles too many appeal cases to operate efficiently and therefore there is a need for a Lower Court to screen them.

There were five submissions to the effect that the Constitution should provide for a Judicial Committee with original jurisdiction to deal with test cases (5).

10.2.10.2 Constitutional Court

A large number of petitioners proposed that a constitutional court there should be established to deal with constitutional matters, violation of guaranteed human rights, and election petitions (147). It was further said that this Court should be a Division of the High Court with appeals lying to a full bench of the Supreme Court. Petitioners expressed dissatisfaction with the current arrangement. They argued that the Judiciary lacks expertise and specialisation in constitutional matters. They also lamented the delays in determining cases involving constitutional matters, including human rights and election petitions. In addition, petitioners argued that a constitutional court would enhance the checks and balances among the three organs of the State.

The LAZ also proposed that any person having a law degree and at least 10 years experience in constitutional matters, however earned, should qualify for appointment as Judge of the Constitutional Court (1).

Observations

The Commission notes that though petitioners on the subject of Court of Appeal were few, they nonetheless voiced concerns that are shared by many. Petitioners particularly felt that the workload of the Supreme Court could be reduced if a Court of Appeal or a Judicial Committee was introduced to screen cases before they proceeded to the highest court.

The Commission considered the merits and demerits of having a Judicial Committee whose jurisdiction would be to screen appeal cases to ensure that only those that merit being heard by the Supreme Court are heard. The Commission appreciates the fact that the Supreme Court is extremely congested and that some of the appeal cases the court deals with lack merit. On the other hand, the Commission also feels that such a mechanism may stifle access to justice, as some cases may be unjustifiably disallowed. In fact, some cases originating in the High Court may not have the opportunity of proceeding on appeal. Although the Commission is satisfied that a panel composed of more than one person could be trusted to render fair decisions, it is nonetheless persuaded that access to justice,

which is assured through the right of appeal, is paramount. The Court of Appeal would have the necessary competence to render fair and just decisions on the merits of a case.

The Commission notes the apprehension that the establishment of a Court of Appeal would lead to the process of appeals being prolonged. However, this concern is not persuasive because the Court of Appeal would have the benefit of decongesting the Supreme Court, which should lead to expedition of the appeals process. Also, the potential that the process might become more costly is mitigated by the fact that in a number of cases, decisions of the Court of Appeal would be final.

The Commission is therefore of the view that rather than establish such a committee, there should be established a Court of Appeal in between the High Court and the Supreme Court to ease the pressure on the Supreme Court.

The Commission further considered submissions made with respect to the establishment of a constitutional court. Though petitioners on the subject were relatively few, the Commission carefully examined the subject, taking into account the arguments advanced by petitioners to this Commission as well as to previous Commissions.

One of the outstanding submissions received by both the Mvunga and Mwanakatwe Commissions was a call for the establishment of a constitutional court with jurisdiction in all constitutional matters. Some petitioners felt that the Court should also have final jurisdiction on all human rights issues. The main reasons advanced were to encourage specialisation and expertise and reduce the delays experienced in the administration of justice. A smaller number was against the idea of such a special court, arguing that it would prove expensive for the country.

Petitioners to this Commission repeated this call and said that the Constitutional Court should deal with constitutional matters, human rights and election petitions. They argued that the judiciary lacks expertise and specialisation in constitutional matters. They also lamented delays in the determination of cases involving constitutional matters, particularly human rights and election petitions. These experiences point to loss of confidence in the current Judicial system.

The Commission also notes that there is a trend now in progressive constitutions to establish constitutional courts to deal specifically with constitutional matters. Examples are the Constitutions of Uganda and South Africa. However, in both cases, these courts do not have exclusive jurisdiction over electoral petitions.

In the case of Uganda, the Court of Appeal sits as a constitutional court when determining matters such as on the interpretation of the Constitution. It has

original and final jurisdiction in all Constitutional matters. In any other case, the Court has appellate jurisdiction, with appeals lying to the Supreme Court. Lower Courts have an obligation to refer questions of interpretation of the Constitution to the Constitutional Court upon the request of a party to proceedings. A court may, on its own motion, refer a matter to the Constitutional Court if, in its opinion, such a matter involves a constitutional issue.

The Constitutional Court of South Africa is established as a separate court within the Judiciary. It deals only with constitutional matters and issues connected with decisions on constitutional matters. It has original, appellate and final jurisdiction. It also has exclusive jurisdiction over certain matters such as determination of the constitutionality of a Parliamentary Bill which the President has declined to assent to on account of constitutionality. Decisions of other Courts over constitutional matters have no effect unless confirmed by the Constitutional Court.

The Commission is compelled to accept the idea of the establishment of a constitutional court. This call has been persistent, running through the Mvunga and Mwanakatwe Commissions to this Commission. The question to be settled is the modality of where to place the Constitutional Court in the judicial structure. As noted in the Uganda case, the Court is placed within the Court of Appeal, with original and final jurisdiction in Constitutional matters. In South Africa, the Court is on a par with the Supreme Court and has original and final jurisdiction in constitutional matters.

By contrast, in India the Constitutional Court is constituted by the Chief Justice from members of the Supreme Court to deal and determine constitutional matters and issues if and when they arise.

In considering the question of placement, the Commission is mindful that this Court should not create any conflict within the existing judicial structure. If the Court were perceived as a rival or superior to the existing Supreme Court, it would pose considerable problems to the existing judicial hierarchy. Morale among Judges of the Supreme Court could be adversely affected and the Office of the Chief Justice would also feel undermined. To doubt or seem to doubt the calibre of the present Supreme Court would be very disparaging of the competence and abilities of the existing judicial personnel. The Commission is therefore conscious that in creating a constitutional court, the rationale should be to enhance the justice delivery system and not to disrupt it.

In this regard, the Commission feels that, first and foremost, it must be unequivocally acknowledged that the present Supreme Court is the final Court of Appeal in the Judicial hierarchy, hence nothing should be done which has the effect of abolishing it by stealth. Having accepted this, the Commission also accepts the establishment of both the Court of Appeal and the Constitutional Court.

On the subject of structure, the Court of Appeal will be an intermediary Court placed between the High Court and Supreme Court. The Court should have appellate jurisdiction, with the right of appeal lying to the Supreme Court. This Court should also have jurisdiction to screen which cases should proceed on appeal to the Supreme Court. This function can be achieved through a provision to the effect that the appeal lies to the Supreme Court with leave of the Court of Appeal. The Court should be presided over by the Deputy Chief Justice.

As for the Constitutional Court, this should be a division of the Supreme Court to be presided over by the Chief Justice. In order to ensure that the Constitutional Court becomes a reality, a sufficient number of Judges with experience and expertise in constitutional and human rights matters should be appointed. This personnel will constitute the division.

In relation to its evaluation of the subject of access to justice, the Commission observes that the complexity of court procedures is also an impediment to justice that needs redress.

Further, in this era where domestic considerations are extending to sub-regional groupings (such as SADC in our case), the concept of the right of appeal should be reviewed in the context of regional integration.

The concept of a regional court is not novel. Namibia, Botswana and the Seychelles each have a Court of Appeal whose composition is not exclusively local, but includes Judges from the region. Already, there are moves to reconstitute the Court of Appeal of East Africa. The establishment of the COMESA Court of Justice is also an illustration of this concept, although its jurisdiction is limited. The Commission urges the Government to take the initiative of creating a Regional Court of Appeal for the SADC sub-region with jurisdiction to hear both criminal and civil appeals. This will ensure the development of a coherent regional jurisprudence.

Recommendations

Accordingly, the Commission recommends that a constitutional court should be established by the Constitution as a division of the Supreme Court, and that a Court of Appeal be similarly established under the Constitution.

In regard to the Constitutional Court, the Constitution should provide that:

- the Constitutional Court as the division of the Supreme Court shall consist of the President of the Court who shall be the Chief Justice and six Judges with experience and expertise in constitutional and human rights matters. The Court shall have exclusive and final jurisdiction in all constitutional

and human rights matters and issues, subject to other provisions of the Constitution;

- the Court shall make the final decision whether a matter is a constitutional matter or is connected with a decision on a constitutional matter;

- any question as to the interpretation of the Constitution, the violation of fundamental rights or freedoms, the constitutionality of any law, including an Act of Parliament, irrespective of whether such law was passed or made before or after commencement of the new Constitution, the constitutionality of any Bill before the National Assembly, whether or not a matter falls within the jurisdiction of the Court, any dispute or conflicts of a constitutional nature between organs of the State, and any such constitutional matters as may be entrusted to the Court shall be determined by the Court;

- a person who alleges that an Act of Parliament or any other law or anything done under the authority of any law; or any act or omission by any person or authority, is inconsistent with or is in contravention of a provision of the Constitution, including fundamental rights and freedoms, may petition the Court for a declaration to that effect and for redress, where appropriate;

- the National Assembly may, by a resolution supported by at least 30 MPs, refer a Bill to the Constitutional Court for determination of its constitutionality. The President may refer a Bill requiring assent to the Constitutional Court for determination of its constitutionality. Individuals or groups of persons, however, may only refer a Bill for such determination by the Constitutional Court with leave of the Court;

- where, upon determination of the petition referred to above, the Court considers that there is need for redress in addition to the declaration sought, the Court may grant an order of redress or refer the matter to the High Court to investigate and determine the appropriate redress;

- where any question as to the interpretation of this Constitution arises in any proceedings in a Court of law other than a Court Martial, such Court may, if it is of the opinion that the question involves a substantial question of law and shall, if any party to the proceedings requests it to do so, refer the question to the Court for a decision;

- where any question is referred to the Constitutional Court in accordance with the foregoing provisions, the Court shall give its decision on the question, and the court in which the question arises shall dispose of the case in accordance with that decision;

- upon a petition being made or a question being referred to it on a constitutional matter, the Court shall proceed to hear and determine the petition as soon as possible and may, for that purpose, suspend any other matter pending before it;

- when the Court is determining any matter other than an interlocutory matter, it shall be composed of an uneven number of Judges not being less than three, but when sitting to hear a constitutional matter, the Court shall consist of a bench of at least three and not more than five members of that Court, including at least one specialised in constitutional and human rights law;

- the same provisions with respect to appointment and tenure of office as those applicable to Supreme Court Judges shall apply to the Judges of the Constitutional Court;

- where the Office of the President of the Court is vacant or the incumbent is for any reason unable to perform the functions of the Office, then, until a person has been appointed to and has assumed the functions of the Office, those functions shall be performed by the Deputy Chief Justice;

- the Chief Justice may make rules with respect to the practice and procedure of the Court, and the rules shall be such that they facilitate easy access to the Court and expeditious disposition of cases;

- the Court of Appeal of Zambia shall consist of the President of the Court, who shall be the Deputy Chief Justice, and six Judges of the Court or such greater number as may be prescribed by an Act of Parliament; and

- an appeal shall lie to the Court of Appeal from such decisions of the High Court as may be prescribed by an Act of Parliament and the Court shall have appellate jurisdiction in all such appeals and final jurisdiction in all cases where the Court refuses the grant of leave to appeal to the Supreme Court.

The Commission also recommends that legislative or other measures be taken to establish the Court in Lusaka and for the Court to conduct circuit court sessions in all the provinces.

In addition, the Commission recommends that the Government take the initiative of creating a Regional Court of Appeal for the SADC Region with jurisdiction to hear both criminal and civil appeals.

10.2.11 Industrial Relations Court

Submissions

10.2.11.1 Establishment

A few petitioners proposed that the Industrial Relations Court should be established under the Constitution (3). A few other petitioners indicated that there was need for this court to be strengthened in order to facilitate expeditious disposal of cases (3).

10.2.11.2 Jurisdiction

One petitioner said that the Industrial Relations Court should have original and exclusive jurisdiction to hear and determine any industrial relations matter, and any procedure under the Industrial and Labour Relations Act (1).

10.2.11.3 Judges – Appointment

The Judiciary proposed that Article 95 should be amended in order that:

- Judges of the Industrial Relations Court are appointed as High Court Judges and that the Industrial Relations Court is headed by a Judge in charge; and

- members of the Industrial Relations Court are appointed by the President on the advice of the Judicial Service Commission, subject to ratification by the National Assembly (1).

One petitioner said that the Chairperson and the Vice-Chairperson of the Industrial Relations Court should continue being appointed by the President as at present (1).

10.2.11.4 Judges Conditions of Service

One petitioner said that all members of the Industrial Relations Court should enjoy the status, privileges and immunities of High Court Judges (1).

10.2.11.5 Disposal of Court Cases

There was a submission that there should be a time limit for the disposal of cases. The petitioner further said that the Industrial Relations Court should be de-linked from the Ministry of Labour and Social Security in order to improve efficiency and effectiveness (1).

10.2.11.6 Decentralisation

Three petitioners proposed that the Industrial Relations Court should be decentralised in order to service the people more effectively (3).

Observations

The Commission has critically evaluated various issues under the subject of the Industrial Relations Court. Though petitioners to the Commission on the subject were few, in the estimation of the Commission the subject deserves careful attention.

Some petitioners wanted the Industrial Relations Court to be established under the Constitution, whilst the Judiciary implicitly wanted the court to be part of the High Court. The Judiciary proposed that Judges of the Industrial Relations Court should be Judges of the High Court and its members should be appointed by the President on the recommendation of the Judicial Service Commission and ratified by Parliament. Similarly, one petitioner was of the view that members of the Industrial Relations Court should enjoy the same conditions of service as Judges of the High Court, whilst another felt that the Court should be de-linked from the Ministry of Labour and Social Security in order to improve its efficiency.

On the other hand, another petitioner advanced the view that the Court should have original and exclusive jurisdiction over all industrial relations matters.

Other petitioners were concerned about the lack of capacity of the court to deal with matters efficiently and expeditiously. Some of these petitioners called for strengthening of the capacity of the Court and decentralisation of the same to make it more accessible. There was also a submission that a time limit be set for disposal of cases before the Court in order to improve efficiency.

Whilst noting that the Industrial Relations Court is part of the Judicature as provided for under Article 91 of the Constitution, the Commission observes that the Court is not established by the Constitution, as is the case with the Supreme Court and High Court. It remains a quasi-judicial institution. The Constitution merely makes provision for the appointment, qualifications and tenure of office of

the Chairperson and Deputy Chairperson of the Industrial Relations Court. Members of the Court, other than the Chairperson and Deputy Chairperson, are appointed by the Minister responsible for labour and social security and do not enjoy the same conditions of service as those applicable to judicial officers. Similarly, assessors are nominated by the Minister. On the other hand, the Registrar, other officers and staff of the Court are appointed by the Judicial Service Commission.

The Commission also notes that the jurisdiction of the Court in industrial and labour matters is not exclusive.

In its submissions to the Mvunga Commission, the Judiciary called for the establishment of the Industrial Relations Court by the Constitution, security of tenure for its officers and equating the Chairperson and Deputy Chairperson of the Court to a Judge of the High Court. The Commission, in response, maintained that because of its quasi-judicial status, the Court could not be part of the Judicature. The Mwanakatwe Commission, whilst acknowledging the quasi-judicial character of the Court, recommended that provisions relating to appointment and tenure of office of the Chairperson and Deputy Chairperson of the Court, which were the same as those applicable to a Judge of the High Court, should be provided for in the Constitution.

The Court's status as part of the Judicature is somewhat incompatible with its quasi-judicial character. In its evaluation of the issue, this Commission considered the option of integrating the Court fully into the Judicature as a specialised Division of the High Court. The Commission is persuaded that such a course of action would not only resolve the issue of the status of the Court, but also give the Court a better chance of being strengthened in terms of its capacity, including jurisdiction and expertise.

As a Division of the High Court, the Court should now have exclusive jurisdiction in all industrial and labour relations matters. At present, the Court exercises concurrent jurisdiction of the High Court, hence the need for harmonisation of jurisdiction of this divisional Court. Lay members and assessors of the Court, as at present, can be appointed under appropriate legislation, although this may entail some amendments to the Act.

Recommendations

Accordingly, the Commission recommends:

- that the Industrial Relations Court should be established as a specialised Division of the High Court and that the Court should have exclusive jurisdiction in all industrial and labour relations matters;

- the Chairman and Deputy Chairman, who shall be known as Judges, be appointed by the President upon recommendation of the Judicial Service Commission, subject to parliamentary ratification;

- lay members and assessors of the Industrial Relations Court shall be appointed by the Judicial Service Commission on recommendation of the Ministry responsible for labour; and

- the Industrial and Labour Relations Act be appropriately amended.

10.2.12 Commercial Court

Submissions

A petitioner said that a Commercial Court should be introduced to promote efficiency in the resolution of commercial and business disputes (1)

Observations

The Commission observes that the Commercial Court has been established as a specialised Division of the High Court under ordinary legislation.

10.2.13 Juveniles Courts

Submissions

Some petitioners proposed that juvenile and child-friendly courts should be established (7). They also wanted to see juvenile offenders kept separate from adult criminals.

Observations

The Commission notes that though few petitioners addressed the subject, it nonetheless merits consideration.

The Commission notes that juveniles courts are constituted by Magistrates Courts under the Juveniles Act, Cap. 53. However, no such court has in fact been established, although the Judiciary has embarked on a project to promote child-friendly juveniles courts.

The need for the establishment of a Juveniles Court is founded on the principle that special attention and care should be accorded in the administration of justice pertaining to children, whether as offenders or as victims, complainants or petitioners. This is justified, as the ordinary court environment is often insensitive and unresponsive to the

psychological and social needs of children, including the need to protect children from the damaging effects of publicity in certain cases.

The Commission acknowledges that the establishment of a Juveniles Court would call for specialised expertise that is currently lacking, but also feels that these requirements would add substance to the profile, stature and competence of the Judiciary. However, in view of the fact that currently the workload would not justify the establishment of this division at the High Court, they should be restricted to the Subordinate Courts for the present and foreseeable future.

Recommendations

In the light of the foregoing considerations, the Commission recommends that:

- a Juveniles Court should be established as a special Division at the Subordinate Court level;

- the Juveniles Court shall have jurisdiction to deal with all matters involving juveniles, whether as offenders or complainants or petitioners;

- the Juveniles Court shall hold its proceedings in a child-friendly environment and its procedures shall reflect this;

- access to and publication of proceedings of the Juveniles Court should be strictly regulated by legislation along the lines of Article 18 (11) of the Constitution, as an exception to the rule under Article 18 (10) requiring court proceedings to be conducted in public;

- disclosure of identity of children in court proceedings should be strictly regulated and that this should be enshrined in the Constitution;

- lawyers, Magistrates and Judges should undergo specialised training in juvenile justice; and

- the establishment of the Juveniles Court, its jurisdiction, powers, procedures and other relevant details on the subject should be provided for in an Act of Parliament, unless otherwise required to be prescribed under the Constitution.

10.2.14 Special Courts and Procedures – Domestic Relations and Gender Violence

Submissions

Two petitioners proposed that there should be Special Courts to deal with issues of gender violence in order to ensure that they are handled with fairness, taking into account their sensitive character (2). One petitioner called for domestic relations proceedings in local courts to be held in camera (1).

Observations

The Commission observes that though it may not be appropriate to establish a special court to deal with gender violence, it nevertheless considers the need for a specialised court to deal with domestic relations, as is the case in a number of other countries. However, for the present and foreseeable future, this court should be established at the subordinate courts and local courts as the workload at the High Court would not justify its establishment at that level.

With regard to procedures relating to cases of sexual violence and domestic relations, the Commission observes that many times Courts handle these cases in an insensitive and embarrassing manner on account of existing procedures and rules of evidence. This is especially the case in subordinate and local courts where the majority of such cases are dealt with. In most cases, it is women who are subjected to such embarrassment and ridicule. The Commission urges that rules of procedure and evidence on the subject be revisited to alleviate any embarrassment occasioned to persons appearing before courts in cases of sexual violence and domestic relations.

Recommendations

The Commission recommends that:

- the Constitution should provide that court proceedings in cases of sexual violence and domestic relations should have regard for privacy and guarantee anonymity in appropriate cases; and

- appropriate legislation should establish Family Courts at the subordinate court and local court levels.

10.2.15 Local Courts

Submissions

10.2.15.1 Education and Training

One petitioner said that the Local Court Justice system should be upgraded in order to promote justice (1).

Some petitioners said that minimum education standards should be set and training programmes conducted for Local Court Justices in order to improve their performance (12). Suggested qualifications were Grades 9 and 12 certificates.

Observations

The Commission concurs with the views of petitioners that the performance of Local Courts is essential to the delivery of justice. This is in view of the fact that these courts are more accessible to the majority of the people than subordinate courts and superior courts. It is therefore important that their capacity be enhanced through minimum education standards and conducting training programmes for Local Court Justices. The Commission also feels that Local Court Justices should be experts in the customary law(s) of the communities in which they serve.

With regard to the requisite education standard for Local Court Justices, the Commission agrees that the minimum education qualification should be a Grade 9 certificate.

However, these issues should be dealt with by ordinary legislation and not the Constitution.

Recommendations

The Commission therefore recommends that the following qualifications for appointment as Local Court Justice be established by ordinary legislation:

- minimum education standard of Grade 9;
- a local resident and expert in the customary law of the rural community to be served;

- in the case of an urban community, a person should be an expert in most of the customary laws applicable to the people in that community; and

- a person should have successfully completed a prescribed training programme for Local Court Justices.

10.2.15.2 Jurisdiction of Local Courts

Submissions

Two petitioners were of the view that the jurisdiction and capacity of local courts should be strengthened to cover a wider scope of civil and criminal cases, as the majority of Zambians can only access these courts (2).

Observations

The Commission has no difficulty agreeing with the views of the petitioners on the subject. As already recommended, there is need to strengthen the capacity of Local Courts, *inter alia,* through improved education and training standards of Local Court Justices and expansion of criminal and civil jurisdiction in order to make them more effective in delivering justice. This can be done through the amendment of appropriate legislation to empower these courts to cater for more people at local levels.

Recommendations

The Commission recommends that, as part of capacity building of local courts, their jurisdiction should be expanded through appropriate legislation.

10.2.15.3 Accessibility

Submissions

One petitioner called for the establishment of more Local Courts to cope with the volume of work (1).

Observations

The Commission agrees with the petitioner that there is need for more local courts to be established in order to improve accessibility. However, this is an administrative issue that should be addressed by the Judiciary.

Recommendation

The Commission recommends that more Local Courts should be established to enable them to cope with the workload and that this should be done administratively.

10.2.15.4 Appointment and Supervision of Local Court Justices

Submissions

Two petitioners proposed that Local Court Justices should be nominated by Chiefs (2). This was in contrast to one petitioner who said that Local Court Justices should not be nominated by Chiefs, but employed on merit through a transparent and competitive process (1). On the other hand, one petitioner was of the view that Local Court Justices should be appointed by local residents from among the local people, because they understand the customs (1).

Some petitioners felt that Local Courts in Chiefs' areas should fall under the supervision of Chiefs or that Chiefs should preside over Local Courts, as was the case during the colonial era (9). A few other petitioners, however, argued that Local Courts in Chiefs' areas should not be supervised by Chiefs (5).

Observations

The Commission debated the question of involvement of local Chiefs in the processes of appointment and supervision of Local Court Justices at length. The Commission also considered the submission that Chiefs should preside over local courts, as was the case during the colonial era.

The Commission notes that though only a few petitioners addressed the subject, the majority were in favour of a system involving Chiefs in the appointment and supervision of Local Court Justices, whilst a minority of petitioners were not in favour of such a system. Others wanted Local Court Justices to be

recruited through a competitive and transparent process. Another petitioner wanted Local Court Justices to be elected by the people in the local communities concerned.

The Commission finds the issue of Chiefs appointing or nominating Local Court Justices inappropriate as this is exclusively done by the Executive. It is adequate that Chiefs are consulted and their consent is sought before the appointments are made.

One of the concerns expressed on the subject was that supervision of Local Court Justices by the Judiciary is extremely remote and that this leaves the Local Courts literally unsupervised for long intervals. There was dissatisfaction that because Chiefs do not have supervisory powers over Local Court Justices, they cannot intervene when complaints of maladministration of justice are made by the people. This was the argument advanced for the submission that Chiefs should supervise Local Court Justices or preside over these courts. Procedurally, the local Chief concerned is consulted before a Local Court Justice is appointed, but he/she plays no role in monitoring the performance of these Justices.

On the other hand, the Commission considered the possible implications of involving Chiefs in the supervision of Local Court Justices or having Chiefs preside over Local Courts. The Commission observes that such supervision may entail that Chiefs give directives to Local Court Justices. This would compromise the independence and impartiality of these Courts and undermine the rule of law.

Further, the Commission recalled that during the colonial era, Chiefs presided over Native Courts, but the system was found to be unsatisfactory and repugnant to justice. This was because it was improper for Chiefs to rule and, at the same time, adjudicate in court cases. In this regard, the Commission notes that some petitioners to the Chona Commission suggested that Chiefs should preside over local courts, as was the practice before independence. Whilst appreciating that Chiefs were the custodians of local customary law and that many people approached them for guidance on customary matters, the Chona Commission concluded that Chiefs were an extension of the Executive arm of the Government and therefore should not be allowed to be part of the Judiciary, as this would be contrary to the principle of separation of powers. This Commission fully

endorses, in this regard, views in support of the doctrine of separation of powers.

In the light of the above considerations, the Commission is of the view that Chiefs should not preside over Local Courts or be directly involved in the appointment and supervision of Local Court Justices. They should only be consulted to give their consent on appointment. The Commission is of the view that the Provincial Local Courts Officers should be strengthened to enable them to supervise Local Court Justices competently and efficiently.

The Commission notes that these matters would be appropriately dealt with by ordinary legislative and administrative measures.

Recommendations

The Commission therefore recommends that the following measures should be taken through legislative and/or administrative instruments:

- local Chiefs should be consulted and their consent be obtained before Local Court Justices are appointed;

- appointment of Local Court Justices should be through a competitive and transparent process at the local level to ensure that only qualified and competent persons are recruited;

- regular performance monitoring and evaluation of Local Courts and Local Court Justices should be conducted by the Office of the person in charge of local courts; and

- provincial local courts officers should be strengthened to enable them to supervise Local Court Justices competently and efficiently.

10.2.15.5 Lawyers Audience in Local Courts

Submissions

One petitioner said that lawyers should have audience in Local Courts (1).

Observations

The Commission observes that Local Court procedures are deliberately designed to facilitate easy access to justice by persons without the need for legal representation or technicalities. Also, not all lawyers are well-versed in the customary laws of the various ethnic groups of the country.

Recommendation

The Commission therefore recommends that lawyers should not be granted audience in Local Courts unless they appear on their own behalf.

10.2.15.6 Traditional Courts

Submissions

Some petitioners, including the House of Chiefs, called for Traditional Courts to be recognised and integrated in the judicial system (15). One added that these should have original jurisdiction in matters of customary law and should have powers to deal with witchcraft cases.

Further, two petitioners said that Traditional Courts should be given power to adjudicate in minor cases arising in their localities (2).

The House of Chiefs proposed that a "Traditional Court of Appeal" should be established and that the House should constitute such a court in order to ensure harmony between statutory and customary laws (1).

Observations

The Commission observes that the de facto existence of Traditional Courts, presided over by Chiefs in rural communities, is acknowledged. These courts deal with minor cases at the community level and they are functioning well. The Commission is of the view that the informal existence of these courts outside the official judicial system is a source of strength, in that they are not hampered by legal limitations or procedural rules and regulations that govern the judicial system. For example, Traditional Courts enjoy original and final jurisdiction in customary law.

In the light of the above considerations, the Commission is of the view that formal recognition and integration of these Courts into the judicial system may in effect weaken them and complicate the traditional justice delivery system.

Further, the Commission has considered the concept of a "Traditional Court of Appeal" which the House of Chiefs called for. In the light of the above observations, the Commission is of the view that Traditional Courts at the community level should continue to informally enjoy final jurisdiction in minor cases involving customary law without the complexity of formal recognition and requirement for a "Traditional Court of Appeal". The Commission also notes that these Courts complement the formally established Local Courts as an alternative means of administration of justice in customary law matters at that level.

In addition, the law guarantees the right of appeal from a Local Court to such an extent that a matter could be finally determined by the highest court in the land. In any case, the customary laws of the country vary to such an extent that the House of Chiefs would not have comparative advantage over the established court system in adjudicating in such appeals. Therefore, there is no compelling justification to introduce a "Traditional Court of Appeal" as an alternative to the existing system.

Recommendations

The Commission therefore recommends that:

- there should be no Traditional Court of Appeal; and
- traditional Courts should continue to exist and function as has been the case hitherto, but should not be given formal recognition and integrated into the judicial system.

10.2.15.7 Right of Access to Justice – Disposal of Court Cases

Submissions

A large number of petitioners for speedy disposal of court cases (70). Petitioners complained that cases take too long to be disposed of in courts, which has tended to adversely affect justice delivery. It was suggested that there should be a

maximum period in which every court case must be disposed of and judgment delivered. The suggested period ranged from two months to one year, with two months being the most popular.

Observations

The Commission appreciates the concerns expressed by petitioners on the delays in the disposal of court cases currently experienced, and observes that this constitutes an impediment to the enjoyment of the right of access to justice. As the adage goes, "Justice delayed is justice denied".

The Commission observes that it would be ideal for the Constitution to impose restrictions on law enforcement agents and judicial officers in order to secure the realisation of the right to expeditious trial and conclusion of cases. In this regard, the Commission notes that the majority of petitioners suggested that there be a limit of 60 days within which a case should be disposed of and judgment delivered. On the other hand, the Commission also acknowledges that this would be practically difficult to achieve in the light of the financial, human and other institutional resource constraints faced by law enforcement agents and the Judiciary in the administration of justice.

In its evaluation of the subject, the Commission took note of the fact that the subject was addressed by petitioners to both the Mvunga and Mwanakatwe Commissions. Whilst acknowledging the problems posed by delays in the disposal of court cases, the Mvunga Commission declined to recommend time limitation because of difficulties encountered by the courts and other agents involved in the administration of justice. Instead, the Commission recommended that the Law Association of Zambia, the Judiciary and Government institutions involved should continue to seek ways and means of addressing the problem.

The Mwanakatwe Commission, on the other hand, felt that there was need to place time limits on the courts and executive agents involved in the administration of justice in order to secure the right of access to justice. Accordingly, the Commission recommended that judgment should be delivered within 30 days following the conclusion of trial. Notwithstanding and appreciating the gravity of the problem, this Commission is of the view that the prevailing conditions

under which the courts and law enforcement agents operate would render such a constitutional provision difficult to attain.

Recommendations

Under these considerations, the Commission recommends that there should be no time limit imposed on the adjudication of court cases. The Commission instead recommends that:

- the Constitution should provide that court cases be disposed of and judgment delivered without undue and unreasonable delays; and

- the Legislature, Executive, Judiciary, other Government institutions and the LAZ should be urged to identify and implement remedial measures to deal with the problem of delays in the disposal of court cases.

10.2.15.8 Introduction of Jury System

Submissions

A few petitioners proposed that a jury system should be introduced in the Zambian criminal justice system (6).

Observations

The Commission, in its consideration of the subject, observed that historically the jury system, which entails the involvement of ordinary citizens in the administration of criminal justice (in particular the determination of the verdict of "guilty" or "not guilty" of an accused person), emerged as a result of the struggle to extricate judicial authority from the grip of the British Monarch, which was both the ruler and in charge of the Judiciary. Such a system is not necessary in a setting where the Judiciary is separate from the Executive and the criminal justice system ensures judicial impartiality and freedom from interference by the Executive. Further, socio-cultural, ethnic and economic considerations would render such a system unworkable. In this regard, the Commission notes that relatively few petitioners called for the introduction of the jury system in Zambia.

In the light of the foregoing, the Commission concludes that there are no compelling reasons for the jury system to be introduced in Zambia. What is paramount is the need to

enhance the independence and impartiality of Judges and other judicial officers in the adjudication of cases before them.

Recommendations

The Commission recommends that the jury system should not be introduced in the criminal justice system of Zambia.

10.2.15.9 Judicial Complaints Committee

Submissions

The National Assembly proposed that reports of the Judicial Complaints Committee should be submitted to Parliament so that the House is kept abreast of activities in the Judiciary (1).

Observations

Whilst it is important to acknowledge that exercise of parliamentary powers should not amount to interference with judicial functions, it is essential that Parliament extends its oversight role, for the purpose of providing checks and balances, to the work of the Judicial Complaints Committee. This, however, does not require the intervention of the Constitution. It can be addressed in the statute establishing the Judicial Complaints Committee.

Recommendations

Accordingly, the Commission recommends that Reports on the work of the Judicial Complaints Committee should be submitted to the National Assembly annually and this requirement be provided in the statute establishing the Committee.

10.2.15.10 President's Immunity from Contempt Proceedings

Submissions

A few petitioners said that the President's immunity should not extend to contempt of court, in particular where he/she comments on matters before courts of law (6). This, it was argued, would protect the independence and impartiality of the Judiciary.

Observations

The Commission appreciates the concerns expressed by the few petitioners who addressed this subject. It is, however, of the view that it would be improper to limit the immunity of a serving President from legal proceedings.

The courts are at liberty to assert the independence and impartiality of the Judiciary in cases where a serving President makes pronouncements that could undermine public confidence in the Judiciary. Nothing stops courts from stating that such pronouncements constitute contempt of court and that immunity from legal proceedings should not be misused to undermine the judicial authority of courts or public confidence in the courts. There is no need for the Constitution to assist courts in the matter.

Recommendations

The Commission recommends that courts should exercise their liberty to censure an erring President or to remind such a President that immunity from legal proceedings should not be misused to commit contempt of court and to undermine the judicial authority of courts.

10.2.15.11 Domestic Laws and International Instruments

Submissions

A few petitioners said that in interpreting domestic laws, international instruments to which Zambia is a party should be taken into account and should take precedence (3).

Observations

The Commission observes that in Zambia, international instruments to which the country is a State Party do not automatically have the force of law, but require to be specifically incorporated into domestic laws through legislation.

As already recommended under the chapters dealing with fundamental human rights and the Legislature (Chapter 3 and 9), the Commission is of the view that international instruments to which Zambia is a State Party require to be incorporated into domestic laws through legislation in order to be enforceable.

With regard to the question of precedence of international instruments over domestic laws, the Commission observes that where an international instrument is domesticated, the issue of precedence could not arise. The Commission, in this regard, notes that what needs to be done is domestication of international instruments.

Recommendations

The Commission recommends that the Constitution should provide that international instruments to which Zambia is a State Party should be incorporated into domestic laws through legislation in order to be enforceable.

CHAPTER 11

LOCAL GOVERNMENT

Terms of Reference:

No. 11 Examine and recommend effective methods to ensure grassroots participation in the political process of the country, including what type of provincial and district administration should be instituted; and

No. 29 Examine the local government system and recommend how a democratic system of local government as specified in the Constitution may be realised.

11.1 Introduction

Central to any meaning of democratic governance is the concept of self-governance and administration closest to the people. The essential notion is that inhabitants of a given area have the right and responsibility to make decisions on those issues that affect them most directly and on which they can make decisions. This is not only a question of social justice, but also of efficiency. Thus, the role of local government in general and decentralisation in particular, in a democratic dispensation is of fundamental importance in the promotion of good governance.

Local government simply refers to the system of Government at the local level. Such a system would normally be a decentralised representative institution with general and specific powers devolved to it within a geographically-defined area. The primary objectives of such a system are to facilitate the efficient delivery of services and to promote accountable and transparent governance which responds to and benefits all sectors of society, particularly the poor, and which strives to eradicate all forms of exclusion. Thus, the need for Local Government arises together with the need to bring the Government closer to communities.

Zambia, like many countries in the progressive world, is committed to good governance, which is essential to economic and social development. The essentials of good governance include constitutional legitimacy, accountability, transparent decision-making procedures, participatory development, democracy, respect for human rights and adherence to the rule of law.

This commitment is in line with the International Union of Local Authorities (IULA) World Wide Declaration of Local Self Government of June 1993, which provides, *inter-alia*, that:

> *"Considering that local government, as an integral part of the national structure, is the level of government closest to the citizens and, therefore, in the best position both to involve them in the making of decisions concerning their living conditions and to make use of their knowledge and capabilities in the promotion of development.*
>
> *The principle of local self government shall be recognised in the constitution or in the basic legislation concerning the governmental structures of the country."*

Further, the second United Nations Conference on Human Settlements (Habitat II) held in Istanbul in June 1996, demonstrated "that citizens are demanding to be seen and heard and to be given power to take part in decisions affecting their living environment." Modern managers and elected officials are relying less on top down approaches to governance. Many local authorities accept the idea that by adopting more open, accountable and transparent systems of governance, they will become more efficient.

Development of Post-Independence Local Government In Zambia

Since the attainment of independence in 1964 from British colonial rule, the Zambian Government has implemented three major local government reforms. The development of local government administration in independent Zambia can be divided into three phases: the first, covering the period from 1965 to 1980; the second, covering the period from 1981 to late 1991; and the third, covering the period from 1991 to date.

1965 – 1980

The local government system that operated in Zambia between 1965 and 1980 was based on the Local Government Act of 1965, which came into operation on 1 November 1965. This system was basically adapted from the former colonial master, Britain, and was suitable to a multi-party system of government, which Zambia embraced at independence.

The 1965 Act provided for four types of local authorities (city councils, municipal councils, township councils and rural councils). It may be noted that the President of Zambia was empowered to confer the title of 'city' on a deserving municipal council. The municipalities and townships and rural councils were divided into wards, each of which elected a single Councillor who served for three years. However, the Minister responsible for local government was empowered to

appoint persons to a council, provided that the number of appointed Councillors did not exceed three (five in the case of a municipality adjoining a mine township).

For each municipal and city council, there was a Mayor and Deputy Mayor, and for each rural and township council there was a Chairman and a Vice-Chairman, elected annually by Councillors from amongst themselves.

Town Clerks and Council Secretaries constituted the executive wing of the councils for cities and municipal and rural councils, respectively.

Most writers on local government have alluded to the fact that the period 1965 to 1972 was the most stable period in local government service delivery. During this period, electricity was controlled by local authorities and yielded substantial surpluses, which helped finance capital projects and general development. Local authorities also received steady and generous Central Government grants for community developments such as housing, roads, fire services, police and health services. These grants were based on some predetermined formula such as a percentage of the total expenditure. This stable and predictable flow of resources enabled local authorities to plan and implement adequate service delivery programmes and pertinent infrastructure developments.

However, this trend began to decline between 1973 and 1980 when the local government financial base began to deteriorate. The major factors included:

- the withdrawal of the Housing Grant in 1973 which hitherto had been extended to councils to assist them to keep rates down, with a view to attracting investors to cities;

- the 1974 Rent (Amendment) Act, which put restrictions on councils to evict defaulting tenants until after three months of accruing arrears for political reasons, thereby resulting in extensive rent arrears;

- the withdrawal of several grants such as police, health and fire grants, owing to general economic difficulties that the country was facing due to, among other things, the oil crisis;

- the 1975 watershed speech, which declared that undeveloped land would have no value and therefore was not rateable, resulting into loss of income that had accrued on rates and the retarding of capital developments since there was no impetus to develop land;

- the transfer of electricity distribution from local authorities to Zambia Electricity Supply Corporation, which previously had been involved only in the generation and transmission but not retail distribution; and

- the withdrawal of long term capital funding had disastrous consequences, especially on local authorities' capacities to maintain essential services such as water supply to increasing urban populations.

1980 –1990

In January 1980, the Government enacted the Local Administration Act No. 15 of 1980 to replace the Local Government Act of 1965. The major reason given for the repeal of the Act was that it had proved ineffective because of lack of integration and co-operation between different levels and institutions, such as the State administration, party organs and local councils. Officially, the 1980 Act had three principal objectives. These were to:

- decentralise power to the people;

- ensure an effective integration of the primary organs of local administration in the district; and

- enable district councils to play a more direct and substantial role in the development process than they had done in the past.

The rationale behind this integration under one body – "the District Council" - of local party units, local offices of central ministries and local government agencies themselves was to resolve the problems of lack of co-ordination and duplication of efforts and resources that had characterised local administration and local government during the previous system. District, party and council structures were fused as part of that process.

During this period, all existing city, municipal, township and rural councils became known as district councils. Where a district had both a township and a rural council, these were merged to form a district council.

Each district council was composed of a District Governor, who replaced the Mayor (or Chairperson); a District Political Secretary; two District Trustees appointed by the ruling party's (UNIP) Provincial Committee and approved by the (UNIP) Central Committee; all Chairmen of (UNIP) Ward Committees in the district; all Members of Parliament of the district; one representative from each of the trade unions operating in the district; one representative from each of the security forces; and one Chief elected by all Chiefs in the district.

The President appointed the District Governor and District Secretary. Chairpersons of UNIP Ward Committees were elected by UNIP members. To be eligible to stand as a candidate in UNIP ward elections, one had to be a paid-up UNIP card-carrying member. The composition of councils included chairpersons of the Youth League and Women's League of the party. The representatives of

mass organisations, trade unions and security wings were chosen by their respective organisations.

The Act also established a secretariat for each district council under the supervision of a District Executive Secretary. Under the said Act, the Minister of Decentralisation (Local Government) was given veto powers over most decisions by district councils, including major financial decisions.

It is on record that this is the period when the performance of local government worsened owing to, *inter-alia*, the following:

- councils were compelled to embark on commercial ventures such as clothing factories, hotels and farms following a presidential directive, but regrettably these ventures recorded massive losses, as they were not preceded by any feasibility studies or business analysis. Even their management was poor; and

- the assignment and transfer of the Central Government and Party (UNIP) functions and staff to local authorities without matching resources, which further weakened the financial and administrative position of the council while political structures were strengthened.

1991-2001

In December 1990, Zambia returned to a multiparty political system and upon taking over the reins of power in 1991, the new Government, under the Movement for Multiparty Democracy, enacted a new Local Government Act (the Local Government Act of 1991) in December 1991, to replace the 1980 Act.

The notable changes brought about by the 1991 Act included the clear institutional divorce of party structures from the council (at least on paper), the abandonment of the integrative role of the district councils, and the reintroduction of democratic representative local government based on universal adult suffrage. This local government system is basically a return to that which existed during the 1965-1980 period.

The councils under the current law are composed of elected Councillors representing wards, elected Members of Parliament in the district and two representatives of the Chiefs in the district appointed by all the Chiefs in the district. There is a Mayor and Deputy Mayor for City and Municipal councils, elected by the Councillors from amongst themselves. These officials are elected annually and can only hold office for a maximum of two consecutive terms. The Councillors constitute the legislative wing while the appointed officials, headed by Town Clerks (city and municipal councils) and Council Secretaries (for district councils) constitute the executive wing of the councils. The Councillors represent their wards and are responsible for making and supervising the implementation of

policies. The appointed officials are responsible for rendering technical advice to the Councillors as well as implementing policies.

The Minister of Local Government and Housing, Councillors and the appointed council officials are the key actors in the Local Government Policy process. The Minister is responsible for laying down broad policy guidelines for the bureaucrats in the Ministry to implement, and is accountable to Parliament and the President for all acts or omissions in the Ministry.

From 1991 until 2001, a number of statutes were passed and Government policies adopted and implemented, most of them to the detriment of Local Government. The most notable ones were:

- the Local Authorities Superannuation Fund (Amendment) Act No. 27 of 1991, which made it mandatory for council employees who had spent 22 years in the service of local authorities to retire. Meanwhile, no provision was made by the Government to refund local authorities for payments made to meet unbudgeted terminal benefits to retiring council employees. Even though this was later reversed in 1999, the adverse financial impact is still being felt by most councils;

- the complete withdrawal of Government funding to city and municipal councils, as announced in the 1992 Budget Speech to Parliament;

- the Ministry of Finance directive, in 1993, to transfer motor vehicle licensing functions from local authorities to the Road Traffic Commission, while the responsibility of maintaining roads remained with councils;

- the presidential sale of council housing units, including parastatal housing units, to sitting tenants in 1996 at giveaway prices, which robbed councils of one of their major sources of revenue in the form of rentals;

- the Rating Act. No. 12 of 1997, which increased the categories of properties exempted from paying rates; this was only reversed later in 1999 by Act No. 9 of 1999, but by then councils had lost substantial income;

- the transfer of water and other undertakings from councils to commercial utilities on 2 May 2000, under Statutory Instrument No.55 of 2000. Known as the Water Supply and Sanitation (Transfer of Property) Order, this law transferred all assets to commercial utilities while leaving related liabilities, including the operatives (i.e. workers) with local authorities. This problem has remained unresolved and explosive to date;

- the imposition of 50% salary increases by the Government just before the 2001 general elections for all unionised council workers in November

2001, and backdating them to September 2001, without matching budgetary provisions. Most councils have been struggling ever since to implement these salary increases, and those that did not implement them fell into arrears;

- the delayed approval of the decentralisation policy, which is very critical in giving direction to the local government sector and for the attraction of donor support to the sector; and

- the appointment of District Commissioners in the year 2000 under the office of the President without clear guidelines, which has brought confusion in channels of communication and politicised the administration at district level.

The effect of all these policies is that all councils in Zambia have been operating under very trying and unfavourable circumstances to the extent that they could be said to have lost the confidence of the public whom they are supposed to serve.

There is no doubt that the local government system in Zambia is facing very severe challenges. It has been estimated that most councils are only providing about 30% of the services they are supposed to provide to the residents. Some of the most visible symptoms of the problems in the local government are:

- huge heaps of uncollected garbage;

- perpetual strikes, erratic payment of salaries (in some councils, workers have gone for more than 18 months without pay);

- run down communal infrastructure like roads, street lights, water and sewerage systems; and

- a highly de-motivated workforce, making the proper running of these important institutions virtually impossible.

A recent study conducted by Transparency International Zambia on making local authorities more effective, transparent and accountable, revealed a general dismal performance of local authorities countrywide. The study cited the major contributing factors to such state of affairs as:

- lack of finances;

- poor relations between Councillors and council officials;

- low calibre of Councillors;

- lack of qualified and experienced personnel;

- unsupportive legislation and Government pronouncements; and

- political interference and undemocratic practices that have hindered active public participation in the affairs of local authorities.

The study also observed that the introduction of the Office of the District Commissioner has compounded the apparent lack of a clear distinction in the function of the Office of the District Commissioner, on the one hand, and that of the council's principal officer, the Town Clerk, on the other, resulting in conflict of roles.

Clearly, even though local government was given a new constitutional recognition in 1996 and has been democratised, the local government system is not structured to meet the current demands. A fundamental constitutional transformation is required to meet the challenges of today.

The Chona Commission, in its Report, recommended that a larger share of autonomy be given to local authorities to enable them administer local affairs more effectively.

Both the Mvunga and Mwanakatwe Commissions dealt with the subject of the Local Government system extensively. The Mvunga Commission recommended that:

- the province should be headed by a Provincial Resident Minister, to be assisted by a small but effective team of civil servants;

- the mayoral/chairmanship system should be reintroduced;

- civic and political functions at district level should be severed, with the former being administered by a Mayor/Chairman and the latter by a political appointee assisted by civil servants;

- in future, consideration should be given for non-Zambians who are residents to take part in local government elections; and

- consideration be given to the request for re-demarcation of provinces.

The Mwanakatwe Commission recommended, among other things, that issues of local government and, in particular, general objectives of the Local Government system should be provided for in the Constitution, namely:

- devolution of functions, powers and responsibilities from Central Government to province, district and sub-district;

- concepts of accountability, transparency and efficient administration;

- mechanisms for ensuring that each local government initiates and executes plans and policies; and

- the establishment of a sound financial base.

The Parliamentary Committee on Governance, Housing and Chiefs' Affairs, in its Report for the Third Session of the Ninth National Assembly, made a recommendation urging the Government to revisit the National Decentralisation policy and, in particular, to consider the devolution of responsibilities, power and resources to the local institutions serving the communities, as opposed to merely empowering departmental heads at the levels of the district and province.

Current Constitutional and Legislative Provisions

It is worth noting that until 18 May 1996, when the Constitution Amendment Act No. 18 of 1996 came into force, the previous Republican Constitutions made no direct mention of or reference to local government. Even the present 1996 Republican Constitution merely provides, under Article 109, that:

> *"There shall be such system of Local Government in Zambia as may be prescribed by an Act of Parliament. The system of Local Government shall be based on democratically elected Councils on the basis of universal adult suffrage."*

What this means is that the local government system in Zambia has been left to operate within the provisions of an Act of Parliament (Local Government Act Cap. 281 of the Laws Zambia), which could be changed at will to suit a given political situation. The present Act has many weaknesses. For example:

- the Act does not expressly define the purpose and objectives of local government;

- in terms of service delivery, the Act does not set minimum standards for measuring performance in Councils;

- since governance transcends the State and its organs to include civil society, the Act does not define relationships between various stakeholders in local governance, that is, the Act does not provide for decentralisation or co-operative governance at all;

- the Act leaves out the all-important aspect of local government finance in terms of fiscal relations between Central and Local Government;

- the Act also gives the Minister so many powers over democratically-elected councils that he or she can legally suspend all councillors and, with the approval of the President, dissolve all the councils and administer the whole country with appointed local government administrators; and

- the Act makes no reference to Provincial Administration or how the councils will relate with the province.

Under the provisions of the Act, councillors are elected by universal adult suffrage for a term of five years. Prior to the recent amendment to the Act in 2004, the term was three years. Mayors (city and municipal councils) and Chairpersons (district councils) are thereafter elected by councillors from amongst themselves to head Councils. They perform non-executive functions. The chief executive officers of councils are Town Clerks (city and municipal councils) and District Secretaries (district councils).

Central Government also functions directly at district level through a number of Government departments. These are supervised by the Office of the District Commissioner, which was introduced in the year 2000. The Office of District Commissioner is established under the Office of the President.

The introduction of this Office has led to controversies. Many people view the office as a political instrument of the ruling party. The background to this perception can be traced to, among other things, the role of the President in the appointment and removal of office bearers, non-adherence to normal civil service recruitment procedures, and affiliation of the appointees to the ruling party. In addition, as "appointees of the President", District Commissioners are not fully accountable to the provincial administration.

Further, there is an apparent lack of clear distinction in the functions between the Office of District Commissioner on the one hand and that of the Town Clerk/District Secretary on the other, resulting in conflicts.

At the provincial level, Government administration is headed by a Provincial Deputy Minister who is appointed by the President from among members of the National Assembly. The Provincial Deputy Minister is assisted by civil servants in Government departments who are led by a Provincial Permanent Secretary.

In terms of comparison, South Africa is a typical example of a country that has devolved power from Central Government to local authorities. Under the South African system, Municipalities are the engines of social and economic development. These Municipalities are vested with legislative authority and the right to govern on their own initiative, with little or no intervention from Central Government.

The Constitution of Uganda also has extensive provisions on the system of local government. These include the principle of devolution of functions, powers and responsibilities from Central Government to local government units and decentralisation of decision-making to the people at all levels. The Ugandan Constitution makes provision for the collection of local taxes and the retention of a percentage by local authorities, grants from the Government, distribution of revenue between Central Government and local authorities, and oversight by local government of the performance of civil servants and Government services and projects under their jurisdiction. The Constitution has also established a Local Government Finance Commission whose functions include giving advice on the distribution of revenue, the allocation of grants and local taxes.

11.2 Submissions, Observations and Recommendations

Three thousand seven hundred and ninety-nine (3,799) submissions were made on this subject. Most of these called for the devolution of power and the transfer of resources from Central Government to local authorities, the abolition of the Office of District Commissioner, an increase in the term of office of Councillors, and the awarding of salary and gratuity to councillors.

11.2.1 Local Government System

Submissions

A number of petitioners proposed that a system of local government, including the objectives, structures, functions and sources of funding for councils should be adequately provided for in the Constitution (61).

One petitioner said that the local government system should be restructured to ensure that it is accountable and transparent in its operations (1).

A petitioner claimed that the local government system had failed and that it was necessary to establish a commission that would review the system and recommend corrective measures (1).

Some petitioners called for the local government system to revert to the pre-independence system (8). Others specifically called for the reintroduction of Native Authorities under which Chiefs would be empowered to preside over developmental programmes in their areas (14). The main reason advanced was that Chiefs were better placed to steer and administer developmental programmes than Central Government. On the other hand, a few others submitted that the Office of District Commissioner, as existed under the colonial system, should be re-introduced.

Observations

The Commission notes that a number of petitioners specifically addressed the subject of local government system. They were concerned that currently the Constitution has no substantive provisions on the local government system. Petitioners argued that in order to have a strong, effective system of local government, general principles relating to objectives, structures, functions and the financing of local authorities should be clearly defined in the Constitution.

The Commission concurs with the views of the petitioners and observes that currently the Constitution does not clearly define the system of local government. It merely states that there shall be such a system of local government as may be prescribed by an Act of Parliament.

The Commission notes that it is at the level of local government that the people deal directly with the Government in terms of the delivery of services. Local government is best placed to play a leading role in representing local communities, protecting people's human rights, promoting the realisation of these rights and meeting people's basic needs. Therefore, the Government cannot successfully deliver on its development policies and programmes without a clearly defined and functioning system of local government. Recognising the important role that local government plays in national development, the Commission is of the view that the Constitution should make substantive provisions for the system of local government in terms of objectives, structures, functions and financing. These should not be left to ordinary legislation and successive governments to define.

In considering this subject, the Commission also notes that the Mwanakatwe Commission recommended that general objectives of the local government system should be provided for in the Constitution.

Regarding the call for the reintroduction of Native Authorities, the Commission concludes that petitioners were reacting to frustrations over inadequacies and inefficiencies of the local government system and the exclusion of traditional rulers from politics.

Recommendations

The Commission recommends that the Constitution should make provision for a decentralised system of local government that will outline the goal, objectives, structures, functions and financing, to include the following:

- **Goal:** To ensure devolution of functions, powers and responsibilities from Central Government to the province, district and sub-districts; to decentralise decision-making powers to the people at all levels; to promote people's participation and democratic control in decision-making.

- **Objectives**

    a) To provide an enabling environment for provinces and local authorities to initiate and execute policies and development plans;

    b) to provide democratic and accountable government for local communities;

    c) to promote social and economic development at local level;

    d) to ensure the provision of services to communities in a sustainable manner;

    e) to encourage the involvement of communities and organisations in matters of local government;

    f) to promote a safe and healthy environment;

    g) to establish a sound financial base for local government with reliable and predictable sources of revenue;

    h) to empower local authorities to employ persons in their services;

    i) to empower local authorities to oversee the performance of persons employed by the Central Government to provide services in their areas and to monitor the provision of Government services or the implementation of Government projects in their areas; and

    j) to promote co-operative governance in which the Central Government will support and enhance the developmental role of local government.

- **Structures**

  To establish such local government structures as may be necessary to respond to people's needs at provincial, district and sub-district level.

- **Functions**

  a) To administer the affairs of local government in general;

  b) to carry out land use planning and regulation;

  c) to ensure sustainable environment and development;

  d) to undertake transport planning and promote capital investment;

  e) to promote equity between developed and undeveloped parts of the area of jurisdiction, including redistribution of resources; and

  f) to promote local democracy by encouraging people's participation in decision-making through appropriate strategies and the provision of affordable and efficient services.

- **Financing**

  a) To ensure adequate and predictable financing of local authorities through appropriate resource mobilisation and allocation policies and other measures, including direct collection of local taxes; and

  b) to establish an independent commission to determine sharing of resources between Central Government and local government and the capacity of provincial and local government institutions.

11.2.2 Devolution of Power

Submissions

11.2.2.1 Constitutional Provisions

A number of petitioners argued that devolution of power should be enshrined in the Constitution (149). In particular, petitioners called for the creation of provincial legislatures that would, among other things, be responsible for approving provincial budgets. One petitioner said that power should not be devolved to provinces and districts since there is usually a tendency to abuse power and make arbitrary decisions in the administrative conduct at these levels (1).

Some petitioners felt that in order adequately to provide for the devolution of power in the Constitution, the recommendations of the Mwanakatwe Constitutional Review Commission should be adopted with the necessary modifications (27). Others were of the view that the Mwanakatwe Commission recommendations should not be taken into account in this process (3).

11.2.2.2 Decentralisation

There was a submission that Government ministries and departments should be fully decentralised to provinces (49). A number of petitioners called for the implementation of the Decentralisation Policy and for funds to be made available to facilitate this (4).

11.2.2.3 Central Government Policies

There was a submission that Central Government should not devise and implement policies that tend to disempower councils, such as the sale of council houses (1).

Observations

The Commission observes that a number of petitioners addressed the subject of devolution of power, functions, responsibilities and resources from Central Government to local government at the provincial and lower levels, in particular, the district.

Some petitioners specifically addressed the Barotseland Agreement, with some demanding its incorporation into the Constitution and others calling for it to be revisited.

The majority of those petitioners who spoke on the subject of the devolution of power wanted the concept to be enshrined in the Constitution and implemented. Petitioners argued that it was practically impossible for the Government to function directly and deliver effectively at the provincial, district and lower levels. They also lamented that systems of local government instituted and experimented upon since independence had failed to deliver. Petitioners further cited inequalities in the allocation of resources and development between the capital city, Lusaka and urban centres, on the one hand, and rural areas and other parts of the country**,** on the other, as an illustration that the centralised system of government excluded most parts of the country and the majority of the people in terms of socio-economic development.

The Commission deliberated on the concept of the devolution of power at length and came to the conclusion that petitioners' views and arguments on the subject were well-founded. They are based on the country's history of poor performance in political, social and economic development in genera, and poor service delivery at the provincial, district and lower levels in particular. Deepening levels of poverty among the people, the poor state of infrastructure and a lack of basic services attest to the need for viable policy solutions.

Though self-determination, per se, at the local level may not guarantee a reversal of the negative trends in socio-economic development, the failures of the centralised system of government are evident. They are, to a large measure, characteristic of a system that operates on the lines of a "representative government" which, in effect, excludes the people it represents from direct control and determination of their developmental agenda. Such a system overlooks capacity limitations of the Central Government and the negative impact on development of alienation and exclusion of the people it purports to represent.

At the global level, nations seek independence or self-determination as a means of fulfilling political, social and economic aspirations. Similarly, the call for devolution of power from Central Government to local government is part of people's search for solutions that will enable them define and respond to their needs and aspirations.

In the concept of devolution of power, petitioners conceive an arrangement where legislative and administrative authority would bring provinces and districts close to the span of powers vested in Central Government. In this way, provinces and districts will enjoy increased autonomy, although the context of this would be defined taking into account the role of Central Government in the administration of affairs affecting provinces and districts, as well as the dependent nature of provincial and district economies.

The people in the various provinces of the country share many circumstances and needs, and many problems and aspirations. They have worked together and continue to work together as a nation to pursue a common destiny. At the same time, their different histories, cultures and economic resources tend to define or characterise their diversity, sometimes in fundamental ways.

There are many other factors to be taken into account. For example, the Western and Eastern provinces differ in their histories, their traditional governmental patterns and the proportions of local and non-local people in their populations. Perceptions at the various levels of government may also differ. For example, some of the institutions Central Government would support devolution largely because they view it as a cost cutting exercise. However, some provincial administrations would support it as a means of increasing self-determination of the local people. Others with prospects of relatively rich economies might see an opportunity to control and utilise their resources for the betterment of their provinces. Yet others with little or no resources might see a danger of even deeper exclusion unless adequate guarantees for resource allocations are made.

These contradictions suggest that it should be expected that the contribution of Central Government and local authorities to the devolution of power should be understood as the outcome of the patterns of co-operation and conflict within it. The contrasting interests and vantage points of all these participants make it inevitable that quite different interpretations of devolution are likely to develop. For example, residents in local communities may not understand the compromises which their provincial and district authorities have to make in order to meet the concerns of Central Government. They may view these concessions as evidence of a lack of sensitivity to local or regional needs. For their part, provincial and district authorities may not fully appreciate the roots of the concerns which prompt some leaders at national level to resist devolution.

On their part, leaders at national level may be sceptical about the prospects of success for devolution, not least because they view provincial and district Government structures as lacking the necessary capacity. In addition, they may consider the concept a threat to their own survival.

Judgments about devolution must be tentative until it is tested. However, wholehearted political would be essential. Some important powers, such as control over development planning and infrastructure development**,** would have to be devolved. In other matters, such as revenue collection, devolution would have to take place at the level of local authorities. There would be a need for agencies to administer policies such as health and education boards. In the absence of experience, how effectively they would function and use their power to meet the needs of the people can only be speculated. Regarding forestry, some new policy priorities and programmes would be expected to result from devolution. Also,

the impact of devolution would be influenced by developments on other constitutional fronts.

It is worth noting that devolution, where it has been practised, has tended to enhance the responsiveness of policy, but not local control over it.

It may be suggested that the people of the Western Province have pursued the concept of devolution more aggressively than the people of other provinces. The differences appear to reflect different constitutional strategies, with people of other provinces considering the Barotseland claim as part and parcel of the general claim for devolution.

As already stated in the introductory part of this Chapter, the Commission notes that successive Governments of Zambia have, at different stages since independence, attempted to respond to the need to devolve power to the people by developing some models of decentralisation. These have not been implemented successfully, largely due to lack of political will. The Commission notes that the current system of local government has failed dismally to meet the basic needs of Zambians.

The Commission is of the view that the new Constitution should enjoin local government to seek to provide services to all the people, but also to be fundamentally developmental in orientation. Further, there is need to set out the core principles, mechanisms and processes that will give meaning to developmental local government and to empower municipalities to move progressively towards the social and economic uplifting of communities and the provision of basic services to all the people and, specifically, the poor and disadvantaged.

The Commission is also of the view that a fundamental aspect of the new local government system should be the participation or active engagement of communities in the affairs of the municipalities of which they are an integral part and, in particular, in planning service delivery and in performance management. Above all, the new system of local government requires an efficient, effective and transparent local public administration that conforms to constitutional principles and the need to ensure financially and economically viable municipalities. However, the process towards total devolution of powers, functions, responsibilities and resources to local government at provincial and district levels should be gradual. This is so as to give the country enough time to re-align itself in terms of institutional structures, policy development, and both human and financial resources.

In its evaluation, the Commission also considered the views of previous Commissions on the subject. Petitioners to the Chona Commission were concerned about the lack of power on the part of local authorities to make decisions on issues of local development. They complained that, instead of

implementing the Decentralisation Policy, the Government was centralising power and decision-making. The Ministry of Local Government was managing local authorities to micro levels. They demanded a large measure of autonomy for local authorities to enable them to make decisions affecting local interests. The Commission recommended that viable local authorities be given a larger measure of autonomy.

In its findings, the Mvunga Commission observed that few petitioners suggested the creation of provincial assemblies or councils composed of elected leaders and traditional Chiefs in the province.

The Mwanakatwe Commission observed that there was a serious power vacuum at provincial and district levels and that this was particularly acute between district and village structures. The Commission further observed that the political and administrative vacuum was even more complicated by the perceived failure to distribute the national wealth equitably to all parts of the country. In addition, it was observed that petitioners to the Commission felt that the prevailing system alienated the people from their Government and created a feeling of powerlessness, marginalisation and neglect. The Commission recommended some measures aimed at strengthening local government administration, including financing.

In the light of the above considerations, this Commission is of the view that Zambia should adopt a suitable system of decentralisation and deconcentration of some powers, functions, responsibilities and resources to local government, based on the district as a basic unit, under which there shall be such lower local governments and administrative units as may be provided by an Act of Parliament. The system should include principles of local government, structures and systems, the financing of local government and integrated and participatory planning. The main features of this system should be enshrined in the Constitution.

In terms of comparison, the Commission observes that the South African and Ugandan models of devolution of power and decentralisation may offer helpful lessons in defining a suitable system for Zambia.

Recommendations

The Commission recommends that the Constitution should make provision for the system of local government and decentralisation and deconcentration of some powers, functions and resources to appropriate local government structures as follows:

System of Local Government

The system of local government in Zambia shall be based on the district council as a unit which shall integrate Government and local authority departments into one, and under which there shall be such lower local government structures and administrative units as my be provided by an Act of Parliament.

Principles of Local Government

The system of local government in the Republic shall be based on democratically elected city, municipal and district councils founded on the basis of universal adult suffrage and which shall function on principles of democratic decentralisation, in general, and devolution, in particular, of power from Central Government to lower levels of governance. Specifically, the following principles shall apply to the local government system:

- the purpose of decentralisation shall be to give power and responsibility to lower echelons, and promote local democracy and good governance, with the ultimate objective of improving the quality of life of the people through improved delivery of public goods and services;

- decentralisation should be to local government structures which are representative of and accountable to all sectors of the local population, including marginalised and disadvantaged groups;

- decentralisation should be to levels of local government structures which enable effective community participation in local governance;

- decentralisation should involve the transfer to local government institutions of those powers, functions and matching resources necessary to enable them to:

    a) provide services for the local population efficiently and effectively;

    b) provide a conducive environment for local economic development; and

    c) develop and manage local resources in a sustainable manner.

- the local government system shall provide for affirmative action to ensure adequate representation of marginalised groups such as youths, women, the disabled and the aged;

- financial resources should be available to local authorities in a manner which is reliable, adequate, predictable, transparent, accountable, sustainable and equitable; and

- local Authorities shall be accountable to their electorates and to Central Government regarding the execution of their mandates.

Structures of Local Government

City, Municipal and District Councils

- the city, municipal or district council shall be the highest service organ and political authority within its area of jurisdiction, and shall have legislative and executive powers to be exercised in accordance with this Constitution;

- the council shall comprise:

    a) all persons residing in the district represented by elected councillors from each ward in the district, provided that elections to the council shall be based on such electoral systems as is prescribed in this Constitution or as shall be prescribed by an Act of Parliament in order to take into account the principle of affirmative action for special interest groups, as provided for in this Constitution;

    b) all area Members of Parliament holding constituencies in the district;

    c) three Chiefs representing all the Chiefs in the district;

    d) one representative from the Chamber of Commerce in respect of councils which have Chiefs' representatives, and two representatives from the Chamber of Commerce in districts where there are no Chiefs' representatives; and

    e) one representative from the Defence and Security wings operating in the district.

- a person shall not be a member of a council unless that person is a citizen of Zambia according to this Constitution;

- the council shall be headed by a Mayor or Chairperson who shall be elected by a direct vote and who shall have executive powers over the service delivery mandates of the council;

- a principal officer who shall be appointed in accordance with the relevant provisions in this constitution shall head the district council administration; and

- subject to the provisions of this Constitution, district councils shall be responsible for the physical implementation of all or any of the functions assigned to them by or under appropriate legislation such as those reflected in the schedule; provided that councils may, on request by them, be allowed to exercise the functions and services of Central Government or if delegated to them by Central Government or by an Act of Parliament.

Sub-district

Subject to the provisions of an Act of Parliament, there will be, at the ward level, such structures as will facilitate and enhance community participation.

Financing Local Government

Notwithstanding the mandate assigned to the National Fiscal and Emoluments Commission, the Constitution shall provide:

- guaranteed entitlement of councils to an equitable share of revenue raised nationally, in addition to retention of local revenue necessary for the adequate performance of mandates assigned to them;

- entitlement of councils to receive any other allocations from Central Government either conditionally or unconditionally;

- entitlement of councils to levy, charge and collect appropriate fees and taxes, royalties, rates and other funds in accordance with the law; and

- empowerment of councils to collect taxes on behalf of Central Government for payment into a consolidated fund and to retain for the council's functions and services a specified proportion of the said revenue.

Integrated and Participatory Planning

In order to facilitate the attainment of their democratic and developmental mandates:

- councils shall prepare comprehensive and integrated development plans in a participatory manner incorporating interventions under all mandates assigned to them for submission to Central Government;

- the integrated plans of councils shall be prepared and submitted in such timely manner as to form an integral component of the national budget process; and

- integrated development plans shall incorporate sub-structure organs.

Structures and Systems of Central Government

For purposes of facilitating the mandates of councils, the structure of Central Government shall be as follows:

Provincial Administration

- the Provincial Administration shall comprise:

    a) a Provincial Minister, appointed by the President, who shall be the political head of the province;

    b) a Permanent Secretary, who shall be the administrative head of the province; and

c) a Provincial Council consisting of Mayors and/or Chairpersons of councils, and three Chiefs' Representative elected by all Chiefs in the province from among persons representing Chiefs in councils at the district level.

- the Permanent Secretary will be supported by a team of technocrats in matters relevant to the development of the province. In accordance with the decentralisation principle, the technocrats shall not be hierarchical heads of the mandates devolved to councils;

- the Provincial Administration shall discharge such functions as shall be assigned to it by or under an Act of Parliament; and

- as an integral component of Central Government, the Provincial Administration shall retain oversight responsibility over all functions performed by councils as reflected in the schedule.

Central Government

Central Government shall:

- for such functions as shall be assigned to councils and provincial administration, generally retain policy formulation, supervisory and oversight responsibility; and

- be responsible for policy formulation, regulation as well as physical implementation for all such functions as shall be assigned to it by or under an Act of Parliament.

Principles of Intra-Governmental relations

In the Republic of Zambia, the Government shall constitute two separate, interactive and interdependent spheres, namely Central Government and local government. Central Government shall comprise national and provincial administration, while local government shall comprise councils (cities, municipalities and district councils) and the sub-district structures to be established under them.

Central Government and Local Government shall, in the exercise of their powers and performance of their functions, be obligated to

observe the principles of intra-governmental relations such as the obligation to conduct their affairs in a manner that enhances the overall performance of the Government.

The Commission further recommends that the Local Government Act should make provision for the functions of city, municipal and district councils and provincial administration as shall be assigned by or under an Act of Parliament, including those reflected in the schedule to this Chapter.

In addition, the Commission recommends that arrangements to facilitate the decentralisation and deconcentration of power, functions, responsibilities and resources to local government should be implemented within a period of five years as follows:

- enabling legislation to be enacted;
- identified structures to be established and elections conducted in districts; and
- decentralisation of power and functions and corresponding resources in respect of matters listed in the Schedule to this Chapter.

11.2.2.4 Use of Local Languages

A few petitioners called for the use of local languages in council proceedings in addition to English (3). There were two submissions to the effect that people should participate in the legislative processes of councils (2).

11.2.2.5 Dissolution of Councils

Two petitioners said that Councillors should have power to dissolve themselves and that such power should be provided for in the Constitution (2).

Observations

Regarding the call for council proceedings to be conducted in local languages, the Commission observes that in some areas, particularly in urban centres, this might entail using all vernacular languages communicable in those areas. Also, this would necessitate translation of records and interpretation of proceedings. The Commission appreciates the need to enhance people's participation in the work of councils and recognises that effective communication is essential in achieving

this. However, due to various limitations, it is not practical to use local languages as a strict requirement, particularly for record purposes.

On the question of councils having power to dissolve themselves, the Commission agrees that this is in line with the principle of decentralisation of power to local government. Councils should have power to dissolve themselves and this should be enshrined in the Constitution.

Recommendations

The Commission accordingly recommends that:

- council proceedings should be conducted in the official language (English) for the purpose of records, while local languages may be used for the convenience of communication in the course of proceedings; and

- councils should be at liberty to dissolve themselves.

11.2.2.6 Barotseland Agreement, 1964

Submissions

A number of petitioners who addressed this issue argued that the Barotseland Agreement should be restored and incorporated in the Constitution (126). Others were of the view that the Agreement should be revisited. The main reason advanced was the need to restore the authority of the Barotse Royal Establishment over the local administration of the Western Province.

Observations

Although the Commission did not have a specific term of reference to deal with the Barotseland Agreement, it proceeded to consider submissions on the subject within the framework of local government. The Commission is in agreement with the observations of the Mvunga Commission that the issue could only be settled by the parties concerned in terms of provisions of that Agreement. The Commission also notes that the Mwanakatwe Commission recommended that the Government and the Barotse Royal Establishment should negotiate over the Agreement. However, it is this Commission's view that since these submissions were motivated by a desire that power should devolve to the Royal Establishment, the matter could be considered within the context the system of local government recommended in this Report.

The Commission deliberated at length on the subject of the Barotseland Agreement and Commissioners observed that some petitioners wanted the whole Agreement restored and incorporated in the Constitution whilst others merely called for the Government and the Barotse Royal Establishment to revisit the Agreement with a view to reactivating some of its provisions. The main motive in these submissions was the restoration of the authority of the Royal Establishment. Views expressed by petitioners to this Commission were similar to those of petitioners to the Mvunga and Mwanakatwe Commissions.

The Commission notes that in a historical perspective, the unitary nature of Zambia as a State is derived from the fact that two constituent territories the Protectorate of Barotseland and the Protectorate of Northern Rhodesia, signed this Agreement to become one independent Sovereign Republic of Zambia.

This principle is enshrined in Paragraphs 2 and 3 of the Preamble to the Agreement. This principle was further reflected in the legal instruments that gave birth to the Republic, that is, Article 20 (1) of the Northern Rhodesia Independence Order, 1964, which promulgated the Independence Constitution and Section 1 of the Zambia Independence Act of 1964.

An important aspect of the Agreement was that it provided for the recognition of the Litunga of Barotseland as the principal local authority for the Government and Administration of Barotseland, with powers to make laws for Barotseland with respect to matters such as land, natural resources and taxation.

However, by Act No. 5 of 1969, the Referendum Act was amended. That amendment had the effect of abolishing all referenda. It was specifically aimed at facilitating amendments to the Constitution in respect of rights to property, without recourse to referendum, as the law then provided. Consequently, on 23 October 1969, an amendment to the Constitution was made which, inter alia, resulted in the abrogation of the Barotseland Agreement without prior consultation with the people of Barotseland through the Litunga and council.

The effect of the abrogation meant that all rights, liabilities and obligations accruing under the Barotseland Agreement of 1964 ceased.

Further, the unilateral abrogation of the Agreement has given rise to frustrations and a sense of betrayal of the people of Barotseland by the Zambian Government, hence their demand for the restoration of the Agreement.

Consequent to these frustrations, the Barotse Royal Establishment has continued to ignore the abrogation and has, in some instances, continued to discharge its functions as provided for in the Agreement, thereby resulting in conflict between the Barotse Royal Establishment and the local authority in the province. From the foregoing, it is clear that the need to find a solution to this problem cannot be over-emphasised.

The Commission notes that the submissions made to both the Mvunga and Mwanakatwe Commissions are similar to those made to this Commission. The two Commissions concluded that the issue of the Barotseland Agreement be settled by negotiations between the Government of the Republic of Zambia and the Barotse Royal Establishment.

The Commission further observes that in spite of those recommendations, negotiations have never been effected on account of lack of political will on the part of the Government. The Commission is of the view that the country should utilise the current Constitution Review Process as a legitimate political device to address the social and political issues confronting it, including the Barotseland Agreement of 1964.

In this regard, the intent, evolution and arbitrary abrogation of the Barotseland Agreement should be addressed through appropriate legislation in the context of the structures of the devolved system of local government now being proposed by this Commission.

Recommendations

The Commission recommends that:

- the Barotseland Agreement should be addressed through the decentralisation system of local government as recommended in this Report; and

- the Government and the Barotse Royal Establishment must show political will to finally resolve the outstanding issue of the Barotseland Agreement by initiating negotiations between the two parties to the Agreement.

11.2.3 Local Government Staff Establishments

Submissions

A number of petitioners called for local authority staff to be on the payroll of Central Government (48). Another suggestion was that chief executives of councils should be employed by Central Government and be transferable.

A few petitioners said that Town Clerks and Council Secretaries as well as chief officers of councils should be employed on contract (5). One petitioner argued that the Local Government Minister should be responsible for the appointment of Chief Executive Officers and Chief Officers of councils (1).

There were a few petitioners who submitted that the Local Government Service Commission should be reintroduced (10). On the other hand, three petitioners wanted Township Boards to be reintroduced (3)

Observations

The Commission observes that calls for the staff of local authorities to be employed by Central Government or placed on Central Government payroll were a reaction to failures of the local government system. However, such an arrangement would not be compatible with the principle of devolution of power and, in any case, such an arrangement would promote insubordination among staff.

11.2.4 Powers of the Minister

Submissions

Some petitioners called for the reduction of powers of the Minister of Local Government over the affairs of councils, for example, the power to dissolve councils and approve budgets and by-laws. It was argued that the Minister's powers should be reduced in order to minimise undue interference and improve the efficiency and effectiveness of councils. Petitioners added that the Constitution should define the roles of and relationship between the Ministry in charge of local government, provincial administration and councils.

Observations

The Commission notes that petitioners were concerned that the Minister of Local Government has immense powers over councils under the current law, which include approval of by-laws and budgets and power to dissolve councils. This, they argued, undermines the effectiveness and efficiency of councils. The Commission agrees with these views and observes that these powers are incompatible with the concept of local self-governance. The Commission notes that a strong and capacitated local government can play a significant role in enhancing the success of national and provincial policies and programmes, and building sustainable communities for the nation. In a spirit of co-operative governance, Central Government should seek to support and enhance the developmental role of local government.

Recommendations

The Commission recommends that the exercise of authority by Central Government should be in the context of co-operative governance and intra-governmental relations recommended in this Report, and any interventions should be within the framework of the provisions of the Constitution and relevant legislation to that effect.

11.2.5 Accountability and Management Capacity

Submissions

One petitioner said that councils should build the capacity required for the efficient delivery of services and management of resources (1). Another petitioner wanted mechanisms through which councils and management can be held accountable to the residents to be put in place (1).

Observations

The Commission notes the concerns of petitioners that local authorities should build capacity in order to effectively deliver services and that they should be held accountable. The Commission acknowledges that these attributes are essential for decentralisation to succeed.

Recommendations

The Commission recommends that capacity building for local authorities should be undertaken within the framework of the decentralization and deconcentration of power and that provinces should, within the context of co-operative governance and intra-governmental relations, have power to conduct audits of local authorities, including performance audits.

11.2.6 Revenue Mobilisation

Submissions

11.2.6.1 Financing Local Authorities

A number of petitioners said that local authorities should be adequately funded by Central Government in order for them to effectively provide services (230). Most of the petitioners added that grants to councils should be substantial (up to 50% of a council's budget), predictable and should be guaranteed by the Constitution.

11.2.6.2 Sharing of National Resources

A number of petitioners said that councils should be entitled to an equitable share of national resources (87). Some of these called for the establishment of an independent body to determine resource sharing between Central Government and councils.

11.2.6.3 Local Levies and Taxes

Some of the petitioners who made submissions on the subject of financing of local authorities and sharing of national resources also said that councils should be allowed to introduce new taxes and levies to be able to raise revenue. Forty-four petitioners said that councils should be empowered to levy a poll tax on all adults and that they should charge tax on local industries, motor vehicles and receive royalties from natural resource exploitation and retain a percentage of that revenue (44).

Observations

The Commission notes that a number of petitioners were concerned that local authorities are not adequately funded and that this has resulted in their poor performance and failure to deliver services. Some of these petitioners wanted Central Government to give substantial grants to councils for the effective delivery of services. Others wanted to see equitable resource sharing between Central Government and local authorities. They suggested that an independent Commission should be established to determine resource sharing between Central Government and local authorities. Petitioners also wanted local authorities to be allowed to collect local taxes in order to boost their financial base. These concerns were compounded by the fact that major sources of revenue, such as houses, motor vehicle licences, water supply, electricity distribution, sales tax and liquor licensing had been taken away from local authorities by Central Government, thereby depleting their revenue base.

The Commission concurs with these views and acknowledges that financing of local authorities is essential if these institutions are to successfully deliver services to the people, as is the case in other countries like Uganda and South Africa, where the sources of revenue for local authorities are entrenched in the Constitution itself.

Recommendations

Accordingly, the Commission recommends that adequate arrangements for sharing of resources between Central Government, provinces and local authorities and direct mobilisation of finances by local authorities, through local taxes, should be made within the framework of the decentralisation of power to local government and this should be enshrined in the Constitution.

The Commission further recommends that the Constitution should specifically provide in respect of each financial year:

- unconditional grants to local government to run decentralised services;

- conditional grants which shall consist of monies to local governments to finance programmes that shall be agreed upon between Central Government and local governments; and

- equalisation grants which shall consist of monies to local governments for giving subsidies for making special provisions for the least developed districts and shall be based on planning indices (i.e. the degree to which a particular district may lag behind in terms of development).

The Commission also recommends that:

- that the proposed grants shall be included in the annual estimates of revenue and expenditure of the Government which shall state the sum of monies that will be paid to each local government; and

- the grants shall form part of the appropriation Act as recommended in this Report.

The Commission also recommends that without prejudice to the above and other recommendations, local government should be legally empowered to collect all appropriate taxes such as poll tax, motor licences, royalties and timber levies, as well as to borrow monies and, with the approval of the Government, to accept any grants or assistance for the carrying out of its functions and services.

11.2.7 Office of the District Commissioner

Submissions

A large number of those who addressed the subject argued that the office of District Commissioner should be abolished (500). The main reason advanced was that it was an unnecessary drain on public resources. It was observed that the Office served to promote partisan political interests of the ruling party and that the work of the District Commissioner could be better done by the Town Clerk or Council Secretary.

On the other hand, a number of petitioners felt that the position should be retained (332). Among these, many said that the Office should be depoliticised and filled by career civil servants appointed by the Public Service Commission and who should hold a minimum of a university degree. Others said that a university degree was not essential. Some called for the President to be the appointing authority (13), while others said that the post should be elective (23). Some amongst these suggested that MPs and Councillors should form electoral colleges to elect District Commissioners.

A few petitioners said that the position of District Governor should be reintroduced to replace that of District Commissioner (2).

Observations

The Commission notes that a sizeable number of petitioners addressed this subject. The majority of these wanted the Office of District Commissioner to be abolished, arguing that it was an unnecessary drain on public resources. Petitioners expressed the view that the office existed only to serve partisan interests of the ruling party.

Others, on the other hand, called for retention of the Office, but urged that it should be depoliticised and held by career civil servants.

The Commission observes that the call for abolition of the Office of District Commissioner was a reaction to the political influence in the appointment of the office-bearers and operations of the Office as well as the centralised system of government under which it is established. The Commission is of the view that this Office would serve no purpose if power, functions and responsibilities were decentralised to democratically elected institutions in order to promote self-local governance. Under the recommended integrated planning and participatory budgeting, there shall be only one unit at the district level, namely the district council.

Recommendations

The Commission therefore recommends that the Office of District Commissioner should be abolished.

11.2.8 Local Government Elections

Submissions

Three petitioners said that local government elections should be provided for in the Constitution and not left to ordinary legislation (3). Three other petitioners agreed that non-Zambians with valid residence permits should be eligible to participate in local government elections, including contesting elections (3).

Observations

The Commission notes that only two views were considered under this subject. Few petitioners wanted provisions on local government elections to be enshrined in the Constitution. One petitioner called for non-Zambians with valid residence permits to be eligible to vote and contest local government elections.

The Commission has no difficulty with the idea of embodying the principle of local government elections in the Constitution, but is of the view that details should be left to ordinary legislation.

On the question of non-Zambians participating in local government elections, the Commission notes that until 1992, non-Zambians were allowed to vote, but not to contest in elections. The rationale then was to enable established residents to participate in local civic affairs. In the Commission's view, this position can no longer legally be supported, because the right to vote is enjoyed by citizens and not non-Zambians. The Commission therefore is of the view that the current provisions restricting participating in local government elections to Zambians only are justified and should be retained to safeguard national interests. This is common practice in many parts of the world. However, necessary provisions for this should be left to ordinary legislation.

Recommendations

Accordingly, the Commission recommends that the principle of local government elections should be embodied in the Constitution, whilst details should be prescribed by an Act of Parliament, and that only Zambians should be allowed to participate in local government elections.

11.2.9 Election of Mayor/Council Chairperson

Submissions

A number of petitioners said that Council Mayors/Chairpersons should be elected by universal adult suffrage (186). Some among these proposed that their Deputies should also be elected. Very few petitioners called for an absolute majority vote of at least 51% in order for a candidate to win an election (3).

Some petitioners said that Councillors should elect Mayors and Chairpersons of councils (27). A few petitioners suggested that councils should have Executive Mayors or Chairpersons, as the case may be (5).

Observations

A sizeable number of petitioners addressed the subject. The majority of these wanted the Mayor elected by universal adult suffrage. A few of these petitioners further suggested that a winning candidate should receive at least 51% of the votes cast. A few other petitioners wanted the current system of election of Mayor to be maintained. Yet others submitted that councils should have an executive Mayor.

The Commission observes that the idea of a Mayor or Council Chairperson being popularly elected points to a desire to have local authorities presided over by a person democratically chosen by the people. Such a person would inspire confidence in the minds of the electorate and enjoy popular support to spearhead development programmes of a Local Authority. This is important for successful service delivery.

The Commission further notes that a similar call was made by petitioners to the Mwanakatwe Commission which, in response, recommended election of Mayors, Chairpersons and their Deputies by direct vote for a term of three years.

This Commission does not, however, consider the idea of a 51% threshold of votes practical at this level of government, as it would lead to unnecessarily protracted and costly electoral processes.

The Commission is further of the view that it would be appropriate for popularly elected Mayors/Council Chairpersons to have executive power as demanded by some petitioners. The Commission observes that this arrangement is common in Scandinavian countries. The Commission's view is that the role of these leaders and Councillors should be restricted to directing policies and service delivery. Implementation should be left in the hands of appointed executives.

In addition, the Commission is of the view that the Constitution should make provision for qualifications and disqualifications for election to the Office of Mayor/Council Chairperson which should be the same as those relating to contesting for the Office of Councillor, with a modification as to educational requirement.

The minimum education qualifications for election to the Office of Mayor or Chairperson, should be a Grade 12 certificate or its equivalent.

Further, the Commission is of the view that the emoluments of a Mayor/Chairperson should be determined by the Emoluments Commission upon the recommendation of the Council.

Recommendations

The Commission recommends that the Constitution should provide that the Council Mayor/Chairperson should be elected by universal adult suffrage and the Office should have executive powers.

The Commission also recommends that qualifications and disqualifications for candidature to contest elections to the Office of Mayor/Chairperson should be the same as those relating to the Office of Councillor, with the exception that the minimum education requirement should be a Grade 12 certificate or its equivalent.

The Commission further recommends that the Constitution should provide that the emoluments of a Mayor/Chairperson shall be determined by the Emoluments Commission upon the recommendation of the Council

11.2.10 Mayors/Chairpersons of Councils - Term of Office

Submissions

Some petitioners argued that the term of office of Mayors/Council Chairpersons should be extended to two, three, four or five years (21). The most favoured period was five years. The reason advanced was that they needed time to make meaningful contribution to development and to demonstrate their capacity to deliver.

A few petitioners said that the term of office of Mayor/Chairperson should remain unchanged at one year (4).

Observations

The Commission notes that some petitioners, though relatively few, addressed the subject. The majority of them wanted the term of office of Mayor/Council Chairperson to be extended to five years. Others suggested extension of the term to a period ranging between two and four years. They argued that the current term of one year was inadequate for meaningful programme delivery.

The Commission concurs with the views of the majority of the petitioners. Frequent changes in the Office of the Mayor/Council Chairperson undermine effective service delivery. Further, the Commission observes that it would be favourable to extend the term to bring it into conformity with the terms of office of Councillors, MPs and the President.

A vacancy in the Office of Mayor/Chairperson should be filled through a by-election.

Recommendations

The Commission recommends that the Constitution should provide that:

- the term of office of a Mayor/Council Chairperson shall be five years; and

- a vacancy in the Office of Mayor/Chairperson should be filled through a by-election.

11.2.11 Qualifications for Elections of Councillors

Submissions

A large number of petitioners agreed that councillors should have the following qualifications (324):

- minimum of Grade 9 or 12 Certificate or Diploma;

- both parents should be Zambian citizens by birth or descent;

- minimum age ranging from 16 to 25 years;

- maximum age of 55 years;

- residence and ownership of the property in the ward; and

- possession of a medical certificate of physical and mental fitness.

One petitioner said that independent candidates should be eligible to stand in local government elections (1).

Observations

The Commission notes that a sizeable number of petitioners made submissions on this subject. They called for a range of qualifications for election to the office of Councillor, which included minimum education, minimum and maximum age, residence and ownership of property in the ward, and certificate of medical and physical fitness.

In addition, there was a submission that independent candidates should be allowed to contest local government elections.

The Commission has no difficulty with the idea that qualifications for election as a councillor should be enshrined in the Constitution. These should, in the main, be similar to those applicable to parliamentary candidates, with some variations. Ownership of fixed assets, as a qualification to contest local government elections, should not be restricted to the ward. It should suffice that the fixed assets are in the district in which the ward is located. Further, this qualification should be an alternative to the candidate being resident in the ward for at least five years immediately preceding the election.

Further, in line with its earlier position on the issue of independent presidential and parliamentary candidates, the Commission's view is that independent candidates should be permitted to contest local government elections.

Recommendations

The Commission recommends that the Constitution should make provision for qualifications for election to office of a Councillor and disqualifications similar to those applicable to parliamentary candidates with the following variations, namely that a candidate should:

- have a minimum education of Grade 9 Certificate or its equivalent;

- be of the age of 18 years or above;

- be a resident of the ward for at least five years immediately preceding the election or own fixed assets in the district;

- have a clearance certificate of in respect of property rates and rentals; and

- have a certificate of mental and physical fitness.

Further, the Commission recommends that the Constitution should provide that independent candidates shall be eligible to contest local government elections.

11.2.12 Election of Councillors

Submissions

The few petitioners who made submissions on this subject endorsed the current arrangement of election of councillors through direct popular vote (9). Two petitioners suggested that a Councillor should be declared winner only after obtaining, at least 51% of the votes cast (2).

A few others said that candidates for local government elections should not be sponsored by political parties, but should run purely on civic lines (3).

Observations

The Commission notes that, though relatively few, some petitioners on the subject wanted the current system of election of Councillors by direct popular vote to be retained. Two felt that there should be a winning threshold of 51% of the votes cast. Three petitioners did not want the current system of sponsorship of candidates by political parties, arguing that elections should be based purely on civic lines.

The Commission observes that the current system of electing Councillors by direct popular vote is the commonly accepted practice in many parts of the world. It has existed in Zambia since independence and has not faced objections. However, as already observed, it would be unnecessarily inconveniencing and costly to have a requirement of 51% majority votes in order to win a local government election. Therefore, in respect of those seats to be contested on the basis of physical wards, winning should be determined in accordance with the First-Past-The-Post electoral system under the recommended Mixed Member Representation system.

Whilst the Commission appreciates the argument advanced for the submission that local government elections should be based purely on civic lines, it is of the view that politics are unavoidably part of local government.

The Commission also takes cognisance of the principle of equitable gender representation at all levels of governance, including local authorities.

Recommendations

The Commission recommends that in relation to physical wards, seats should be contested on the basis of the First-Past-The-Post electoral system, whilst other seats shall be held on the basis of the Proportional Representation electoral system, in accordance with the Mixed Member Representation system already recommended in this Report under the Chapter dealing with governance (Chapter 7).

The Commission further recommends that there should be a requirement that the composition of a council shall reflect gender representation on each side of not less than 30% of the total number of seats and that provision for this should be made in the Constitution.

11.2.13 By-Elections

Submissions

A number of petitioners said that there should be no by-elections for Councillors except in the event of death (79). Some argued that there should be no by elections whatsoever. They pointed out that by-elections were too costly for the nation and should therefore be discouraged.

Some went further and proposed that in the event of resignation or expulsion from a party, the runner up in the previous elections should take over or the party on whose ticket the Councillor was elected should replace the Councillor (15).

On the other hand, a number of petitioners said that a Councillor who resigns or is expelled from a party should lose the seat and not be allowed to recontest until the end of that term (78).

A few petitioners said that a Councillor who resigns or is expelled, but does not join another party should retain the seat as an independent (5).

Two petitioners, however, argued that a Councillor who crosses the Floor or is expelled from a party should be allowed to re-contest elections (2).

Observations

The Commission notes that, as in the case of parliamentary elections, some petitioners called for an end to by-elections in order to save the scarce resources. Alternative means of filling vacancies were suggested, namely the runner-up in the previous election should assume the seat, or the party on whose ticket the seat was held should nominate a replacement.

There were also those petitioners who wanted Councillors who cross to other parties or are expelled from their parties to be barred from contesting by-elections. Others, though few, submitted that Councillors who are expelled or who resign from their parties should retain their seats as independents, provided they do not join any other party.

The Commission concurs with the views of the majority of petitioners that by-elections are an unnecessary cost and should be minimised. As for alternative means of filling vacancies, the Commission's view is that a replacement for the runner-up in the previous election is not favourable. It is complicated and may, sometimes, fail to provide a replacement due to death, absence or unavailability for other reasons.

Further, the Commission is of the view that the idea of a Councillor who is expelled or who resigns from a political party retaining the seat as an independent is not favourable. It is difficult to ascertain whether or not a Councillor has joined another party.

Recommendations

The Commission recommends that the Constitution should provide that:

- there shall be no by-elections except where a seat falls vacant as a result of nullification, incapacitation, death, or where the seat was held by an independent Councillor;

- when a seat held by a Councillor sponsored by a party falls vacant, the party affected shall nominate a person to fill the vacancy;

- where a Councillor's political party is dissolved, that Councillor shall retain the seat as an independent where the seat was held on the basis of the First-Past-The-Post electoral system;

- where the seat of a Councillor whose party has been dissolved was held on the basis of the Proportional Representation system, it shall be relocated in accordance with that system; and

- when a seat held on account of a special allocation to an interest group falls vacant, the interest group affected shall nominate a person to fill the vacancy.

11.2.14 Recall of Councillors

Submissions

A number of petitioners argued that the Constitution should provide for the right of the electorate to recall a non-performing Councillor through a vote of no confidence (34).

Observations

Petitioners on the subject, though relatively few, called for a provision to enable the electorate recall a non-performing Councillor. The Commission's views on the concept of recall of a non-performing Councillor are the same as earlier expressed in relation to MPs.

Recommendations

The Commission recommends that the Constitution should make similar provisions as those recommended in respect of recall of an MP, that is:

- the electorate shall have power to recall a councillor on grounds of failure to perform;

- a recall shall be initiated by a petition in writing setting out the grounds relied on and signed by at least half of the registered voters in the ward;

- the petition shall be presented to the Electoral Commission of Zambia who shall appoint a tribunal to inquire into the matter;

- the Electoral Commission of Zambia shall act in accordance with the findings of the tribunal whether to declare the seat vacant or the petition as unjustified;

- a councillor who has been petitioned shall have the right of hearing and to be present during the conduct of the inquiry either by himself in person or through a lawyer representing her/him or both;

- the composition of a tribunal appointed for this purpose and other procedural details shall be prescribed by an appropriate electoral law; and

- the functions and duties of a councillor should be prescribed in an appropriate instrument and be made accessible to the people so that they understand the role of a councillor.

11.2.15 Membership of Councils – Chiefs and MPs

Submissions

A few petitioners said that Chiefs and Members of Parliament should not be members of councils (10). On the other hand two petitioners said that Chiefs should be nominated to councils (2), while others were of the view that Chiefs should have representation in councils in order for them to contribute to development (5). Two other petitioners added that the Constitution should define the role of Chiefs in council affairs (2).

Observations

Though petitioners on the subject were few, a majority of those who addressed the subject were against Chiefs and MPs sitting on councils. Others, on the other hand, argued that Chiefs should have representation in councils in order to contribute to development.

The Commission observes that petitioners did not give a clear rationale for wanting to exclude Chiefs and MPs from participating in councils. The Commission's view is that Chiefs represent a significant constituency of subjects in areas under the jurisdiction of councils. They are therefore concerned with issues pertaining to socio-economic development in their respective areas. Members of Parliament also represent the interests of their constituencies, which consist of various council wards. Knowledge of developmental affairs of the councils enables them to represent their constituencies more effectively.

Therefore, Chiefs and MPs have a justified interest in the running of the affairs of councils, particularly in a devolved system of government.

Recommendations

The Commission recommends that the Constitution should provide that Chiefs and MPs be ex-officio members of councils.

11.2.16 Nomination of Councillors – Women, Youths and Persons with Disabilities

Submissions

There were a few petitioners who argued that the principle of equal gender representation, especially the participation of women in local government affairs, should be guaranteed in the Constitution (7).

A few others said that a system of elections and nominations should take into account affirmative action for women and persons with disabilities (8). It was further suggested that the nominations should be made through electoral colleges for women and persons with disabilities, respectively. Some of the petitioners said that persons with disabilities should be represented in every ward.

There was one submission that the Mayor or Council Chairperson should have power to nominate up to five councillors to serve on the council (1). It was further proposed that these should be eminent persons capable of making special contributions to the efficient delivery of services.

Observations

The Commission notes that, though few, petitioners on this subject called for equitable gender representation and representation of persons with disabilities in councils, and emphasised the need for affirmative action. Petitioners wanted principles of equitable representation and affirmative action to apply to both the elective and nomination processes. Some petitioners wanted elections and nomination of representatives of women and persons with disabilities to be conducted through electoral colleges.

In terms of nomination, one petitioner suggested that the Mayor/Council Chairperson should have power to nominate up to five Councillors on merit, in order to enhance representation and capacity of councils to deliver services.

The Commission has no difficulty agreeing with the principles of equitable gender representation, representation of youths and persons with disabilities, and affirmative action to achieve the desired equitable representation. However, the Commission's view is that this should be achieved through elections based on a suitable electoral system and not nominations.

Recommendations

Accordingly, the Commission recommends that the Constitution should provide that:

- each gender should be represented by not less than 30% of the total number of seats;

- youths, persons with disabilities and any other special group as may be prescribed by an Act of Parliament should be allocated special seats which should be filled through an elective process conducted by electoral colleges of the groups affected; and

- an Act of Parliament should prescribe the necessary formulae.

11.2.17 Election Petitions

Submissions

A small number of petitioners said that in the event of an election petition, a councillor should not assume the seat until the petition has been settled (3).

Observations

The Commission notes that petitioners, though few, wanted a councillor-elect whose election has been petitioned not to assume office until the petition has been settled. This is similar to petitioners' submissions in relation to a President-elect and an elected MP.

Whilst the Commission appreciates that petitioners wanted to maintain consistency in the application of the principle, it is of the view that at the level of councils, this could prove unnecessarily disruptive to the smooth functioning of local authorities.

Recommendations

The Commission therefore recommends retention of the status quo, namely that electoral laws provide that if a councillor's election has been petitioned, the councillor assumes office pending the outcome of the petition.

11.2.18 Term of Office of Councillors

Submissions

A large number of petitioners argued that the term of office of councillors should be increased from three years to a period of four or five years (413). Most petitioners who made submissions on this subject suggested that the term of office of councillors should be increased to five years. Reasons advanced included the need to give councillors adequate time to deliver on development programmes and to ensure harmony with the presidential and parliamentary terms of office and general elections.

Other petitioners said that the term should be reduced to two or two and a half years (40). Yet others submitted that the term should remain the same, that is, three years (22).

A number of petitioners submitted that the term of office of councillors should be limited to (176):

- two four-year terms;
- two five-year terms (most popular);
- three five-year terms;
- two and a half-year terms;
- two three-year terms; and
- one three-year term.

Observations

The Commission notes that a relatively large number of petitioners made submissions on this subject. The majority of them called for the term of Office of Councillor to be increased to five years to give them time to deliver on programmes and in order to align the term of office with presidential and parliamentary terms. A few, on the other hand, wanted the term reduced, whilst others wanted the current term retained.

The Commission also notes that some petitioners wanted the term of Office of Councillor to be limited and the majority of these wanted it to be limited to five years.

The Commission observes that very few petitioners wanted the current term to be retained or reduced and that those in favour of increasing the term to five years were many, in comparison. The Commission also acknowledges that the arguments advanced by those petitioners in favour of an increase in the term are sound. In this regard, the Commission notes that the law has since been amended to increase the term of Councillors to five years.

However, the Commission sees no advantage in limiting the term and feels that this would rob councils of quality leadership.

Recommendations

The Commission recommends that the Constitution provide that the term of office of Councillors be five years and that Councillors should continue to be eligible for re-election.

11.2.19 Offices in Wards

Submissions

Three petitioners said that councillors should have offices in their wards (3).

Observations

The Commission notes that very few petitioners addressed this subject. They called for offices for councillors to be established in wards to facilitate their work.

Though the Commission appreciates the reason for this submission, it is of the view that it would be too costly a venture to embark on.

Recommendations

The Commission recommends that there should be no requirement for offices to be established in wards.

11.2.20 Remuneration and Transport for Councillors

Submissions

A number of petitioners argued that councillors should receive salaries, allowances and gratuity comparable to those applicable to MPs (299). The reason advanced was that whereas MPs were in Lusaka most of the time, councillors are always working to promote development among

the people. Some among these petitioners added that councillors should also be provided with means of transport to enable them undertake field tours.

Other petitioners, on the other hand, felt that councillors should not receive gratuity, as the position of a councillor is of a civic and voluntary nature and that the Government cannot afford the cost (3).

One petitioner said that MPs should not be entitled to a sitting allowance in councils (1).

Observations

The Commission notes that petitioners called for remuneration of councillors and provision of transport to enable them execute their duties effectively. They argued that the work of councillors is comparable to and, in some respects, more than that of MPs. They, therefore, reasoned that their remuneration should compare with that of MPs.

The Commission acknowledges that the work of councillors is by no means inferior to that of MPs. However, the Commission also took into consideration the resource capacity of councils and observes that many of them are in dire straits. Further, this is a matter over which each local authority should make recommendations to the National Fiscal and Emoluments Commission.

Recommendations

The Commission recommends that each council:

- makes provision for remuneration of councillors and provision of transport, subject to availability of resources; and

- recommends suitable remuneration packages for Councillors to the National Fiscal and Emoluments Commission according to its financial capacity. The National Fiscal and Emoluments Commission should in turn determine the emoluments.

11.2.21 District and Provincial Administration

Submissions

11.2.21.1 Office of Provincial Deputy Minister

A number of petitioners argued that the post of Provincial Deputy Minister should be elevated to the level of Cabinet

Minister because, although the position of Deputy Minister is a junior position, the office holder performs responsibilities that would otherwise be carried out by a Cabinet Minister (81). Petitioners also observed that Provincial Deputy Ministers do not sit in the Cabinet and are not supervised by a Minister above them.

Other petitioners said that the Office of Provincial Deputy Minister should be replaced by that of Provincial Commissioner (13).

Some petitioners felt that the Office of Provincial Deputy Minister should be elective (40). Some suggested election by universal adult suffrage and others by MPs. Some among these said that the post should be changed to that of Provincial Prime Minister under a federal system of government.

There were ten submissions that Provincial Governors should replace Provincial Deputy Ministers and that they should be elected by universal adult suffrage (10).

11.2.21.2 Office of the Provincial Deputy Minister – Abolition

A few petitioners said that civil servants, and not political appointees, should run provinces and districts (6). It was suggested by eight petitioners that the post of Provincial Deputy Minister should be abolished and its functions performed by the Provincial Permanent Secretary (8).

11.2.21.3 Office of the Provincial Deputy Minister – Retention

Two petitioners were of the view that the Office of Provincial Deputy Minister should be maintained (2) whilst two others were of the view that they should be appointed from local residents of the respective provinces (2).

Observations

The Commission notes that the majority of petitioners on this subject wanted the Office of Provincial Deputy Minister elevated to the level of Cabinet Minister in recognition of the status, duties and responsibilities of the Office, as well as the fact that a Provincial Deputy Minister is not supervised by a Cabinet Minister. Petitioners also felt that Provincial Ministers should represent the interests of their respective provinces in the Cabinet.

Some petitioners wanted the office to be elective through universal adult suffrage. Others called for change of the title whilst others wanted substantive change of the Office to that of Prime Minister under a federal system of government. Few petitioners wanted the Office abolished.

The Commission observes that, by and large, there is a desire to have the Office of Provincial Minister elevated and that it should assume a different character, which includes an element of election by popular vote.

The Commission views the powers and functions of this Office within the framework of devolution of power from Central Government to provinces as already recommended. There is therefore merit in the argument that the Office should be elevated to that of Cabinet Minister and that the Provincial Minister should be a member of the Cabinet. However, the Commission is of the view that Provincial Ministers should not be elected, but continue to be appointed by the President, as the recommended system of decentralisation of power does not entail autonomy of provinces from the Central Government.

Recommendations

The Commission recommends that constitutional provisions should provide that:

- that the Office of Provincial Deputy Minister shall be the same level as Cabinet Minister and that the title shall be Provincial Minister under a devolved system of Local Government;

- Provincial Ministers should be members of the Cabinet; and

- the President should appoint the office holders.

11.2.21.4 Provincial Assemblies and Delimitation of Districts and Provinces

A number of petitioners argued that in order to enhance devolution of power, the Constitution should provide for the establishment of Provincial Assemblies under a federal system of government (52).

Thirteen petitioners said that the number of districts and provinces should be increased by redemarcating existing ones for ease of administration, particularly in far flung areas (13). In this regard there was a submission that a tenth province be created and be known as North-Eastern Province. This would

incorporate the districts of Chinsali, Isoka, Nakonde, Mpika, Mbala, Chama and Muyombe. It was observed that Northern Province is too large for effective administration and needed to be divided. Another petitioner proposed that another province, to be known as Kafue Province incorporating Kafue, Itezhi-tezhi, Mumbwa, Mufumbwe and Kaoma districts, be created.

However, one petitioner said that the Constitution should safeguard against the arbitrary creation of districts by establishing criteria such as demographic factors and the existence of infrastructure (1).

Observations

The Commission notes that under this subject, some petitioners, though few, advocated Provincial Assemblies (legislatures) in a federal system of government. Others wanted an increase in the number of districts and provinces. With regard to the number of provinces, petitioners suggested the creation of two additional provinces in the Northern and Eastern parts of the country, on the one hand, and in the Southern, North-Western, Central and Western provinces, on the other. The argument advanced was that these areas are too vast for effective provincial administration. However, one petitioner called for the Constitution to safeguard against arbitrary changes to provincial and district boundaries.

The Commission concurs with the views of petitioners to a large extent. However, it is of the view that a federal system of government is unsuitable for the country's socio-economic context as already discussed. The prevailing context, including the level of development, merely warrants self-local governance under a unitary system of government, as already recommended.

The Commission is also of the view that whilst it may be necessary to revisit provincial and district boundaries and, when appropriate, to increase or reduce their number, this should be regulated to avoid arbitrary decisions.

Recommendations

The Commission recommends that the Constitution should:

- provide for regulation in the system of change of provincial and district boundaries, including changes in the number of provinces and districts; and

- that the regulation should be prescribed by an Act of Parliament and done by an appropriate Commission.

SCHEDULE

Functions of District Councils (as set out in the Local Government Act)

1. To discharge both executive and legislative powers;

2. to create Township Management Boards where necessary;

3. to establish and maintain offices and buildings for the purposes of transacting the business of the council and for public meetings and assemblies;

4. to ensure against losses, damages, risks and liabilities which the council may incur;

5. to maintain municipal law and order and ensure national security and the good administration of the council;

6. to prohibit and control the erection and display of advertisements and advertising devices in, or in view of, streets and other public places;

7. to establish and maintain farms and allotment of gardens;

8. to take and require the taking of measures for the:

    a) storage, market and preservation of agricultural produce;

    b) conservation of natural resources; and

    c) prevention of soil erosion, including the prohibition and control of cultivation.

9. to take and require the taking of measures for control of grass, weeds and wild vegetation and for the suppression and control of plant and insect pests and diseases;

10. to maintain, protect and control local forests and woodlands;

11. to control the keeping and movement of livestock;

12. to establish and maintain ponds;

13. to establish and maintain grazing grounds;

14. to take measures for the destruction and control of bees and of dangerous animals and reptiles;

15. to control the slaughtering of animals, the meat of which is intended for human consumption, to control the sale of such meat, and to require the disposal of diseased animals and carcasses and of meat which is unfit for human consumption;

16. to establish and maintain abattoirs, cold storage facilities and plans for the processing of by-products from abattoirs; and

17. to control the movement of the carcasses of animals.

Others are:

18. To establish and maintain roads;

    a) to exercise general control, care and maintenance of all public roads, streets, avenues, lanes, sanitary lanes and foot walks forming part thereof, bridges, squares, ferries and water courses and to remove all obstacles therefrom;

    b) to close or divert any public road, street or thoroughfare;

    c) to close or divert ferries and water courses;

    d) to declare a street or road to be a public street or road;

    e) to compile and maintain a register of all public streets and roads; and

    f) to make up to tarmacadamised standard any private street and to charge the statutory leaseholders or occupiers of the land abutting on such streets in proportion to frontage and to recover the costs as a civil debt.

19. To prohibit and control the erection and laying in, under or over, and the removal from streets and other public places of:

    a) posts, wires, pipes, conduits, cable and other apparatus;

    b) temporary platforms, seats and other structures; and

    c) street decorations.

20. To control traffic and the parking of vehicles and, for that purpose, establish and maintain parking meters and premises for the parking of vehicles;

21. to take measures for the promotion of road safety;

22. to prepare and administer schemes for the encouragement of and participation in Community development;

23. to establish and maintain a system of lighting and other public places;

24. to establish and maintain fire lighting and prevention services and to take and require the taking of measures for the protection of life, property and natural resources from damage by fire;

25. to control persons and premises engaged in or used for the manufacture, preparation, storage, handling, sale or distribution of items of food or drink;

26. to brew beer;

27. to establish and maintain premises for the sale of and to sell therefrom, items of food and drink, including beer and other intoxicating liquor for consumption on or off the premises;

28. to establish and maintain catering services;

29. to erect, purchase and maintain buildings used as dwellings or clubs and, where it is in the public interest, for use for business or professional purposes;

30. to erect, purchase and maintain buildings and facilities and encourage the erection of dwellings needed for the accommodation of persons residing within the area of the council;

31. to prohibit and control the development and use of land and buildings and the erection of buildings, in the interests of public health, public safety and the property and orderly development of the area of the council;

32. to control the demolition and removal of buildings and to require the altering, demolition and removal of buildings which:

    a) do not conform to plans and specifications in respect thereof approved by the council; and/or

    b) are a danger to public health or public safety.

33. 1) To require the statutory leaseholder or occupier of land to do any of the following acts:

        i) to remove or trim to the satisfaction of the council any tree shrub or hedge overhanging or interfering with traffic in any street or with any wires, or with works of the council;

        ii) to remove any dilapidated fence or structure abutting on any public street or place;

        iii) to paint, distemper, whitewash or colourwash the outside walls or roof of any building forming part of the premises;

        iv) to tidy the premises; and

        v) to remove from the premises any unsightly debris, including derelict vehicles; and

    2) to provide space on which debris and derelict vehicles may be deposited;

    3) to prohibit, control and require the fencing of land to control the use of barbed wire and other dangerous materials for fencing; and

    4) in the event of the statutory leaseholder or occupier failing to comply with a notice from the council requiring him to perform any other acts specified in sub-paragraph (1) to undertake the work and charge the statutory leaseholder or occupier with the cost thereof.

34. To assign names to localities and numbers to premises and to require the number assigned to any premises to be displayed thereon;

35. to establish and maintain parks, zoos, gardens, pleasure grounds, camping grounds, caravan sites and open spaces;

36. to plant, trim and remove trees, shrubs and plants in streets and other public places and to prohibit and control the planting, camping, destruction and removal of trees, shrubs and plants in streets and other public places;

37. to establish and maintain swimming baths and bathing places;

38. to establish and maintain art galleries, libraries, museums and film services;

39. to establish and maintain social and recreational facilities and public entertainments;

40. to establish and maintain public transport services;

41. to establish and maintain colleges, schools and day nurseries;

42. to establish and maintain environmental health services;

43. to establish and maintain cemeteries, crematoria and mortuaries and, otherwise, to provide for the control of the burial of the dead and destitute persons who die in the area of the council;

44. to control the manufacture, storage, sale and use of petroleum, fireworks, gas and other combustible or dangerous substances; and to establish and maintain magazines and other facilities for the storage thereof;

45. to take and require the taking of measures for the preservation and improvement of public health and the prevention and abatement of nuisances, including measures for the extermination of mosquitoes and other insects, rats, mice and other vermin;

46. to control persons, premises and land engaged in or used for the holding of any fair, circus, fete or other entertainment, recreation or assembly to which the public are entitled or permitted to have access, whether on payment or otherwise;

47. to prohibit or control the collection of money from door to door and in streets and other public places;

48. to preserve public decency;

49. to prevent damage and trespass to property, whether public or private;

50. to establish and maintain public information services and to advertise and give publicity to the advantages and amenities of the area of the council;

51. to provide for and maintain:

    a) the enumeration and registration of persons or property for any purpose connected with the administration of the area of the council;

b) the registration of births, marriages and deaths;

c) the registration of clubs; and

d) the registration of such transactions in connection with land charges as may be prescribed in any written law relating to land charges.

52. To establish and maintain sanitary convenience and ablution facilities and to require, whenever necessary, the establishment and maintenance of such facilities;

53. to establish and maintain sanitary services from the removal and destruction of, or otherwise dealing with all kinds of refuse and effluent and compel the use of such services;

54. to establish and maintain drains, sewers and works for the disposal of sewerage and refuse;

55. to take and require the taking of measures from the draining of water;

56. to require and control the provision of drains and sewers and to compel the connection of drains and sewers established by the council;

57. to prohibit and control the carrying on of offensive, unhealthy or dangerous trade;

58. to establish and maintain weighing machines;

59. to sell products and by-products resulting from the carrying of any of the undertakings or services of the council;

60. to establish and maintain the business of:

a) manufacture;

b) wholesale; and

c) retail.

61. To undertake mining operations;

62. to provide and maintain supplies of water and for the purpose, to establish and maintain water works and water mains;

63. to take and require the taking of measures for the conservation and prevention of the pollution of supplies of water;

64. with the consent of the Directors of Postal and Telecommunication Services, and subject to such conditions as they may impose, to establish and maintain postal services;

65. to establish and maintain twin-town contacts;

66. to solemnise marriage in the district;

67. to co-ordinate decentralised structures, including Health and Education Boards;

68. disaster management;

69. community development;

70. primary health care;

71. primary and basic education;

72. water and sanitation;

73. rehabilitation, maintenance and construction of feeder roads;

74. infrastructure development and maintenance;

75. planning and implementation of development projects and programmes;

76. mobilisation of local resources;

77. preparation of progress reports for the province;

78. management, conservation of natural and wildlife resources;

79. environmental services;

80. provision and maintenance of public amenities;

81. land allocation and utilisation;

82. trade and business licensing;

83. agriculture extension services,

84. by-laws;

85. community police service;

86. youth and juvenile delinquency; and

87. any other functions as delegated from the centre.

Functions of Provincial Administration (set out in the National Decentralisation Policy)

88. Co-ordinating and consolidating district plans into the provincial development plans for submission to the centre;

89. monitoring the utilisation of resources and implementation of development programmes in the province;

90. coordinating and auditing of local institutions;

91. preparing provincial progress reports for Central Government on the implementation of development programmes and projects;

92. ensuring implementation of Central Government policies and regulations;

93. implementation of national development projects and programmes which cut across sectors;

94. ensuring proper utilisation and maintenance of Government buildings, equipment, plants and other infrastructure; and

95. any other functions delegated from the centre.

Functions of Central Government (as set out in the National Decentralisation Policy)

96. General and legislative policy formulation, monitoring and evaluation and provision of advice to councils on their operations;

97. setting national performance standards;

99. controlling arms, ammunition and explosives;

99. national defence and security;

100. regulating banks and financial institutions, promissory notes, currency and exchange;

101. citizenship, immigration, emigration, refugees, deportation, extradition and designing of passports and national identities;

102. copyrights, patents and trademarks and all forms of intellectual property, incorporation and regulation of business organisations;

103. control of State land and minerals;

104. declaration of public holidays, working and shopping hours;

105. preservation of national monuments, antiquities, archives and public records;

106. foreign relations and trade, regulation of trade and commerce;

107. national and local government elections;

108. guidelines on national census and statistics;

109. control of publications of national surveys and mapping;

110. control and management of epidemics, pandemics and disasters;

111. airports, aerodromes and air strips;

112. national development projects and programmes;

113. correctional policy and maximum security prisons;

114. trunk roads and highways;

115. prosecutorial functions;

116. high school and tertiary education; and

117. any other functions delegated by Parliament.

CHAPTER 12

TRADITIONAL AUTHORITY, CUSTOMS AND PRACTICES

Terms of Reference:

No.5 Examine and recommend the elimination of provisions which are perceived to be discriminatory in the Constitution;

No. 11 Examine and recommend effective methods to ensure grassroots participation in the political process of the country, including what type of provincial and district administration should be instituted; and

No. 30 Examine and recommend on any matter that is connected with or incidental to the foregoing Terms of Reference.

12.1 Introduction

The institution of traditional leadership in Zambia continues to exhibit the historical dilemma that has confronted the colonial and post-colonial State and traditional institutions of governance.

Traditional authority refers to powers that are associated with and emanate from the institution of chieftaincy. In African societies, traditional rulers derive their authority from customs and traditions that have existed since time immemorial. Traditional rulers are custodians and repositories of traditional customs and cultural heritage.

Zambia has 286 Chiefs, four of whom are paramount Chiefs, namely: Chitimukulu, Gawa Undi, the Litunga and Mpezeni. Clearly, Chiefs constitute an important factor in the socio-economic and political development of the country. Since tribesmen, particularly in rural areas, have traditional respect for their Chiefs, they have the potential to play a catalystic role in development.

Traditional Authorities before the Colonial Era

Before Zambia was colonised, the country was inhabited by 72 tribes. These tribes lived in villages. Each village had a village headman and a Chief in that

order. Some large tribes had a Senior Chief or a Paramount Chief, who was also referred to as King. Each tribe had its own system of administration through headmen, Chiefs, Senior Chiefs and Paramount Chiefs or Kings. However, some communities such as the Tonga of the Plateau are known to have existed without the institution of chieftaincy.

Kings and Chiefs did not rule their dynasties on their own. The Litunga, for example, was assisted by the "Kuta" in running his kingdom. Equally, senior Chiefs and Chiefs had their traditional councillors to assist them in their duties, while headmen had advisors from among their genealogical relations.

Financial Arrangement

Traditional rulers used to collect tax in the form of ivory, venison, or forced labour in order to meet the charge of what limited services tribal governments could provide such as defence against enemies.

Traditional Authorities under Direct Rule and BSA Company

During the colonial era and particularly when the country was administered by Direct Rule under the British South Africa Company, the institution of chieftaincy was adversely affected, as the Native Commissioner was responsible for almost all matters of administration in the district. The situation was compounded by the fact that Chiefs now had to be appointed by the Commissioner. Thus Chiefs became insignificant executive officials with no fixed remuneration.

The Chiefs' roles were reduced to assisting the colonial administration in apprehending criminals, collecting taxes and in executing a variety of other duties. Thus they lost substantial powers, including that of adjudicating in criminal matters.

The Chiefs found themselves in a situation where they were indistinguishable from their subjects. This was a basic weakness in the BSA Company's administrative scheme.

Due to its treatment of traditional rulers and many other factors, such as the imposition of hut tax, this system of government was resented by Africans. In order to get money to pay native tax, Africans were forced to look for employment on the line of rail and in mines around the Copperbelt.

BSA Company rule, however, ended in 1924 when the British Government took over and commenced direct rule and administration.

Traditional Authorities under British Indirect Rule (Native Local Government)

At the end of the BSA Company administration, the British Government took over the administration of the country, and its policy of Native Local Government or Indirect Rule gave recognition to the institution of chieftaincy. It was acknowledged that if Chiefs were to become effective and permanent auxiliaries of the Government, they required more defined powers as well as a greater say in monetary matters. In 1933, the majority of Provincial Commissioners agreed that Chiefs should have more financial responsibilities. The question at issue, then, was how much power the Chiefs ought to have. The Colonial Office favoured extensive devolution of authority along the lines of the Tanganyika Territory (Tanzania), which was administered under a mandate of the League of Nations. The British Prime Minister's Office, however, argued that the Native Authorities ought themselves to be entrusted with the collection of the native tax which would improve their lives and also provide for the most valuable part of their education, that is, in administration and financial responsibility.

The Provincial Commissioners displayed greater caution, arguing that Northern Rhodesia (Zambia) should follow the lines of Nyasaland (Malawi) which only allowed Chiefs to collect money from Local Native Treasuries. The only dissenting voice was that of the Provincial Commissioner of Barotseland (Western Province), who was familiar with a more elaborate system of indigenous government.

In 1936, the new policy of indirect rule found expression in a series of important Ordinances, for example, the Native Courts Ordinance, 1936, and the Native Authorities Ordinance, 1936. The Ordinances permitted Native Treasuries to be set up, though Native Authorities were not yet entrusted with the collection of the general tax, a sharp distinction being drawn between the Government and the Native Authorities' revenue. Native Authorities could raise a small income from court fees and fines, bicycles, dogs, arms and game licences. In addition, the Government agreed to pay to the various treasuries 10% of the native tax collected either inside or outside the district from Africans belonging to the tribe.

Native Courts wielded wide authority in civil and criminal jurisdiction in African cases, the courts being graded according to their importance. Native Courts were regarded as the most successful venture of indirect rule, giving Africans the chance to be tried in a manner which was understood by the people.

While the main objective of indirect rule was to save the resources of the British Government, the recognition of Native Authorities, through legislation, also helped Africans to enhance the role of their own traditional institutions in governance. There was, however, a minority view that indirect rule was leading to a reversion to superstition and witchcraft and that the Africans themselves

preferred the system of direct rule practised under the British South Africa Company. It was argued, perhaps correctly, that the new legislation did not tackle the problem of detribalising Africans. However, this critical view received little support among members of the Legislative Council. It was counter argued that settlers could not ask for self-government while at the same time denying this boon to Africans. It was further argued that powers of the Native Courts were limited and that Chiefs, or at any rate their children, needed further education to cope with the laws introduced by the British Administration.

The concept of indirect rule appeared to have met with the approval of traditional rulers and indigenous Africans, particularly progressive ones such as clerks, supervisors of workers (Capitaos) and teachers. Indeed, this form of administration was viewed as a genuine form of African local government system. This system remained intact and Chiefs exerted some influence on the Government until 1965.

Traditional Authorities after Independence (1964)

On attaining independence in 1964, the Government abolished the Native Authorities by the enactment of the 1965 Local Government Act. Under the new law, rural district councils were created to replace native authorities. Thus, we now had rural councils, city councils, municipal councils and township councils. The 1965 Act became the legal instrument for local government in the independent nation of Zambia. The Act, under Section 16(1), provided for a maximum number of four councillors, including Chiefs, who could be appointed by the Minister responsible for local government to a council in rural areas.

During this period, Chiefs played a significant role in local government. They had their own constitutional House of Chiefs from which the Government sought advice before any law which affected any tradition or custom was made and passed by Parliament.

Later, during the one-party rule which was created by Article 4 of the 1973 Constitution, Chiefs were appointed into the Party's hierarchy. Thus, they belonged to the ruling party (UNIP).

Traditional Authorities under the Third Republic

With the advent of multi-party politics, however, Chiefs' participation in partisan politics became a contentious issue. There was a widely shared view that Chiefs, as traditional rulers, should be above partisan politics.

The 1991 Constitution did not make provision for the House of Chiefs, but instead made provision for the upper chamber in which three Chiefs per province were to be members. The 1996 Constitution amendment prohibited Chiefs from participating in partisan politics unless they abdicated their throne. However, the

House of Chiefs was restored by the same enactment, although it was not functional until December 2003 when it was officially opened. Its role, however, still remains purely advisory rather than influential in promoting Government policy and governance.

Both the Mvunga and Mwanakatwe Commissions dealt with the subject of traditional authority.

On the question of Chiefs' active participation in politics, the Mvunga Commission recommended that individual rulers who wanted to participate in politics or accept a political appointment should be free to do so. This was contrary to the view of the majority of petitioners and the House of Chiefs. The Commission also recommended that the House of Chiefs be dissolved and converted into an integral part of the Chamber of Representatives in a bicameral legislature. This was in response to a popular call for retention of the House of Chiefs, broader ethnic representation and a submission by some petitioners that the House be given legislative powers.

The Mwanakatwe Commission recommended that:

- the institution of chieftaincy should be strengthened;
- the role of Chiefs should be recognised and defined in the Constitution;
- Chiefs should be fully involved in and superintend development projects at all local levels in order to close the gap between the people at the grassroots level and Central Government;
- traditional rulers should remain neutral, but that where a traditional ruler is elected to the National Assembly, he /she should abdicate the chieftaincy;
- the House of Chiefs should be restored; and
- Chiefs should be properly remunerated.

Current Constitutional Provisions

In Zambia, successive post-independence governments have acknowledged the role of Chiefs in governance. Part XIII of the current Constitution provides for the institution of chieftaincy according to the culture, customs and traditions of the people in any particular area. Article 129 prohibits a Chief from participating in partisan politics while remaining a Chief. However, the Constitution provides for the representation of traditional rulers in governance through the House of Chiefs. Functions of the House of Chiefs are advisory in matters of customs and traditions. The House of Chiefs is composed of 27 Chiefs, that is, three chiefs elected by the Chiefs themselves from each of the nine provinces of the Republic.

The Chiefs Act, which is the supportive legislation, provides for recognition and succession of Chiefs.

The institution and role of chieftaincy, according to customary law, has been recognised by the modern constitutions of some African countries such as Ghana, South Africa and Uganda.

In particular, the Constitution of Ghana, perhaps because of the country's entrenched traditional culture, provides for a strong institution of chieftaincy that is involved in governance matters such as adjudication in matters affecting chieftaincy; administration of traditional land; and study, interpretation and codification of customary laws, with a view to standardisation, harmonisation and modernisation. The Constitution provides for a National House of Chiefs and a Regional House of Chiefs for each region. In recognising the institution of chieftaincy, Article 270 of the Constitution of Ghana states that:

> *"(1) The institution of chieftaincy, together with its traditional councils as established by customary law and usage, is hereby guaranteed.*
>
> *(2) Parliament shall have no power to enact any law which –*
>
> *(a) Confers on any person or authority the right to accord or withdraw recognition to or from a chief for any purpose whatsoever; or*
>
> *(b) In any way detracts or derogates from the honour and dignity of the institution of chieftaincy.*
>
> *(3) Nothing in or done under the authority of any law shall be held to be inconsistent with, or in contravention of, clause (1) or (2) of this article if the law makes provision for:*
>
> *(a) The determination, in accordance with the appropriate customary law and usage, by a traditional council, a Regional House of Chiefs or a Chieftaincy Committee of any of them, of the validity of the nomination, election, selection, installation or deposition of a person as a Chief;*
>
> *(c) A traditional council or a Regional House of Chiefs or the National House of Chiefs to establish and operate a procedure for the registration of Chiefs and the public notification in the Gazette or otherwise of the status of persons as Chiefs in Ghana."*

The Constitution of Uganda prohibits traditional leaders from participating in partisan politics. The prohibition extends to exercising any administrative, legislative or executive powers of the Government or local government. The Constitution of Ghana also prohibits Chiefs from taking part in active politics and requires any Chief wishing to do so and seeking election to Parliament to abdicate chieftaincy (Article 276). However, a Chief may be appointed to a public office.

In the case of South Africa, the Constitution recognises the status and role of traditional leadership according to customary law and subject to the Constitution.

12.2 Submissions, Observations and Recommendations

There were one thousand two hundred and twenty-nine (1,229) submissions received on this subject. These included issues such as the participation of traditional rulers in politics, the role of the chieftaincy in governance, the functions and composition of the House of Chiefs, and the role of the Government in the installation and remuneration of Chiefs.

12.2.1 Participation in Politics - Chiefs

Submissions

A very large number of petitioners who addressed this subject argued that traditional rulers should not participate in partisan politics (591). The main reason advanced was to avoid conflicts with their subjects on account of political affiliation.

Other petitioners, including the House of Chiefs, on the other hand, said that traditional rulers should be free to participate in politics (204). The main reason advanced was that they should enjoy their freedom of association like any other citizen.

Observations

The Commission notes that the subject of Chiefs' participation in active politics attracted a significant number of submissions. The majority of those who spoke on the subject were against Chiefs' participation in active politics, arguing that Chiefs should be neutral in order to promote unity among their subjects and avoid conflicts with them on account of being partisan.

Others, on the other hand, including the House of Chiefs, maintained that Chiefs, like other citizens, should be free to participate in active politics.

The Commission observes that the subject of the role of Chiefs in politics has been under active debate since independence. The Chona Commission, whilst appreciating that Chiefs, as custodians of traditions and culture, play an important role in governance, recommended that they should not have a special legislative House, but be represented in Parliament. This Commission, however, notes that this recommendation was made in the context of the one-party State.

Since the advent of multi-party politics, there has been strong opposition to Chiefs' participation in active politics. Petitioners to this Commission have maintained the same pattern of submissions and arguments as petitioners to the Mvunga and Mwanakatwe Commissions. The Mvunga Commission recommended that as participation in active politics is a fundamental right, the choice should be left to individual traditional rulers. The Mwanakatwe Commission concurred with the views of the majority of petitioners and recommended that Chiefs should not participate in active politics.

The Commission acknowledges that participation in active politics, such as seeking elective office, partisan campaigns and their consequences can be embarrassing, especially to traditional rulers who command respect from their subjects. People view traditional rulers as symbols of unity and custodians of traditions and culture who should be held in high esteem. It is on account of these considerations that they have overwhelmingly and repeatedly rejected the idea of Chiefs participation in active politics.

On the other hand, however, the Commission observes that Chiefs vote and do not enjoy privileges such as immunity against legal proceedings because they are regarded as ordinary citizens. Therefore, it is inconsistent to deprive them of the right to seek elective office. Any conflicts that might arise as a result of a Chief opting to participate in politics could be dealt with through alternative means.

Though the view of the majority of petitioners is rational, it lacks constitutional backing when viewed against fundamental human rights.

This Commission also took into consideration term of reference No. 5 which enjoins this Commission to recommend the elimination of provisions which are perceived to be discriminatory in the Constitution.

Recommendations

The Commission recommends that the constitutional provisions prohibiting Chiefs from participating in active politics and seeking elective office unless they vacate their chieftaincy should be repealed.

12.2.2 House of Chiefs

Submissions

12.2.2.1 Establishment and Composition

A few petitioners said that the institution of House of Chiefs should be enshrined in the Constitution (5).

A number of petitioners, including the House of Chiefs, said that the House of Chiefs should be maintained and that representation should be increased (57). The suggested number of representatives ranged from four to 10 per province.

Others were of the view that each district should be represented in the House of Chiefs (8). Three others called for representatives in the House of Chiefs to be directly elected by their subjects (3). There were also two submissions that Paramount Chiefs should be members of the House (2).

A small number of petitioners, including the House of Chiefs, argued that the term of office for the House of Chiefs should be increased from three to four or five years (5).

12.2.2.2 Functions

Some petitioners, including the House of Chiefs, said that the functions of the House of Chiefs should include passing legislation, dealing with customary law and other developmental issues (13).

A few petitioners felt that the House of Chiefs should be given more powers (5). Others, including the House of Chiefs, said that the House of Chiefs should be independent of the Ministry of Local Government and Housing and should operate under the Office of the Vice-President (4).

12.2.2.3 House of Chiefs and the Legislature

A small number of petitioners felt that the House of Chiefs should be made part of the Legislature (7). The House of Chiefs said that the House should operate as an Upper Chamber of Parliament with powers to discuss and debate Parliamentary Bills before assent by the President (1) whilst a few others called for

Chiefs to be represented in Parliament, but not belong to political parties (3).

12.2.2.4 Abolition of House of Chiefs and Establishment of Bicameral Parliament

Some petitioners said that the House of Chiefs should be abolished (20). Among these, some expressed the view that the House did not serve any meaningful purpose. Some other petitioners suggested that, in its place, an upper legislative chamber should be established in which Chiefs would be represented (11). There was one submission that the House of Chiefs should be a Lower House of Parliament (1).

Observations

The Commission notes that although relatively few petitioners spoke on the subject of the House of Chiefs, they nonetheless addressed a range of issues.

The majority of those who spoke on the composition of the House of Chiefs wanted it to be retained and its representation increased. Most of them suggested a range from four to 10 representatives per province, whilst others suggested that every district should be represented.

Other petitioners called for the term of office to be increased from three years to four or five years.

On functions of the House some petitioners, including the House of Chiefs, wanted it to be given more powers and to have a legislative function as well as deal with customary law and other issues. They also wanted the House to be independent of the Ministry in charge of local government and to operate under the Office of the Vice-President.

Some petitioners, including the House of Chiefs, called for the House to be converted or incorporated into an Upper Chamber in a bicameral legislature.

The Commission further notes that both the Mvunga and Mwanakatwe Commissions recommended the restoration of the House of Chiefs, to be composed of three representatives from each province, and that the House should be an advisory body to the Government on traditional, customary and related matters.

The Commission has taken into account the submissions on this subject and agrees with the majority of petitioners on this issue. In its evaluation, it has taken into account its earlier recommendation that Chiefs should be free to participate in active politics and seek elective office. Under such an arrangement, Chiefs would

be free to contest parliamentary elections. The Commission is also recommending that three Chiefs should be represented in each district and provincial council.

It is further observed that currently the function of the House is merely advisory and it has no direct role in the legislative process. Nonetheless, the Commission is convinced that there is need for some link between Chiefs and the Government, a clear line of communication and, of course, a common platform for Chiefs to interact. This can only be attained if the House of Chiefs can be retained and its functions increased beyond merely being advisory. The House of Chiefs should have jurisdiction to discuss matter related to national development and to make recommendations on these. It should also hear and determine chieftaincy succession disputes and other matters of traditions and customs, where affected communities have failed to resolve these, but parties should have recourse to courts of competent jurisdiction.

The Commission also agrees with the views of petitioners who called for increased representation in the House of Chiefs, and in this regard feels that there should be provision for five representatives for each province.

Recommendations

The Commission recommends that:

- the House of Chiefs should be retained and the institution of chieftaincy should continue to be recognised, subject to the Constitution;

- there should be provision for increased representation in the House of Chiefs by providing that there shall be five representatives for each province;

- the Constitution, in stating the role of functions of the House of Chiefs should include:

    a) discussion of and making recommendations on matters related to national development; and

    b) hearing and determining Chieftaincy succession disputes and all other matters related to tradition and customs where the effected community has failed to resolve these, but the parties should have recourse to courts of competent jurisdiction.

- the clarity of its role should be enhanced by subsidiary legislation;

- the Chairperson and Vice-Chairperson of the House of Chiefs should be elected annually on rotation basis while other members should be eligible for re-election;

- An MP should not be eligible for election to the House and vice-versa;
- the term of office of members of the House should be five years; and
- Chiefs' participation in legislative and related development processes should be as follows:

    a) to be represented by three Chiefs or any other person at district level who shall attend and participate in meetings of councils in order to advise them on the needs and interests of their communities;

    b) at provincial level in provincial councils by three representatives; and

    c) at national level in the National Assembly on an elective basis.

12.2.3 Institution of Chieftaincy

12.2.3.1 Recognition of the Institution of Chieftaincy

A few petitioners, including the House of Chiefs, argued that the institution of chieftaincy should be enshrined in the Constitution and that its role in the mainstream of governance should be clearly defined (17). One petitioner said that the Constitution should set standards for recognition of Chiefs and provide for their remuneration (1). There was also a submission that junior Chiefs should be recognised by the State (1).

There were two submissions that the Government should expedite the recognition of Chiefs once they are installed (2). Some petitioners, however, believed that power to recognise Chiefs should not be vested in the President or any other Government office (10). It was argued that recognition of Chiefs by the Government undermines traditional authority, customs and decisions of local people. A few petitioners said that the Government should recognise village headmen/headwomen by according them the status of traditional rulers (3).

One petitioner called for the removal of any Chief convicted of a criminal offence (1).

Observations

The Commission notes that some petitioners, who included the House of Chiefs, wanted the institution of chieftaincy to be enshrined in the Constitution and its role in governance to be clearly defined. The Commission observes that the institution of chieftaincy is already enshrined in the Constitution. Article 127 (1) provides that the institution of chieftaincy shall exist in any area of Zambia in accordance with the culture, customs and traditions or wishes and aspirations of the respective local people. This means that the role of a Chief is defined in accordance with the culture, traditions and customs of the respective community and its aspirations. Therefore, the Commission is satisfied that the role of the institution of chieftaincy is adequately defined in the Constitution.

The Commission also considered the question of recognition of Chiefs. It is of the view that installation is a matter of tradition, culture and custom. The State's role is merely to acknowledge the result of the traditional process. The Commission is, however, aware that the Government has, on some occasions, taken sides in recognising Chiefs and this has the effect of influencing the process of choice and installation of the Chiefs. Therefore, the Chiefs Act should be more explicit on the role of the Government as merely one of recognising the choice of the local people.

The Commission also considered the question of removal of any Chief convicted of a criminal offence and came to the conclusion that this can only be determined by tradition, customs and practice. On the call by petitioners for a proper definition of the role of Chiefs in governance, the Commission agrees with this view and feels that there is need for a comprehensive review of the Chiefs' Act in order to address the relationship between traditional leadership and elected local government officials at local level, the structures and roles of traditional authorities, and the principles relating to the remuneration of Chiefs.

Recommendations

The Commission recommends that the Chiefs Act should be more explicit in order to address the relationship between traditional leadership and elected local government at local level, the structures and roles of traditional authorities, and the principles relating to remuneration of Chiefs, as well as to ensure that the installation of Chiefs is done purely within the traditions

and customs of the people and that the Government plays no role in the process.

12.2.3.2 Succession to Chieftaincy - Disputes

Submissions

A number of petitioners said that matters of succession to chieftaincy should be determined by traditional courts and not by the Government (20).

Observations

The Commission considered the call made by some petitioners for matters of succession to chieftaincy to be determined by traditional courts and that the Government should not be involved.

The Commission concurs with this view and in reiterating its earlier observation that the installation of Chiefs should be dealt with according to tradition, customs and practices, emphasises that this principle also applies to the settlement of disputes. However, since the issue of chieftaincy is fundamental, it is important that any aggrieved party should have recourse to ordinary courts of law by way of appeal or judicial review. Article 127 (2) of the Constitution makes provision for such disputes to be resolved by the community concerned using a method prescribed by an Act of Parliament. The Chiefs Act provides a facility for settlement of disputes through a tribunal appointed by the President, but does not put the obligation on the Government to settle such disputes.

The Commission is of the view that the Government should have no role in these matters, not only because this should be done according to customs, traditions and culture, but also in order to avoid politicisation of the institution and remove perceptions of partisan influence. Succession disputes should be settled by communities themselves but the Constitution should also provide that the House of Chiefs shall have jurisdiction to determine such disputes as already recommended.

The Commission is also of the view that in order to avoid situations where communities remain without a Chief for an indefinite period, the law should provide for a limited period within which these disputes should be settled.

Recommendations

The Commission recommends that the Constitution should state that communities, the House of Chiefs and ordinary courts should have jurisdiction to deal with disputes over chieftaincy as already recommended, but the Government should have no role in this. The Chiefs Act should clearly spell out this position.

The Commission further recommends that the Chiefs Act should provide that disputes over chieftaincy shall be resolved within 90 days.

12.2.3.3 Abolition of Chieftaincy

Submissions

Some petitioners proposed that the institution of chieftaincy should be abolished (5). It was argued that chieftaincy, as an institution, is anachronistic to modern democratic practices and retards development.

Other petitioners said that the Litunga's emissary Chiefs should be removed, as the practice promotes a sense of domination (5).

Observations

The Commission notes that a few petitioners called for abolition of the institution of chieftaincy, arguing that it was incompatible with modern democratic practices and development. The Commission observes that this institution has existed in the country since pre-colonial days and continues to play a key role in the governance of the country. Traditional authority, customs and practices need not be incompatible with demands of modern democracy and development. What is required is an innovative institutional arrangement which combines the natural capacities of both traditional and elected local government to advance the development of the communities. Indeed, traditional authorities are not static, but dynamic in response to the prevailing political, social and economic conditions.

The Commission also considered the call by a few petitioners for abolition of the practice of installing emissary Chiefs representing the Litunga, which they alleged to be promoting domination of other tribes. The Commission's view is that this matter should be settled between the Barotse Royal

Establishment and the subjects in the affected areas, in accordance with established traditions, customs and practices.

Recommendations

The Commission recommends that:

- the institution of chieftaincy, as provided for in the Constitution, should be retained;

- an innovative institutional arrangement should be put in place to streamline the role of traditional authorities in politics and governance through principles of co-operative governance; and

- the call for abolition of the practice of installing emissary Chiefs representing the Litunga should be resolved by the Litunga and the people affected.

12.2.4 Traditional Ceremonies, Customs and Marriage

Submissions

Very few petitioners argued that traditional ceremonies should be recognised by the Constitution and be equally funded and supported by the Government (3). On the other hand, three petitioners said that traditional ceremonies should be abolished (3). It was felt that sometimes state resources are used to promote these ceremonies at the expense of development.

One petitioner said that "lobola" should be standardised (1) while two proposed that "sexual cleansing" should be outlawed (2).

A few petitioners said that customary laws relating to divorce, affiliation and maintenance should be reviewed to strengthen the protection of children (5).

Observations

The Commission notes that a few petitioners wanted traditional ceremonies to be given recognition in the Constitution and supported by the Government, whilst a few others felt that traditional ceremonies should be abolished, arguing that they were an unnecessary expense on the National Treasury. The Commission observes that, whilst it would not be appropriate to make provision for traditional ceremonies in the Constitution, they play a significant role in the lives of the people. They

promote cultural awareness and also contribute to national development, for example, through tourism.

The Commission also considered the submission that "lobola" should be standardised. Since this is a customary law matter, it has to be determined according to customary traditions.

The Commission deliberated on the issue of "sexual cleansing" and concluded that if non-consensual, the practice amounts to the criminal offence of rape under the Penal Code. The Commission is, however, of the view that it would be wrong in principle to criminalise the practice where it involves consenting adults. However, since the practice is repugnant and a possible channel for the transmission of sexually transmitted infections (STIs), including HIV, it cannot be given formal recognition.

The Commission is therefore of the view that the issue could be best addressed through awareness campaigns and education programmes. It is important that the issue is dealt with through this approach within the framework of programmes aimed at prevention and control of HIV/AIDS and STIs.

The Commission also considered submissions made by a few petitioners that customary laws relating to divorce, affiliation and maintenance should be reviewed in order to afford children better protection.

The Commission agrees with these petitioners and is of the view that both statutory and customary laws on the subject in question should offer better protection and support to children and/or a deserving party, who is usually a vulnerable woman. Although customary laws pertaining to these issues vary among the various ethnic groups, the main source of practices that are prejudicial to the interests of children and women is distortion of customary laws coupled with maladministration of justice, particularly in local courts. The Commission feels that both statutory and customary laws should be reviewed to safeguard the interests of children and/or a deserving party.

Recommendations

The Commission recommends that:

- the Government and civil society organisations should intensify their awareness campaigns and education programmes against "sexual cleansing" and HIV/AIDS/STIs; and

- the subject of review of customary laws and statutory laws relating to divorce, affiliation and maintenance should be referred to the Law Development Commission for research, with a view to codification and amendment as necessary in order to give the interests of children and/or a deserving party better protection and support.

12.2.5 Harmonisation of Statutory and Customary Laws

Submissions

Two petitioners, including the House of Chiefs, argued that customary law should be harmonised with statutory law to remove conflicts (3). An example was given of marriage of girls below the age of 16 under customary law. Whereas these marriages are valid and recognised under customary law, they constitute an offence under the Penal Code, which prohibits carnal knowledge of a girl under the age of 16.

Observations

The Commission notes that some petitioners, who included the House of Chiefs, called for harmonisation of statutory and customary laws in order to remove conflicts. An example was given of customary law marriage of girls under 16, which is a criminal offence under statutory law.

The Commission agrees with this view, but observes that the law states that where customary law is in conflict with statutory law, the former is void. However, in order to deal with problems existing in practice, the matter should be referred to the Law Development Commission.

Recommendations

The Commission recommends that statutory law and customary law should be harmonised wherever there are conflicts, and that the Law Development Commission should include this in its programme.

12.2.6 Chiefs, Local Resources and Collection of Levies

Submissions

A few petitioners proposed that Chiefs should be empowered by law to impose and collect levies from their subjects, such as development levy (5). Some petitioners, including the House of Chiefs, said that Chiefs and their subjects should benefit from exploitation of local resources by investors (18). Two petitioners proposed that investors in rural areas

should pay 20% of tax to the Chief and 10% to the community in which they operate (2).

Observations

Some petitioners, though relatively few, wanted Chiefs to be empowered by law to impose and collect levies from their subjects. They further submitted that Chiefs and local communities should derive some benefit from investors' exploitation of local resources. It was suggested that investors' tax should be apportioned to the local Chief and community at the rates of 20% and 10%, respectively.

The Commission agrees with these views in principle, but feels that specific provisions on revenue sharing at the local level should be addressed within the framework of devolution of power, functions, responsibilities and resources to local government, which should be prescribed by an Act of Parliament for the benefit of the local communities.

Recommendations

The Commission therefore recommends that the principle of resource sharing at local level, within the framework of devolution of power and cooperative governance, should include Chiefs and local communities as beneficiaries, but that this should be addressed through an Act of Parliament.

12.2.7 Remuneration of Chiefs

Submissions

A number of petitioners, including the House of Chiefs, argued that the Government should pay salaries to Chiefs (63). A few among these also suggested that even Headmen and Indunas who assist Chiefs in local governance should receive salaries and allowances. One other petitioner proposed that the salary of a Paramount Chief should be equivalent to that of a Cabinet Minister (1).

One petitioner said that Chiefs should be entitled to a pension (1), while others said that the Government should provide transport and build palaces for Chiefs (10).
Observations

The Commission considered the various views submitted by petitioners on the subject of remuneration of Chiefs. Whilst acknowledging the principle that Chiefs' contribution to governance should be remunerated, the

Commission feels that the form that this takes should be determined by or under and an Act of Parliament within the framework of devolution of power in the local government structure, which should be defined by an Act of Parliament. However, remuneration for members of the House of Chiefs shall be determined by the Emoluments Commission and approved by the National Assembly.

Recommendations

The Commission recommends that remuneration of Chiefs should be provided for by an Act of Parliament within the framework of decentrlaisation of power in the local government structure and the relative capacity of local authorities.

12.2.8 Code of Conduct and Immunity from legal Proceedings - Chiefs

Submissions

One petitioner said that Chiefs should have a code of conduct (1). A few petitioners said that Chiefs should enjoy immunity from legal proceedings and, in particular, criminal proceedings (4).

Observations

The Commission notes the call by one petitioner for Chiefs to have a code of conduct and observes that a Chief's conduct is regulated by established traditions, customs and practices.

The Commission considered the call made by a few petitioners for Chiefs to be accorded immunity from legal proceedings. The Commission is of the view that, in law, the status of a Chief is that of an ordinary citizen and does not warrant, let alone justify, their protection from legal proceedings.

Recommendations

Accordingly, the Commission does not make any recommendations.

12.2.9 Traditional Court - Land Disputes

Submissions

One petitioner said that Chiefs should have their own court to deal with land disputes (1). The petitioner added that the Court should comprise two Paramount Chiefs, three Senior Chiefs and a Government Clerk of Court.

Observations

The Commission considered the submission from one petitioner that Chiefs should have their own court to deal with land disputes. The Commission observes that it has earlier made observations on the subject of Chiefs presiding over local courts, integration of traditional courts into the judicial system and the establishment of a "Traditional Court of Appeal". It reiterates that jurisdiction over land disputes should be left to the ordinary courts. However, as already recommended, the House of Chiefs should have jurisdiction to deal with disputes over customary land.

Recommendations

The Commission recommends that land disputes should continue to fall under the jurisdiction of ordinary courts but the House of Chiefs should have jurisdiction to hear and determine disputes over customary land where these have not been resolved at community level as already recommended in this Report.

12.2.10 Traditional Land

Submissions

Four petitioners said that Chiefs should not displace subjects by giving land to investors (4).

Observations

The Commission notes the call made by a few petitioners for Chiefs not to displace subjects by giving land to investors. The Commission appreciates the apprehension that uncontrolled allocation of land may cause a crisis. Further, the Commission observes that the Lands Act regulates allocation of land under traditional rulers. There may be need for improvement in the procedures; for example, consulting respective local communities when land allocation to an investor is being considered.

Recommendations

The Commission recommends that the Ministry of Lands should examine the procedure relating to allocation of land under traditional rulers, with a view to involving the local communities through consultations and that this be incorporated in the appropriate legislation.

12.2.11 Witchcraft

Submissions

Many petitioners argued that the Witchcraft Act should be revisited so that offences under it attract stiffer penalties (88).

Some petitioners said that witches should be given the death penalty when proven guilty (9).

Observations

The Commission notes that a number of petitioners wanted the Witchcraft Act to be revisited in order to make penalties for offences stiffer, including prescribing the death penalty for the offence of "murder" through witchcraft.

Though the Commission acknowledges that there is a general belief in the practice of witchcraft, the Commission is not attracted to the idea of legislating on matters that cannot be proven by empirical evidence.

CHAPTER 13

POLITICAL PARTIES

Terms of Reference:

No. 13 Recommend the relationship that should exist between the party in power and the parties in opposition and whether or not the political parties should be funded by government and, if so, to what extent; and

No. 28 Examine and recommend on any subject-matter of a constitutional, political or economic nature which, in the Commission's view has relevance in the strengthening of parliamentary and multi-party democracy.

13.1 Introduction

Zambia is still a young multi-party democratic State, having returned to plural politics slightly over a decade ago after nearly two decades of one party rule. For democracy to thrive, there is need to have a strong and organised political party system that encourages competitive politics, accountability and transparency. A good democratic system would ensure peaceful co-existence of different shades of political opinion which should contribute to stability and ultimately lead to sustainable development of the country.

Political parties can be perceived as associations of citizens whose main objectives or purposes are to form government, or influence public affairs, policies and governance, processes by competing in presidential, parliamentary and local government elections. Apart from articulating the interests of their members, political parties act as important instruments through which people express their will and hold Government accountable in the management of the affairs of the nation.

Petitioners to the Mvunga and Mwanakatwe Commissions called for regulation in the registration of political parties so that they are not tribally-based, for example through a minimum membership requirement for each province. Petitioners were divided on the question of regulating the number of political parties. Some advocated a limitation of the number to between two and five. They argued that allowing any number of political parties would promote tribally-based parties and

that a proliferation of parties would undermine political competition. Most petitioners, however, called for an unlimited number of political parties, arguing that limiting the number would be undemocratic and constitute an infringement on the freedom of association.

Both Commissions recommended that there should be no limitation on the number of political parties, arguing that this was essential in a democracy and that the strength of political parties should be left to the political market forces. The Mvunga Commission, however, further recommended that the formation of parties should be regulated by legislation to ensure that they were not tribally based.

In comparative terms, many democracies regulate the registration of parties but do not limit the number. An example is India, where registration is based on economic programmes and manifestos. Those parties with similar manifestos are merged.

It has been propagated in some circles that political parties should be funded by the State in order to enhance democracy. There are, however, contrary views on the subject of funding of political parties.

Some petitioners to the Mvunga Commission called for assistance to political parties through external funding, whilst others argued that such funding should be channelled through the Government. Petitioners felt that assistance to political parties would strengthen democracy. The Commission recommended that political parties that have secured any number of seats in Parliament should be assisted with Government grants through Parliament in equal amounts and that any external assistance to parties should be channelled through the Government.

The majority of petitioners to the Mwanakatwe Commission on this subject called for funding of political parties by the State. Petitioners observed that the ruling party had, in any event, access to State resources. Most petitioners suggested that such funding should be restricted to those parties with seats in Parliament, whilst others favoured funding for elections only. A minority of petitioners were opposed to the idea of funding political parties by the State. They argued that it would be a waste of tax payers' money and that this would lead to the development of what they termed as "political party commercial enterprise." However, the Commission did not make any recommendation on the issue.

On the related issue of the relationship between the ruling party and the Government, both Commissions received submissions on the need to separate the ruling party from Government functions and operations. Both recommended that the ruling party should not have access to Government resources.

In the case of South Africa, Section 236 of the Constitution provides for funding of political parties participating in national and provincial legislatures on an

equitable and proportional basis. A party qualifies to be funded if it has representatives in the National Assembly or in a Provincial Legislature or in both. The funds are proportionately and equitably distributed and the Chief Electoral Officer is responsible for the management of the Fund.

Another issue that has been raised is defining the frame-work of the relationship between the ruling party and the opposition parties. This is perceived by some citizens as cardinal, considering that the ruling party and leadership are the main political instrument in exercising State power. They are seen as capable of inspiring, promoting or undermining the opposition parties' ability to participate in national development.

Petitioners have repeatedly raised the issue of internal party democracy. Petitioners to the Mwanakatwe Commission complained against the manner in which upper organs of some parties imposed election candidates on their members. They called for a constitutional provision obligating parties to conduct primary elections to elect candidates. The Commission recommended that political parties' internal organisation should conform to democratic principles.

Current Constitutional Provisions

There are no specific provisions in the Constitution dealing with political parties. However, the preamble to the Constitution states that:

> *"Zambia shall forever remain a…multi-party and democratic sovereign State".*

Further, Article 1 (1) reiterates this by stating, in part, that:

> *"Zambia is a… multi-party and democratic sovereign State".*

The Constitution also makes reference to political parties in provisions dealing with election of the President. Article 34 (3) (d) in dealing with the qualifications of a presidential candidate requires that such a candidate "is a member of, or is sponsored by, a political party."

Currently, there are 28 registered political parties in Zambia. There is no specific legislation relating to the registration and regulation of political parties, although the Societies Act has been used for this purpose.

There is also no limit to the number of political parties. Advantages and disadvantages have been cited pertaining to the possibility of restricting the number of political parties. It has been argued that a restriction on the number of political parties, for instance, would violate the right and freedom of association.

On the other hand, too many political parties, it has been contended, may promote tribalism and regionalism and deny the electorate a credible choice.

13.2 Submissions, Observations and Recommendations

Three thousand four hundred and seventy-nine (3,479) submissions were made.

Submissions received on this subject include those on the definition of political parties, party registration and participation in elections, funding of political parties, disclosure of sources of funding and restriction on campaign funds, restrictions on parties, inter-party dialogue, number of parties and intra-party democracy.

13.2.1 Definition of Political Parties, Party Registration and Participation in Elections

Submissions

13.2.1.1 Definition of Political Parties

One petitioner said that, "Political parties" should be defined as "… any registered party and includes any organisation or movement of a political nature." (1)

13.2.1.2 Party Registration

Some petitioners said that a body other than the Registrar of Societies should register political parties (11). In particular, it was suggested that legislation should be passed to regulate the conduct of political parties. A few petitioners suggested that political parties should be registered and regulated by the Electoral Commission of Zambia (5).

Others were of the view that a political party which is formed or campaigns on ethnic lines or fails to participate in elections or fails to win a parliamentary or local government seat or is guilty of electoral malpractice (including corruption) should be de-registered for a prescribed period (12).

A number of petitioners felt that in order to avoid proliferation of political parties and to strengthen the party system, the Constitution should provide for strict conditions for the registration of political parties (70). It was proposed that a party should:

- not be registered in an election year;
- ensure that its constitution is based on democratic principles;
- have membership of eligible voters ranging from 2,000 to 2,000,000;
- have at least 40% of eligible voters as members;
- provide proof of representation or membership in all constituencies;
- provide proof of representation in all provinces;
- provide proof of having a prescribed number of members/supporters in each district;
- be financially sound with a minimum amount of K50 million in its bank account; and
- have offices at all levels of the party structure.

13.2.2 Participation in Elections

Some other petitioners called for a minimum period within which political parties should exist before they can participate in any election (14). Suggested periods were:

- four years;
- two years (most popular);
- one year; and
- one month.

There was a submission that a party that rules for more than 20 years should not be eligible to contest presidential and parliamentary elections (1).

Observations

Although only one petitioner called for the definition of a "political party", it is the view of the Commission that this is important, particularly in view

of prevailing apprehensions that some civil society organisations operate like political parties.

Generally, a political party is defined from a functional point of view, namely from the objectives and functions of this type of organisation. Political parties are formed with the objective of contesting elections and forming or influencing the formation of government. Thus, one source has defined a political party as "an association or organisation of persons which has for its objects or purposes or one or more of its objects or purposes the proposition or support of candidates for national or local government elections with a view to forming or influencing the formation of the government."

On the other hand, civil society organisations have been defined as non-State groups and organisations that seek to protect popular interests and which enjoy relative autonomy, their main purpose and function being the pursuit of specific socio-economic development programmes aimed at improving the welfare and standards of living of the communities or society they serve. Consequently, civil society organisations may participate in politics, for example through civic education on issues of governance (such as political, civil and socio-economic rights and elections), but without the motive of assuming state power or governing. Therefore, in this way, civil society organisations influence politics in a nation. However, it is improper for civil society organisations to align themselves with political parties, as this would be outside the scope of their objectives and functions.

The Commission observes that in the case of Nigeria, the Constitution explicitly prohibits associations other than political parties from engaging in political activities, such as canvassing for votes for any candidate at any election or contributing to the funds of any political party or to the election expenses of any candidate at an election.

From the above definitions of political parties and civil society organisations, it can be understood why, in the Zambian context, some civil society organisations have been accused of operating like political parties or harbouring political agendas while hiding under the cover of civil societies. This is partly because of misconceptions that civil society organisations should have no role whatsoever in politics. However, it is correct to state that there are civil society organisations that have been accused of campaigning for or aligning themselves with political parties.

In the light of the above considerations, the Commission is of the view that the law should provide a clear definition of a political party so as to regulate the conduct of political parties on the one hand, and civil society organisations on the other. However, this definition should not be in the

Constitution, but be left to appropriate legislation. In this regard, the Commission finds the definition of a political party as suggested by the petitioner to be vague and so broad that there is a danger of including civil society organisations in it.

In relation to the subject of registration of political parties and their participation in elections, the Commission wishes, in the first instance, to acknowledge the importance of political parties to democracy and governance. Multi-party democracy cannot thrive without strong political parties which are able to participate fairly and freely in elections. In order to play this important role, political parties must observe tenets of good governance and democracy. They should also show that they hold substantially different manifestos from other registered political parties. Democracy is synonymous with government by the people. Democracy legitimises government authority and promotes peace and stability in a nation. In a multi-party democracy, the will of the people to form government is expressed through political parties. Therefore, it is important that parties are themselves democratic.

The basic tenets of democracy demand that parties should embrace and include principles such as holding regular and free elections; disciplinary codes to embrace rules of natural justice; assurance of freedom of expression and the right to holding dissenting views, as well as the right to vote and be voted for.

On the subject of registration of political parties, a few petitioners wanted a body other than the Registrar of Societies to register parties. Some of them suggested that this should be done by the Electoral Commission of Zambia. They also called for the functions of the institution registering political parties to include regulation of the conduct of parties, in order to ensure that this is in conformity with prescribed standards. Some of the petitioners felt that there should be strict conditions for the registration of political parties, which included that they should reflect the national character.

It is noteworthy that Zambia currently has 28 registered political parties. However, only a few political parties have been politically active. For example, in the 2001 elections, only 11 political parties participated in the elections out of which only six managed to win parliamentary seats. These were: Movement for Multi-party Democracy (69) (which is the current ruling party), United Party for National Development (49) (currently the principal opposition party), United National Independence Party (13), Forum for Democracy and Development (12), Heritage Party (4), Patriotic Front (1) and Zambia Republican Party (1).

Whilst the Commission appreciates the submissions that the number of parties should be limited, it is of the view that freedom of association cannot be restricted by limiting the number of parties, but that the Electoral Commission of Zambia should register and regulate the conduct of political parties and that the process should be free, fair, transparent and accessible. The registration and conduct of political parties should be regulated according to prescribed criteria and a code of conduct, which should include the basic tenets of democracy outlined above. The criteria for registration and the code of conduct should also require that constitutions of political parties have clear objectives and that the parties themselves should be national in both character and outlook.

The Commission notes that in Nigeria, the Constitution provides that constitutions of political parties shall provide for regular elections, at intervals not exceeding four years, on a democratic basis of the principal officers and members of governing bodies. The Constitution also prohibits ethnic and religious based political parties. In addition, rules relating to eligibility for membership to political parties as well as the composition of membership of governing bodies of political parties are required to reflect the national character.

Petitioners to both the Mvunga and Mwanakatwe Commissions called for regulation in the registration of political parties, but reasons for these submissions were mainly to avoid regionally-based parties. The Mvunga Commission recommended that formation of parties should be regulated by legislation to ensure that they were not tribally-based. The Mwanakatwe Commission recommended that political parties should be freely established and registered, but that their internal organisation should conform to democratic principles.

This Commission also observes that, contrary to the submissions of petitioners to the Commission, petitioners to the Electoral Reform Technical Committee called for political parties to be registered under the Societies Act. In its final report the ERTC recommended that political parties should be registered and monitored by the Registrar of Political Parties, arguing that this should not be done by the Electoral Commission because its role in the electoral process could be compromised. This Commission is of the view, however, that it is appropriate for political parties to be registered by the ECZ. This is because registration and regulation of the conduct of political parties and the conduct of the electoral process are closely related and would, therefore, be more effectively carried out by the same institution.

With respect to calls by petitioners for restrictions on political parties' participation in elections, the desire that political parties should not only focus on elections, but also actively participate in the politics of the

country is implicit in these submissions. Petitioners are also concerned that some political parties are only sponsored to split the votes and cause confusion, thereby robbing the electorate of their right to choose credible candidates. Such parties become a burden on the administration of elections and they do not reflect any sense of seriousness because they fizzle out after elections. The Commission appreciates the reasoning behind such submissions, but the Commission is of the view that restriction and monitoring of political parties are best dealt with through regulations by the appropriate body responsible for the conduct of both elections and political parties.

On the issue of restricting political parties which have been in power for more than 20 years from taking part in elections, the Commission's view is that these political parties are mature, experienced and have the structures necessary for a strong political party. In addition, the Commission notes that political leadership and membership keep changing and therefore to exclude a political party on the basis that it has been in existence for a long time is to deny new members of such a political party the right to be voted for. The Commission is therefore of the view that there should be no restriction on eligibility of a political party that wishes to participate in elections, as this would be contrary to the tenets of democracy.

Recommendations

The Commission recommends that:

- a political party should be defined in appropriate legislation as "an association or organisation of Zambian nationals which is national in character and has one or more of its objects or purposes contesting elections in order to form government or influence national or local government.";

- the Electoral Commission of Zambia should register, de-register and regulate the conduct of political parties;

- the registration process should be free, fair, transparent and accessible;

- there should be a constitutional provision on political parties setting out clear criteria for forming and registering political parties and a code of conduct to effectively regulate them, the details of which shall be spelt out in an Act of Parliament and shall include the following:

i) observance of basic tenets of democracy, which should also be reflected in their constitutions;

ii) holding regular free and fair elections,

iii) adopting a disciplinary code that embrace rules of natural justice;

iv) assurance of freedom of expression and the right to hold dissenting views;

v) the right to vote and to be voted for; and

vi) observance of criteria in compiling party lists.

- the Constitution should provide that political parties shall be freely established and registered, but should conform to criteria and code of conduct to be prescribed by appropriate legislation;

- regulations for registration and conduct of political parties should also include provisions that political parties must conform to their constitutions and objectives;

- there should be no restriction on eligibility of political parties to participate in elections, but parties should be regulated through an Act of Parliament; and

- there should be no restriction on the lifespan of a political party.

13.2.3 Restriction on Number of Parties

Submissions

An overwhelming number of petitioners argued that the number of political parties should be limited (1,277). The main reasons advanced were to:

- strengthen democracy and increase political competition;

- avoid splitting votes to levels where candidates may fail to achieve the required majority;

- avoid a trend of regional parties;

- avoid one-man or briefcase parties;

- avoid proliferation of parties;
- avoid confusion; and
- enable the Government to rationally fund parties.

The specific numbers of parties preferred were as follows:

- one;
- two;
- three (most popular); and
- four.

Some petitioners, on the other hand, felt that the number of political parties should not be limited (21). It was felt that citizens should continue to exercise their freedom of association and, in any event, the number of political parties has no relevance to the nature and quality of political competition.

Observations

An overwhelming majority of petitioners called for a restriction on the number of political parties. The argument was mainly that this would strengthen democracy in the sense that parties will be more effective and the electorate would be more focused in their choice of credible candidates. Petitioners also felt that such restriction would discourage the formation of regional parties and that it would be easier to fund political parties if they were few. The majority of petitioners were in favour of the number of political parties being limited to three. In contrast, very few petitioners were opposed to the concept of restricting the number of political parties. These felt that such a move would be contrary to freedom of association.

The Commission observes that multi-party democracy was reintroduced in the country only after a decade ago. This was after almost two decades of one-party rule. With the advent of multi-party politics in 1991, many political parties emerged. A number of these were too small to operate effectively. Invariably, they had no party programmes or manifestos and lacked capacity to resist the strains of politics in a country as diverse as Zambia.

The submissions calling for a restriction on the number of political parties reflect the disillusionment and frustrations of the people who feel that

some parties are frivolous and opportunistic in nature. Since the 1991 multi-party elections, no single opposition party has been strong enough to unseat the ruling party. This has often been attributed to the fact that these opposition parties split votes amongst themselves. There is also a feeling that the existence of many political parties in the country makes it difficult for people to identify with any particular party, as most of them appear to be virtually the same in terms of ideology, membership strength and outlook.

The Commission, however, is not persuaded by the submissions calling for restriction in the number of political parties, because such limitation runs counter to democracy and freedom of association. Limiting the formation of political parties can only bring about tension, instability and insurgency. In any case, the democratisation process invariably leads to a rush in party formations, many of which disappear through natural attrition.

For Africa as a whole, the Commission observes that the transition from one-party rule to multi-party democracy opened political floodgates leading to formation of many political parties. For example, Mali by 1999 had more than 70 parties while Cameroon had 159 parties by 2002 (as compared to Zambia's 28 parties). The Commission also observes that the tendency for some political parties to operate on narrow ethnic and personal power base is not peculiar to Zambia. However, such matters are best left to the electorate and regulations governing the formation of political parties.

The Mvunga Commission also recommended that there should be no limit to the number of political parties, but that appropriate legislation should be enacted to regulate the formation of political parties so as to ensure that such parties are not tribally-based.

The Mwanakatwe Commission acknowledged the adverse impact that numerous political parties might have in a developing country with a diversity of ethnic groups. However, in its recommendations, the Commission indicated that since the formation of political parties was key to democracy, no legal limit should ever be placed on the number of political parties in Zambia.

Recommendations

The Commission therefore recommends that the law should not limit the number of political parties to be registered, but that appropriate legislation should prescribe standards and criteria to regulate the registration and conduct of parties.

13.2.4 Funding of Political Parties

Submissions

An overwhelming number of petitioners argued that political parties should be funded by the State (1,171). The main reasons advanced were:

- to strengthen multi-party democracy; and
- to create a level playing field and prevent a situation where only the ruling party benefited from the use of public resources.

Those who supported funding of political parties suggested several criteria. These included that a party should:

- obtain at least 25% of the presidential vote;
- have at least 1,000 members in each district;
- have at least 50,000 members nationwide;
- have at least five, 10, 15 or 30 parliamentary seats;
- have at least a seat in Parliament (most favoured);
- have a membership threshold ranging from 200 to 1,000 per province; and
- be a ruling party.

Some of these petitioners felt that funding of political parties should be on an equal basis and that such funding should only be during election campaigns. Others said that funding should be provided only if the number of political parties is limited to three. However, the majority of those who made submissions on the issue of funding preferred funding to be restricted to those political parties with seats in Parliament.

Some petitioners said that all leaders of political parties should be on the Government payroll (37).

There was also a large number of petitioners who addressed this subject and who argued that political parties should not be funded by the State (550). The main reasons advanced were:

- funding by the State would encourage a proliferation of political parties;

- such funding would impose unnecessary demand on the national Treasury; and

- such funding would serve only to enrich the leaders of these parties.

Observations

On the subject of funding of political parties, the Commission notes that the majority of petitioners called for the Government to fund political parties. The main reasons they advanced were that this would strengthen multiparty democracy and create a level playing field by preventing a situation where only the ruling party benefited from the use of public resources. Petitioners suggested several criteria for funding of political parties by the Government, the most popular one being that only parties represented in Parliament should be funded. In this regard, the petitioners further suggested that parties should be funded on a pro rata basis in relation to their respective number of seats in Parliament.

The Commission also notes the other view held by some petitioners, although in the minority, that political parties should not be funded. These petitioners argued that funding political parties would lead to the proliferation of parties. It was also their view that such funding would impose unnecessary demands on the National Treasury and, in the long run, only serve to enrich the leaders of those parties. Some of these petitioners further argued that Zambia had insufficient resources to sustain such funding and that it had more pressing social and economic priorities. Additionally, such funding may encourage formation of parties on sectarian and ethnic lines.

This Commission examined the Reports of the Mvunga and Mwanakatwe Commissions in relation to this subject and found that petitioners have been consistent in calling for the Government to fund political parties.

A number of petitioners who made submissions to the Mvunga Commission wanted political parties to be granted financial assistance in order to enable them exist, since they take part in the formulation of laws, thereby strengthening democracy. They further suggested that such grants should come from parliamentary allocations. In its recommendations, the Mvunga Commission recommended that political parties with any number of seats in Parliament be assisted with Government grants through Parliament in equal amounts, subject to accountability to Parliament

The majority of petitioners to the Mwanakatwe Commission who addressed and supported the subject of funding of political parties argued that it was important for democracy and that it was virtually impossible for small parties without adequate funding to be viable. They further argued that there was need to level the playing field, assuming that the ruling party always has an upper hand because it enjoyed direct or indirect access to public resources. They cited Ministers' use of Government transport when visiting their constituencies as a case in point.

However, a few petitioners to the Mwanakatwe Commission were opposed to the idea, arguing that political parties should thrive on the goodwill of their members and that it was the responsibility of party members to make resources available to support their party affairs. They also felt that funding political parties was not economically feasible and would lead to Zambia having more political parties operating as commercial enterprises.

The ERTC, in its Report, recommended that the national budget should provide for funding of political parties proportional to the seats in Parliament and councils, and that only parties with representation in Parliament or a local authority should be funded. The ERTC reasoned that political parties needed funding because of paucity of resources amongst political parties. The Committee also reasoned that this would help parties avoid being compromised on issues of national interest and security. In its recommendations, the ERTC also called for Government funding of political parties to be aimed at meeting parties' administrative and electioneering costs. The Commission agrees with the recommendations of the ERTC that the funding of political parties should be based on representation in Parliament and local authorities.

The Commission also notes the submission that leaders of political parties should be on the Government payroll. However this, in the view of the Commission, is not feasible in a situation where there are so many parties.

In terms of comparisons with practices in other countries, the Commission finds that in Nigeria, the Constitution provides that the Government may fund political parties as prescribed by law, on fair and equitable basis. In South Africa, the Constitution provides that political parties participating in national and provincial legislatures shall be funded on an equitable and proportional basis.

Following lengthy deliberations on the subject, this Commission came to the conclusion that the call for the Government to fund political parties is justified. It is the view of this Commission that such funding will enhance multiparty democracy and contribute to the country achieving a level political playing field. However, such funding should not be

indiscriminate. The Commission agrees with the view of the majority of petitioners that Government funding of political parties should be restricted to registered political parties with seats in Parliament or local authorities. Further, such funding should be proportional to the number of seats and should be accounted for through audited annual statements. These criteria are justified on the basis that such parties demonstrate that they exist and parties with more seats need more funds because the scope of their functions and administrative obligations is wider. The public funding to political parties should be managed by ECZ and will be regulated to guard against abuse and misuse.

Recommendations

The Commission recommends that the Constitution should provide that:

- registered political parties with seats in Parliament or local authorities, as the case may be, should be funded by the Government proportionately to their respective number of seats to ensure adequate and equitable participation in elections;

- political parties that receive funds from the Government shall be required to account for expenditure of these funds through annual statements which should be submitted to the Electoral Commission of Zambia;

- public funds and resources for political parties should be regulated to guard against abuse and misuse; and

- public institutions should not be allowed to make financial, material or other contributions to political parties.

13.2.5 Disclosure of Sources of Funding and Restriction on Campaign Funds

Submissions

A number of petitioners argued that there should be a legal provision for disclosure by political parties of their sources of funding (58). Four of these petitioners said that presidential and parliamentary candidates should be compelled to disclose sources of their campaign funds (4).

Others felt that there should be a limit on the amount of campaign funds that can be raised and used in a campaign to ensure a level playing field and to avoid candidates obtaining funds from questionable sources (2).

Observations

The Commission notes the submission calling for a legal provision to compel political parties to disclose their sources of funding, including sources of campaign funds for presidential and parliamentary elections. Others wanted a limit on the amount of funds a party could use in election campaigns. Petitioners called for these controls in order to curb corruption and prevent political parties from being used for money laundering and from receiving funds from other questionable sources such as drug dealers. It was also the view of petitioners that such action would help to provide a level playing field and ensure free and fair elections.

The Commission observes that some funding given to political parties by "well wishers" or "friends of the party" is clearly intended to buy political favours and to gain indirect influence on the party, should such a party win elections. The Commission agrees that if there is no legal requirement for the disclosure of sources of funds on political parties, some political parties may be used for money laundering. This may lead to patronage and corruption, and thereby compromise good governance and the rule of law. It is noteworthy that in the 2001 elections, parties raised campaign funds largely from donors within and outside the country, some of whom wanted to remain anonymous. Once a political party is voted into Government, these donors may want to hold such a government to ransom. Good governance and the rule of law, which are the bedrock of democracy, can be compromised and this could lead to the nation being ruined.

The Commission also examined provisions of the Constitution of Nigeria. This constitution has extensive provisions regulating the conduct of political parties, which include those on financing of political parties. Every political party is required to submit to the National Electoral Commission a statement of assets and liabilities, when requested to do so by the National Electoral Commission.

Political parties are also required to submit an annual statement and analysis of sources of funds and other assets. Political parties are not allowed to possess funds or other assets outside the country or to retain any funds or assets remitted or sent to it from outside. Any funds sent to a party from outside is handed over or transferred to the Commission within 21 days with such information as the Commission may require. The National Electoral Commission is required, every year, to prepare a report to the National Assembly on accounts and balance sheets of every political party.

The Commission therefore agrees with the petitioners who called for disclosure of sources of funding of political parties and that there should

be transparency regarding sources of funding for both political parties and candidates, and a limit on the amount of funds a political party may utilise in election campaigns. Appropriate legislation should make provision for these requirements. In its function of regulating and monitoring the conduct of political parties, the Electoral Commission of Zambia should ensure that political parties comply with these requirements.

The Commission also notes that petitioners to the Mvunga Commission called for grants from well-wishers outside the country to be channelled through the Central Bank or the Ministry of Finance, and the Commission recommended accordingly.

The ERTC has also recommended that political parties should be obliged to disclose their sources of funding as a way of building a more accountable and transparent political system. In its findings, the ERTC points out that dirty money may be used to fund election campaigns and if this were not curbed, democracy would be compromised.

Recommendations

The Commission therefore recommends that appropriate legislation should:

- compel political parties and election candidates to be transparent regarding sources of funds, including election campaign funds, and limit the amount of election campaign funds that can be raised and used by a political party or candidate, and require disclosure of sources of campaign funds where these exceed the prescribed limit;

- provide that political parties should submit annual statements on their receipts of funds and expenditure; and

- provide that disclosure of amounts and sources of funds and annual statements on finances of political parties should be made to the Electoral Commission of Zambia, which should ensure compliance by political parties with the requirements of the law within its function of regulating and monitoring the conduct of political parties.

13.2.6 Inter-Party Dialogue (Relationship between Party in Power and the Opposition)

Submissions

A number of petitioners called for inter-party dialogue (181). Some of these called for enhanced and improved relations between the ruling party and those in opposition. It was suggested that the Constitution should provide for institutional mechanisms that will promote co-operation between the party in power and opposition parties in the interest of national development.

Observations

A number of petitioners called for inter-party dialogue to be institutionalised in order to promote co-operation among political parties and to foster national development.

The Commission observes that the major objective of any political party is to aspire to form government. When in opposition, it must be regarded as the "alternative" party or "government in waiting". For the same reasons, both the ruling party and the parties in opposition must share a "national objective" which in our country must aim at but not be limited to democracy, good governance and the eradication of poverty. This can only be achieved if political parties understand that this is their common goal. Serious inter-party dialogue must be encouraged on a regular basis. Lessons from the one-party rule suggest that the ruling party never benefited from other opinions because there were no other political parties to render them.

The Mwanakatwe Commission found that the majority of petitioners who addressed the issue of the relationship that should exist between the party in power and the parties in opposition were unanimous on the need to cultivate a spirit of co-operation and consultation between the ruling party and opposition parties in order to reduce suspicion, enhance unity and promote development in the country.

The Commission also looked at the practice in South Africa. The Electoral Act of South Africa provides for a Party Liaison Committee whose membership is drawn from all political parties. The cost of participation in the Committee is borne by individual parties. The Committee meets once every month to harmonise the relations between political parties, especially during electoral disputes.

The Commission fully agrees with petitioners' calls for inter-party dialogue in the interest of national development and the need for constitutional mechanisms that will promote co-operation between political parties.

Recommendations

The Commission recommends that appropriate legislation should be enacted to:

- establish mechanisms and a forum for the purpose of inter-party dialogue; and

- provide that it will be a function of the Electoral Commission of Zambia to initiate inter-party dialogue.

13.2.7 Intra-Party Democracy

Submissions

Some petitioners argued that parties should be compelled to observe basic tenets of democracy, such as adoption of candidates after a primary election, in order to avoid the imposition of handpicked candidates on the electorate (47).

There was a submission that the Constitution should outlaw the expulsion of members by political parties (1). The reason advanced was that expulsion of a member from a political party goes against the principle of freedom of association and should not be used as a punitive sanction against members.

Some petitioners, on the other hand, argued that political parties should be compelled by law to ensure gender balance at all levels of representation (12). One added that there should be a minimum number of party posts (35% to 50%) reserved for women to enable them participate in national elections.

Observations

On the subject of intra-party democracy, the Commission notes that petitioners expressed concern that a number of political parties do not observe the basic tenets of democracy. Specifically, petitioners wanted the expulsion of members of political parties to be prohibited by law, arguing that this is often done in circumstances which constitute an infringement of the freedoms of association and expression. Petitioners were also concerned that political parties violate other basic tenets of democracy

such as the conduct of regular elections of leaders and adoption of election candidates. Others wanted gender balance reflected at all levels of structures of parties.

The Commission wishes to note, at the very outset, that, insofar as it is being suggested that political parties may be established freely, it is also important in a democracy that political parties conform to democratic principles. They must accept to conduct proper internal elections to avoid autocracy. No individual should own a party. Members must be free to contest all party posts at regular intervals and in a manner prescribed by regulations on the conduct of elections.

The Commission also considers it necessary for political parties to have their own internal rules and regulations, provided these are not inconsistent with democratic practice. Parties should be able to discipline and even to expel a member if that member's behaviour is inconsistent with party rules which are just, democratic and based on the rule of law. An expelled member should be free to seek judicial redress if he/she thinks his or her expulsion unjustified. Courts should have explicit jurisdiction to grant appropriate relief.

All in all, the Commission notes the value of discipline and the necessity to take disciplinary action within the party disciplinary code. However, such disciplinary action should be fair and not capricious so as not to undermine intra-party democracy and encourage defections.

The Commission is in agreement with petitioners who do not want candidates of political parties to be handpicked and imposed on the electorate, but to be elected democratically. In the past, there have been numerous complaints on this issue. As already observed, it is important that political parties observe basic principles of democracy with regard to the procedures for elections. This should apply to election of candidates to party positions as well as for presidential, parliamentary and local government elections. The Commission is of the view that the ECZ should be empowered to oversee intra-party elections.

As regards the principle of gender equity, the Commission is also of the view that political parties should be gender sensitive and strive to achieve gender equity in membership and governing structures. Currently, no political party has constitutional provisions for ensuring gender equity in the selection of candidates for parliamentary and local government elections in their constitutions. However, some parties have a policy of encouraging women to seek adoption as candidates as a means of striving to achieve a minimum of 30% representation for women, in line with the SADC Declaration on Gender and Development.

Recommendations

The Commission recommends that:

- political parties should be intra-democratic and should hold regular elections;

- in intra-party conflicts or disputes courts, including the Constitutional Court recommended under Chapter 10, should have jurisdiction to grant appropriate relief, as people look to these courts as the ultimate and neutral arbiters;

- the code of conduct for political parties to be prescribed by legislation should include provisions that a member of a party shall not be unjustly penalised for exercising democratic rights or fundamental rights and freedoms;

- ECZ should oversee intra-party elections; and

- appropriate legislation should compel political parties to conform to basic democratic principles and not to discriminate on grounds such as gender, religion, or race in their conduct and that these principles should be reflected in their constitutions.

13.2.8 The Ruling Party and the Government

Submissions

A few petitioners said that the ruling party should be detached from the Government in order to avoid misuse of public resources (3).

Observations

The few petitioners who spoke on the subject of the relationship between the ruling party and the Government were concerned that the ruling party had access to public resources because the Government is seen as an extension of the ruling party. They emphasised that the ruling party should be detached or separated from the operations of the Government.

The Commission observes that there is a tendency for the party in power to treat the Government as part of its structure. This has led to misapplication of Government resources to fund party activities. The situation was especially prevalent during the one-party era (Second Republic) where the concept of the "party and its government" thrived, creating the impression that the two were one and indivisible. Even in the Third Republic under the multi party dispensation, complaints were made

concerning the use by the ruling party of State resources to their electoral advantage.

The Commission further observes that the Mvunga Commission dealt with this subject in the context of transition from the one-party rule to multi party democracy. In its findings, the Mvunga Commission noted that the majority of petitioners advocated complete separation of the ruling party from the day-to-day running of the Government. Subsequently, the Commission recommended that the party that has won an election should detach itself from the Government, its functions, operations, material and human resources

The Mwanakatwe Commission observed that it was a foregone assumption that the ruling party always had an advantage because it enjoyed direct or indirect access to public resources. However, the Commission made no recommendation in this respect.

The Commission is in agreement with the principle that there should be a clear separation between the ruling party and the Government. This is necessary in order to avoid even the slightest perception that the ruling party has access to public resources.

Recommendation

Accordingly, the Commission recommends that appropriate legislation should explicitly require that the ruling party and the Government shall operate separately and should prohibit the ruling party from accessing State resources.

CHAPTER 14

CIVIL SOCIETY AND NON-GOVERNMENTAL ORGANISATIONS

Terms of Reference:

No. 1 Collect views by all practicable means from the general public, in such places, within Zambia, as you may consider necessary, and from Zambians living outside Zambia, on what type of Constitution Zambia should enact, bearing in mind that the Constitution should exalt and effectively entrench and promote legal and institutional protection of fundamental human rights and stand the test of time;

No. 2 Recommend a system of government that will ensure that Zambia is governed in a manner that will promote the democratic principles of regular and fair elections, transparency and accountability, and that will guard against the emergence of a dictatorial form of government;

No.3 Recommend appropriate ways and means of entrenching and protecting human rights, the rule of law and good governance in the Constitution;

No. 28 Examine and recommend on any subject-matter of a Constitutional, political or economic nature which, in the Commission's view has relevance in the strengthening of Parliamentary and multi party democracy; and

No. 30 Examine and recommend on any matter that is connected or incidental to the foregoing terms of reference.

14.1 Introduction

Social movements, civil society and Non-Governmental Organisations (NGOs) are essentially social structures that represent the ambitions and aspirations of groups of people who want to have an effect on society. A working definition of the civil society refers to non-state groups and organisations that seek to protect popular interest and which enjoy relative autonomy. This broad definition covers

a range of associations. These include professional associations, sporting clubs, cultural associations, religious groups, trade unions, media organisations, NGOs and socio-economic orientated organisations.

Many NGOs are involved in what can be termed as "care and welfare" activities inherited from the charitable work of philanthropy that flourished in industrial countries from the 19th century onwards. Such work led to organisations being formed by the middle and wealthy classes to provide relief and welfare to the poor and less privileged. This kind of work has been termed "voluntary action" and has led to the establishment of NGOs called "charities", "charitable organisations", or "welfare organisations".

National governments, international organisations and the world community as a whole are becoming increasingly aware of the vital role NGOs play in the development of countries, particularly those in the Third World. This growing awareness, in turn, has given rise to the need by governments to encourage and facilitate the operations of NGOs so as to enable them intensify efforts, particularly in the assistance they give to communities in development efforts and initiatives.

Zambia has had a long and rich tradition of the participation of civil society organisations in the affairs of the country. Over time, civil society organisations have played different roles and espoused different agendas.

Towards the end of the colonial period, the major social movements created a united front for national independence. After the attainment of independence, the united front was maintained in the form of various nationalist political parties. However, after the promulgation of the Second Republic in 1972, where only one party was allowed to exist, the various social movements (labour, co-operatives, youth and women's organisations) were subsumed as mass organisations of the sole political party, the United National Independence Party.

After this uneasy consensus, the social movements that remained active were those with charitable or cultural agendas, and specific interest groups and professional associations. Some of the charitable and cultural organisations included the Boy Scouts and Girl Guides Movements; the Young Women's and Young Men's Christian Associations; the Red Cross; the Lions, Rotary and Jaycees Clubs, and other similar organisations. Professional associations, on the other hand, were established to promote professionalism, in particular professions as well as to protect the interests of the members.

The revival of local civil society organisations started during the early 1980s. This is also a period when many development assistance organisations began to realise that development assistance could not be confined to supporting Government departments alone. Some of the more public spirited and development-oriented organisations started to encourage local groups to form

local NGOs and CBOs to mobilise around a number of developmental issues such as gender, environment and rural development, as well as provide support to vulnerable groups in society.

More recently, the subject of governance has been added to the programmes of civil society organisations, and a number of NGOs have emerged in the areas of democracy and human rights. In addition, pressure groups and, to some extent, umbrella organisations, NGO networks and professional associations are actively engaged in national discourse.

From the foregoing, it is evident that the history of NGOs in Zambia has followed a circuitous route, beginning with what could be properly called social movements to the current situation where independent civic organisations are mobilising around pertinent social, economic and political issues. Such a development, in itself, is an indication of the different forces at play at different periods in the unfolding process of social change.

Social movements, civil organisations and NGOs have an important role to play in the development of society. But this role, however important, should not substitute the fundamental duties and obligations of states and governments towards their own people. The role of civil society organisations was primarily to complement and supplement the efforts of governments in the provision of social services. In more recent years, their role has included keeping the Government in check.

The relationship between the Government and NGOs in Zambia has been a subject of some misunderstanding during the past few years. This has been partly due to:

- lack of adequate communication channels between the stakeholders;
- the absence of an appropriate policy framework highlighting Government-NGO relationships;
- lack of a national code of conduct and standards for NGOs;
- lack of capacity at the Registrar of Societies to monitor activities of NGOs;
- lack of an effective NGO-media collaboration;
- lack of compliance by NGOs with conditions laid down under the Societies Act to provide audited accounts and returns;
- lack of access by NGOs to information on the Government's priority areas of focus resulting in duplication of efforts; and

- NGOs' involvement in political activities.

In the past, calls for regulation of NGOs have received mixed reactions. Some contend that such regulation constitutes infringement of the freedoms of association and expression. On the other hand, others argue that NGOs should be regulated and held accountable because they exist to render services to the public, on account of whom some of them receive financial and other forms of support from donors.

Although the Mwanakatwe Constitution Review Commission examined the need to reflect the role of NGOs in the Constitution, it was unable to find any good reason for providing for the recognition of NGOs in the Constitution, arguing that the entire premise of a democratic society presumed freedom of association and NGOs were part and parcel of these free associations.

Current Constitutional Provisions

The Constitution has no provisions on NGOs. They are registered under the Societies Act.

An open society based on a transparent and accountable administration is one of the themes on which submissions were received from members of the public. Some petitioners called for NGOs to be registered, regulated and held accountable.

14.2 Submissions, Observations and Recommendations

There were ninety-four (94) submissions on this subject.

14.2.1 Registration of NGOs

Submissions

A number of petitioners said that the Constitution should provide for legal and regulatory framework for Non-Governmental Organisations (23). This is to ensure accountability, allow the NGOs the freedom to organise without undue victimisation, and to compel them to hold regular elections.

Other petitioners called for the activities of NGOs to be regulated by the Government (18). Another petitioner called for a legal requirement that Zambians should head Non-Governmental Organisations (1).

One petitioner said that NGOs should be registered by a different authority from that which registers political parties (1).

One other petitioner said that NGOs should be deregistered after every three years and made to reapply (1). Yet another said that NGOs should be non-partisan and have representation in Parliament (1).

Observations

The Commission observes that NGOs and other civil society organisations are useful and necessary in the process of governance. Apart from supplementing Government efforts in community development and welfare programmes, NGOs provide necessary checks and balances and play useful watchdog roles. In this regard, the Commission notes that a number of NGOs receive assistance, particularly from international agencies, meant to benefit the public.

From the outset, the Commission acknowledges the role of NGOs in enhancing democracy by cultivating democratic cultures in decision-making, participation and playing a watchdog role over political regimes. NGOs are particularly important in the promotion of human rights as well as in the monitoring of economic and social rights and in the conduct of free and fair elections.

In view of this important role, NGOs should be accountable and should also be required to function within their set objectives and to comply with democratic principles. However, whilst it is necessary to ensure that NGOs comply with these standards, it is important that the enjoyment of their fundamental freedoms is not impaired and, to this effect, there should be an enabling legislative environment to protect them.

The Commission is in agreement with the view of the Mwanakatwe Commission that there is no need for the Constitution to recognise the role of NGOs as, in a democratic society, their existence is assured in the freedom of association. However, the standards relating to the conduct and operations of NGOs constitute an important policy objective. These should therefore be reflected in the Constitution and regulatory legislation.

With regard to registration of NGOs, the Commission considers that NGOs are essentially non-partisan and should not be treated like political parties. Whilst a body other than the Registrar of Societies should register political parties, NGOs should continue to be registered under the Societies Act. However, the Commission is of the view that there is need for the Act to stipulate the criteria for registration and deregistration, as well as guidelines for conduct of NGOs.

As for the question of representation in Parliament, the Commission feels that NGOs should be non-partisan.

Recommendations

The Commission recommends that:

- NGOs and other civil society organisations should continue to be registered under the Societies Act and the Act should provide guidelines and criteria for conduct, registration and deregistration of NGOs and other civil society organisations; and

- appropriate legislation should have a detailed framework to regulate the operations of NGOs and other civil society organisations to compel them to be accountable and democratic without impairing the enjoyment of their fundamental rights and freedoms.

14.2.2 Disclosure of Sources of Funds

Submissions

Some petitioners argued that the Constitution should compel NGOs to disclose their source of funds (19).

On the other hand, four petitioners called for all funding to NGOs to be channelled through the Government (4).

Some petitioners said that NGOs receiving public funding (including from donors), should be audited by the Auditor-General in order to curb misuse and ensure that the resources reach the targeted beneficiaries (10).

Observations

On the subject of disclosure of sources of funds of NGOs and other civil society organisations, the Commission notes that some petitioners wanted NGOs to be compelled to disclose their sources of funds. Others wanted those organisations that receive public funds to be audited by the Auditor-General. This is in order to ensure accountability. Very few petitioners wanted all funds to NGOs and other civil society organisations to be channelled through the Government.

The Commission observes that NGOs play a very important charitable and civic role in society. However, the Commission is of the view that their financial dependence on external funding or foreign donors makes them vulnerable to questions about their legitimacy and that some of them operate beyond their stated objectives and engage in partisan politics. The Commission reiterates its earlier observations on the subject of the role of political parties in relation to that of NGOs. Similarly, Non-Governmental

Organisations should be regulated to ensure that they operate within their objectives

Those who provide funds to NGOs and charities should ensure that there is proper accountability and funds are applied to advance the objectives of the supported NGOs or charitable organisations.

Recommendations

The Commission recommends that appropriate legislation should provide that:

- NGOs shall be financially and operationally autonomous and remain accountable to their donors and beneficiaries; and

- NGOs and other civil society organisations shall disclose their sources and have their annual financial statement submitted to the Registrar of Societies for public scrutiny.

14.2.3 First Lady (President's Spouse) and NGOs

Submissions

There was one submission on the need for the Constitution to create the Office of First Lady/Gentleman (1).

A few petitioners said that the First Lady should not manage any NGO (5). This was to avoid the possibility of public funds being used for an NGO. Further, there were some petitioners who wanted the role of the First Lady to be clearly defined (5).

Two other petitioners submitted that NGOs run by the First Lady should be integrated in the mainstream Government structure for purposes of accountability and transparency (2).

Observations

Though relatively few petitioners addressed the subject of the First Lady in relation to NGOs, the Commission is of the view that the issues raised by petitioners deserve attention.

One petitioner was of the view that the Constitution should establish the Office of the First Lady/Gentleman (or President's Spouse); whilst others wanted the role of the First Lady/Gentleman to be clearly defined. Others wanted a prohibition against any First Lady/Gentleman running an NGO, whilst two petitioners called for any NGO run by any First

Lady/Gentleman to be integrated into the Government structure for purposes of accountability. Those opposed to any First Lady running an NGO argued that such an NGO might be a beneficiary of public funds.

The Commission acknowledges the role that some First Ladies play in undertaking activities that are beneficial to communities, especially charitable work. However, whilst this role is commonly accepted by convention and tradition, it is the view of the Commission that it should not be given constitutional or legal recognition. The Commission is also of the view that in line with convention and tradition, no First Lady/Gentleman (or President's Spouse) should form an NGO, but give support to charitable programmes. The role of the First Lady/Gentleman is strictly ceremonial, neutral and supportive of any charitable cause that is beneficial to a community or society at large.

The Commission considers that it is not prudent for a First Lady/Gentleman to form an NGO which will compete with other NGOs with similar objectives. Further, such an NGO tends to create a perception that it is indirectly funded by the State. This invites unnecessary criticism detrimental to the status of the First Lady/Gentleman.

Therefore, the Societies Act, in prescribing the criteria for registration of NGOs, should exclude organisations formed by First Ladies/ Gentlemen.

Recommendations

The Commission recommends that:

- the role of a President's spouse should not be given constitutional or legal recognition; and

- the Societies Act, in prescribing the criteria for registration of NGOs, should explicitly exclude organisations formed by First Ladies.

14.2.4 Elections

Submissions

Three petitioners said that NGOs should be compelled to hold regular elections (3).

Observations

The Commission is unanimous that the institution responsible for registration of NGOs should deal with the details regarding the rules and regulations governing the conduct of elections and operation of NGOs. NGOs should conform to democratic principles, including holding regular elections.

Recommendation

The Commission recommends that appropriate legislation should make it obligatory for NGOs to hold regular and free elections and provide for the conduct of these elections.

CHAPTER 15

CODE OF ETHICS AND CONDUCT - HOLDERS OF PUBLIC OFFICE

Terms of Reference:

No. 1 Collect views by all practicable means from the general public, in such places, within Zambia, as you may consider necessary, and from Zambians living outside Zambia, on what type of Constitution Zambia should enact, bearing in mind that the Constitution should exalt and effectively entrench and promote legal and institutional protection of fundamental human rights and stand the test of time;

No. 2 Recommend a system of government that will ensure that Zambia is governed in a manner that will promote the democratic principles of regular and fair elections, transparency and accountability, and that will guard against the emergence of a dictatorial form of government;

No.3 Recommend appropriate ways and means of entrenching and protecting human rights, the rule of law and good governance in the Constitution; and

No. 30 Examine and recommend on any matter that is connected or incidental to the foregoing terms of reference.

15.1 Introduction

Holders of public office are entrusted with enormous decision-making and discretionary powers which, if unchecked, could erode principles of transparency and accountability which are cardinal to good governance. Public officials make a wide range of decisions pertaining to constitutional, statutory, administrative, financial, operational and other issues that have a direct impact on the nation and citizens. Some of the actions of public officers amount to abuse of office, impropriety, diversion and misapplication of financial resources, among many others.

The trend in many countries is to promulgate codes of ethics and conduct for holders of public office to prohibit certain conduct and actions or inappropriate behaviour. Such codes are meant to set professional, ethical and moral standards expected of public office holders. Some of the salient principles emphasised in these codes include:

- prohibition of behaviour likely to undermine honesty, impartiality and integrity;
- prevention of behaviour likely to lead to corruption in public affairs or that is detrimental to the public good;
- declaration of incomes, assets and liabilities;
- prescription of a system through which the code will be enforced; and
- enforcement of penalties for breach of the code which could include application of criminal sanctions and loss of office.

Under the 1973 Constitution, attempts were made to regulate the conduct of holders of any office in the Government, local authorities, parastatal companies, the ruling party (UNIP) and the Zambia Congress of Trade Unions. This was done through a Leadership Code which was appended to the Constitution.

Under this Code, holders of public offices who were citizens of Zambia were prohibited from owning businesses, holding or occupying land in excess of 25 hectares or any real property outside Zambia. The President, however, could exempt some persons from the Leadership Code, provided that such persons did not receive a salary of the specified public office.

In order to enforce the Leadership Code, holders of specified offices, together with their spouses, were required by the Code to declare their assets within three months of assuming office. Where a person held more assets than permitted under the Code, the excess assets were to be disposed of within 12 months by sale or transfer to any person other than a spouse or children.

The provisions of the Leadership Code were strictly observed in the Second Republic so that, at the end of that era, many leaders left office without owning any business, piece of land or dwelling house.

In addressing this subject, the Mvunga Commission observed that the Leadership Code had failed to achieve its objectives and recommended that it be abolished and be replaced by a new Code of Conduct. It further recommended that appropriate legislation be initiated in Parliament to bring about the new Code of Conduct.

Petitioners to the Mwanakatwe Commission called for a Code of Conduct to, *inter alia,* regulate the conduct of leaders and prohibit the use of public funds for personal gain. The Commission noted that legislation requiring holders of public office to make statutory declarations of assets and liabilities already existed and recommended that in the interest of transparency and good governance, the new Constitution continues to subject Ministers, Deputy Ministers and Members of the National Assembly to a well-articulated code of conduct.

Petitioners who made submissions on this particular issue also pointed out the need for a code of ethics and conduct in order to regulate the behaviour and actions of other holders of public office. In this regard, there was a strong argument that the declining socio-economic indicators were due to lack of transparency and accountability in the management of public resources and the affairs of the country. People were outraged by the "get-rich-quick" attitude that seemed to permeate the leadership of the Third Republic, particularly with the policy of privatisation of public companies and parastatals.

Current Constitutional Provisions

Under Articles 52 and 71 (2) (b) of the 1991 Constitution, Ministers, Deputy Ministers and Members of the National Assembly are required to conduct themselves in accordance with a code of conduct promulgated by Parliament. A Parliamentary and Ministerial Code of Conduct Act was enacted in 1994 for this purpose. The Act prohibits Ministers, Deputy Ministers and MPs from knowingly obtaining significant pecuniary advantage or assisting in the acquisition of such advantage by another person through unlawful use of their official positions. In this regard, the Act specifically prohibits the use of officially obtained information; influencing the appointment, promotion or disciplining of a public officer; converting Government property for personal use; and soliciting or accepting economic benefit.

Any person may make a complaint to the Chief Justice in writing alleging misconduct and the Chief Justice shall appoint a tribunal to investigate the allegation. Such a tribunal is to be composed of three persons who hold or have held the office of Judge of the Supreme Court or High Court. A tribunal so appointed may, in its report, make such recommendations as to administrative actions, criminal prosecutions or other further actions to be taken.

Similar to Articles 52 and 71 (2) (b) is Article 91 (2) which provides, in part, that Judges, members of the Industrial Relations Court, Magistrates and Justices of local courts shall conduct themselves in accordance with a code of conduct promulgated by Parliament. In this regard, the Judicial (Code of Conduct) Act No.13 of 1999 elaborates the standard of conduct of judicial officers, which includes independence, impartiality and integrity. The Act also prescribes procedures for the public to make complaints of the conduct of judicial officers.

A finding of misconduct against an officer under the Judicial (Code of Conduct) Act results in a recommendation to the appropriate authority for disciplinary action or to the DPP for consideration of possible criminal prosecution.

15.2 Submissions, Observations and Recommendations

There were fifty-one (51) submissions on this subject.

Submissions

A number of petitioners said that the Constitution should provide for a Leadership Code of Ethics and Conduct for all holders of public office, including the President (36). This is to combat corruption and indiscipline among leaders as well as to ensure accountability and transparency.

Some petitioners called for a provision that political leaders should declare their assets before election and at the end of their service (4). A few others called for a requirement that a leader should voluntarily step down if implicated in misconduct (5). Yet other petitioners said that senior public officers, such as Permanent Secretaries and Chief Executives of parastatal bodies, should declare their assets and liabilities before and after their appointments (5).

One petitioner, on the other hand, said that institutions should be created to supervise and monitor the enforcement of the Code of Conduct (1).

Observations

The Commission notes that it was sitting at the time when the President had appointed a taskforce to look into theft and misuse of national wealth. This is one of the reasons for the outrage the Commission has witnessed when people learned that some office-holders had acquired unexplained wealth. Understandably, there is legitimacy in the call for a mechanism to assist in preventing and reducing such misconduct. One such mechanism is a code of ethics and conduct for leaders.

The Commission is of the view that a code of ethics and conduct for leaders is necessary in order to eradicate or eliminate corruption. Such a code is also necessary for the promotion of fair, efficient and good governance in public affairs. The Commission is in agreement with petitioners that in order to make the law more effective all public officers, including Permanent Secretaries and Chief Executives of parastatals and local authorities, should be required to declare their assets and liabilities. Further, this should be done before election or upon appointment and annually thereafter.

In this regard, the Commission observes that the Constitution makes provision for MPs, Ministers and Deputy Ministers to comply with the Parliamentary and Ministerial Code of Conduct Act. The Act prescribes standards of ethics and conduct of these leaders. This includes a requirement for the Speaker, Deputy Speaker, Ministers and Deputy Ministers to make declarations of their assets and liabilities within 30 days after appointment and annually thereafter.

In the case of the Office of the President, the Constitution provides that the office-holder may be impeached for violation of the Constitution or gross misconduct. However, the President is only required by law to declare her/his assets and liabilities as a requirement to contest an election. It is therefore necessary that the Constitution also make provision for the President to declare her/his assets annually and at the end of the term of office.

On the call for leaders implicated in misconduct to voluntarily step down, it is the Commission's view that mere allegation is not enough to compel an implicated official to resign. Some allegations may be unfounded whilst others may even be malicious. However, in some cases circumstances are such that convention should compel an implicated official to voluntarily resign. Nevertheless, it would not be appropriate to legislate on this subject.

On the call for the establishment of an agency to enforce the code of ethics and conduct, the Commission is of the view that the current provisions of the Parliamentary and Ministerial Code of conduct are adequate. According to the provisions of the Act, the Anti-Corruption Commission or any other agency is not precluded from exercising its powers under the law. This means that acts amounting to violation of the code can be prosecuted under provisions of other laws. The Act also makes provision for a tribunal to seek the assistance of an investigative organ including the Police, Anti-Corruption Commission and the Commission for Investigations.

In terms of administration of the Act on the declaration of assets and liabilities, the Act requires that affected leaders make such declaration to the Chief Justice who should also keep a record of the assets. The Commission is of the view that the role of the Chief Justice should be confined to setting up a tribunal upon a complaint being made. Another body should administer declarations of assets and liabilities, in order to avoid conflict of roles that may arise, for instance, if such issues become the subject of court proceedings.

The Commission notes that if any affected leader fails to make a declaration or makes a false declaration, this also constitutes a breach of the code of ethics and conduct. As in the case of other breaches, in such event, enforcement proceedings against such a leader may only be commenced by the Chief Justice upon a complaint being made.

In its consideration of the question whether a particular agency should be specifically mandated to enforce or monitor the enforcement of the Act and, in particular, whether issues related to declarations require follow-up action by an agency with such a mandate, the Commission is persuaded that these are matters of public interest in respect of which any interested person should be able to lay a complaint. The Commission also feels that vesting such a mandate in a specific agency would very likely lead to violations of the rights of individuals.

However, the enforcement mechanism should be publicised and made accessible to the people.

Recommendations

The Commission recommends therefore that:

- the Constitution should provide for a Code of Ethics and Conduct for holders of public office of such rank as may be prescribed by an Act of Parliament, to include the Speaker, Deputy Speaker, Ministers, Deputy Ministers, Members of Parliament and senior public officers. The Act should require these officers to declare their assets and liabilities before election or upon appointment, annually thereafter and at the end of their term of office or upon vacating office;

- the Constitution should also make provision for the President to declare assets and liabilities before elections, annually thereafter, and at the end of the term of office or upon vacating office;

- appropriate legislation should provide for the administration of declaration of assets and liabilities and that this should be done by a body other than the Chief Justice; and

- the Code of Conduct and declaration should extend to the spouse.

CHAPTER 16

DEFENCE AND SECURITY

Term of Reference:

No. 30 Examine and recommend on any matter that is connected with or incidental to the foregoing terms of reference.

16.1 Introduction

Defence and security forces have various roles, but the most significant and primary role is that of protecting and safeguarding the nation's physical security and national security interests. This role involves defending and protecting the country, its territorial integrity and its people in accordance with the Constitution and the principles of domestic and international law.

The functions of defence and security institutions include ensuring that citizens live in freedom, peace and safety and facilitating their participation in the process of democratic governance and enjoyment of fundamental rights. Defence and security institutions also help to consolidate democracy, social justice and economic development. They also help reduce the level of crime, violence and political instability. Defence and security wings also participate in humanitarian, disaster relief activities and peacekeeping missions.

In furtherance of the above functions and responsibilities, some countries have enshrined the subject of defence and security in their constitutions to reflect its importance. Examples are Ghana, Uganda, South Africa and India.

The defence and security forces, in particular the army in Zambia, was initially established to promote and sustain colonisation and colonial rule. The first properly constituted regular army was the Northern Rhodesia Regiment (NRR), which was a tool for the domestic task of protecting the British Protectorate. The regiment was essentially involved in conducting constabulary tasks of policing colonial subjects. In fact, the NRR, which is the forerunner to the Zambia Army, grew out of the Northern Rhodesia Police (NRP). Essentially therefore, the NRR forms part of the history of the NRP. In 1933, the military functions of the NRR were separated from the purely civilian functions of the NRP. From there

onwards, the NRP grew into a homogeneous army of men in the conventional sense.

Defence and security services have since evolved to comprise the Zambia Army, Zambia Air Force, Zambia Police Force and Zambia Prison Services, the Zambia National Service and Zambia Security Intelligence Services.

Until the 1996 amendment, following the Mwanakatwe Commission recommendations, the Constitution had no provision for the defence and security services.

The Mwanakatwe Commission noted that the armed forces as well as the civil Police were all important elements in securing democratic order. It also noted that a number of modern constitutions provided for defence and security institutions. The Commission observed that any country which seeks to promote good governance should devote sufficient attention to the defence and security sector in its Constitution. The Commission, thus, recommended that the Constitution should establish a Zambia Defence Force whose supreme command should be vested in the President. The Commission also recommended the establishment of the Zambia Police Force as well as the Zambia Prisons Service whose detailed functions and operational activities and administration should be left to an Act of Parliament.

Current Constitutional Provisions

The Zambian Constitution provides for defence and security under Part VII (Articles 100 to 108). The Part establishes a non-partisan national Defence and Security Force whose scope of functions and responsibilities include the preservation and defence of the sovereignty and territorial integrity of the country, protection of life and property, maintenance of law and order and engagement in productive and developmental activities.

The term "Defence Force" is not defined in the Constitution. However, the Defence Act, Cap. 106 of the Laws of Zambia defines the term as "consisting of the Zambia Army and Zambia Air Force". Apart from the Defence Force, the Constitution provides for the establishment and functions of Zambia Police Force and Zambia Prison Service as well as the Zambia Security Intelligence Services. It does not provide for the Zambia National Service.

Article 101 of the Constitution stipulates the functions of the Defence Force as follows:

> *"(a) Preserve and defend the sovereignty and territorial integrity of Zambia;*
>
> *(b) Co-operate with the civilian authority in emergency situations*

and in cases of natural disasters;

(c) Foster harmony and understanding between the Zambia Defence Force and civilians; and

(d) Engage in productive activities for the development of Zambia."

The President is Commander-In-Chief of the Defence Forces and appoints the Commanders of the Defence Force, the Commandant of the Zambia National Service, the Inspector-General of Police, the Director-General of the Intelligence Services and the Commissioner of Prisons. He also authorises the deployment of defence forces in the defence of the country and in fulfilment of international obligations.

Articles 102, 105, 107 and 108 provide that Parliament shall make laws regulating the Defence Force, the Zambia Police Force, Zambia Prison Service and Zambia Security Intelligence Services, respectively. Currently, there are in existence the following statutes regulating the defence and security wings:

- the Defence Act, Cap. 106;
- the Zambia Police Act, Cap. 107;
- the Zambia Security Intelligence Services Act, Cap. 109; and
- the Prisons Act, Cap. 97.

In addition to the defence and security wings provided for under the Constitution, there is the Zambia National Service whose establishment and functions are provided for under the Zambia National Service Act, Cap. 121.

16.2 Submissions, Observations and Recommendations

There were seven hundred and one (701) submissions on this subject, mainly from the defence and security wings. Submissions made on defence and security appear to be focused on the strengthening of functions and responsibilities of these wings. These include mode of appointment of and security of tenure of service chiefs.

16.2.1 Establishment of Defence and National Security Agencies

Observations

The Commission observes that although no petitioner addressed this subject, it is important that the matter of establishment of defence and national agencies is addressed in the Constitution. This is because these two institutions play an important role in safeguarding the security and in territorial integrity of the nation thereby helping to consolidate democracy. The Commission wishes to state that though the Defence Forces and National Security Agencies may have overlapping functions, they nevertheless have district roles and responsibilities. The two should, therefore, be established under separate articles of the Constitution and that their functions should also be defined separately.

Recommendations

The Commission, therefore, recommends that:

- the Constitution establishes the Defence Forces and National Security Agencies under separate Articles;
- the definition of Defence Forces should include the Zambia National Service; and
- the functions of both the defence forces and national security agencies should be stated separately.

The Commission further recommends that the Constitution should establish the Defence Council, National Intelligence Council and Police and Prison Service Commission and that their composition, functions and other related matters shouldbe in relevant Acts of Parliament.

16.2.2 Defence and Security Service Chiefs – Appointment

Submissions

A large number of petitioners argued that Defence and Security Service Chiefs, including the Inspector-General of Police, should not be appointed by the President, but by a special body or the National Assembly (247). Others, among these, further said that the respective service commissions such as the Defence Council and the Police and Prisons Service Commission should appoint them, subject to ratification by the National Assembly. An argument was advanced that Defence Chiefs should not owe allegiance to any particular government administration, but to the people whom they are required, by the Constitution, to defend.

A number of petitioners, on the other hand, said that the Defence and Security Chiefs should continue to be appointed by the President, and others added that these appointments should be ratified by Parliament (112). These petitioners argued that Defence Chiefs should owe their allegiance to the President, who is the Commander-in-Chief of the Defence Forces.

Some petitioners said that retired Defence and Security Chiefs should not be eligible for reappointment (15). A few others further suggested that Defence and Security Chiefs should be appointed from among serving officers of appropriate rank and not from retired officers (4). One petitioner said that Defence Chiefs should be indigenous Zambians and degree-holders (1). Another petitioner said that there should be a minimum age qualification of 45 years for appointment of Defence and Security Chiefs (1).

A few petitioners called for the post of Commissioner of Prisons to be elevated to the level of Inspector-General of Police (3).

Observations

The Commission notes that relatively many petitioners addressed the subject of the appointment of Defence and Security Chiefs. Of these, the majority preferred that the President should not make these appointments. They said that this should be done by respective service commissions, subject to ratification by the National Assembly. They argued that Defence and Security Chiefs should owe allegiance to the people and not to any particular government administration.

On the other hand, some petitioners wanted the President to continue appointing Defence and Security Chiefs, though some of them wanted the appointment to be subject to ratification by the National Assembly. These petitioners felt that Defence and Security Chiefs should owe allegiance to the President, who is the Commander-in-Chief of the Defence Forces.

There were also a few petitioners who said that retired Defence and Security Chiefs should not be eligible for reappointment, whilst others expressed displeasure at the practice of appointing retired service officers as Defence and Security Chiefs. There was a submission that Defence and Security Chiefs should be indigenous Zambians and that there should be a minimum age qualification of 45 years for appointment.

The Commission also notes that a few petitioners wanted the rank of Commissioner of Prisons to be at the same level as that of Inspector General of Police.

The Commission further notes that the Mvunga Commission recommended that senior defence and security personnel should be appointed by the President and further observes that, in accepting this recommendation, the Government added that this should be done in consultation with the Defence Council. The Commission also recommended that the Defence Council should be accorded the same status as service commissions.

The Commission wishes to observe, in the first instance, that issues of defence and security are sensitive and a preserve of the Executive all over the world.

The Commission discussed the submissions at length and noted that sovereignty and territorial integrity of a country depends on the efficiency and effectiveness of its defence and security forces. It is important therefore that the President has the final say in the appointment of Defence and Security Chiefs. In this regard, the Commission is of the view that the appointment of Defence and Security Chiefs should be made by the President, in consultation with the Defence Council and the respective service commissions which should be established by the Constitution. The Commission is also of the view that the Defence Council and respective Commissions should recommend up to three names to the President from which a Defence and Security Chief should be appointed.

The Commission feels that the appointment of Defence and Security Chiefs should not be subject to ratification by the National Assembly because the President, as Commander-in-Chief of the Armed Forces, should be at liberty to appoint suitable persons and his discretion should not be encumbered.

On the subject of the citizenship of Defence and Security Chiefs, the Commission is of the view that, on account of security considerations, these ranks should be reserved exclusively for Zambian citizens by birth or descent in accordance with categories of citizenship recommended in this Report under the Chapter dealing with citizenship. Further, persons with dual citizenship should not qualify to be appointed Defence and Security Chief.

The Commission observes that some Defence and Security Chiefs in the past have been appointed from among retired officers. The Commission is persuaded that where this is in national interest, retired Defence and Security Chiefs and other service personnel may be eligible for re-appointment. With respect to age eligibility, the Commission agrees with the petitioner who submitted that there should be a minimum age

qualification of 45 years for a person to be appointed a Defence and Security Chief.

With regard to the submissions related to the post of Commissioner of Prisons, the Commission feels that the post should not be equated to that of Inspector-General of Police because the level of its responsibilities does not justify this. The scope of responsibilities of the Inspector-General in operations and overseeing the discharge or functions of Police personnel throughout the country is far greater than the functions of the Commissioner of Prisons.

Recommendations

In view of these observations, the Commission recommends that relevant Acts of Parliament should make provision that:

- Defence and Security Chiefs should be appointed by the President on the recommendation of the Defence Council and respective commissions, and that they should continue to serve at the pleasure of the President in order to enhance national security;

- Defence and Security Chiefs should be Zambian citizens by birth or descent and not have dual citizenship, while other defence personnel should be Zambian citizens and not have dual citizenship;

- retired Defence and Security Chiefs and all retired service personnel should not be eligible for re-appointment as Defence and Security Chiefs;

- former or retired servicemen/women may be recalled to render service under a state of emergency or war;

- there should be a minimum age qualification of 45 years for a person to be appointed a Defence and Security Chief; and

- the post of Commissioner of Prisons should not be elevated to the level of Inspector General of Police.

The Commission also recommends that the Constitution should establish the Defence Council, the National Intelligence Council and the Police and Prisons Services Commission.

16.2.2 Representation in Parliament

Submissions

Two petitioners said that the Defence Forces should be represented in Parliament (2).

Observations

The Commission discussed the issue of representation of Defence Forces in Parliament. The Commission notes, however, that defence personnel reside in parliamentary constituencies and their interests are therefore represented by their respective MPs.

The Commission observes that with very few and deserving exceptions, Parliament should comprise only people who are elected through universal adult suffrage. Further, the nature of duties and functions of defence and security personnel dictate that they be barred from participation in active politics. The Commission is of the view that the current practice is adequate and should be maintained.

Recommendations

The Commission recommends that Defence Forces should not have special representation in Parliament.

16.2.3 Tenure of Office

Submissions

A few petitioners argued that the Defence and Security Chiefs should enjoy security of tenure similar to that of a High Court Judge (26). This was to enable them render service to the best of their professional judgment without fear.

Two petitioners said that Defence and Security Chiefs, including the Inspector-General of Police, should serve a limited term of two four-year terms or two five-year terms (2).

Some petitioners called for the Offices of Defence and Security Chiefs, including the Inspector-General of Police, to be constitutional offices (3). It was further suggested that the office bearers should not vacate office whenever there is a change of government.

Observations

The Commission notes that relatively few petitioners addressed the subject of tenure of office of Defence and Security Chiefs. The majority of these petitioners wanted Defence and Security Chiefs to be accorded security of tenure similar to that of High Court Judges. These petitioners were concerned that Defence and Security Chiefs may not render service professionally due to insecurity, as they serve at the pleasure of the President.

The Commission also notes that two petitioners wanted the office-holders to serve a limited term, while three others wanted these offices to be established by the Constitution.

In its evaluation of the issues raised by petitioners, the Commission examined constitutions and practices of other countries. The Commission found that the appointment and tenure of office of Defence and Security Chiefs is a matter that is rarely provided for in constitutions.

The Commission observes that the practice the world over is that the President is Commander-in-Chief of the Armed Forces and, as such, he/she appoints Defence and Security Chiefs who serve at his/her pleasure. The Commission feels that it is in the interest of the nation that Defence and Security Chiefs serve at the pleasure of the President. This is to safeguard national security and ensure total loyalty by the appointees to the President. Removing the appointment of Defence and Service Chiefs from the President would compromise security and national interest considerations.

Recommendations

The Commission therefore recommends that Defence and Security Chiefs should continue to be appointed by the President and to serve at her/his pleasure.

16.2.4 Membership of Trade Unions

Submissions

Some petitioners approved that the Constitution should guarantee the right of members of the Defence and Security Services, including the Police Force, to form and belong to trade unions (51). They argued that Defence and Security personnel should not be denied this right, which is enjoyed by other citizens, and that this would help them to negotiate better terms and conditions of service.

Observations

The Commission notes that some petitioners called for defence and security personnel to enjoy the right to form and belong to trade unions. This being a subject of human rights, the Commission deliberated on it at length. The Commission considered the petitioners' views and the argument that defence and security personnel do not have the opportunity to negotiate better terms and conditions of service, as they cannot form or belong to trade unions.

The Commission observes that while the enjoyment of rights is fundamental, the enjoyment of the same by citizens depends on a healthy state of a country's national security. For example, it would be absurd for the Police to go on strike during a state of emergency. The Commission is therefore of the view that in the interest of national security, defence and security personnel should not be aligned to any association or pressure group. However, the Commission acknowledges the need for institutions, such as the Defence Council and the Police and Prisons Service Commission to have powers to review the terms and conditions of service of defence and security personnel regularly.

In this regard, this Commission observes that currently the Police and Prison Service Commission is not responsible for review of terms and conditions of service of the personnel in the Police and Prisons Service. This Commission is of the view that the Police and Prisons Service Commission should not only be responsible for recruitment, appointment and discipline of staff, but should also review their terms and conditions of service. The same should apply to the Defence Council.

Recommendations

The Commission recommends that:

- the current provision of the law that defence and security personnel should not form or belong to trade unions should be retained;

- the terms and conditions of service of defence and security personnel should be reviewed by the Defence Council, National Intelligence Council and Police and Prison Service Commission, in consultation with the Government, and that this should be done regularly; and

- the terms and conditions of service should be competitive.

16.2.5 Retirement

Submissions

A few petitioners said that defence personnel should be eligible for retirement after 10 years of service (4). Two, on the other hand, were of the view that defence personnel should not be eligible for retirement after serving for 10 years (2).

Some petitioners called for the retirement age to be reduced to 25, 30 or 45 years (11). The reason advanced was the reduced life expectancy, which has been compounded by HIV/AIDS.

Four petitioners said that once retired, servicemen and servicewomen should become reservists and be eligible to serve on peace-keeping missions (4).

Observations

The Commission notes that relatively few petitioners addressed the subject of retirement of defence and security personnel. Some called for the retirement age to be reduced in view of the shorter life expectancy, which has been exacerbated by the HIV/AIDS epidemic. Whilst some petitioners wanted personnel to be eligible for retirement after 10 years of service, others were opposed to this view.

The Commission also notes that a few other petitioners were of the view that once retired, servicemen should become reservists and be eligible to serve on peacekeeping missions.

Regarding the retirement age, the Commission observes that service demands on defence and security personnel are unique and that they operate under taxing and different conditions from the Public Service. The Commission is therefore of the view that defence and security personnel should be treated differently. As an exception to the recommendation made under an appropriate Chapter of this Report dealing with pensions (Chapter 20), their retirement age should be less and they should have an option to retire even earlier.

With regard to the submission that once retired, servicemen and servicewomen should become reservists and be eligible to serve on peacekeeping missions, the Commission is of the view that this matter should be dealt with administratively by the Defence Council which is

familiar with the criteria for deployment of service personnel on peacekeeping missions.

Recommendations

The Commission recommends that relevant laws should provide that the retirement age of servicemen and servicewomen should be 55 years with an option to retire after 20 years of service.

16.2.6 Senior Police Officers – Transfers

Submissions

One petitioner said that senior police officers should not be at the same station for more than five years in order to avoid complacency and corruption (1).

Observations

Only one petitioner made a submission on the subject of transfer of senior police officers and called for this to be done at least every five years. The petitioner's perception was that the practice of senior police officers serving in one station for a very long time contributes to vices such as corruption in the Police Service. The Commission observes that according to Section 3(1) of the Zambia Police Act, the Inspector-General of Police has the command, superintendence, direction and control of the Force. The Act therefore gives the Inspector-General of Police powers to deploy members of the Force according to their professional ability and in the national interest.

The Commission acknowledges that the concerns of the petitioner may be valid. Related to the subject, the Commission notes that in the past, there have been complaints of victimisation of officers who have been transferred to rural areas and smaller stations because of alleged differences with their superiors. However, the Commission is of the view that issues concerning deployment of officers are administrative and are best left to the Office of the Inspector-General of Police.

Recommendation

The Commission recommends that relevant authorities should address the need for regular but fair transfers within the Police Force, at their discretion, taking into account security and national interest considerations.

16.2.7 Participation in Politics

Submissions

There were a few submissions to the effect that Defence and Security personnel should have a right to participate in politics, including contesting elections (3).

Other petitioners said that defence and security personnel should not participate actively in politics including voting (6). Two other petitioners said that the Police Force should be depoliticised (2).

Observations

Although relatively few petitioners addressed the subject, most of these did not favour the idea that defence and security personnel should be involved in active politics. Similarly, two petitioners called for depoliticisation of the Police Force. On the other hand, others were in favour of defence and security personnel being involved in active politics.

The Commission agrees with the views of the majority of petitioners who claimed that non-participation in active politics of defence and security personnel is essential because of the nature of their services. They should be non-partisan, professional, disciplined and loyal to civilian authority. However, while defence and security personnel should not actively participate in politics, they should be allowed to vote because this is their civic duty and a constitutional right.

In its consideration of the subject, the Commission reflected on the views of petitioners to and recommendations of previous Commissions. The majority of petitioners to the Chona Commission were opposed to the idea of members of the security forces participating in active politics and argued that if allowed to do so, their discipline would be eroded. The Commission recommended that members of the security forces should not belong to the Party (UNIP), but should be free to contest elections if they resigned from the service.

Similarly, petitioners to the Mvunga Commission who addressed the subject of participation in politics by public officers argued that defence and security personnel should owe allegiance to the Government and not be affiliated to a particular party. The Commission then recommended that public officers should not be actively involved in party politics.

Recommendation

The Commission recommends that the Constitution should provide that defence and security personnel should not be involved in active politics, but should continue to exercise their civic and constitutional right to vote for candidates of their choice.

16.2.8 Participation in Peacekeeping Missions

Submissions

Four petitioners said that deployment of Zambian troops on peacekeeping missions should be approved by Parliament, upon recommendation of the President (4). There was a further submission that Zambia National Service personnel should also participate in peacekeeping missions (1).

Observations

The Commission notes that a few petitioners wanted deployment of Zambian troops on peacekeeping missions outside the country to be subject to approval by the National Assembly whilst one petitioner submitted that the Zambia National Service should participate in these missions.

The Commission observes that the President has power, under Section 6 of the Defence Act, to deploy the whole or any part of the Defence Force out of the country. The Commission notes that as part of the international community Zambia has an obligation to participate in peacekeeping missions. The Commission, however, feels that a decision to engage the country in these missions should be assessed taking into consideration factors such as the needs and capacity of the country.

The Commission acknowledges the need for parliamentary approval before engaging Zambian troops in peacekeeping missions and, as recommended under Chapter 8 of this Report on the subject of powers of the President, prior approval of the National Assembly should be sought.

The Commission notes the submission that the Zambia National Service should participate in peacekeeping missions, but feels that this is a matter that should be dealt with by the Defence Council.

Recommendations

The Commission recommends that:

- the Constitution should provide that the deployment of Zambian troops on peacekeeping missions should require prior approval by not less than two-thirds of all the members of the National Assembly, upon recommendation of the President; and

- the Defence Council should examine the suitability or propriety of engaging the Zambia National Service in peacekeeping missions.

16.2.9 National Service

Submissions

A number of petitioners proposed that compulsory national service should be reintroduced and provided for in the Constitution (152). It was argued that reintroducing compulsory national service would provide the youth with entrepreneurial skills and reduce youth unemployment.

Observations

The Commission notes that a number of petitioners called for the reintroduction of compulsory national service. Most of them spoke highly of the skills they acquired during training, which included agricultural production, and felt that it would be in the best interest of the country if compulsory national service were reintroduced. This would provide the youth with entrepreneurial skills and reduce youth unemployment.

In its consideration of the subject, the Commission observed that compulsory national service was introduced in Zambia in the mid-1970s at the height of the Southern African liberation struggle which created a hostile environment in the sub-region. It was therefore necessary to have a reserve force which the Government could use in case the country was invaded. However, the Government soon realised that it could not sustain the programme due to its weak economic base. Consequently, it had to discontinue the programme in the early 1980s.

The Commission agrees with petitioners that compulsory national service training had some benefits, but it was also an economic liability. The current prevailing political environment within the region does not warrant the reintroduction of this programme. In any case, the country's socio-economic conditions cannot sustain it. However, the matter could be given consideration in future if political and socio-economic conditions

merit this. If reintroduced, such a programme should have a focus on providing entrepreneurial skills, especially in agricultural production, to school leavers and other unemployed youths.

Recommendations

The Commission recommends that compulsory national service should be given consideration in future if political and socio-economic conditions merit this and that, if re-introduced, such a programme should have a focus on providing entrepreneurial skills, especially in agricultural production, to school leavers and other unemployed youths.

16.2.10 Reintegration of Ex-Servicemen/women

Submissions

One petitioner said that a policy of reintegration of ex-servicemen/women into civilian life should be pursued through the following:

- paying a good retirement package;
- a resettlement scheme; and
- awards (1).

Observations

Although there was only one submission calling for policy measures to facilitate the reintegration of ex-servicemen/women into civilian life, the Commission gave the issue careful consideration. The Commission took into account the need to prevent a situation where ex-servicemen/women become destitute and therefore a danger to the peace and stability of the nation.

The Commission agrees with the petitioner and is of the view that necessary measures should be taken to ensure that ex-servicemen/women are adequately rewarded and reintegrated into civilian life.

Recommendation

The Commission recommends that necessary measures should be taken by the Government to ensure that ex-servicemen/women are adequately rewarded and are reintegrated into civilian life.

16.2.11 Military Court/Ordinary Courts

Submissions

A few petitioners said that the military court system should be modernised to include the observance of fundamental rights and freedoms (5).

One petitioner proposed that defence personnel should not be sued in ordinary courts (1).

Observations

The Commission notes that the few petitioners who made submissions on the court martial system were concerned about the likelihood of violation of the fundamental rights of accused persons.

On a related issue, one petitioner said that ordinary courts should not have jurisdiction to adjudicate in cases involving military personnel.

In the first instance, the Commission wishes to emphasise that an accused person's right to a fair hearing as guaranteed by the Constitution applies to all courts, including the court martial. Among provisions permitting derogations from and limitations of provisions intended to secure the right to a fair hearing, there is only one that relates specifically to a court martial. Article 18 (12) (f) authorises trial by a civilian court of a person previously convicted or acquitted by a court martial subject, in the event of a conviction, to taking into consideration any punishment meted out by court martial.

The Commission notes that the Defence Act and the Defence Force (Procedure) Rules made thereunder incorporate, to some extent, provisions of the Constitution on the right to a fair hearing. These include provisions that an accused person should be given a proper opportunity to prepare his defence and afforded communication with his defence counsel, though the right of an accused person to engage a legal counsel of his own choice and the right to object to any of the officers appointed to constitute the court martial is limited. However, an appeal against conviction lies only with the leave of the Supreme Court except in cases involving the death sentence, where this is as a matter of right.

The Commission further observes that there are other provisions of the Defence Act and Defence Force (Procedure) Rules that are not in conformity with fundamental rights of an accused person. For example, the rules provide that a person can be held in remand for up to 72 days and

only be charged not less than 24 hours before trial. This violates the right to liberty as guaranteed by Article 13, in particular, Clauses (2) and (3) which require that a person who is arrested or detained be furnished with reasons as soon as is reasonably practicable and that he be brought before a court without undue delay.

The Commission feels that it is necessary to maintain the court martial in view of the nature of military service. However, its procedures should be reviewed to bring them into conformity with the provisions of the Constitution on fundamental rights and freedoms of the individual.

The Commission does not agree with the view that defence personnel should not be sued in civilian courts because, as individuals, they have duties and obligations that may adversely affect civilian citizens.

Recommendations

The Commission recommends that:

- the military should continue to have their own courts to deal specifically with offences that are of a military nature, but the procedures of these courts should be reviewed to bring them into conformity with provisions of the Constitution on fundamental rights and freedoms; and

- civil offences committed by military personnel should be dealt with by civilian courts.

16.2.12 Housing of Defence and Security Personnel

Submissions

There were a few submissions that defence and security personnel should be housed in camps and barracks (4). This is to protect their dignity and integrity as well as to promote and preserve discipline. The other reason is that this would shield them from undesirable associations and criminal activities.

Observations

The Commission agrees with the views of the few petitioners who submitted that defence and security personnel should be housed in camps and barracks in order to preserve their dignity and maintain discipline. The Commission also observes that the Mvunga Commission recommended that in order to enhance their neutrality, defence forces and police officers should be accommodated in army barracks and police

camps respectively. The Commission is, however, of the view that this matter should be dealt with administratively.

16.2.13 Parliamentary Scrutiny of Defence Budget

Submissions

Two petitioners said that the defence budget should be subjected to parliamentary scrutiny (2).

There was, however, a contrary submission that the defence budget should not be debated in the National Assembly (1). The reason given was security considerations. It was suggested instead that debate on the defence budget should be done by the Defence Council.

There was also a submission that the Constitution should provide for oversight on the expenditure of the Zambia Security Intelligence Services in order to enhance accountability (1).

Observations

Although there were very few submissions on the subject of scrutiny of the defence and security expenditure, due to its importance the Commission deliberated on it in detail.

Petitioners were divided between two opposite views. One view was that the National Assembly should debate and scrutinise the defence and security budget and expenditure, whilst the other was that this should be done by the Defence Council on security considerations.

The Commission observes that Article 117 of the Constitution provides for estimates of revenue and expenditure of the Republic to be laid before the National Assembly for its approval. The procedures relating to parliamentary debate of the estimates are defined by the Rules and conventions of the National Assembly. In practice, debate and scrutiny of the defence and security budget and expenditure is constrained by security considerations. The Commission is of the view that the National Assembly should debate and scrutinise the defence budget and expenditure and that this would not compromise national security. However, the National Assembly should not debate or scrutinise defence and security operations unless this is done in camera, and such debate cannot be the subject of deliberations by the full House.

The Commission observes that the Office of the Auditor-General expressed serious concerns to the Mvunga Commission that very little control had been exercised over defence and security expenditure. The

Commission recommended that in order to enhance control of public expenditure, Parliament should scrutinise defence, security and any special expenditure in camera. The Government accepted this recommendation.

Recommendations

In view of these observations, the Commission recommends that the Constitution should provide that the National Assembly shall debate and scrutinise the defence budget and expenditure, provided that the National Assembly shall not debate or scrutinise defence and security operations unless this is done in camera and this should not be the subject of debate by the full House.

16.2.14 Zambia Police Act and Immigration and Deportation Act – Amendment

Submissions

Two petitioners said that the Zambia Police Act and Immigration and Deportation Act should be amended in order to enhance the effectiveness of the two security wings (2). One petitioner said that the Zambia Police Force should be renamed Zambia Police Service in order to remove the connotation of brutality and repression (1).

Observations

The Commission notes that two petitioners wanted the Zambia Police Act and Immigration and Deportation Act to be amended in order to strengthen the two security wings. One other petitioner wanted the "Zambia Police Force" to be renamed "Zambia Police Service".

With regard to the two submissions on the Zambia Police Act and Immigration and Deportation Act, the Commission observes that the petitioners did not specify which provisions of the Acts they wanted amended.

The Commission, however, agrees with the petitioner who called for the Zambia Police Force to be renamed. This is because the word "Force" connotes brutality and repression. It is the view of the Commission that the name "Zambia Police Service" would be in conformity with democratic values. In this respect, the Commission observes that the Police authority have already changed the name administratively, albeit without legislative backing. The Commission wishes further to observe that change in name alone would not be adequate unless this is followed

by retraining of the Police to equip them with skills demanded by their new roles and reflected in the manner the Police carry out their duties.

Recommendation

The Commission recommends that the "Zambia Police Force" should be renamed the "Zambia Police Service" so as to make the name reflect modern democratic values and that this should be backed by legislative provisions in the Zambia Police Act and also be reflected in the manner their mandate is executed.

16.2.15 Directive Principles of Defence and National Security

Submissions

There was a submission that constitutional provisions on Defence and Security Services should be preceded by Directive Principles of State Policy, to include:

- endeavour to create enabling conditions for maintenance of the territorial integrity;
- undertake to create administrative, consultative and advisory structures to meet the requirements of co-ordinated defence and security strategies;
- maintenance of military traditions, customs and values of the Officer Corps of the Defence Force, such as loyalty, courage and good conduct of a commissioned officer; and
- ensure that the welfare and morale of personnel is adequately maintained and that they enjoy fundamental rights and freedoms as other citizens (1).

Observations

The Commission notes that the petitioner who addressed this subject wanted some policy objectives on defence and security services reflected in the Constitution as a preamble to the Chapter on Defence and Security.

The Commission agrees with the petitioner in principle and is of the view that the policy objectives would constitute a guiding philosophy for the defence and security services. The Commission feels that defence and security policy objectives should be enshrined in the Constitution under the Chapter on Directive Principles of State Policy.

Recommendations

The Commission recommends that the Constitution should include the following policy objectives on defence and security in the Chapter on Directive Principles of State Policy:

- the State shall endeavour to create enabling conditions for maintenance of the territorial integrity;
- the State shall undertake to create administrative, consultative and advisory structures to meet the requirements of co-ordinated defence and security strategies;
- the State shall maintain military traditions, customs and values of the Officer Corps of the Defence Force, such as loyalty, courage and good conduct of a commissioned officer; and
- the State shall ensure that the welfare and morale of personnel is adequately maintained and that they enjoy fundamental rights and freedoms as other citizens.

16.2.16 Minister of Defence – Qualifications

Submissions

A few petitioners argued that the Minister of Defence should have a military background (8). The reason advanced was that a person with such a background and experience would be in a better position to appreciate defence and security operations.

Observations

The Commission examined the views of petitioners on this matter and notes that the portfolio of a Minister entails formulating and articulating Government policy in the Ministry and not implementing policy directives. The Commission feels that this is the responsibility of technocrats and other personnel under the Minister's jurisdiction. Therefore, the Minister does not need to have any military background.

16.2.17 Human Rights Training

Submissions

There was a submission that defence and security personnel should be trained in human rights (1). The petitioner argued that knowledge of

human rights would help servicemen/women to appreciate the need for observance of the same.

Observations

The Commission agrees with the view of the petitioner that defence and security personnel should be trained in human rights, but is of the view that this should be dealt with administratively.

Recommendations

The Commission recommends that defence and security personnel training should include human rights, but that this should be dealt with administratively.

16.2.18 Conditions of Service - Non-Commissioned Officers

Submissions

A few petitioners said that the conditions of service for non-commissioned officers were extremely poor in comparison to those for commissioned officers and should be improved (5).

A few others said that promotion prospects for non-commissioned officers were rare and should be improved (6).

Observations

The Commission notes the concerns expressed by petitioners that the conditions of service and prospects of promotion for non-commissioned officers were extremely poor in comparison to those of commissioned officers. The Commission feels that it is important that defence and security personnel operate under satisfactory conditions of service in order to boost their morale, and that prospects of promotion for non-commissioned officers should be made available. Further, the conditions of service for military personnel should aim at achieving proportional parity between commissioned and non-commissioned officers.

Recommendation

The Commission therefore urges the Government to take necessary measures to achieve proportional parity between the conditions of service for commissioned and non-commissioned officers. In addition, it should make the prospects of promotion for these officers available.

16.2.19 Marriage

Submissions

A few petitioners said that officers, both male and female, should be allowed to marry when they wish to (5).

Observations

The few petitioners who addressed the subject of marriage in the military service objected to the practice of requiring officers to seek permission of the military command before marrying. They felt that this was a violation of the right of the individual to found a family. The Commission looked at the Constitution of Zambia and Regulation 89 of Part IX of the Defence (Regular Force) (Officers) Regulations made under the Defence Act which prohibits non-commissioned officers from marrying unless they obtain the consent of the Commander.

The Commission notes that military work involves giving up many rights and is of the view that this provision is necessary in order to ensure that officers render their service to the country first before they are tied down by family responsibilities. The Commission feels that unregulated marriages may disrupt military discipline and activities such as training and field operations. There is also the danger of encouraging marriages and courtship during field operations.

Recommendation

The Commission recommends that marriages of non-commissioned officers should continue to be regulated in accordance with the law.

CHAPTER 17

INVESTIGATIVE COMMISSIONS

Terms of Reference:

No. 2 Recommend a system of government that will ensure that Zambia is governed in a manner that will promote the democratic principles of regular and fair elections, transparency and accountability, and that will guard against the emergence of a dictatorial form of government;

No. 9 Examine the effectiveness of the office of the Auditor-General and that of the Investigator-General and recommend means of improving the effectiveness where necessary; and

No. 30 Examine and recommend on any matter which is connected with or incidental to the foregoing terms of reference.

17.1 Introduction

Investigative commissions are mandated to ensure good governance according to the law. These commissions are cardinal in promoting transparency, accountability and integrity, based on the doctrine of the rule of law. The underlying principle behind the establishment of such institutions is that the governors as well as the governed are not only subject to the law, but equal before the law.

Current Constitutional Provisions

The Commission for Investigations is established under both the Constitution and an Act of Parliament. In respect of the Constitution, Article 90 only creates the Office of the Investigator-General whose security of tenure is the same as that of a Judge of the High Court or Supreme Court. The Commission for Investigations is established under the Commission for Investigations Act, Cap. 39 of the Laws of Zambia.

In its structure, composition and functions, the Commission for Investigations has very little resemblance to the Parliamentary Ombudsman to which it has been

equated or perceived. The Commission's only relationship with Parliament lies in the provisions of the Constitution which require a resolution of the National Assembly by a two-thirds majority of the whole House that removal from Office of the Investigator-General ought to be investigated. The only other relationship with Parliament is that the Commission, under the constitutive Act, is required to report annually to the House on its operations.

The Commission for Investigations's jurisdiction, however, has resemblances to a quasi-judicial tribunal and the Anti-Corruption Commission. In the discharge of its quasi-judicial functions, the Commission is empowered to receive complaints, from individuals and if, in its investigations, any injury or damage is disclosed, the Commission can recommend to the President awarding of compensation to the injured party. The Commission for Investigations is further empowered to investigate complaints even if such complaints are foreclosed under any written law. However, the Commission will not entertain complaints for which there is redress in ordinary courts unless the aggrieved party would experience hardships in pursuing court proceedings.

The Commission's semblance to the Anti-Corruption Commission lies in its investigative powers in cases of abuse of public office and authority. In such cases, although the Commission can act on its own initiative, it is generally directed by the President. The President can also direct the Commission to discontinue investigations.

The Anti-Corruption and Drug Enforcement Commissions are established under respective constitutive statutes. These are the Anti-Corruption Commission Act and the Narcotic Drugs and Psychotropic Substances Act.

The Anti-Corruption Commission was, until the 1996 Anti-Corruption Act, which repealed and replaced the Corrupt Practices Act, 1980, a department under the control and supervision of the President, who also appointed the Commissioner and Deputy Commissioner on such terms and conditions as he deemed fit. Under the provisions of the 1996 Act, the Commission no longer makes recommendations of misconduct of public officers to the President, but to the appropriate authorities for action. Such authorities are required to make a report to the Commission on any action taken within 30 days. The President appoints the Commissioners and the Director-General, subject to ratification by the National Assembly. Both the Commissioners and the Director-General enjoy security of tenure and may only vacate office in restricted and specified circumstances.

The Drug Enforcement Commission is a statutory body established as a department in the Ministry of Home Affairs and operating under the control and supervision of the Minister of Home Affairs. The President appoints the Commissioner and Deputy Commissioner on such terms and conditions as the President determines.

The Mwanakatwe Commission recommended that:

- investigative bodies should be constitutionalised and be independent and impartial;
- heads of investigative bodies should be appointed by the President subject to ratification by the National Assembly;
- investigative bodies should initiate their own investigations on information received from any person and determine what action to take in order to enforce the law;
- investigative bodies should submit regular as well as annual reports to the National Assembly; and
- investigative bodies should be self-accounting and their funding should be charged on the General Revenues of the Republic.

17.2 Submissions, Observations and Recommendations

There were two hundred and eighty-three submissions (283) on this subject. Petitioners who made submissions to this Commission on this matter pointed out the need for these bodies to enjoy the necessary autonomy and independence from the Executive and that this should be guaranteed in the Constitution.

17.2.1 Autonomy and Independence

Submissions

17.2.2.1 Establishment, Administrative and Financial Autonomy, and Reporting

One petitioner said that all investigative Commissions should be independent and autonomous (1). Other petitioners were more specific and called for these investigative bodies to have administrative and financial autonomy (59). Some petitioners wanted the investigative bodies to report to Parliament. The Anti-Corruption Commission said that the ACC should be established by the Constitution in order to ensure its autonomy (1).

There were a few submissions that the Investigator-General should execute duties independently and without interference from the Government (5).

17.2.2.2 Functions

Three petitioners wanted the functions of investigative commissions to be clearly spelt out in the Constitution (3).

17.2.2.3 Appointments

A number of petitioners said that investigative commissions should be appointed by and be answerable to Parliament (79).

Other petitioners called for heads of investigative commissions not to be appointed by the President, but by independent bodies and ratified by Parliament (61). A few petitioners said that Parliament should appoint heads of investigative commissions (3). A few others were of the view that the President should continue making these appointments (3).

17.2.2.4 Security of Tenure

One petitioner felt that heads of investigative commissions should enjoy security of tenure (1). One other petitioner said that the Constitution should provide for the Investigator-General to have the same terms, conditions and security of tenure as the Chief Justice (1).

17.2.2.5 Anti-Corruption Commission – Budget

The ACC said that in determining the budget of the ACC, Parliament should consider the original budget estimates together with the revised estimates from the Ministry of Finance (1).

The ACC further said that disbursements should be regular and consistent with the approved budget (1).

Observations

The Commission wishes to state that petitioners who addressed the subject of investigative commissions concerned themselves only with the Anti-Corruption Commission, the Drug Enforcement Commission and the Commission for Investigations.

On the subject of autonomy and independence of investigative commissions, the Commission notes that the majority of petitioners called for financial and administrative autonomy of these bodies. In this regard,

some of the petitioners said that investigative commissions should report directly to the National Assembly, whilst others were of the view that the Investigator-General should operate independently and without interference from the Government. This Commission also notes that the Anti-Corruption Commission called for the institution to be established by the Constitution, as is the case with the Investigator-General, and argued that this would guarantee its autonomy.

On the subject of functions of investigative bodies, this Commission notes the submissions by a few petitioners that the Constitution should clearly spell out the functions of these institutions.

This Commission concurs with the views of petitioners that investigative commissions should be autonomous and free from influence of any authority or person in order for them to fulfill their mandates. This should be reflected in the manner of establishment of these institutions, their appointments, administrative and financial control, security of tenure and system of reporting.

The Commission notes that, while the Office of Investigator-General is established by the Constitution, the Anti-Corruption Commission and the Drug Enforcement Commission are established under Acts of Parliament. It is important that key institutions that support democracy and good governance should be established by the Constitution in order to ensure that their independence and autonomy, permanence and effectiveness are not undermined. For instance, the Drug Enforcement Commission, which is established by the Narcotic Drugs and Psychotropic Substances Act, is, by provisions of that Act, a department under the Ministry of Home Affairs and operates under the control and supervision of the Minister of Home Affairs.

The Commission finds no justification in the Minister controlling and supervising the Drug Enforcement Commission, as Ministers are policy makers. Whereas the Drug Enforcement Commission can exist as a department under the Ministry of Home Affairs, it should be supervised by a commission. Compared to the Anti-Corruption Commission, the structure of this institution appears inferior because it is more susceptible to suspicion of political interference.

However, whilst it is essential for the Constitution to guarantee the independence and autonomy of these institutions, their powers and functions, composition and mode of appointment of office-holders need not be enshrined in the Constitution.

The Commission is in agreement with petitioners that investigative Commissions should report directly to the National Assembly, as this will enhance their independence, autonomy and effectiveness.

In evaluating the subject of independence and autonomy of investigative commissions, this Commission reflected on the views and recommendations of the Mvunga and Mwanakatwe Commissions. The Mvunga Commission was of the view that it is not always necessary to create all important institutions under the Constitution, as this inhibits making necessary modifications to these institutions without amending the Constitution. It therefore recommended that the Anti-Corruption Commission should not be established by the Constitution.

The Mwanakatwe Commission, on the other hand, in its consideration of petitioners' calls for investigative bodies to be independent and impartial, recommended that these institutions should be constitutionalised, independent and impartial, and that their heads should be appointed by the President, subject to ratification by the National Assembly. It also recommended that they should be self-accounting and report to the National Assembly.

The Commission also notes that relatively many petitioners addressed the subject of appointment of commissioners and heads of investigative commissions and that, of these, the majority were against the President making these appointments. Most of them said that independent bodies should do this, subject to ratification by the National Assembly, whilst a few were of the view that this should be done by the National Assembly.

The Commission observes that submissions made by petitioners on the subject of appointment of commissioners and heads of investigative Commissions reflect the same pattern of perceptions and apprehensions by the people as those observed under various other Chapters in this Report that the President exerts influence in the manner in which appointees discharge their duties.

Whereas this Commission acknowledges the need for the executive function of the President in making these appointments to be subjected to checks and balances, the National Assembly should not itself make these appointments. The President should appoint commissioners on the recommendations of the respective service commissions, subject to ratification by the National Assembly. Similarly, heads of investigative commissions should be appointed by the President on the recommendations of the respective commissions, subject to ratification by the National Assembly.

On the related subject of tenure of office, one petitioner said that heads of investigative commissions should enjoy security of tenure, whilst another called for the Investigator-General to enjoy the same conditions of service and security of tenure as the Chief Justice.

The Commission observes that Article 90 of the Constitution and the Anti-Corruption Commission Act of 1996 accord security of tenure to the Investigator-General and Director-General of the Anti-Corruption Commission, respectively. The Investigator-General enjoys the same security of tenure as that of a Judge of the High Court or Supreme Court. The Director-General of the Anti-Corruption Commission may not be removed from office except on restricted and specified grounds.

However, the President appoints the Commissioner of the Drug Enforcement Commission on such terms and conditions as the President determines and therefore the office-holder does not enjoy security of tenure. The Commission is of the view that security of tenure of heads of investigative commissions is essential to ensuring their independence and effectiveness.

In relation to the budget, the Anti-Corruption Commission said that its proposed budget estimates should not be varied by the Ministry of Finance, but should be considered by the National Assembly, taking into account the Ministry's recommendations. The Anti-Corruption Commission further called for disbursement of funds to be regular and consistent with the approved allocations. Whilst appreciating the concerns of the Anti-Corruption Commission, this Commission is, however, of the view that such a move would be discriminatory and that other public institutions would want to enjoy the same treatment.

Recommendations

The Commission recommends that the Anti-Corruption Commission, Drug Enforcement Commission and other key investigative commissions should be established by the Constitution and be guaranteed independence and autonomy.

The Commission further recommends that the Constitution should provide that:

- investigative commissions shall have a mandate to manage their finances independently;

- members of investigative commissions shall be appointed by the President on recommendation of the respective commission, subject to ratification by the National Assembly;

- heads of investigative commissions shall be appointed by the President on recommendations of the respective commissions, subject to ratification by the National Assembly;

- members of investigative commissions should serve a term of five years and be eligible for re-appointment for one further term only;

- both the members and heads of investigative commissions shall enjoy security of tenure and shall not be removed except on grounds of incapacity to discharge their duties by reason of infirmity of body or mind, for incompetence, misconduct or bankruptcy; and

- investigative commissions shall submit regular and annual reports directly to the National Assembly.

The Commission also recommends that the Drug Enforcement Commission should be elevated to the same status as the two other Commissions.

17.2.2 Merger of Investigative Commissions

Submissions

A few petitioners called for the Anti-Corruption Commission and the Drug Enforcement Commission to be merged in order to rationalise Government expenditure (4). It was felt that the functions of the two Commissions overlap.

Some petitioners said that the Investigator-General's Office should be merged with the Anti-Corruption Commission (6). Two petitioners called for the Investigator-General's Office to be abolished and its functions transferred to the Anti-Corruption Commission (2).

Observations

The Commission notes that some petitioners were of the view that the Anti-Corruption Commission should be merged with the Drug Enforcement Commission whilst others called for the merger of the Investigator-General's Office with the Anti-Corruption Commission. Two other petitioners called for the abolition of the Investigator-General's Office and suggested that its functions be transferred to the Anti-Corruption Commission.

Though relatively few petitioners made submissions on the subject of merging of investigative commissions, the Commission is of the view that it is necessary to examine the functions and powers of the various commissions, taking into consideration that the submissions were based on the perception that the functions of these three institutions overlap.

This Commission observes that, whilst the Anti-Corruption Commission is concerned with corruption, the Drug Enforcement Commission on the other hand deals with drug trafficking and money laundering. The Investigator-General's function is essentially to investigate maladministration and abuse of public office and authority. Therefore, the functions of these institutions are distinct and different.

However, perceptions of overlap of functions between the Investigator-General and the Anti-Corruption Commission may be due to the fact that both can investigate cases of maladministration or abuse of public office. The Commission feels that perhaps the most appropriate measure to take in dealing with the misconceptions in relation to the quasi-judicial functions of the Investigator-General's Office is to transfer the powers relating to investigations of abuse of office to the Anti-Corruption Commission. The other functions of the Investigator-General's Office should be transferred to the Office of the Parliamentary Ombudsman (Chapter 18) which this Commission recommends to be established under the Chapter on Parliamentary Ombudsman. These measures would rationalise and avoid duplication of functions.

Regarding a call for abolition of the Office of the Investigator-General, the Commission further observes that, apart from perceptions that its functions overlap with those of the Anti-Corruption Commission, people do not appreciate the role of the Investigator-General's Office and they do not see its benefits to the public.

In relation to the subject of functions of investigative commissions, the Commission wishes to observe that the name Drug Enforcement Commission is a misnomer, as it conveys the message that the Commission enforces the use of drugs.

Recommendations

The Commission recommends that:

- the powers and functions of investigative commissions should be distinct and should be clearly defined and spelt out in the enabling Acts of Parliament;

- the Office of the Investigator-General and the Commission for Investigations should be abolished and functions of the office transferred to other appropriate investigative bodies;

- functions relating to investigation of abuse of office should be transferred from the Commission for Investigations to the Anti-Corruption Commission, whilst the other functions should be transferred to the Office of the Parliamentary Ombudsman;

- the functions of investigative Commissions should include conducting public education and awareness programmes on their roles and functions; and

- the name "Drug Enforcement Commission" should be changed to "Anti-Drug Abuse Commission" or some such appropriate name.

17.2.3 Capacity

Submissions

Eleven petitioners said that the Office of Investigator-General should have power to prosecute (11) whilst two others called for the capacity of investigative bodies to be enhanced (2).

Observations

On the capacity of the investigative commissions, some petitioners called for the Investigator-General to have the power to prosecute, whilst two others wanted the capacity of investigative bodies to be strengthened.

This Commission agrees that the human and financial resources of investigative Commissions need to be enhanced in order to make them more effective. On the power to prosecute by the Investigator-General's Office, the Commission is of the view that the Investigator-General's Office should not have this power. This is because, as already observed, in terms of functions and effectiveness, its continued existence cannot be justified. Further, even if this Office had to continue, its status would remain quasi-judicial and therefore would not concern itself with prosecutions.

Recommendations

The Commission recommends that the capacity of investigative bodies should be enhanced in terms of human resource development and financial support.

17.2.4 Decentralisation

Submissions

A number of petitioners proposed that investigative bodies, such as the Investigator-General's Office, Anti-Corruption Commission and Drug Enforcement Commission should be decentralised to provinces and districts (33).

Observations

The Commission observes that a number of petitioners were concerned that the operations of investigative bodies are centralised and that this makes them inaccessible to the people. Petitioners wanted these institutions to be decentralised to provinces and districts.

This Commission concurs with petitioners' views because the effectiveness of investigative bodies depends, to a great extent, on their accessibility. Although the extent to which each of the institutions should be decentralised should be determined on its own merits, it is important that the operations of these institutions are decentralised to provinces and districts, as appropriate. The Commission also feels that accessibility to these institutions would be enhanced by simplifying the procedures for lodging complaints. This should include allowing complainants to make their complaints verbally or in writing, as well as in local languages.

Recommendations

The Commission recommends that:

- investigative commissions should be decentralised to provinces and districts, as appropriate; and

- the procedure for lodging a complaint or claim should be simple, clear and without technical inhibitions. Also, individuals should be free to make their claims or complaints verbally or in writing in English or any local language.

17.2.5 Vesting of Forfeited Property – Anti-Corruption Commission

Submissions

The ACC proposed that all property forfeited to the State in the course of investigations should be vested in the Commission and not the State (1).

Observations

The Commission observes that all investigative commissions function as agents of the State and it would be improper to vest any property seized in the course of their duty in them. In any case, such a move would create a conflict of interest between the need for investigations and the temptation to regard such vested property as belonging to the commission.

Recommendation

The Commission therefore recommends that property seized by the Anti-Corruption Commission or indeed any investigative commission should continue to vest in the State.

17.2.6 Task Force on Corruption

Submissions

Two petitioners said that the Task Force on Corruption should be a legal entity reporting to Parliament (2) whilst one proposed that the Task Force should be under the Anti–Corruption Commission (1). Two petitioners said that the Task Force on Corruption should have a time frame (2).

Observations

The Commission notes that a few petitioners addressed the subject of the Task Force on Corruption. Some of these petitioners wanted it to be established as a legal entity reporting directly to the National Assembly, whilst another was of the view that it should be under the Anti-Corruption Commission. Two petitioners simply wanted the mandate of the Task Force to have a definite time frame.

The Commission considers the work of the Task Force on Corruption important in terms of the political, social and economic development of this country. Corrupt leadership, if left unchecked, will ruin the economy and the very fabric on which good governance is founded. There is need to enhance the independence and capacity of investigative and oversight institutions to deal with the scourge.

Whilst the Commission appreciates the concern of petitioners as regards the identity of the Task Force on Corruption in terms of the law, it is, however, of the view that the Task Force is composed of institutions that are established under the law and charged with investigative powers. It has a temporary and specific task to perform and was constituted by the President in exercise of his Executive powers under the Constitution. Therefore, it is not necessary that it be established as a special legal entity.

The Commission also feels that the time frame for the Task Force is a matter to be determined administratively by the appropriate authorities.

CHAPTER 18

PARLIAMENTARY OMBUDSMAN

Terms of Reference:

No. 2 Recommend a system of government that will ensure that Zambia is governed in a manner that will promote the democratic principles of regular and fair elections, transparency and accountability, and that will guard against the emergence of a dictatorial form of government;

No. 3 Recommend appropriate ways and means of entrenching and protecting human rights, the rule of law and good governance in the Constitution;

No. 9 Examine the effectiveness of the Office of the Auditor-General and that of the Investigator-General and recommend means of improving their effectiveness where necessary; and

No. 30 Examine and recommend on any matter that is connected with or incidental to the foregoing terms of reference.

18.1 Introduction

The concept of Parliamentary Ombudsman has its origin in the Swedish history of governance. It operates through an autonomous office under Parliament with the mandate of ensuring compliance of public officers and authorities with the law. The functions of the Ombudsman are to investigate citizens' complaints of executive or bureaucratic incompetence or injustice as a result of misuse of public authority or law. The scope of investigations usually excludes legislative and judicial conduct.

The Swedish Parliamentary Ombudsman has existed for nearly two centuries. The concept of ombudsman has spread and can now be found in many other parts of the world. Examples are Finland, Norway, Denmark, New Zealand and the United Kingdom.

The Swedish Parliamentary Ombudsman

The persons who are appointed as Parliamentary Ombudsmen in Sweden are, normally, recruited from those who are regarded as qualified to act as members of the two highest courts of law - the Supreme Court and the Supreme Administrative Court.

The statutory provision concerning the role of the Parliamentary Ombudsmen are found in the Instrument of Government (IG) which is the equivalent of a constitution and Acts of Parliament, including an Act with instructions for the Parliamentary Ombudsmen. The tasks of the Parliamentary Ombudsmen are described in the first paragraph of Article 6 (IG.12.6) as follows:

> *"The Riksdag (Parliament) shall select one or more Ombudsmen to supervise, under instructions laid down by the Riksdag, the application in public service of laws and other statutes. An Ombudsman may initiate legal proceedings in cases indicated in these instruments."*

The powers accorded to the Parliament Ombudsman are laid down in (IG 12.6). The second paragraph therein states that:

> *"Ombudsmen may be present at the deliberations of a court or a public authority and shall have access to the minutes and documents of any such court or authority. A court of law or administrative authority and any state or local government official shall provide an Ombudsman with such information and opinions as he may request. A similar obligation shall be incumbent upon any other person coming under the supervision of the Ombudsman. A Public prosecutor shall assist an Ombudsman if so requested."*

When an Ombudsman is present at the deliberation of a court or a public authority, he does not have the right to express an opinion. An Ombudsman has no power to investigate cases that are more than two years old, unless there are particular reasons for doing so.

Details concerning the organisation, operation and administration of the offices of the Ombudsmen are contained in various statutes.

The supervision of the Ombudsmen does not extend to the following:

- Members of the Riksdag (Parliament);

- the Riksdag (Parliament) Board of Administration, the Riksdag Election Review Board, the Riksdag's Complaints Board or the Clerk of the Chamber;

- members of the Governing Board of the Riksbank (Central Bank), the Director of the Riksbank and Vice-Directors of the Riksbank, except to the extent of their involvement in exercise of the powers of the Riksbank to make decisions in accordance with the Act on the Regulation of Currency and Credit;

- Cabinet Ministers;

- the Chancellor of Justice (Chief Justice); and

- members of policy-making municipal bodies.

The Ombudsmen have no jurisdiction over the administration of justice by courts. They do, however, have the mandate to contribute to remedying deficiencies in legislation. The Ombudsmen may also make statements intended to promote uniform and appropriate application of the law.

In the case of disciplinary measures, the Ombudsmen may report a matter to those empowered to decide on such measures. In the case of individuals with professional qualifications or some authorisation entitling them to practice in a particular profession, who have displayed gross incompetence in their professional conduct or shown themselves in some other way to be unsuitable to practise, the Ombudsmen may submit a report to those who have the authority to decide on the revocation of the qualification or the authorisation of such professional.

The Ombudsmen are obliged to initiate and prosecute legal proceedings against a Minister or officials within Parliament or its agencies, provided that this is in accordance with a decision of an appropriate Committee established under the IG or by a Committee of Parliament. They are, however, not competent to institute legal proceedings against a fellow Ombudsman.

In addition to powers to prosecute or initiate disciplinary measures against an erring public official, the Ombudsman's main weapon lies in criticising and advising on particular cases. Though not legally binding, these statements carry considerable weight.

The funds needed to finance the activities of the Parliament Ombudsmen are appropriated directly by Parliament.

The concept of Parliamentary Ombudsman has often been compared to that of the Investigator-General established under Article 90 of the Constitution of

Zambia. The two are, however, different in many important respects. The fundamental difference is that although the constitutional provisions establishing the Office and functions of the Investigator-General fall under Part V, which deals with the Legislature, in its functions and operations the Office has very little to do with Parliament.

The Investigator-General, who is the Chairperson of the Commission for Investigations, and other members of the Commission are appointed by the President. The President generally directs the Commission in its investigations. Further, the Commission submits reports on its investigations to the President, who shall take such decisions in respect of the matter investigated as he thinks fit.

Although the Commission for Investigations Act requires that the Commission submits an annual report to the National Assembly on its operations, the Act also stipulates that such a report shall not disclose the identity or contain any statement which may point to the identity of any person into whose conduct an investigation has been or is about to be made. This means that, unlike the Swedish Ombudsman, the Commission is not fully accountable to Parliament.

Whereas the Swedish Parliamentary Ombudsman is funded directly by Parliament, the Commission for Investigations in Zambia depends on allocations from the Executive arm of the Government.

While the Mvunga Commission did not deal with the concept of Parliamentary Ombudsman, petitioners to the Mwanakatwe Commission submitted that as originally conceived, the Investigator-General was to play a role of Ombudsman whose main function was to protect the citizens from maladministration. They argued that an officer appointed by the Executive and accountable to the Executive could not be expected to effectively check the Executive. The Commission noted the useful lessons learnt from the Scandinavian model of Parliamentary Ombudsman. Recommendations of the Mwanakatwe Commission included the following:

- the Office of the Investigator-General should be renamed Office of the Parliamentary Ombudsman;

- the Office should be independent, impartial and established under the Constitution and report to Parliament;

- the Parliamentary Ombudsman should be appointed by the National Assembly in consultation with the Judicial Service Commission; and

- the functions, jurisdiction and powers of the Parliamentary Ombudsman should be to investigate complaints alleging abuse of power, unfairness, injustice, nepotism, tribalism, etc., on the part of all public offices and institutions except the President.

18.2 Submissions, Observations and Recommendations

There were six submissions on this subject (6).

Submissions

Four petitioners said that an Office of Parliamentary Ombudsman should be established for effective conduct of oversight functions which involves scrutiny and checking of Government conduct (4). There was a submission that nominations for appointment to the Office should be made by various stakeholders from the civil society and public institutions (1).

The Commission for Investigations proposed that the:

- Investigator-General should be called the Ombudsman in order to avoid misunderstanding of the role and function of the Commission for Investigations, which are similar to that of the Police or Zambia Security Intelligence Services;

- Commission for Investigations should be called the Office of the Ombudsman;

- Ombudsman should be appointed by the President upon recommendation of the Judicial Service Commission and subject to ratification by the National Assembly;

- exercise of the powers, functions and duties of the Ombudsman should be completely free from interference or direction of any other person or authority;

- Office of the Ombudsman should appoint its own staff and control its budget as appropriated by Parliament;

- Office of the Ombudsman should be answerable to Parliament and submit its annual reports to the National Assembly;

- annual reports should include a record of all complaints lodged and remedies afforded to the aggrieved persons, and any special report of cases where a public institution has failed to take necessary action to remedy an injustice;

- Office of the Ombudsman should conduct its investigations and sessions in the open and not in camera;

- Press should have access to information on investigations conducted by the Office of the Ombudsman; and

- Office of the Ombudsman should be decentralised to all provinces in order to make it more accessible to members of the public (1).

Observations

Though very few petitioners made submissions on the subject of the Parliamentary Ombudsman, the Commission observes that those who did called for the Constitution to establish the Office of Parliamentary Ombudsman. This included the Commission for Investigations, which submitted that the Office of the Investigator-General should be transformed into that of Parliamentary Ombudsman. The Commission, however, notes people know very little about the Commission for Investigations and its functions.

Despite little being known about it and misunderstanding of the functions of this Office, the Commission is of the view that the Office should be replaced by a Parliamentary Ombudsman and should be established by the Constitution. As already observed under the Chapter on the Legislature (Chapter 9), there is need for the Constitution to enhance the oversight role of the National Assembly through the establishment of this Office. The Office should be vested with powers to investigate and prosecute cases of abuse of public office and maladministration in public offices. Through this Office, decisions of the National Assembly on Government conduct can be enforced.

The Office of Parliamentary Ombudsman would play a leading role in the promotion of the rule of law in the administration of public offices and in the elimination of abuse of public office and authority.

The functions of the Parliamentary Ombudsman would be distinct from those of specialised institutions such as the Human Rights Commission, the Anti-Corruption Commission, Drug Enforcement Commission, Police and Public Complaints Authority and the Director of Public Prosecution, all of which are deemed independent and not subject to control or supervision of any person or authority.

In its consideration of the subject, the Commission noted that the Mwanakatwe Commission recommended the establishment of the Office of Parliamentary Ombudsman.

Recommendations

The Commission recommends that the Constitution should provide that:

- there shall be established the Office of Parliamentary Ombudsman who should be appointed by the National Assembly from names recommended by the Parliamentary Service Commission;

- the Office of the Parliamentary Ombudsman shall be independent and autonomous and that in the discharge of the functions of the Office, the office-holder shall not be subject to the control of any person or authority;

- the functions of the Parliamentary Ombudsman shall include to:

    a) check the administration of law in public institutions and offices;

    b) initiate on own motion or on a complaint received from any person, investigations into cases of abuse of public office or authority or maladministration of justice in public offices, with the exception of cases involving corruption;

    c) prosecute such cases where necessary;

    d) make binding recommendations for disciplinary action against erring officers as appropriate, subject to the power of review of courts;

    e) make statements of opinion on matters of administration of public institutions or offices;

    f) make recommendations on the review, harmonisation and development of laws, with the aim of improving the administration of justice in public institutions;

    g) execute such other functions as may be prescribed by an Act of Parliament; and

    h) carry out such other duties as may be assigned by the National Assembly.

- subject to provisions of this Constitution, in the exercise of the functions of the Office, a Parliamentary Ombudsman shall have power to summon any person holding public office or private individuals to appear before her/him to give evidence or to require such person to disclose any

information and shall have the powers of the High Court in compelling the production of documents;

- it shall be an obligation of any person coming under the jurisdiction of the Parliamentary Ombudsman to provide any such information or opinions as he/she may possess;

- all decisions of the Ombudsman shall be acted upon by respective institutions or authorities;

- the Office of the Parliamentary Ombudsman shall publish an Annual Report of its operational and financial activities and shall submit the same to the National Assembly as well as the President;

- the annual reports shall include a record of all complaints and claims lodged and the remedies accorded to the aggrieved persons, as well as any special reports of cases where a public institution has failed to take necessary action to remedy an injustice;

- a Parliamentary Ombudsman shall be removed from office by the National Assembly through a tribunal only on grounds of incapacity to discharge the functions of the Office by reason of infirmity of body or mind, incompetence, or misconduct or bankruptcy; and

- other details concerning the operations of the Office of Parliamentary Ombudsman shall be prescribed in an Act of Parliament.

The Commission further recommends that the Office of the Ombudsman should be decentralised to all the provinces and that its work should be publicised through education and awareness campaigns.

CHAPTER 19

PUBLIC SERVICE

Terms of Reference:

No. 3 Recommend appropriate ways and means of entrenching and protecting human rights, the rule of law and good governance in the Constitution;

No. 7 Examine and recommend a composition of functions of the organs of government and their manner of operating, with a view to maximizing on checks and balances and securing, as much as possible their independence;

No. 8 Examine and recommend whether the holder of the office of Attorney-General should vacate office following a change in Republican Presidents;

No. 26 Examine provisions relating to government's accountability and transparency in the expenditure of public funds and those relating to the presentation of a financial report as required by Article 118 of the Constitution; and

No. 30 Examine and recommend on any matter which is connected with or incidental to the foregoing terms of reference.

19.1 Introduction

The Public Service comprises all the institutions of the Government that play a vital role in the formulation and implementation of policies of the Government of the day as well as programmes and delivery of services to the citizenry. It is the institution that enables the President to perform and discharge the functions of the Government.

During the colonial era, the provision of public services to the citizens was both limited and dual in nature. The settler population was served separately from the majority indigenous population. Apart from this, the Public Service was small

and dominated at the upper and middle levels by officers drawn mainly from the British Colonial Administration. Its responsibility centred around law enforcement and regulation, while a few agencies were established to handle some modest socio-economic programmes.

After independence, the new government fundamentally changed and made the provision of public services, such as education, health and agricultural extension services, paramount to all citizens. This was done by consolidating the two Public Services into a single nation-wide Public Service system.

To fulfill the pre-independence electoral promises for jobs as repayment for political support, and to respond to the growing popular demands for social service and material benefits, the new Government adopted an increasing interventionist approach and introduced new social and economic programmes. It also created, as part of the Public Service, new institutions to spearhead the implementation of these programmes.

In the late 1960s and early 1970s the Government, as part of its participation in economic development, nationalised the mining, financial, trading and other key economic sectors. Instead of facilitating economic development and providing an enabling environment, the Government became directly involved in the management of business in these sectors. This considerably diminished private sector involvement in the formal sectors of the economy. Government domination continued to grow, as it controlled majority shareholding in almost all key industrial and commercial enterprises. To effectively deal with these new responsibilities, need arose for a bigger Public Service.

Zambia, like many other sub-Saharan African countries, suffered macro-economic imbalances during the beginning of the 1980s. These imbalances meant that Zambia was financially unable to support the bloated Public Service, which was out of proportion to the Public Service performance in providing the requisite goods and services to the people of Zambia. This failure was demonstrated in later years by a strong public outcry and criticism of the performance of the Public Service.

In response to sentiments expressed by the public and the political leadership, various reform efforts aimed at reducing the size of the Public Service and improving its operational performance were undertaken between 1981 and 1991. These, however, did not help to improve its performance. Failure to effectively reform the Public Service therefore continued to have serious repercussions on the growth of the national economy.

Over the years, the shortage and inappropriate use, as well as the poor distribution and management of available resources led to public institutions' inability to perform to expected standards. In addition, proper personnel management systems were disrupted due to politically instigated changes in policies and practices of

recruitment, development and remuneration of Public Service employees. Opportunities for deployment and promotion slumped while the criteria shifted from merit to partisan considerations. These developments, including the absence of rewards as a recognition for good performers or penalties for bad performers, coupled with the absence of systems for monitoring controls for personnel records and the absence of strict and timely enforcement of stipulated conditions of service and standards of discipline and integrity, contributed to the environment of fear, resignation and apathy among public servants.

By late 1991, it became very clear that the economic crisis needed urgent redressing. The results of the 1991 presidential and parliamentary elections spoke volumes on how the people of Zambia felt about the state of affairs. The new Government therefore came in with a vision of transforming the economy through liberalisation and free market-oriented strategies which required new management principles and operations.

However, in order to achieve success, it was envisaged to create a small but well remunerated professional, disciplined and responsive Public Service, capable of providing a conducive environment and support for increased individual and private sector participation in the economy. This called for radical changes in the organisational structures, operational modes and management practices in the Public Service. The new Government committed itself to transforming the Public Service into a professional civil service that was completely divorced from the political party in government. It committed itself to creating a Public Service that would provide an enabling environment for increased individual and private sector involvement in the economic and social development of the country.

In order to achieve this, the Public Service Reform Programme (PSRP) was launched in November 1993. Its overall goal was to "improve the quality, delivery, efficiency and cost effectiveness of public services to the people of Zambia."

The specific objectives were to:

- improve the Public Service capacity to analyse and implement national policies and perform all its appropriate functions in an efficient and effective manner;

- effectively manage public expenditure in order to meet the fiscal stabilisation policies; and

- make the Public Service more effective and responsive to the needs of the country's population.

The PSRP was intended to put in place measures to:

- depoliticise the Public Service;
- revive the morale of the public servants (which was at its lowest ebb) through appropriate reward systems;
- create a better and more conducive working environment; and
- carry out internal devolution, where management is devolved to internal units; external devolution, where objectives are handed over to external agencies; and regional devolution, where authority and responsibility is given to local authorities and districts.

The reforms were also expected to address:

- the absence of an environment in which public servants could execute their duties confidently and without fear or favour;
- the absence of guarantees for the security of tenure of public officers;
- the absence of a provision to protect public officers from victimisation and discrimination; and
- the absence of institutional capacity to enforce the Civil Service Code of Conduct.

Among recommendations relating to the Public Service made by the 1991 Mvunga Commission were the following:

- public officers should not be actively involved in party politics unless they resign or retire from their office;
- senior civil servants of the rank of Deputy Permanent Secretary and above should be appointed by the President;
- the Defence Council should be accorded the status of a service commission;
- senior defence and security personnel should be appointed by the President; and
- steps should be taken to establish a career diplomatic service.

Petitioners to the Mwanakatwe Commission called for service commissions to be enshrined in the Constitution in full, including their powers, functions and mode

of appointment of Chairpersons and other Commissioners. The Commission also recommended that the Constitution should have provisions with respect to the Judicial Service Commission, Public Service Commission and Teaching Service Commission. It further recommended that the Constitution should underline the independence and impartiality of these Commissions in the performance of their functions. The Commission, however, recommended that the Heads of Service Commissions should be appointed by the President without the need for ratification by the National Assembly, as it felt that there was nothing political in the functions of these institutions.

Current Constitutional Provisions

Unlike the 1964 Constitution, the current Constitution of Zambia does not provide for the Public Service.

Chapter IX of the 1964 Constitution was devoted to the Public Service. Provisions under this Chapter included those relating to the appointment, powers and tenure of office of the Public Service Commission, the DPP and the Auditor-General. It also contained provisions relating to pensions.

The current Constitution, however, provides under Part XI, Article 123, for the establishment of the Judicial Service Commission and any other service commissions by an Act of Parliament. It does not specifically provide for the establishment of the Public Service Commission and other service commissions.

Other public offices such as the Attorney-General, Solicitor-General and Director of Public Prosecutions are provided for under the Part dealing with the Executive, whilst that of the Auditor-General is dealt with under the Part dealing with Finance. In addition the Constitution, under Part VII, establishes the Defence Force, Zambia Police Force, Zambia Prisons Service and Zambia Security Intelligence Services.

Article 61 vests the power to constitute offices for the Republic in the President. The President has also power to abolish any such office, and appoint or remove any such persons to or from such offices.

In view of the important and impartial role the Public Service plays in governance, some modern constitutions have provisions addressing this subject. In particular, some countries have identified the need for their constitutions to provide principles by which the Public Service conduct should be guided in order to meet the needs and aspirations of the people. Some of the constitutions also establish specific service commissions. This is clearly the case in the South African Constitution.

Section 195 (1) of the Constitution of South Africa provides democratic values and principles which should govern public administration. These include a high

standard of professional ethics; economic use of resources; equitable provision of services; and accountability and transparency, as well as provision of timely, accessible and accurate information to the public.

Further, Section 196 of the Constitution of South Africa establishes a single independent Public Service Commission encompassing all organs of the State and provides for its powers and functions. The President, upon approval of the National Assembly and provincial legislatures, appoints members of the Commission. They enjoy security of tenure and may be removed only on restricted specified grounds.

Another example is the Constitution of Uganda, which provides for the Public Service, establishes various service commissions, and provides for their powers, functions and appointment of commissioners by the President with the approval of Parliament. The Constitution of Uganda further guarantees that "in the exercise of their functions, the commissions shall be independent and shall not be subject to the direction or control of any person or authority". It further guarantees security of tenure for public officers.

In addition to these, there are established by the Constitution of Uganda the Parliamentary Service Commission and the Judicial Service Commission under the Legislature and Judiciary, respectively.

19.2 Submissions, Observations and Recommendations

There were one thousand three hundred and sixty-two (1,362) submissions on this subject. Submissions in respect of the Public Service include those relating to service commissions, appointments of senior civil servants such as the Secretary to the Cabinet, Deputy Secretary to the Cabinet and Permanent Secretaries, participation of civil servants in active politics and retirement of civil servants.

19.2.1 Service Commissions

Submissions

19.2.1.1 Chairpersons and Commissioners

Thirteen petitioners said that the President should not appoint Chairpersons and Commissioners of various service commissions (13). It was suggested that independent bodies such as the National Assembly should appoint them.

Three petitioners were of the view that Chairpersons and Commissioners should be nominated by their respective commissions, appointed by the President and ratified by Parliament (3). Five petitioners on the other hand submitted that

the President should appoint Commissioners as is the case now (5).

One petitioner said that the power to nominate chairpersons of service commissions should be vested in a "Council of State" (1).

19.2.1.2 Decentralisation

There was a submission that service commissions should be decentralised to districts in order to combat corruption (1). Two petitioners said that all service commissions should be merged into one commission and then decentralised to provinces (2).

19.2.1.3 Persons with Disabilities – Representation

There were five submissions that persons with disabilities should be represented on all service commissions (5). These included a group submission from associations representing persons with disabilities.

19.2.1.4 Teaching Service Commission – Re-organisation

One petitioner said that the Teaching Service Commission should be reorganised in order to improve on its efficiency (1).

Observations

The Commission observes that there were relatively few submissions on this subject. Most of the petitioners expressed the desire that Chairpersons and Commissioners in all service commissions should be appointed by an independent body such as the National Assembly rather than the President as is currently the case. A few others felt that the President should continue to be the appointing authority, but should only do so on recommendation of the respective service commissions, subject to ratification by the National Assembly. A few petitioners, on the other hand, called for the current practice of the President making such appointments to continue while one petitioner wanted the power to nominate Chairpersons of these commissions to be vested in a "Council of State".

The Commission observes that the current practice of Chairpersons and Commissioners of service commissions being appointed by the President tends to undermine the independence and autonomy of these commissions. Furthermore, vesting the power of appointment exclusively in the President leaves the tenure of Chairpersons and Commissioners at the discretion of the appointing authority. In the same vein, the Commission

observes that Sections 5 and 10 of the Service Commissions Act, Cap. 259, which give power to the President to give directions to service commissions in the exercise of their functions are not in conformity with the principle of independence and autonomy of the service commissions. The Constitution should explicitly and unreservedly protect service commissions from control of any person or authority in the exercise of their powers and discharge of their functions. Further, Chairpersons and Commissioners should not be removed from office except on restricted and specified grounds.

Service commissions are key institutions in any constitutional dispensation, as they serve to protect and enforce the independence of the Public Service which are measured broadly by the principles of independence, accessibility, accountability and impartiality. The Commission wishes to recognise that such principles have been eroded since 1991 because the constitutional provisions relating to service commissions are limited in the present Constitution.

Article 123 does not provide for the three Commissions by naming them except for the Judicial Service Commission. It does not provide for the composition, appointments of members, powers and functions of the Commissions over the sectors for which they are responsible. Hence these provisions are removed from the protective regime of the Constitution and placed under general legislation enacted by Parliament which could be easily amended.

The Constitutions of Ghana, Uganda and South Africa have made explicit provision for membership, appointments and functions in order to protect the Commission's independence and impartiality.

The Commission, however, finds the submission that respective commissions nominate Commissioners untenable, as this would be tantamount to Commissioners nominating themselves.

On the issue of representation of persons with disabilities in all service commissions, this Commission is of the view that merit is paramount, but that appointments should take into account special interest groups such as women and persons with disabilities.

In response to the call for service commissions to be decentralised to districts, this Commission agrees in principle with the idea of decentralising service commissions to provinces in order for them to function more effectively.

On the submission that service commissions be merged into one, this Commission feels that there is no need for these commissions to be

merged since each one deals with a specialised sector of the Public Service. The Commission recalls that such a concept was mooted towards the end of the Second Republic, but was not implemented.

Concerning petitioners who called for the Teaching Service Commission to be reorganised, this Commission is of the view that this matter should be dealt with by necessary amendments to the relevant legislation.

Recommendations

The Commission recommends that the Constitution should:

- establish specialised public services and commissions with their membership, powers and functions, over the various sectors of Government, such as the Parliamentary Service, the Judicial Service, the Civil Service, the Teaching Service, the Police and Prison Service;

- provide that chairpersons and commissioners of all service commissions should be appointed by the President, subject to parliamentary ratification;

- state that qualifications for appointment of commissioners should include Zambian citizenship;

- provide that the term of office for commissioners shall be five years;

- provide that removal of chairpersons and commissioners of all service commissions by the President shall only be on grounds of misconduct, inability to discharge functions of the Office arising from infirmity of body and mind and incompetence; and

- state that the exercise of the powers and discharge of the functions of service commissions shall not be subject to the direction or control of any person or authority.

The Commission further recommends that Sections 5 and 10 of the Service Commissions Act, which give power to the President to give directions to service commissions in the exercise of their functions, should be repealed.

The Commission also recommends that:

- service commissions should continue to operate in areas of their specialisation and should not be merged;

- appointments should, first and foremost, be on merit, but take into account special interest groups such as women and persons with disabilities; and

- steps should be taken to ensure that all service commissions are decentralised to provincial level.

19.2.4 Secretary/Deputy Secretary to the Cabinet, Permanent Secretaries and Other Senior Civil Servants

Submissions

A number of petitioners proposed that the Secretary to the Cabinet and Permanent Secretaries should be appointed by the Public Service Commission on merit from within the Civil Service, subject to ratification by the National Assembly (96). A few petitioners felt that the President should continue to appoint Permanent Secretaries, subject to ratification by the National Assembly (5).

The Secretary to the Cabinet said that, in addition to the current provisions in the Constitution regarding the functions of the Secretary to the Cabinet, the Secretary to the Cabinet should be Chief Advisor to the President on Public Service management (1) while another petitioner said that the current position and functions of the Secretary to the Cabinet should be maintained (1).

On the appointment of Permanent Secretaries, the Secretary to the Cabinet said that the Office of the Permanent Secretary should be provided for in the Constitution and their appointment be made by the President from the cadre of public servants, in consultation with the Secretary to the Cabinet and on the advice of the service commissions (1). He further suggested that the responsibility of Permanent Secretary should be provided for in the Constitution. This would avoid the current problems where responsibilities of Ministers which are already stipulated in the Constitution and those of the Office of the Permanent Secretary are sometimes confused and blurred, to the detriment of service delivery to the citizenry.

Two petitioners said that the Constitution should provide security of tenure for all senior public officers so as to avoid political interference in their appointment and functions (2).

Observations

The majority of petitioners who made submissions on this subject were concerned with the deteriorating performance of the Civil Service, especially as it seemed to be partisan and serve the interests of the Government of the day. They wanted the Civil Service to be protected from political interference in order to promote professionalism and efficiency. They therefore called for the Secretary to the Cabinet and Permanent Secretaries not to be appointed by the President so that they serve the Government of the day. They wanted these officers to be non-partisan career civil servants who should be professional in their work.

One petitioner in particular was very passionate about the breakdown of the Civil Service due to the system of appointing Permanent Secretaries from outside the Civil Service. He pointed out that this has resulted in having some Permanent Secretaries who are not conversant with Civil Service procedures as Heads of Ministries. He argued that this demotivates and frustrates career civil servants who no longer can expect to rise to that position.

The Commission observes that the Civil Service has been over-politicised and this has not only compromised standards, but also undermined discipline in the Civil Service. There is therefore need to protect the Civil Service from political patronage if performance is to improve.

The Commission further observes that Article 61 of the Constitution vests power to appoint or remove a person to or from public office in the President. The exercise of this power by the President has been delegated to a large extent and generally by law to other authorities and institutions, such as the Public Service Commission. However, this power has been largely reserved in respect of appointment to senior Civil Service and other Public Service posts.

The Commission observes, however, that there are no specific provisions in the Constitution for appointment to senior Civil Service posts except for the position of Secretary to the Cabinet, which is established under Article 53 of the Constitution. The absence of such provisions denies the guarantee of security of tenure of office and renders the Office of the Permanent Secretary susceptible to political interference.

The Commission notes that Uganda and Nigeria make specific provisions within their constitutions for the appointment to the Office of Permanent Secretary by the President, in consultation with or on the recommendation of the Public Service Commission. The Constitution of Uganda goes further to give powers to the President to appoint a Head of Department on the advice of the sector service commission.

Whilst the Secretary to the Cabinet should admittedly be a person that a President is satisfied with in view of her/his role of providing advice to the President on the operations of the Civil Service, it is essential that this office enjoys professional independence. This is essential for the proper discharge of duties of the Office of the Secretary to the Cabinet. The Deputy Secretaries to the Cabinet and Permanent Secretaries also require to operate under similar terms if their supervision of the operation of Ministries and control of finances are to be effective.

The Commission notes the submission from the Office of the Secretary to the Cabinet that the Secretary to the Cabinet should be chief advisor to the President on public service management in addition to being head of the Civil Service as provided for in the present Constitution. The Commission agrees with this submission, but further observes that such function should be restricted to providing information and advice to the President on public service management.

The Commission further agrees that the Secretary to the Cabinet should be the head of the Public Service. The Commission wishes to point out that the position of Secretary to the Cabinet is critical and central to the operations of the Government and specifically to the effective implementation of Government policies and programmes. It is both a strategic and symbolic position in the functioning of the Government. It is strategic in the sense that it provides the required overall leadership of the Public Service to effectively implement Government programmes. In this sense, the position is responsible for securing the general efficiency of the Public Service in undertaking its functions. It is symbolic in the sense that every organisation needs a leader which key players should identify with.

The responsibilities that the Secretary to the Cabinet is assigned with in servicing Cabinet business puts this Office in a very central and critical position in the implementation of Government policies and programmes. It therefore gives the position the central leadership role in ensuring that quality and responsive public services are delivered to ensure a better quality of life for the citizenry. Therefore, appointments to this office should be made from among serving cadre within the public service of the rank of Permanent Secretary and above or their equivalent. Qualifications for appointment to this office should include requisite professional qualifications, experience and a minimum age.

The Commission also notes that petitioners to the Mwanakatwe Commission suggested that the Secretary to the Cabinet should be appointed by the President in consultation with the Public Service Commission, and that Permanent Secretaries should be appointed by the Public Service Commission on the basis of professionalism and

experience. The Commission recommended, accordingly, observing that the Civil Service would be strengthened if politicians were removed completely from the process of appointment and removal of civil servants.

In conclusion, the Commission is of the view that checks and balances should be instituted in the powers of appointment and removal of these officers.

Recommendations

Accordingly, the Commission recommends that the Constitution should provide:

- for the appointment of the Secretary to the Cabinet and Deputy Secretary to the Cabinet by the President in consultation with the Civil Service Commission, subject to ratification by the National Assembly;

- that the Secretary to the Cabinet shall be chief advisor to the President on Public Service management and should be the head of the Public Service;

- that there shall be a minimum age requirement of 45 years for a person to be appointed Secretary or Deputy Secretary to the Cabinet and that other qualifications shall be prescribed by or under an Act of Parliament;

- that Permanent Secretaries should be appointed by the President acting in accordance with the advice of the Civil Service Commission, subject to parliamentary ratification and on the basis of professional merit;

- for core functions of the Secretary and Deputy Secretary to the Cabinet and Permanent Secretaries;

- that the Secretary to the Cabinet and Deputy Secretary to the Cabinet shall serve on fixed period contracts the terms of which shall be prescribed by or under an Act of Parliament;

- that Permanent Secretaries shall be career civil servants employed on permanent and pensionable terms; and

- that subject to vacating office on expiration of the contractual term, removal of a Secretary to the Cabinet, Deputy Secretary to the Cabinet and Permanent Secretaries shall be only on grounds of

failure to perform the duties of the office due to infirmity of body or mind or incompetence or misconduct.

19.2.2 Attorney-General

Submissions

A number of petitioners argued that the President should not appoint the Attorney-General and that the National Assembly should instead appoint the holder of the office, as he/she should owe allegiance to the people and serve as an independent chief legal advisor to the Government (294).

Many petitioners said that the Attorney-General should not vacate office following change in the presidency (287). Most of these petitioners argued that the office-bearer should be a widely experienced and knowledgeable civil servant. One petitioner went further to suggest that the Office of Attorney-General should be established as an independent office (1).

On the other hand, some petitioners felt that the Attorney-General should be appointed by the President and should vacate office upon change of Government, since the office-bearer owes allegiance to the appointing authority (147)

Other petitioners suggested that the Attorney-General should be appointed by the President, subject to ratification by the National Assembly(68).

One petitioner said that the Attorney-General should be elected by universal adult suffrage (1).

On the question of combining the position of Attorney-General with that of Minister of Justice, a few petitioners said that the Attorney-General should not hold a ministerial or other political position (10). This was in order to avoid conflict of interest and promote efficiency in the running of the Office.

There were two submissions that the Attorney-General should have security of tenure similar to that of a Judge of the High Court (2). This is to enable the office bearer to perform functions of the office professionally and without fear.

Observations

The majority of petitioners who addressed this subject wanted the Attorney-General not to be appointed by the President, but by the National Assembly, and further said that the Attorney-General should not vacate

office following a change in the Republican President. Others also suggested that the Attorney-General should not be appointed to any ministerial position, in order to avoid conflict of interest and promote efficiency in the running of the Office.

It was these petitioners' desire that the Attorney-General should be a civil servant and a professional person of wide experience in law.

The Commission finds the demand that the Attorney-General should be detached from political office and be a professional civil servant with experience to serve the Government of the day persuasive. The office-bearer serves all the organs of Government and other public institutions.

On the other hand, the Commission notes that the Attorney-General, as chief legal advisor to the Government in the discharge of its day-to-day functions, is more aligned to and operates under the Executive.

A smaller number of petitioners wanted the Attorney-General to be appointed by the President and the office-holder to vacate office following change of Government. Some added that the appointment should be subject to ratification by the National Assembly. This view seems to assume that the Attorney-General is the President's personal representative or is employed to serve a particular President at the latter's pleasure. In the Commission's view this is not the case, because the Attorney-General is a senior civil servant and principal legal advisor to the Government.

There were calls for qualifications for appointment to the Office and security of tenure to be similar to that of a Judge of the High Court. This is to enable the office-bearer to perform functions of the Office professionally and without fear. Article 52 of the Constitution provides that the qualifications for appointment to the Office of Attorney-General are the same as those required for appointment of a person as Judge of the High Court. However, no security of tenure is accorded to the Office.

The Mwanakatwe Commission observed that the Attorney-General was the principal legal advisor to the Government and should therefore be a member of the Cabinet. Accordingly, the Commission recommended that the Attorney-General should be appointed by the President, subject to ratification by the National Assembly. The Commission concurs with this view. The office holder, as the principal legal advisor to the Government, should be a member of the Cabinet.

In the light of the above considerations and as previously stated in this Report, it is the Commission's view that emphasis should be on the need to provide checks and balances in the powers of appointment and removal

of the office-bearer. The Office should be guaranteed security of tenure in order to remove any perceptions that it is subject to manipulation and, more importantly, to guarantee its professional and operational independence. The Commission also feels that the qualifications for appointment to this Office should include a minimum age of 45 years.

Recommendations

The Commission recommends that the Constitution should provide that:

- the Attorney-General should be a professional and the Office should be independent and shall not be appointed to a Cabinet position;

- the Attorney-General should be appointed by the President on the recommendation of the Judicial Service Commission, subject to ratification by the National Assembly;

- there should be added to the existing qualifications for appointment as Attorney-General a minimum age requirement of 45 years;

- the Attorney-General should not vacate office upon change in the Office of the President;

- the Attorney-General shall be an ex-officio member of the Cabinet; and

- the Office of Attorney-General shall be accorded security of tenure similar to that of Judges of a superior court; and

- the Attorney-General shall retire at 70 years or may opt to retire at 65 years.

19.2.3 Solicitor-General

Submissions

A number of petitioners argued that the President should not be responsible for the appointment of the Solicitor-General (37). Three petitioners suggested that the National Assembly should make the appointment (3) while a few others said that the Solicitor-General should not vacate office following change in the office of President (4). One petitioner said that the Office of the Solicitor-General should be strengthened in terms of the authority it commands and that its functions should be clearly spelt out (1).

Observations

The Commission is of the view that the concerns expressed in respect of the Office of Attorney-General apply to the Office of Solicitor-General.

Recommendations

In the light of its observation, the Commission recommends that the principles recommended in respect of the Attorney-General should be extended to the Solicitor-General, with the exception that an office-bearer shall not be an ex-officio member of the Cabinet.

19.2.5 Director of Public Prosecutions

19.2.5.1 Appointment

Submissions

Some petitioners proposed that the Judicial Service Commission should appoint the Director of Public Prosecutions (64). A few others said that the DPP should be appointed by Parliament (8). Two petitioners, on the other hand, were of the view that the President should appoint the DPP (2).

Two petitioners said that the DPP should be independent and enjoy security of tenure (2). One petitioner proposed that the National Assembly should be the only body empowered to investigate and dismiss the DPP, as is the case currently with the Auditor-General (1). Two others similarly said that the President should have no role in the removal of the DPP (2).

Observations

Most petitioners wanted the Director of Public Prosecutions to be appointed by the Judicial Service Commission, a few preferred that this should be done by Parliament, whilst an even smaller number suggested that it should be done by the President. There was also a submission that inquiries into the conduct of a DPP for purposes of removal from office should be done exclusively by the National Assembly.

The Commission agrees with petitioners on the need for impartiality of the DPP and that this should be reflected in the appointing authority and appointment procedures. In agreeing with these submissions and sentiments, the Commission wishes

to observe that the routine of appointing constitutional office holders as recommended in this Report, that is, by the President upon recommendation of the Judicial Service Commission and ratification by the National Assembly, should be followed even in the case of the DPP.

Further the DPP being in charge of all public prosecutions should discharge functions of the Office with professional diligence, which can only be assured if it is independent from all organs of the State. As in the case of the Attorney-General, independence would be achieved through checks and balances in the appointment of the office-bearer, provision of security of tenure and adequate funding of the Office.

As regards qualifications for appointment to the Office of the DPP, it is important that, in addition to the existing qualifications, the Constitution includes the requirement that only a person with qualifications and experience in criminal prosecution and of a minimum age of 45 years shall be eligible for appointment to the Office.

Recommendations

The Commission therefore recommends that the Constitution should provide that:

- the DPP shall be appointed by the President on recommendation of the Judicial Service Commission, subject to ratification by the National Assembly;

- the Office of DPP shall be accorded security of tenure similar to that of a Judge of the High Court, as currently provided for in the Constitution, save that removal from office should fall entirely under the National Assembly instead of the President;

- funding of the Office of the DPP should be adequate and timely; and

- the qualifications for appointment to the Office of the DPP shall include qualifications and experience in criminal prosecution and a minimum age of 45 years.

19.2.5.2 Powers and Functions of the DPP

Submissions

Two petitioners proposed that Article 56 (7) of the Constitution (which subjects the DPP to receive directives from the Attorney-General in matters of public interest) should be repealed (2). One petitioner said that courts should be empowered to question the entry of a *nolle prosequi* if they feel that no good grounds exist (1). Three petitioners further said that the DPP should be required to apply for leave to enter a *nolle prosequi* and to provide sufficient grounds to the court (3). Whilst one petitioner said that entry of a *nolle prosequi* should result in acquittal of the accused person (1), two others said that there should be a time limit within which an accused person who has been discharged on entry of a *nolle prosequi* may be charged afresh on the same facts (2). The reason advanced for this submission was to prevent abuse of power.

One petitioner said that the powers and functions of the DPP should be established under separate legislation which should provide for an independent governing body (1).

One petitioner said that all police prosecutors should be appointed and supervised by the DPP (1).

Another petitioner said that the Office of the Director of Public Prosecutions should be decentralised (1).

Observations

The Commission agrees that, contrary to what is currently stipulated in the Constitution, in the exercise of the powers of the Office conferred by the Constitution, the DPP should not receive directions from the Attorney-General in matters involving general consideration of public policy. As already pointed out in its earlier observations on the subject of appointment of the DPP, the Commission feels that the independence and impartiality of the DPP ought to be protected.

The Commission therefore concurs with the submissions. It also notes that, in its Report, the Mwanakatwe Commission observed that the Attorney-General should not have supervisory role over the DPP and that there was need to remove any executive influence on the criminal justice system. Accordingly, the

Commission recommended that the Judicial Service Commission appoint the DPP, subject to ratification by the National Assembly.

The Commission notes that though the submission on a *nolle prosequi* did not attract many petitioners, the few that made submissions including the LAZ, voiced concerns that are widely shared. In summary, the following demands were made: the courts should question grounds for entry of a *nolle prosequi*; the DPP should be required to seek leave of court to enter a *nolle prosequi*; and there should be a time limit within which an accused person may be charged on the same facts after entry of a *nolle prosequi*.

In its consideration of this subject, the Commission notes that it is common practice in Commonwealth countries to reserve this power to the DPP. However, this power has been so excessively abused as to trample upon the rights of accused persons and has offended public conscience.

While accepting the need for the power of a *nolle prosequi* to be vested in the DPP and that this power should be used sparingly and in good faith, past experience has shown that there has been persistent abuse of this power. The Commission is of the view that public interest can still be protected, but within a restricted scope.

This Commission notes that the Mvunga Commission, in responding to a call for the DPP to give reasons when entering a *nolle prosequi*, recommended retention of the power of the DPP to enter a *nolle prosequi* without any conditions, arguing that it was an essential part of the constitutional functions of the Office, the exercise of which should not be compromised. However, the Mwanakatwe Commission recommended that in the interest of justice, the DPP should give reasons for entry of a *nolle prosequi*. This Commission agrees with the Mwanakatwe Commission.

In response to a submission that the powers and functions of the Office of DPP should be established under separate legislation which should provide for an independent governing body, the Commission's view is that establishment of the Office, powers and functions under the Constitution is preferable. Separate legislation may supplement or enhance the constitutional provisions. To this end, a governing body would be restricted to providing facilities and infrastructure for administrative

purposes, but not to supervise the discharge of functions of the Office. This is because it should function independently of any person or authority.

On appointment and supervision of public prosecutors, the Commission agrees with the submission that all police prosecutors and other public prosecutors should be appointed by the DPP, as is the case at present. Supervision of these prosecutors by the DPP should be enhanced by the provision of necessary facilities, infrastructure, training and decentralisation of the Office.

Recommendations

Accordingly, the Commission recommends that:

- the constitutional provision requiring the DPP to consult and receive directions from the Attorney-General on matters he/she considers to involve public policy consideration should be repealed, as such matters should be left to the discretion of the DPP;

- while the power of entry of *nolle prosequi* can be retained, the Constitution should provide that the exercise of the same shall be conditional on the DPP being required to obtain leave of the court for entry of *nolle prosequi* and the court having power to inquire into the grounds thereof;

- entry of a *nolle prosequi* should not automatically result in an acquittal;

- the Constitution should provide that where a *nolle prosequi* has been entered, an accused person should only be charged afresh on the same facts within a reasonable time, not being more than 12 months, after which the accused person shall be deemed to have been acquitted;

- separate legislation may be enacted to supplement or enhance the constitutional provisions establishing and conferring powers and functions on the DPP; and in this regard, a governing body would be restricted to providing facilities and infrastructure for administrative purposes, but not to supervise discharge of the functions of the Office;

- the Constitution should explicitly specify that the DPP shall supervise all public prosecutors; and

- there should be enhanced provisions of facilities and infrastructure, as well as decentralisation of the Office.

19.2.6 Diplomatic Missions Abroad

Submissions

A few petitioners called for Heads of Diplomatic Missions to be appointed by an independent Commission, such as the Public Service Commission (10). Others said that these appointments should be made by the President, subject to ratification by the National Assembly (7). One other petitioner said that the President should appoint Heads of Missions without the need for ratification by the National Assembly (1).

The Secretary to the Cabinet proposed that appointments to posts of Head/Deputy Head of Mission should be made from career diplomats, but with a proviso that the Head of State may appoint non-career diplomats who should not exceed 30% of the total number of Heads and Deputy Heads of Missions (1). This petitioner was supported by another who said that only career diplomats should be appointed to the Diplomatic Service (1).

One petitioner said that the tour of duty in the Foreign Service should be limited to nine years (1).

Observations

The Commission considered the position that Ambassadors as personal representatives of the Head of State are appointed by the Head of State and that this is the practice the world over. They therefore need not necessarily be career diplomats. The Commission, however, acknowledges that in some countries such appointments are made in consultation with or upon the recommendation of an appropriate institution, and in some cases with the approval of the National Assembly. The Commission, however, notes that the issue did not attract much debate.

The Commission, on the other hand, appreciates the need for the country to be represented by competent career diplomats. The Mvunga Commission observed that all petitioners that spoke on this subject wanted to see the establishment of a career diplomatic service. They said that the diplomatic service then was manned mostly by politicians who had been rejected in elections. Petitioners preferred a non-partisan diplomatic service where officers were appointed on merit and not on the basis of

political affiliations. The Commission recommended that efforts to establish a career diplomatic service be speeded up.

Whilst the call for standardisation of the upper limit on duration of tours of duty is valid, the Commission feels that this is an administrative matter that should be addressed by appropriate service commissions and other appropriate authorities.

Recommendations

The Commission recommends that:

- Heads of Mission accredited to other countries should be appointed by the President on professional merit, subject to ratification by the National Assembly; and

- all officers below the rank of Head of Mission should be appointed by appropriate service commissions and that they should be career diplomats.

19.2.7 Civil Servants – Participation in Politics

Submissions

A number of petitioners argued that civil servants should be allowed to participate in active politics, including contesting elective office (147). Some of these suggested that in the event of contesting elections, civil servants should only be required to take leave. It was argued that civil servants constitute a considerable proportion of the enlightened population of the country and therefore excluding them would deprive the country of potential quality leadership. It was also argued that the current provision is discriminatory.

Other petitioners, however, said that civil servants should not be allowed to participate in politics without resigning their posts (35). Those who held this view argued that civil servants should be professionals and be seen to be non-partisan. They should pay allegiance to the Government of the day and should therefore not actively participate in politics, as this may result in conflict of interest.

Observations

The Commission observes that a large number of petitioners called for civil servants to be allowed to participate in active politics, including contesting elective office. The rationale given by petitioners was that civil servants constitute a concentration of enlightened citizens and excluding

them from politics would deprive the country of quality leadership. A lesser number of petitioners expressed the view that civil servants should not be allowed to participate in politics without resigning their posts. These petitioners argued that civil servants should be non-partisan and pursue their profession without interference from politicians.

The Commission concurs with petitioners who wanted a civil service which is non-partisan. The Commission feels that the Civil Service should be professional and not politicised. This, the Commission believes, will avoid creating confusion in the Public Service by interruption of services resulting from civil servants proceeding on leave in order to engage in political campaigns.

In this regard, the Commission observes that the majority of the petitioners in favour of civil servants taking part in politics were in fact civil servants. The Commission agrees with the recommendations of both the Mvunga and Mwanakatwe Commissions that public officers should not be actively involved in party politics and those who wish to do so should resign from their posts or retire from the Public Service. However, as citizens of the country, public officers should not be denied the right to vote.

Recommendation

The Commission, therefore, recommends that the Constitution should state that public officers shall not be allowed to participate in active politics. However, an officer who has served for over twenty years and wishes to participate in politics should be retired in the national interest while an officer who has served for less than twenty years should retire early.

19.2.8 Retirement of Civil Servants

Submissions

Some petitioners said that retired civil servants should not be re-employed (20), while seven held the opposite view that the experience of retirees should be utilised in the Public Service (7). Three others expressed the view that retirees re-engaged on contract should serve for a maximum of two contract terms (3).

One petitioner said that the civil servants' pension scheme should include home ownership as a matter of right (1). Two petitioners argued that the pension scheme conditions should include a house as part of the retirement benefits (2) while another said that, when employed, civil servants should be given land to develop in preparation for retirement (1). This is to alleviate the suffering experienced by retired civil servants due to delays in payment of their retirement benefits as well as lack of housing.

Thirty-seven petitioners argued that unpaid retirees should continue receiving salaries until they were paid their benefits in full (37). Three petitioners said that in the event of the death of a pensioner who had not received her/his benefits, the surviving beneficiaries should continue to receive the salary until the benefits were paid in full (3).

Observations

The Commission observes that some petitioners did not want to see retired civil servants re-engaged, while a few other petitioners held the opposite view. Some of those who held the opposite view wanted those re-engaged on contract to serve a maximum of two contract terms.

A smaller number of petitioners called for the reorganisation of the civil servants' pension scheme so as to include provision of a house and /or land for all retiring civil servants.

A few other petitioners called for a provision in the Constitution that allows unpaid retirees or their surviving beneficiaries to continue receiving a salary until all their benefits are paid. These petitioners were concerned with the suffering currently being endured by retired civil servants due to delays in payment of terminal benefits.

The Commission is in agreement with petitioners who submitted that retired civil servants should not be re-engaged, as the practice deprives junior officers of promotion opportunities. However, this prohibition should not apply to certain personnel in specialised institutions.

The Commission agrees with petitioners that civil servants suffer hardships due to delays in payment of terminal benefits and need to be cushioned from these hardships by continuing to receive salaries until the Government pays them terminal benefits, and that for the avoidance of doubt this payment shall not be deducted from the terminal benefits.

Recommendations

The Commission recommends that:

- the Government should not re-engage retired civil servants, with the exception of those in specialised institutions; and

- all retired civil servants should be retained on the payroll until such time that they are paid their terminal benefits in full and that such payments shall not be deducted from their terminal benefits.

CHAPTER 20

PENSIONS

Terms of Reference:

No. 2 Recommend a system of government that will ensure that Zambia's governed in a manner that will promote the democratic principles of regular and fair elections, transparency and accountability, and that will guard against the emergence of a dictatorial form of government;

No. 3 Recommend appropriate ways and means of entrenching and protecting human rights, the rule of law and good governance in the Constitution; and

No. 30 Examine and recommend on any matter that is connected with or incidental to the foregoing terms of reference.

20.1 Introduction

Pension refers to regular income received after retirement. Generally, pensions are part of social security schemes whose fundamental objective is to protect individuals from the hardships which would otherwise result from unemployment, retirement or death of a wage earner.

Pensions are critical to the social and economic development of a country. A significant number of people depend on pensioners (currently estimated at five dependants to one pensioner in Zambia). Pensions are also critical in improving coping strategies as well as contributing to socio-economic development through savings and investment of pension funds and benefits.

Pension schemes are usually contributory, whereby regular payments are made by both the employer and the employee from their salaries in order to guarantee a regular income when such employees retire. The most prominent formal pension schemes in Zambia are discussed below.

The National Pensions Scheme Authority

The National Pensions Scheme Authority (NAPSA) was effectively established on 1 February 2000, following an enabling Act which was passed in 1996. The scheme was a successor to the Zambia National Provident Fund (ZNPF), which had been in existence since 1966. The transformation of ZNPF was a result of its poor performance, which manifested in low levels of benefits and delayed payments to members, poor record keeping, bad investment and lending policies and Government borrowing.

The new scheme has about 350,000 members and is mandatory for all formal sector employees. The scheme also covers all new entrants to the public sector, but excludes existing members of the public pension schemes. It currently has 12,500 contributing employers.

The scheme is said to be an improvement over its predecessor. For example:

- NAPSA is required to publish its annual statements as well as send to each member a statement of the individual's account;

- clear investment policy and guidelines have been legislated to limit the degree of the impact of external interference, including restrictions on Government borrowing;

- NAPSA's administrative expenditure has been limited to 3% of assessable earnings in the formative years and 1% thereafter;

- the new system provides for benefits in respect of retirement, disability and survivorship, with an ex-gratia funeral grant;

- the pensionable age for both males and females is standard, that is 55 years;

- a member who does not meet the pension criteria is entitled to a lump sum made up of the employee's and employer's contributions plus interest on the contributions; and

- the new system provides a minimum pension guarantee of 20% of national average earnings while contributions are paid at the rate of 10% of a person's gross earnings.

Being a new scheme, NAPSA's problems are yet to be assessed.

The Local Authorities Superannuation Fund

The Local Authorities Superannuation Fund (LASF), on the other hand, is the oldest pension scheme, having been first created in 1954 under Government Notice No. 314 of 1954. Initially, the scheme covered officers who were mainly employees of local authorities, the Victoria Falls Electricity Board and the Northern Electricity Supply Corporation.

Currently, LASF is under the control of the Board of Directors appointed by the Minister of Local Government and Housing, in accordance with Section 41 of the Local Authorities Superannuation Fund Act. The Managing Director is appointed by the Board and runs the day-to-day affairs of the Fund and appoints other officers.

LASF provides cover for employees in the local authorities (councils); water and sewerage companies; National Housing Authority; Zambia Electricity Supply Corporation and LASF employees. In all, LASF has an active membership of 14,966 plus 6,676 pensioners.

LASF offers retirement benefits at the age of 55 years, as long as the employee has been contributing for at least 10 years. The scheme also offers retirement benefits following retrenchment. This requires a person to have served a minimum of 10 years. The pensions are paid after one-third or two-thirds has been commuted for cash. Other benefits include death benefits whereby the surviving spouse, children or dependants are entitled to lump sum death benefits. Members dismissed from service are only entitled to refund of their contributions. Other than discharge or dismissal, a member who has served seven years but less than 10 years is entitled to twice his contributions plus interest on contributions exceeding three years.

The current contribution rate for LASF is 10% of basic salary for employees and 23% of basic salary for the employers.

LASF has experienced problems of delayed payments of benefits to its retired members and terminal benefits to retrenched employees. This has been, mainly, due to non-remittance of contributions on a regular basis to the Fund by local authorities, which constitute the largest number of members of the Fund. Another problem was the compulsory retirement in 1991 of employees who had worked for 22 years or more for the councils with full benefits. The result was a financial overrun on the scheme with immediate claims amounting to K1.8 billion (approximately equivalent to US $375,000). The other problem relates to the creation of NAPSA which led to loss of members and potential members, currently, estimated at 14,000 with income of K4.5 billion (approximately equivalent to US $937,500).

The Public Service Pension Fund Board

The Public Service Pension Fund (PSPF) has a long history dating back to 1 November 1961. The scheme was first established by Section 3 of the Zambia Civil Service (Local Conditions) Contributing Pensions Ordinance. Since 1968, the scheme has been run by the Civil Service (Local Conditions) Pensions Fund Board (CSPFB). The name changed in 1998 to the Public Service Pensions Fund Board (PSPFB) after the Public Service Pensions Act No. 35 of 1996 was passed. Under this Act, the Board is responsible for pension matters of the entire Public Service, including the Teaching Service and the Defence Forces.

The PSPFB provides benefits in the event of retirement at 55, permanent invalidity and survivorship. The scheme is also a paying agent for the Government with regard to death and early retirement cases, such as those under public interest and national interest.

By the close of 2004, the actual deficit of the Fund (the difference between the value of the Fund's assets and its pension liabilities) stood at an estimated K4 trillion. Causes for this deficit are:

- over-borrowing by the Government;
- non-remittance of pension contributions by the Government;
- increase in number of retrenchees as a result of the Public Service Reform Programme;
- declining membership; and
- archaic and unsound provisions in the existing Public Service Pensions Act.

Between 1974 and 1991 when the Fund was part of what is now the Ministry of Finance and National Planning, the Government borrowed K346.3 million (equivalent to US $186 million) from the Fund. This amount was borrowed at extremely low interest rates ranging between 7.25% in 1974 to 38% in 1991. The grace period for the loan was unrealistically generous and so was the repayment period of up to 20 years in some cases. At the time of settlement of the outstanding loan in 2003, the loan plus interest stood at K1 trillion (approximately US $220 million) in real terms. However, due to lack of a provision for revaluation in the contracts, the loan was only valued at K1 billion (approximately US $220,000) which the Government paid.

The financial position of the PSPF has been further weakened by the non-remittance of pension contributions by the Government from 1991 to 2002. This

has resulted in huge pension contribution arrears now amounting to K400 billion (approximately US $83 million).

Generally, the problems that have beset the pension schemes run by public institutions include the following:

- in the main, these schemes cover people in regular employment who constitute a small percentage of the population and the majority of these are in the low-income category of workers. The result is a low income and investment base for the schemes;

- low levels of benefits in real terms which is partly due to borrowing by the Government on exploitative terms, failure to invest funds in commercially viable ventures, depreciation of the currency and inflation;

- many of the institutions contributing to pension schemes are financially unstable and unable to remit contributions to the schemes on a regular basis;

- poor investments policies which include unsecured Government borrowing;

- HIV/AIDS-related illnesses and deaths which have exposed pension schemes to extreme financial stress due to reduced revenue and increase in expenditure;

- taxation of incomes of schemes; and

- shortage of skilled human resources in pension management.

Private Pension Schemes

Zambia has been running private pension schemes since independence. However, in 1968, the Zambia State Insurance Corporation (ZSIC) was established, after which no foreign company was allowed to operate as an insurer. This scenario was reversed under the Third Republic administration when the insurance business was once again liberalised. Well established pension schemes include the Mukuba Pension Scheme, which caters for the mining industry, and schemes run by ZSIC on behalf of employers. In relative terms, private-run pension schemes have a better performance record than those run by public institutions.

The Mwanakatwe Commission, in dealing with the issue of pensions, noted that any undue delay in the payment of pensions led to a lot of suffering and demoralisation of pension beneficiaries. The Commission also noted that, in most cases, pensions were rendered valueless by the interplay of market forces and devaluation of the currency. In view of these problems, the Commission

recommended the protection of pensions in the Constitution with the following measures:

- payment of reasonable pension as is commensurate with a person's rank, salary and length of service;
- exemption of pensions from any form of tax and a system of periodic review to take account of the changes in the value of money;
- prompt and regular payment to pensioners;
- enactment of appropriate legislation; and
- constitutional provisions to enable affected persons to seek judicial relief in the event of undue delay in the payment of pensions.

Social security schemes in Zambia have been widely criticised for their inefficiencies and ineffectiveness and their economic unsustainability.

Current Constitutional Provisions

Article 124 of the Constitution of Zambia provides for protection of pensions for public officers, staff of the National Assembly and members of the Armed Forces. Other than this, the Constitution has no further provisions regarding pensions.

In Uganda, the Constitution provides that a public officer shall, on retirement, receive such pension as is commensurate with his or her rank, salary and length of service. The Constitution also provides for the exemption of pension from tax. It also provides for periodic review of pensions to take into account changes in the value of money. The Constitution further provides that pension payments should be prompt and regular and easily accessible to pensioners.

20.2 Submissions, Observations and Recommendations

One thousand four hundred and thirty-seven (1,437) submissions were received on this subject. Most petitioners appreciate the principal objective of pension schemes. They therefore called for pension to be considered a constitutional right of all citizens and said that pension benefits should be paid promptly. Others have called for improved pension packages.

20.2.1 Right to Pension

Submissions

A few petitioners expressed the desire to have the right to a pension enshrined in the Constitution as a justiciable right (13).

Observations

The Commission observes that petitioners were dissatisfied with the manner in which retirees are treated after many years of service and wanted constitutional provisions in the Bill of Rights to protect their pension.

The view of the Commission is that pensioners have suffered a lot after retirement, mainly, because of inefficient pension systems that do not take care of the needs of the retirees. The Commission notes that retirees do not receive their pension benefits on time and, in most cases, it is not protected from loss of value due to inflation, depreciation of the currency and other economic factors. This has led to untold suffering for pensioners.

Recommendations

The Commission recommends that the right to pension should be enshrined in the Constitution as a justiciable right.

20.2.2 Retirement Age

Submissions

An overwhelming number of petitioners proposed that the retirement age should be reduced in view of reduced life expectancy (604). The suggested ages of retirement were:

- 30;
- 35;
- 40;
- 45 (most popular); and
- 50.

Yet others felt that the present retirement age of 55 years should be maintained (10).

Observations

The Commission observes that the submission on the reduction of the retirement age by petitioners was based on perceived reduced life expectancy due to HIV/AIDS. The Commission also notes that HIV/AIDS

is an epidemic and could one day be reversed or controlled and should therefore not be used as a basis for reducing the retirement age.

It is the opinion of the Commission that people are still productive between the ages of 40 and 60 years and that it would be unfair to have them retire when they still have the energy to work. In any case, the longer people are in employment, the more money is due to them in the form of terminal benefits at the time of retirement.

The Commission considered the option of early retirement at the age of 55 years instead of compulsory retirement. The Commission also considered the possibility of providing for optional retirement based on length of service. These provisions would mitigate the concerns of the petitioners who called for reduction in the retirement age from 55 to 45 years.

Recommendations

The Commission therefore recommends that appropriate legislation should provide that:

- retirement age be 60 years with an option for early retirement with full benefits at the age of 55 years; and

- there be an option for early retirement based on length of service after 25 years of continuous service, subject to agreement with an employer.

20.2.3 Retirement Benefits

Submissions

Some petitioners said that retirement benefits should be improved (12), while others indicated that retirees should be exempted from paying tax (18). Yet other petitioners said that the law should cushion retirement benefits from losing value (12). They lamented the severe erosion in the value of the benefits which is not compensated. Others called for a provision entitling workers to a lump sum payment against their benefits before retirement (42). This is to enable them to invest their benefits as they see fit.

A number said that civil servants should be entitled to receive pension benefits after serving for a period which ranged from 10 to 25 years (114).

There were three petitioners who expressed the view that retirees should benefit from salary increments awarded to serving employees in order to ensure that the benefits are sustained at reasonable levels (3).

Many petitioners, including the HRC and the House of Chiefs, said that retirement benefits should be paid on time, preferably on the last working day, failing which the benefits should attract interest (343). A number of petitioners suggested that pension benefits should be paid promptly on the last working day (119). Others said retirees should continue receiving salaries until they are paid their benefits in full (42).

Two petitioners felt that employers should be obliged to pay pension benefits to employees who have served for a period of 30 years and above (2), while one was of the view that senior citizens should be placed on salaries for the rest of their lives (1). One petitioner said that retirees should enjoy free social services (1).

The Public Service Pension Fund Board said that Article 124 of the Constitution relating to pensions, which is at the moment rigid and whose interpretation is unclear, should be amended (1).

Observations

The Commission observes that a large number of petitioners who made submissions on the subject of pension benefits wanted retirement benefits to be paid on time, preferably on the last working day, failing which the benefits should attract interest. Others said that civil servants should be entitled to receive pension benefits after serving for a period which ranged from 10 to 25 years. Others called for a provision entitling workers to a lump sum payment against their benefits before retirement, is to enable them invest their benefits as they see fit.

Some petitioners argued that unpaid retirees should continue receiving salaries until they are paid their benefits in full, while others said that retirees should be exempted from paying tax. Other petitioners wanted the law to cushion retirement benefits from losing value. They lamented the severe erosion in the value of the benefits.

The Commission notes with concern the heavy taxes employees are subjected to when they are in active employment and feels that it is unfair for the Government to impose tax on benefits which are the retirees' last payment. In any case, the beneficiary or pensioner would have been paying tax throughout their career service. The Commission also notes that pensions are rendered valueless by the interplay of market forces and devaluation of currency due to delays in paying out the benefits.

In dealing with the subject of delays in the payment of pensions, the Mwanakatwe Commission made appropriate recommendations, among which were payment of reasonable pension as is commensurate with a person's rank, salary and length of service; exemption of pension from any form of tax, and a system of periodic review to take into account changes in the value of money; prompt and regular payment to pensioners; and the enactment of appropriate legislation.

The Mwanakatwe Commission further recommended that constitutional provisions should enable affected persons to seek judicial relief in the event of undue delay in the payment of pensions. The Government noted these recommendations, but was of the view that issues covered under pensions were administrative and as such should not be reflected in the Constitution.

This Commission observes that the current practice under which the employer removes the employee from the payroll even before they are paid their benefits in full is not only unfair but also inhuman, as employees are left with no means of sustenance.

The Commission also notes that failure by employers to remit pension contributions has grossly affected the operations and the capacity of pension schemes to pay pension benefits adequately and on time. On the calls that civil servants should be entitled to receive pension benefits after serving for a period which ranged from 10 to 25 years, and that workers should be entitled to a lump sum payment against their benefits before retirement, the Commission is of the view that such an arrangement would have the effect of depleting the funds and would be detrimental to the operations of the pension funds itself.

The Commission further observes that a lump sum payment against benefits before retirement could enable retirees to invest their benefits as they see fit whilst still in employment. This it is felt might prevent the severe erosion in the value of retirees' benefits and would afford them an extra source of income.

With regard to Article 124 of the Constitution, which states that the pension of a public officer cannot be reduced, the Commission notes that the argument of the petitioner who wanted the Article to be amended was that the provisions of this Article are restrictive and rigid in that they do not take into account factors such as possible reduction in pension resulting from bad performance of pension investments. While agreeing with the petitioner on the need to amend Article 124 to make it flexible to the Board to invest, the Commission maintains that pensions must at the same time be protected from losing value and that the

interest of pensioners should not be curtailed. It is the responsibility of managers of pension schemes to ensure that this is achieved through prudent management practices, including investing pension funds in such a manner as to secure good returns.

Recommendations

In view of the observations made above, the Commission recommends that the Constitution should provide that:

- pension must be paid promptly upon retirement;
- if a retiree is not paid her/his pension benefits due to the employers' failure to remit the contributions, the employee should be maintained on the payroll until benefits are paid in full;
- if a retiree is not paid her/his pension due to circumstances attributed to the scheme, the scheme should make good the loss suffered by the pensioner without loss of value;
- the value of a person's pension should be preserved as at the date of retirement; and
- pension benefits should be exempted from tax.

The Commission also recommends that Article 124 of the current Constitution should be retained with a variation to provide flexibility to the Board to invest as well as to protect the pensioners.

The Commission further recommends that an appropriate parliamentary committee should provide oversight in the area of pensions to ensure that the Government, employers and managers of pension schemes comply with the law.

20.2.4 Pension Funds - Prohibition of Borrowing

Submissions

Two petitioners said that the law should prohibit Government borrowing from pension funds, as this affects the payment of pensions (2).

Observations

The Commission observes that petitioners who made submissions on this subject were concerned about Government borrowing from the Public Service Pensions Fund and other pension schemes, which has negatively

affected the ability and capacity of these schemes to pay retirees and retrenchees on time. Petitioners felt that this had resulted in untold suffering among retirees and retrenchees who were usually left with no means of sustenance.

In discussing this subject, the Commission notes that there is nothing wrong with the Government or any institution borrowing from pensions funds as long as pension scheme managers exercise prudent investment polices which will ensure timely payment and reasonable rates. It is the view of the Commission that the Public Service Pension Fund Board and other pension schemes should develop sound investment policies to regulate lending of the Fund.

Recommendations

The Commission recommends that appropriate legislation should provide that:

- contributions to the Public Service Pension Fund Board should be prudently invested in order to ensure sustainability; and

- the Government or any other institution should be free to borrow funds from the Pension Fund, provided this is done on commercially viable terms;

20.2.5 Pension Schemes

Submissions

One petitioner said that the Government should control the Civil Service Pension Fund Board (1) while another argued that the Government should not control the pension scheme (1).

A number of petitioners proposed that payment of retirement benefits should be decentralised to provinces and districts (68).

There was a submission that the Pensions Board should be exempted from paying tax (1). Currently, the schemes are taxed at three stages: that is, contributions, investment income and benefits.

Some petitioners said that workers should have a right to choose which pension scheme to contribute to, while the law should ensure that it is mandatory for every worker to belong to a pension scheme (17). Three other petitioners, in contrast, were of the view that pension schemes should be abolished and instead employees should be placed on contracts (3).

One petitioner said that social security schemes should be harmonised so as to bring their supervision under one Ministry, preferably that which deals with labour matters (1).

Observations

The Commission observes that the majority of petitioners who addressed this subject called for the payment of pension benefits to be decentralised to provinces and districts. Others wanted workers to choose which pension scheme to contribute to, while the law should ensure that it is mandatory for every worker to belong to a pension scheme.

The Commission notes that the social security system in Zambia has evolved as a fragmentation of schemes. The social security reforms that the Government embarked on in 1991 have laid more emphasis on the reform and development of work-related social security schemes.

The Commission also notes that during the Kabwe Commission of Inquiry of 1981, the people of Zambia had expressed a desire to have a comprehensive social protection system in Zambia that would provide for some form of assistance to vulnerable groups financed from Government revenue. The recommendation could not be implemented on account of costs.

The Commission further notes that the current supervisory framework for social security schemes in the country is fragmented, leading to a number of difficulties in the co-ordination and implementation of social security policies. For instance, the Ministry responsible for labour and social security supervises the NAPSA and the Workers Compensation Fund Control Board; the Office of the President is responsible for the supervision of the PSPF; and the Ministry responsible for local government and housing supervises the LASF.

The Commission is of the view that in order to ensure consistent application and implementation of policies, pension schemes should fall under one ministry, preferably that which deals with labour and social security matters. The Commission notes, however, that these schemes are directly supervised by their various Boards. Poor performance of the schemes should thus be attributed to poor supervision by the Boards. These Boards are self-regulating and therefore decide on what type of investment to make. The role of the Government should thus be to formulate sound policies that will ensure payment of pensions.

The Commission took note of the views of the petitioners on the subject and observes that many of the concerns raised were as a result of the

absence of a good pension system that takes care of the interests of the pensioners. It is the view of the Commission that this would only be addressed if an appropriate policy on pension were put in place.

The Commission is also of the view that it should be mandatory for all workers to belong to a pension scheme of their choice.

Further, the Commission agrees with petitioners on the need to decentralise payment of pension benefits to provinces.

Recommendations

The Commission recommends that:

- policy should be formulated on the establishment of pension schemes;

- it should be mandatory for all workers to belong to a pension scheme of their choice;

- social security schemes should fall under the Ministry responsible for labour and social security matters in terms of policy direction,, but pension schemes should be supervised by their boards or other similar bodies;

- pension schemes should decentralise payment of pension benefits and that, in particular, necessary legislative or administrative measures should be taken to ensure that the Public Service Pensions Fund and NAPSA decentralise payment of pensions to provinces; and

- both employers and employees must have equal rights in appointing the Board.

20.2.6 Workers' Compensation

Submissions

Four petitioners said that workers' compensation laws should be reviewed in order to improve levels of compensation (4).

Observations

The Commission observes that petitioners who made submissions on this subject were concerned about the low levels of workers' compensation and wanted laws reviewed in order to improve levels of compensation.

The Commission observes that complaints against the low levels of compensation paid to employees injured in the course of their duties are genuine and need to be addressed. The Commission observes that the current levels of compensation are not adequate to mitigate the difficulties experienced by injured employees and/or dependants.

The Commission is particularly concerned with delays in obtaining compensation as well as the impact this has on the employees and/or their dependants. Section 17(1) of the Workers' Compensation Act states that:

> "All moneys payable under the Act to any person shall be paid as soon as possible after the date on which they become payable"

Further, Section 17(2) states in part that:

> *"If the Commissioner, or the employer individually liable, as the case may be, is unable to trace the payee, and any such moneys accordingly remain unpaid after the expiration of twelve months of the date on which they became payable, the following procedure shall be adopted:*
>
> *(a) Details of all such amounts payable to persons other than persons from outside Zambia shall be notified in the Gazette and in a local newspaper by the Commissioner, both in respect of moneys payable from the Fund and moneys payable by employers individually liable, who shall advise and pay to the Commissioner such moneys every quarter…."*

Upon examining provisions on workers' compensation, the Commission notes that:

- the Act does not specifically state the period within which compensation should be paid out to the worker/dependant in the event of injury or death; and

- the Act is silent on what measures a worker/dependant should take against the Fund if compensation is not paid on time.

Recommendations

In view of the observations made above, the Commission recommends that:

- the Workers' Compensation Act should categorically state the period within which workers and/or dependants should expect compensation;

- the Act should state options available to the worker and/or dependant if compensation is not paid within the stipulated period;

- levels of compensation should be improved to take into account prevailing economic conditions; and

- the Act should be reviewed to take care of the various lacunae in the law.

20.2.7 Social Security/Vulnerable Groups

Submissions

One petitioner argued that there should be guaranteed a minimum level of social protection benefits for vulnerable groups that matches economic growth and affordability by the Zambian society (1), while another submitted that there should be an Old Age Support Scheme that should be used to provide for all persons over the age of 60 years and who are not on pension, welfare support or engaged in paid employment (1).

Observations

The Commission observes that of the two petitioners who made submissions on the subject of vulnerable groups, one said that there should be guaranteed a minimum level of social welfare benefits for vulnerable groups that matches economic growth and affordability. The other petitioner was concerned that aged persons who are not earning an income or who are not in receipt of pension have no social security.

Economic growth plays an important role in reducing and preventing poverty. However, economic growth alone is not sufficient to prevent and fight poverty. The Commission observes that without the Government putting in place certain interventions, the advantages of the market economy may only be beneficial to a small part of society while the vulnerable, who are in the majority, may suffer increased levels of poverty. It is the view of the Commission that unless the Government

deals with vulnerability with the same vigour as economic growth, poverty reduction will not be realised.

The Commission acknowledges the need for the introduction of an Old Age Grant Support Scheme that should be paid monthly to all persons over the age of 60 years and who are not on pension, welfare support or engaged in paid employment.

The Commission also feels that there is need for the Government to develop policies that will protect the interests of vulnerable groups with regard to payment of rates and rent to councils.

The Commission observes that today many aged persons are expected to take care of orphaned children due to a sharp increase in deaths from HIV/AIDs. Many of the aged people have no income and are therefore not able to care for themselves and their dependants. The Commission is of the view that this group of people needs assistance and empowerment, and that this would also contribute to poverty reduction.

Recommendations

In view of these observations, the Commission recommends that:

- there should be guaranteed a minimum level of social welfare benefits for vulnerable groups that matches economic growth and affordability and, accordingly, appropriate legislation should be introduced to provide an effective social security scheme; and

- an Old Age Support Scheme should be introduced to provide welfare support.

CHAPTER 21

PUBLIC FINANCE AND THE BUDGET

Terms of Reference:

No. 9 Examine the effectiveness of the Office of Auditor-General and that of the Investigator-General and recommend means of improving their effectiveness where necessary;

No. 17 Examine and recommend whether international agreements should be considered and ratified by the National Assembly prior to Zambia's ratification of those agreements;

No. 25 Examine and recommend to what extent members of the public should participate in the formulation of budgetary proposals and whether or not the time for presentation of the budget in Parliament should be changed and if so, to when; and

No. 26 Examine provisions relating to Government's accountability and transparency in the expenditure of public funds and those relating to the presentation of a financial report as required by Article 118 of the Constitution.

21.1 Introduction

The subject of public finance relates to the mobilisation, management and control of public revenue and expenditure. It includes aspects of the budget process, public investment, assets and debt management.

Public finance is crucial to socio-economic development. The question as to how the revenue and other assets of a country are acquired, invested, spent or otherwise disposed of is a major determinant of the socio-economic destiny of a country. Thus transparency and accountability in public finance management are important to good governance and democracy.

Source of Revenue

The main source of revenue for any government is taxation. There is therefore need to have a tax system which is cost efficient and less burdensome to the taxpayers. Developing countries tend to raise revenue through high tax rates. On the other hand, developed countries pursue the concept of broadening the tax base resulting in high revenue collection. The other factor which encourages taxpayers in developed countries to pay tax is that nationals can see development programmes being undertaken by their governments, such as good roads, good and affordable educational systems and well maintained and easily accessible health facilities. There is need to strengthen the tax system in developing countries to curb tax evasion and also to provide encouragement to the unwilling tax payer. The other major sources of government revenue are donor support, government investment, royalties and loans.

Budgeting

A national budget is an annual statement of a country's expected income and expenditure. The Executive arm of the Government is responsible for planning, executing and controlling the budget through the Ministry responsible for finance. A budget is based on short-term and long-term planning and is determined by the amount of resources available. It may also take into account any foreign assistance.

When preparing a budget for a country, individual budgets have to be prepared by subsections of the Government and these will constitute a national budget. As the Government superintends the affairs of the entire nation, it is important that the budgeting process is decentralised in order to cover the interests of every part of the country. In developed countries, gathering of such information flows from the lowest level of a nation and moves upwards. It would, for example, be useful in Zambia if the budgeting process could begin at ward and district level, then progress to provincial level before finally reaching the Ministry responsible for finance, which would then prepare a consolidated budget.

Expenditure is divided into short-term and long-term. Short-term expenditure is referred to as recurrent and covers payment of salaries of civil servants; and procurement of consumables such as hospital drugs, educational materials and stationery. Capital expenditure, on the other hand, currently covers infrastructure projects such as the construction of roads, bridges, schools and hospitals. However, ideally, for meaningful economic development to be achieved, capital projects should also include projects aimed at supporting public or private institutions that are involved in development activities such as agriculture, manufacturing industry or housing.

Oversight

Although the Executive is responsible for planning and formulating the budget, it is important that the Legislature provides checks and balances. It is the role of Parliament to approve the Budget and to monitor its implementation through the work of its Committees. When approving the Budget, Parliament is expected to evaluate both the objectives and the strategies presented by the Executive, ensuring their feasibility, suitability and acceptability to the country's needs.

Many developed countries have entrenched this concept of interaction between the Executive and Legislature to such an extent that no public expenditure can be incurred without prior approval by Parliament, and contravention of this is punishable.

Thus any supplementary budget requires the approval of Parliament before expenditure can be incurred.

Vices such as corruption are a threat to democracy and development. Corruption is a manifestation of lack of accountability and transparency in the management of public finances. It thrives on lack of or inadequate accounting systems, as such conditions lead to minimal risk of discovery or punishment. Corruption deters foreign and local investment and reduces potential government revenue, culminating in inadequate funding for provision of basic public services. Important instruments in the fight against corruption include the separation of powers and duties, and the existence of proper lines of accountability and transparency. Where there is accountability and transparency, resources will be utilised effectively towards social and economic development, and priority in expenditure will be in areas that will benefit the people.

Current Constitutional Provisions

Under the Constitution, matters of public finance are mainly provided for under Part X. Article 117 (1) of the Constitution states that the Minister responsible for finance shall cause to be prepared and shall lay before the National Assembly within three months after the commencement of each financial year estimates of the revenues and expenditure of the Republic for that financial year.

The Constitution does not make provision with regard to the budget process and procedures for preparation of the Budget. Practically, Article 115 (2) (a) and (b) makes it imperative that the estimates are approved within four months from the commencement of the financial year.

The absence of a legal framework for the budget process has, among other things, led to a situation where the process is in effect a preserve of the Ministry responsible for finance.

Uganda has constitutional and legislative provisions which ensure that the Legislature participates in budget formulation and effectively contributes to the estimates of income and expenditure before they are tabled in Parliament. Article 155 of the Constitution of Uganda states in part that:

> *"(1) The President shall cause to be prepared and laid before Parliament in each financial year but in any case not later than the fifteenth day before the commencement of the financial year, estimates of revenues and expenditure of Government for the next financial year.*
>
> *(4) At any time before Parliament considers the estimates of revenues and expenditure laid before it by or on the authority of the President, an appropriate committee of Parliament may discuss and review the estimates and make appropriate recommendations to Parliament.*
>
> *(5) Notwithstanding the provisions of Clause (1) of this Article, the President may cause to be prepared and laid before Parliament –*
>
> > *(a) fiscal and monetary programmes and plans for economic and social development covering periods exceeding one year; and*
> >
> > *(b) fiscal estimates of revenue and expenditure covering periods exceeding one year.*
>
> *(6) Parliament may make laws for giving effect to the provisions of this article."*

The Budget Act, 2001, of Uganda provides for, among other things, the submission of financial and economic information and indicative estimates of revenues and expenditure for the following year to Parliament well before the presentation of the estimates before the House. These are discussed by the Budget Committee and other sessional committees, and the recommendations thereon are sent by the Speaker to the Executive.

In Zambia, the process of presentation and passing of the Budget and estimates, as provided for under the Standing Orders (Rules of the National Assembly) is brief. Members do not have prior opportunity to analyse reports and other information related to the estimates. The whole process takes about one and half months. The stages can be summarised as follows:

- delivery of the budget speech followed by tabling of the estimates;

- general debate on administration and policy for a period not exceeding five days;

- consideration of the estimates in parliamentary committees; and

- adoption of the estimates by the House.

The role of the Legislature in approving and monitoring the budget is also hindered by other limitations.

In the Committee, no amendment may be moved without notice. Though the Standing Orders permit an amendment to omit or reduce an expenditure item, an amendment to increase any item in a grant or alter the destination of a vote is expressly prohibited (Standing Order 88). The prohibition is based on the rationale that such measures would impinge on the function of the Executive to move tax or revenue measures.

In addition, Article 81 of the Constitution prohibits the introduction of any Bill to alter taxation or any charge other than by reduction without the recommendation of the President. This restriction also applies to any motion which would have the same effect.

Further, the Constitution permits expenditure prior to the approval of estimates or supplementary estimates. In addition, expenditure which would otherwise be unconstitutional is "ratified" by the National Assembly as late as 30 months after the end of the financial year (Articles 115, 116 and 117).

Composition and repayment of public debt are a preserve of the Executive. Article 120 (1) of the Constitution states, "There shall be charged on the General Revenues of the Republic all debt charges for which the Government is liable." By virtue of Article 117 (3), that part of the estimates which constitutes debt repayment is exempted from the requirement for approval by the National Assembly.

In addition, various statutes have concentrated power in the Ministry in charge of finance to determine matters of debt contraction and servicing. Legislation dealing with the control of loans, loan repayments, guarantees and public investments reflects the same pattern of exclusion of the National Assembly from the realm of public debt management, particularly external debt. Notable among these are those statutes that deal with International Monetary Fund and World Bank loans.

On the other hand, however, Article 115 (4) requires that investment of moneys forming part of the revenue of the Republic and the making of advances from such revenues shall be subject to such limitations and conditions as Parliament may prescribe. Such oversight by the National Assembly could be even more

meaningful if it included approval and management of debt, including repayments, in view of their far-reaching implications on the economy.

In the case of Ghana, Article 181 of the Constitution provides for parliamentary approval of loan agreements in the following terms:

> *"(3) No loan shall be raised by the Government on behalf of itself or any other public institution or authority otherwise than by or under the authority of an Act of Parliament.*
>
> *(4) An Act of Parliament enacted in accordance with clause (3) of this article shall provide –*
>
> *1. That the terms and conditions of a loan shall be laid before Parliament and shall not come into operation unless they have been approved by a resolution of Parliament; and*
>
> *2. That any monies received in respect of that loan shall be paid into the Consolidated Fund and form part of that Fund or into some other public fund of Ghana either existing or created for the purposes of the loan."*

Similarly, the Constitution of Uganda requires that all loans or guarantees are authorised by Parliament, except that Parliament may exempt certain categories of loans from this requirement subject to such conditions as Parliament may prescribe. In addition, Article 159 (4) states:

> "The President shall, at such times as Parliament may determine, cause to be presented to Parliament such information concerning any loan as is necessary to show –
>
> (a) The extent of the total indebtedness by way of principal and accumulated interest;
>
> (b) The provision made for servicing or repayment of the loan; and
>
> (c) The utilisation and performance of the loan."

The Constitution of India gives the Executive power to borrow and to give guarantees within such limits, if any, as may from time to time be fixed by an Act of Parliament (Article 292).

Other aspects of public finance management deserve to be highlighted for their importance generally and particularly as they are subject of some terms of reference.

External sourcing of a substantial component of the budget is a major factor which influences economic policies and decisions. So far, this factor has not been brought under parliamentary oversight.

Article 118 requires a financial report to be laid before the National Assembly not later than nine months after the end of each financial year. However, the Article exempts, among others, public expenditure charged by the Constitution or other laws on the General Revenues of the Republic. Further the report, which is intended to show the revenue and other monetary receipts as well as expenditure of the Government in that financial year, is tabled months after the estimates of revenue and expenditure for the subsequent year have been debated and approved by Parliament.

21.2 Submissions, Observations and Recommendations

Four hundred and eighty-six (486) submissions were received on this subject. Although the subject of public finance attracted relatively few submissions, interesting views were expressed. These include calls for:

- a participatory budget formulation process;
- Parliament to be vested with power to amend the estimates of revenue and expenditure;
- supplementary estimates of revenue and expenditure to be approved before expenditure is incurred;
- public debt contraction to be considered and determined by the National Assembly before commitments are made;
- strict auditing of public expenditure, including performance and value for money audits;
- decisions of the National Assembly on public finance to have legal force;
- restriction on disposal of major public assets; and
- expenditure before approval of the budget.

21.2.1 Participation by the People in Preparation of the Budget

Submissions

A large number of petitioners who addressed the subject argued that the people at grassroots and all other levels should participate in the preparation of the national budget. Many of the petitioners said that the people should determine their own development programmes and projects as well as the budget (256). Many lamented the fact that the budget starts and ends in Lusaka in terms of preparation and implementation.

One petitioner, however, suggested that the public should not be involved in the budgetary process since MPs can adequately represent them (1). Another petitioner said that MPs should be involved in the preparations of the budget from the initial stage (1).

Observations

The Commission notes that it is quite evident from the submissions that people at grassroots level want to participate in the preparation of the national budget. Petitioners expressed the view that the people themselves were in a better position to determine their own development programmes and projects and this should not be done for them by Central Government.

The Commission observes that participation of the people in the budgetary process would instill a sense of discipline on the part of the Executive during the implementation process.

The Commission further observes that involvement of the people in budget formulation is very important as it gives them ownership of the budget. Furthermore, modern concepts of development demand that there should be a bottom-up and not top-down approach to development issues.

Although over the recent years efforts have been made to involve the public and key economic institutions in the budget preparation process, people's participation in this process has not been effectively achieved. This is partly due to lack of an appropriate policy, legislative and institutional framework. Unlike other countries, Zambia does not have a law to regulate the preparation of the budget. Although grassroots structures that should be involved in the preparation of the Budget do exist, the Commission notes that the people do not participate in any clearly structured or defined manner in the formulation of development plans. This is a subject of concern.

The Commission notes that none of the previous Commissions received submissions on the subject of participation by the people in the preparation of the national Budget, an indication of the people's rising awareness on the national importance of the subject.

Recommendations

The Commission recommends that an appropriate Act of Parliament should provide:

- for participation of the people at grassroots levels in the formulation of development plans and the Budget; and

- that the grassroots level, including the ward, constituency, district and province shall participate in the preparation of the national budget and national plan which shall be in conformity with devolution of power as recommended in this report under the Chapter on local government.

21.2.2 Budget Preparation and Presentation

21.2.2.1 Timing

Submissions

A number of petitioners said that the preparation of the budget should begin early and that it should be submitted to the National Assembly and approved before the beginning of the financial year to which it relates (58). Reasons given included the need to:

- facilitate timely release of funds for development programmes and to make planning and implementation practical;

- ensure that implementation of the Budget can effectively commence at the beginning of the financial year; and

- give adequate time to Parliament to scrutinise the estimates and, if necessary, increase the Budget and identify additional revenue measures.

Suggested periods were the last quarter of the preceding financial year, with specific months being October, November or December. Most of the petitioners suggested that December should be the

month in which the national Budget should be presented to the National Assembly.

The Budget Office, Ministry of Finance also said that Article 117 (1) of the Constitution, on preparation and presentation of the estimates of revenue and expenditure, should be amended so that implementation of the national budget is in line with Government's financial year, which starts on 1 January (1).

A few petitioners said that the Budget should be submitted at the beginning of the financial year (4). Yet two others said that the Budget should be presented to Parliament as at present, that is, during the last week of January (2).

There was a submission that the Budget should run for a period of two years, while another called for the Budget to also take account of medium-term and long-term development plans (2).

Four petitioners said that the preparation of the Budget should be based on the country's own resources (4).

Observations

The Commission observes that a majority of petitioners who made submissions on this subject wanted the preparation of the budget to commence early and urged that it should be submitted to the National Assembly and approved before the beginning of the financial year to which it relates. Reasons given include the need to facilitate timely release of funds for development programmes and to make planning and implementation practical as well as the need to give adequate time to the National Assembly to scrutinise the budget. A few petitioners called for the budget to be submitted at the beginning of the financial year.

The Commission appreciates the need for preparations of the budget to commence early so that it is submitted to the National Assembly and approved before the beginning of the financial year to which it relates. The Commission observes that petitioners made these submissions in the light of the numerous occasions in the past when Ministries and other Government institutions could not implement development projects on time, particularly in the first quarter of the financial year. However, exception to this should be made in respect of estimates relating to a financial year succeeding an election year as the National Assembly may not sit during the period preceding the commencement of that financial year. In such case, the estimates should be tabled before and

approved the National Assembly by the expiration of 90 days after the commencement of the financial year to which they relate.

The Commission also acknowledges the concern expressed by petitioners that the Budget should not depend on external resources. The Commission is aware that the country is not in a position to meet its budgetary requirements, but is of the view that the national Budget should be based on the country's own resources, with donor pledges being a subsidiary Budget to the national Budget.

The Commission also observes that the annual Budget is substantially based on activities whose time frame conforms to the period of the Budget. In this regard, it is noted that until recently there were no medium-term or long-term development plans. The Commission agrees with the petitioner who spoke on this subject and called for medium-term or long-term planning so that identified capital projects could be allocated resources covering the whole implementation period.

Recommendations

The Commission therefore recommends that the Constitution should provide that:

- the Minister responsible for finance shall cause to be prepared and laid before the National Assembly estimates of revenues and expenditure of the Government for the financial year. The estimates should be submitted in October and approved by the end of December before the commencement of the financial year to which the estimates relate. However, estimates relating to a year succeeding an election year should be laid before and approved by the National Assembly by not later than 90 days after the commencement of the financial year to which the estimates relate;

- the Minister should table before the National Assembly medium-term and long-term development plans whose funding shall be allocated through the annual budgets tabled in October;

- the estimates of revenue and expenditure should reflect clearly the fiscal and monetary programmes and plans for economic and social development;

- at any time before the National Assembly considers the estimates of revenues and expenditure laid before it by or on the authority of the President, an appropriate Committee of Parliament may discuss and review the estimates and make appropriate recommendations to Parliament; and

- Parliament may make laws for giving effect to these provisions.

The Commission further recommends that the estimates of revenue and expenditure should be based on the country's own resources, with support from donors and co-operating partners being supplementary and, to this end, there should be an objective in the Directive Principles of State Policy.

21.2.2.2 Powers of Parliament

Submissions

One petitioner said that the National Assembly should have the power to amend the national Budget (1). Two petitioners said that the legal and institutional capacity of the National Assembly should be strengthened so that it plays a central role in the entire Budget formulation and implementation process, and in financial management oversight (2).

Observations

Though there were very few petitioners who made submissions on the subject of powers of the National Assembly over the national Budget, they nonetheless raised fundamental issues. One petitioner wanted the National Assembly to have power to amend the national Budget. Two others were of the view that the National Assembly should play a central role in the preparation and management of the Budget and that therefore its legal and institutional capacity should be strengthened.

The Commission observes that the power to approve the national budget is an important function of the National Assembly. This function is part of its oversight role and is intended to ensure that there are checks and balances between the Executive and the Legislature.

The Commission notes that with regard to the budget, the National Assembly only has power to scrutinise and reduce budget allocations in the national budget and otherwise make

recommendations. The National Assembly has no power to increase the overall budget. The rationale is that increasing the total budget would impinge on the function of the Executive to move tax or revenue measures.

The Commission notes that if the National Assembly were to have the power to increase the budget, this would require it to build the necessary institutional capacity to enable it to carry out rational evaluation and assessment of revenue and expenditure measures.

The Commission observes further that the National Assembly is also not actively involved in the process leading to the preparation of the estimates of revenue and expenditure. There are many reasons for this.

Members lack essential information on the economic situation and financial status of the national Treasury. This makes it difficult for MPs to adequately evaluate the performance of the economy and the previous budget on the basis of which they can meaningfully debate the estimates for the subsequent financial year. Often, the Financial Report of the Government and the Report of the Auditor-General are in arrears and in the case of the latter, for a number of years.

Members of Parliament need the necessary analytical skills and human resource expertise in financial matters as well as other sectors of the economy. Therefore, the institutional and human resource capacity of the National Assembly should be enhanced. This includes the need for the National Assembly to have modern information technology and hire expertise in relevant fields of development.

Recommendations

The Commission recommends that the Constitution should provide that:

- the National Assembly should have power to approve the national budget and to amend the same, but not vary the total estimates of revenue and expenditure; and

- Parliament should enact a Budget Act to make provision for the budgeting process, including the submission of financial and economic information and indicative estimates of revenues and expenditure for the following year to the National Assembly, well before the presentation

of the estimates. These should be discussed by the relevant parliamentary committees, and recommendations thereon should be sent to the Executive for its consideration in the preparation of the substantive estimates.

The Commission further recommends that the institutional and human resource capacity of the National Assembly should be strengthened and that this should include the establishment of a Budget Analysis Division and provision of a skills training to MPs.

21.2.2.3 Financial Report – Presentation

Submissions

Two petitioners said that the Executive should be obliged to present to Parliament a detailed financial report on expenditure for the preceding financial year before the estimates of revenue and expenditure are tabled, in order for Parliament to make informed decisions (2).

There was a submission from the Office of the Auditor-General that the Constitution should provide for the Auditor-General to express a formal opinion on the Financial Report of the Government tabled before the National Assembly by the Minister of Finance (1).

Observations

The Commission observes that only three petitioners made on this subject. These petitioners said that the Executive should be obliged to present to the National Assembly a detailed financial report on expenditure for the preceding financial year before the estimates of revenue and expenditure are tabled, in order for the National Assembly to make informed decisions.

Term of reference No. 26 enjoins the Commission to examine provisions relating to the Government's accountability and transparency in the expenditure of public funds and those relating to the presentation of the Financial Report as required by Article 118 of the Constitution. The Commission debated this issue at length.

The Commission observes that the Financial Report, which is intended to show the revenue and other monetary receipts as well as expenditure of the Government in that financial year, is tabled

months after the estimates of revenue and expenditure for the subsequent year have been debated and approved by the National Assembly. However, the Commission also acknowledges the difficulty that there is very little time between the close of a financial year and the tabling of estimates of revenue and expenditure for the subsequent financial year before the National Assembly.

In the evaluation of the matter, three views were considered. The first was that it was not practical to oblige the Executive to present to the National Assembly a detailed Financial Report on expenditure for the preceding financial year before the estimates of revenue and expenditure are tabled, due to the amount of work involved. The second was that the Government should provide its Financial Report within six months after the end of the financial year, while the third was that two Financial Reports should be presented to the National Assembly, that is, one audited and another unaudited, with a prescribed time limit within which this should be done.

Article 118 of the Constitution of Zambia requires a Financial Report for each year to be laid before the National Assembly not later than nine months after the end of each financial year. In spite of what appears to be ample time within which to present the Financial Report, the target has never been met. This has been compounded by the lack of sanctions for non-compliance. The Commission is of the view that this renders the contents of the Report stale by the time it is laid before the National Assembly, thus making it nothing but a fulfillment of a constitutional requirement. The Commission, however, appreciates the amount of work that goes into the production of the Financial Report

In addition, the Commission notes that Article 118 of the Constitution excludes expenditure details relating to public debt from appearing in the Report. This deprives the MPs of essential information for rational analysis of estimates of revenue and expenditure.

Also of significance is the submission made by the Auditor-General's Office that the Constitution should require that the Auditor-General express an opinion on the Financial Report of the Government. The Commission agrees with the Auditor-General's Office and feels that such an opinion would be useful to the MPs in their evaluation of Government performance and future estimates of revenue and expenditure.

The Commission examined the Constitution of Uganda and notes that the Budget Act, which is enacted pursuant to Article 155 of the Constitution, requires the Executive to present to Parliament detailed financial and economic information and indicative estimates within four months before the closure of the year to which it relates. The information contained in the Report includes performance of the economy as well as a Report on receipts and expenditure.

Recommendations

The Commission recommends that the Constitution should provide that:

- the Financial Report of the Government shall be detailed and include payments relating to public debt;
- details to be contained in the Financial Report shall be prescribed by appropriate legislation;
- the Financial Report of the Government shall be presented to the Office of the Auditor-General by the Ministry responsible for finance within six months after the end of the financial year; and
- the Financial Report shall be submitted to the National Assembly by the Minister of Finance and National Planning together with the opinion of the Auditor-General, within nine months after the end of each financial year.

21.2.2.3 Budget and Gender

Submissions

Three petitioners said that the Constitution should require the budget to address gender issues and concerns and that legislation related to collection and allocation of public funds should be gender responsive (3).

Observations

Petitioners who made submissions on this subject called for constitutional provisions to compel the Budget to address gender

issues and concerns and that legislation related to collection and allocation of public funds should be gender responsive.

The Commission agrees that for purposes of consideration of estimates of revenue and expenditure, the Financial Report of the Executive and any other information as may be required by the Constitution or any other law to be submitted to the National Assembly, should provide information on each gender in terms of benefits from development programmes and projects.

In terms of budget allocations, an activity-based budget should show how the activities (projects) constituting the budget are intended to involve both men and women in terms of participation, contribution and benefits.

Recommendations

The Commission therefore recommends that the budget estimates, the Financial Report, statements and other related information laid before the National Assembly on the budget should be gender responsive in terms of benefits from development programmes and projects. Provision for this should be made in the Budget Act, enactment of which has already been recommended in this Report.

21.2.3 Public Expenditure Control

Submissions

Some petitioners said that there should be strict auditing, monitoring and evaluation of public expenditure, including performance audit and evaluation of development projects (6).

Another submission was that there should be an obligation on the Government to release approved allocations in full and on time (1).

Seven petitioners argued that there should be a provision for the supplementary budget to be approved by Parliament before expenditure is incurred (7). A few other petitioners said that no public funds should be spent without the authority of Parliament (10).

Two petitioners said that decisions made by the National Assembly on public expenditure should be enforced (2). Two other petitioners proposed that the Constitution should provide mechanisms for the implementation of decisions of the Public Accounts Committee of Parliament (2).

A few petitioners said that the Constitution should provide for accountability and transparency in expenditure of public resources (21).

Seven petitioners called for information to be made available to the public on the expenditure of public funds (7).

Five petitioners indicated that those convicted of misuse of public funds should receive stiff punishment (5).

Observations

In separate submissions to the Mvunga Commission, the Special Parliamentary Select Committee and the Office of Auditor-General were both concerned that there were no punitive measures for failing to implement the recommendations of the Public Accounts Committee. The Commission recommended that Parliament should control public expenditure.

The majority of petitioners who made submissions on this subject wanted the Constitution to make provision for accountability and transparency in expenditure of public resources. A few petitioners said that no public funds should be spent without the authority of Parliament and that the Constitution should require prior approval of any supplementary budget before expenditure is incurred. Some petitioners felt that information should be made available to the public on the expenditure of public funds.

The Commission observes that, currently, Government institutions are implementing the Activity Based Budgeting System within the framework of National Policies and Programmes such as the Medium Term Expenditure Framework (MTEF) and Poverty Reduction Strategy Paper (PRSP). This demands timely release of adequate resources to allow effective implementation of planned activities.

The Commission notes that the non-release of approved allocations in full and on time by the Ministry responsible for finance adversely affects the operations of Government Ministries and Departments and, consequently, the achievement of set goals and targets.

The Commission further observes that Government Ministries use supplementary budgets at the end of the year when their allocations run out. These are only approved by Parliament in retrospect. The Commission agrees with the argument that Parliament should give prior approval to any public expenditure. However, where estimates relate to a year succeeding an election year, the President can authorise

expenditure before the coming into effect of the Appropriation Act for up to 90 days after the commencement of the financial year, subject to ratification by the National Assembly at its first sitting thereafter.

The Commission also observes that decisions of the National Assembly on public expenditure are usually not enforced by the relevant authorities.

Recommendations

The Commission recommends that the Constitution should provide that:

- release of approved budgetary allocation by the Treasury should be timely;

- expenditure in excess of or outside the annual Budget should be prohibited and the Constitution should provide that Parliament must give prior approval to any expenditure that may exceed the Budget. However, where estimates relate to a year succeeding an election year, the President can authorise expenditure before the coming into effect of the applicable Appropriation Act for up to 90 days after the commencement of the financial year, subject to ratification by the National Assembly at its first sitting thereafter; and

- decisions made by the National Assembly on public expenditure should be enforced by relevant authorities.

21.2.4 Finance Management

Submissions

One petitioner said that the discretionary powers enjoyed by the Ministry of Finance and National Planning in the management of finances should be reduced. The petitioner further said that the function of the Ministry should be restricted to that of managing the national Treasury and that it should therefore not be responsible for national planning. The petitioner also argued that the Ministry should be under obligation to disburse funds as per approved budget (1).

One petitioner further said that the country should revert to having one Treasury into and out of which all public finances should be deposited and disbursed, subject to approval by Parliament. The petitioner suggested that piecemeal and ad hoc funding by donors should be discouraged in

preference to comprehensive funding, and that donors should not be allowed to interfere in finance management at any level (1).

There was a submission that the Constitution should provide for and define penalties for economic saboteurs and plunderers (1).

Observations

The Commission observes that very few petitioners addressed the subject of finance management in general terms. One of the submissions was that the function of the Ministry of Finance and National Planning should be that of managing the national Treasury as opposed to performing both functions of national planning and managing the national Treasury.

The Commission also notes that the petitioner argued that the country should revert to the system of having one Treasury into and out of which all public finances should be deposited and disbursed, subject to approval by Parliament. In this regard, the petitioner was against the system of ad hoc funding by donors and called for this to be replaced by a system of comprehensive funding. He further said that donors should not be allowed to interfere in finance management at any level.

The Commission notes the need to have short-term and long-term development plans as well as the participation of the grassroots in the management of public finances. The Commission sees this as one way of ensuring transparency in the management of public funds.

The Commission acknowledges the need for the functions of the Ministry responsible for finance to be restricted to managing the national Treasury. The two functions of national planning and management of the national Treasury are onerous and should therefore be separated.

The Commission also acknowledges that there is need for the establishment of a Consolidated Fund into and out of which all public finances, including loans, should be deposited and disbursed, subject to approval by Parliament. It is the view of the Commission that this would enhance accountability and transparency in the management of public funds.

On issues of economic sabotage and plunder, the Commission notes that these are already adequately covered by ordinary legislation such as the Penal Code and the Anti-Corruption Commission Act. The Commission, however, feels that public institutions should incorporate in their strategic plan ways and means of identifying and tackling problems related to economic sabotage, theft of public resources and abuse of office.

Recommendations

The Commission recommends that:

- functions of the Ministry responsible for finance should be restricted to managing the national Treasury and the function of national planning should be a responsibility of another Government ministry or institution;

- the Constitution should establish for the Republic a Consolidated Fund into and out of which all public finances, including loans, should be deposited and disbursed in accordance with the law; and

- public institutions should incorporate in their strategic plan ways and means of identifying and tackling problems related to economic sabotage, theft of public resources and abuse of office.

21.2.5 Secretary to the Treasury – Appointment

Submissions

A few petitioners said that the Secretary to the Treasury should be a constitutional office with security of tenure (3). These petitioners said further that the National Assembly should appoint the office-holder, as the Office has a lot of control over the management of public resources and should therefore not be left to serve at the pleasure of the President.

Observations

The Commission observes that only three petitioners made submissions on the subject of appointment of the Secretary to the Treasury. The petitioners said that the Secretary to the Treasury should be a constitutional office-holder with security of tenure. They further suggested that the office-holder should not serve at the pleasure of the President but be appointed by the National Assembly, in view of the immense power that the officer enjoys over management of public resources.

The Commission examined the functions of the Office of the Secretary to the Treasury and is of the view that there is no justification for the Office to be constitutional. The post is equivalent to that of the Deputy Secretary to the Cabinet, an Office that is not constitutional. In fact, the Commission is of the view that the post is superfluous, as its functions can be adequately performed by a Permanent Secretary in the Ministry responsible for finance. The post should therefore be abolished.

Recommendations

The Commission recommends that the post of Secretary to the Treasury should be abolished and that its functions should be performed by the Permanent Secretary in the Ministry responsible for finance.

21.2.6 Accountant-General – Appointment

Submissions

A few petitioners said that the Accountant-General should be a constitutional office enjoying security of tenure and that the National Assembly should ratify the appointment of the office-bearer (4). These petitioners further proposed that the Accountant-General should have the same qualifications as the Auditor-General.

Observations

The Commission notes that only four petitioners made submissions on the subject of appointment of the Accountant-General. The petitioners said that the Accountant-General should be a constitutional office enjoying security of tenure and that the National Assembly should ratify the appointment of the office-bearer. These petitioners further proposed that the Accountant-General should have the same qualifications as the Auditor-General.

The Commission acknowledges the role the Accountant-General, as the chief Government cashier, plays in the management of public funds. However, the Commission feels that there is no need for the Office to be constitutional, as the holder can still effectively discharge the functions of the Office as established under the Civil Service. Further, the Accountant-General reports to a Permanent Secretary and the latter is not a constitutional office. Making the Office of Accountant-General a constitutional post would make supervision of the office-holder difficult.

Recommendations

The Commission recommends that the Office of Accountant-General should continue to be non-constitutional.

21.2.7 Commissioner-General for Revenue

Submissions

There was a submission that there should be established an Office of Commissioner-General for Revenue whose function should include developing tax policies (1).

Observations

The Commission notes that only one petitioner made a submission on this subject and called for the establishment of an Office of Commissioner-General for Revenue whose function would include developing tax policies.

The Commission observes that the development of tax policies is a preserve of the Ministry responsible for finance. The Ministry carries out the function in consultation with the Zambia Revenue Authority and other relevant stakeholders. The mandate of the Zambia Revenue Authority is revenue collection.

Recommendations

The Commission recommends that the development of tax policies should continue to be a preserve of the Ministry responsible for finance in consultation with the Zambia Revenue Authority and the recommended National Fiscal and Emoluments Commission.

21.2.8 National Emoluments Commission

Submissions

One petitioner said that a National Emoluments Commission should be established to determine salaries for politicians, holders of constitutional offices and senior civil servants (1).

Observations

The Commission observes that the only petitioner who made a submission on this subject called for the establishment of a National Emoluments Commission to determine salaries for politicians, holders of constitutional offices and senior civil servants.

The Commission observes that terms and conditions of service for politicians, constitutional office-holders and senior civil servants have

been determined and implemented in a haphazard manner to the extent that, in certain instances, they are not commensurate with qualifications and experience of the office-holders and do not reflect the realities of the economy.

The Commission therefore agrees with the petitioner that the Constitution should establish an independent institution to evaluate and recommend remuneration for the President, Vice-President, Ministers, the Speaker, MPs, Chief Justice, Judges and other constitutional office-holders as well as senior civil servants. However, the Commission is of the view that the functions of this institution should also encompass advising the Government on revenue mobilisation, allocation, disbursement and sharing of resources between the Central Government and local authorities within the structure of devolution. This is in view of the recommendation of this Commission under the Chapter dealing with local authorities (Chapter 11) that there should be an independent body to determine the sharing of resources between Central Government and local authorities.

This institution should be known as the National Fiscal and Emoluments Commission and should comprise five Commissioners and a Secretariat and should have prescribed powers and functions.

The Commission examined the Constitution of South Africa and found that there is established thereunder the Financial and Fiscal Commission. Its functions are mainly to assess financial and fiscal policies and make recommendations on equitable financial and fiscal allocations from national revenues to national, provincial and local government, as well as on levying of taxes and raising of loans by provincial or local governments.

Also, an institution called the Commission on Remuneration of Representatives makes recommendations to Parliament, the provincial legislatures and local governments on the remuneration of members of these legislative bodies, the Council of Traditional Leaders and Provincial Houses of traditional leaders.

In the case of Nigeria, there is established under the Constitution a Revenue Mobilisation, Allocation and Fiscal Commission. Its functions comprise mainly monitoring and disbursement of revenue from the federal account; review of revenue allocation formulae to ensure conformity to the changing realities; and determining the remuneration appropriate for political office-holders, including the President, Vice-President, legislators, Chief Justice, Judges and the Auditor-General.

Recommendations

The Commission recommends that the Constitution should:

- establish a National Fiscal and Emoluments Commission;
- provide for functions of the Commission to include:

    a) assessing financial and fiscal policies and make recommendations on equitable financial and fiscal allocations from national revenues to the Central Government, provinces and local authorities, as well as on levying of taxes and raising of loans by provinces and local authorities; and

    b) evaluating and recommending for the approval of the National Assembly, emoluments of the President, Vice-President, Ministers, Speaker, Chief Justice, MPs, Judges and other constitutional office holders as well as senior civil servants.

Further, it should provide that appropriate legislation should be enacted to support the establishment of the Commission.

21.2.9 Public Debt Management

Submissions

A number of petitioners argued that international and domestic contracts for public debt should be determined and approved by the National Assembly, which should also monitor debt management (15). Others said that only debts above a determined percentage of the GDP should require prior approval of the National Assembly (8). Two others said that Government borrowing should be limited (2).

There was a submission from the National Assembly that there should be an amendment to section 3 of the Loans and Guarantees (Authorisation) Act, Cap. 366 of the Laws of Zambia (1). This is to ensure that the loan agreements are subject to ratification by the National Assembly. One petitioner said that the public should have the right to know and question all borrowing before loan agreements are signed (1).

One petitioner further said that a Debt Service Commission should be set up to oversee public debt management (1). The petitioner added that the Auditor-General should have a clear mandate over the borrowing process (1).

Observations

The Commission observes that the majority of petitioners who submitted on this subject wanted international and domestic contracts for public debt to be determined and approved by the National Assembly and that the Legislature should also monitor debt management. Some petitioners said that only debts above a determined percentage of the GDP should require prior approval of the National Assembly, while others felt that Government borrowing should be limited.

The Commission notes that public debt, is contracted without the approval of the National Assembly. The Commission also notes that part of the public debt contracted may not benefit the nation as there is no effective mechanism in place to monitor how the funds are utilised or indeed whether there is need for borrowing in the first instance.

Further, by virtue of Articles 117 (3), 118 (2) and 120 (1) of the Constitution, debt repayment expenditure is charged on the revenue of the Republic and exempted from a requirement of approval by the National Assembly. It is also exempted from appearing in the Financial Report tabled before the National Assembly.

The Commission also observes that among submissions on this subject was a call from the National Assembly for an amendment to section 3 of the Loans and Guarantees (Authorisation) Act, Cap. 366 in order to require the National Assembly to approve loans.

Sections 3 and 15 of the Act require the National Assembly to determine, by resolution, the amount of loans and loan guarantees to be raised or given on behalf of the Government. However, Section 26 permits the approved amounts to be varied by the Minister, with the authorisation of the President, under certain circumstances. Further, other statutes permit the raising of certain loans, for example, from the IMF and the World Bank, without the approval of the National Assembly. These statutes vest a lot of discretion in the Minister responsible for finance.

In terms of comparison, constitutions of some African countries explicitly require loans and loan guarantees contracted on behalf of the Government to be authorised by the Legislature. These include the Constitutions of Ghana and Uganda.

The Commission is in agreement with petitioners on the need for the National Assembly to approve loans and guarantees contracted on behalf of the Government. This is essential to ensuring that the Government is held accountable to the people.

The Commission also notes the call for the establishment of a Debt Service Commission, but is wary of creating too many public institutions when existing ones can perform the same functions. In this case, parliamentary oversight functions would be adequate to oversee debt management.

Recommendations

The Commission recommends that the Constitution should provide that:

- direct international and domestic public debt and loan guarantees should be approved by the National Assembly before taking effect;

- the Minister responsible for finance shall, at such times as the National Assembly may determine, cause to be presented to the National Assembly such information concerning any loan as is necessary, including the extent of the total indebtedness of the Republic; measures taken or to be taken for servicing or repayment of the loan, and utilisation and performance of the loan; and

- debt repayment should be specifically reflected in the Financial Report.

21.2.10 Compensation Fund

Observations

Although no submissions were received from petitioners on this subject, the Commission feels that there should be established by the Constitution a Compensation Fund out of which claims against the State by judgement or order of court may be met . This would ameliorate the sufferings of judgement creditors of the State who have to wait for long periods for money to be found to satisfy their debt.

Recommendations

The Commission recommends that the Constitution should establish a Compensation Fund out of which claims against the State by judgement creditors may be met and that the details pertaining to operations of this Fund should be in an Act of Parliament.

21.2.11 Public Accounts Committee

Submissions

There were three submissions to the effect that the Constitution should provide that wherever possible, an Opposition MP should chair the Public Accounts Committee (3).

Two petitioners said that the decisions of the National Assembly on public expenditure should be enforceable (2).

Observations

Petitioners who made submissions on this matter were of the view that having an opposition MP chair the Public Accounts Committee would provide effective checks in Parliament, as an MP from the ruling party might be inclined to support the Executive.

The Commission notes that this is the current practice and should continue.

21.2.12 Disposal of Public Assets

Submissions

A few petitioners said that major public assets, such as parastatal companies, should not be sold, transferred or disposed of without the approval of Parliament (5).

Observations

The Commission observes that the few petitioners who submitted on disposal of public assets wanted major public assets such as parastatal companies not to be sold, transferred or disposed of without the approval of Parliament.

The Commission observes that the need for privatisation gained momentum in the 1980s following widespread disappointment with the general performance of State-owned enterprises. The Commission notes that most developing countries which had enthusiastically embraced State-owned enterprises reported less than satisfactory experiences with them. State-owned companies failed to perform for a variety of reasons, including the application of inappropriate technology; total dependence on processing of imported raw materials; inexperienced management; misappropriation of resources by officials appointed by governments to run them; and operation in monopolistic environments with no

competition. The implication of this was that State-owned enterprises were typically or potentially inefficient. This affected their financial viability which, in turn, required that governments subsidise their operations. Thus, many countries saw privatisation as a cure for public sector deficits.

The Commission also observes that as an economic policy, privatisation is not unique to Zambia, as many developing countries struggling to activate their battered and declining economies have either voluntarily or been forced to turn to privatisation as a key economic policy for bringing about dynamic and sustainable growth. Zambia's privatisation programme has followed very closely the strategies adopted in other countries.

Privatisation in Zambia was meant to promote competition and improve efficiency of firms; stimulate investment from both domestic and foreign investors; encourage new capital investment; encourage and facilitate broad-based ownership of shares; and drastically scale down the Government's involvement in business and/or minimise government bureaucracy in business operations. These were all noble objectives.

The privatisation programme was launched in Zambia in July 1993 following the enactment of the Privatisation Act, No.21 of 1992. This Act established the Zambia Privatisation Agency (ZPA) as the sole institution responsible for the divestiture of State-owned enterprises. The Act lists a number of modes that could be employed in the divestiture process. These include offering of shares to the public; sale to private buyers through negotiated and competitive bids; reduction of government holding; sale of assets; restructuring of enterprises before sale of the whole or part thereof; and management/ employee buyouts.

The Commission notes that in Zambia, most of the privatised companies were sold cheaply, as the programme was rushed and no accurate assessment of the value of these companies was undertaken. Much as it was well-intended, privatisation has had a negative social impact. It has resulted in the sale of most State-owned companies to mainly foreign buyers who have been unwilling to take on board most of the former employees of the enterprises which were sold. This has led to retrenchments, redundancies and consequently massive unemployment in the country.

The Commission also notes that since the Government embarked on selling State-owned enterprises, formal employment in Zambia has declined from 537,300 in 1990 to 476,400 in 1991 and to 200,000 in 2000. On the Copperbelt, the employment figure that stood at 148,050 in 1993 decreased to 100,500 by 1998 following privatisation of the mines, as the new owners drastically cut down the inherited workforce they considered excessive. Further, a large number of those retrenched were not paid their

dues in full and on time, resulting in considerable suffering. (2000 Census Report).

In the case of the Zambia Consolidated Copper Mines (ZCCM), some of the new owners failed to sustain the mining operations and opted to abandon the mines or were forced to leave, leading to serious disruptions and distortions in the economy.

Some of the foreign investors who purchased State-owned enterprises were only interested in asset-stripping.

In the light of the above considerations, the Commission agrees that the Government should seek the approval of Parliament before the sale, transfer or disposal of major assets, including parastatal companies. In this regard, the Commission feels that it is Government's obligation to provide certain services such as energy, communications, banking and health (to mention but a few) to the public which would otherwise not be provided if the companies currently providing such services were in private hands.

Recommendations

The Commission recommends that the Constitution should provide that any measure to sell, transfer or dispose of major public assets such as parastatal companies shall require approval by the National Assembly through a resolution supported by not less than two-thirds of all the MPs.

21.2.13 Taxation

Submissions

Some petitioners proposed that the Constitution should provide for a fixed tax rate, for example at 10% of a person's income, while others said that every adult should be taxed (11). Three petitioners felt that all Zambians working abroad should pay tax to the Zambian Government (3).

Other petitioners said that tax such as Pay As You Earn (PAYE) should be reduced (23).

Observations

The majority of petitioners who made submissions on this subject wanted tax to be reduced. Some of the petitioners said that the Constitution should provide for a fixed tax rate, for example at 10% of a person's income. Others said that every adult should be taxed.

The Commission also notes that a few petitioners wanted all Zambians working abroad to pay tax to the Zambian Government.

The Commission observes that the main source of revenue for any Government is tax. The various taxes that are collected are used by Government to provide and improve public infrastructure and social services such as roads, telecommunications, schools and hospitals (to mention but a few). The public should therefore meet its tax obligations. However, there is need for Government to put in place a tax system which is cost efficient and less burdensome to the taxpayers.

The Commission also observes that the tax system in Zambia depends heavily on the formal sector, a situation which has resulted in over-taxation of the sector. While acknowledging the difficulties associated with taxation in the informal sector, the Commission is of the view that the Government should invest in a system which will result in a broadened tax base. The Commission feels that the tax regime should not only target those in the formal and informal employment sectors, but all eligible adults. This will reduce the tax burden currently experienced by the formal sector. However, details relating to tax rates should be prescribed by appropriate legislation.

The Commission notes that currently, public awareness of tax obligations, benefits and procedures is lacking. The tax system is also too complicated to be understood by people. There are currently five main forms of tax, namely Pay As You Earn, Value Added Tax, Customs Duty, Excise Duty and Income Tax. The Commission feels that these should be rationalised and simplified.

It is also the Commission's view that in order to encourage people to pay tax, the Government should strive to demonstrate that taxpayers' money is properly utilised by providing social services such as hospitals, roads, schools and communications infrastructure. Also, where people pay the Government for services which it fails to provide, it should be Government's responsibility to find a suitable method of compensating them.

On the question of Zambians working abroad paying tax, the Commission feels that this would not be feasible. In any case, such a measure would result in double taxation, because Zambian citizens working abroad have tax obligations to those countries.

With regard to the systems of tax collection, the Commission notes that the ZRA is working in partnership with other institutions which are contracted to collect tax on behalf of the authority. The Commission wishes to observe that while this arrangement assists the authority to be

efficient in its function of collecting tax, the arrangement is not supported by appropriate Government policy and legislation. A policy and legislative framework is necessary in order to render legitimacy to this practice.

Recommendations

The Commission recommends that:

- the Government should broaden the tax base by levying all eligible adults and all viable income-generating projects in the country;
- the Government should put in place a policy and legislation for sub-contracting institutions for the purpose of collection of tax;
- the Government should embark on tax education; and
- the various forms of taxes should be rationalised and explained to the citizens.

CHAPTER 22

AUDITOR-GENERAL

***Terms of Reference**:*

No. 2 Recommend a system of government that will ensure that Zambia is governed in manner that will promote the democratic principles of regular and fair elections, transparency and accountability, and that will guard against the emergence of the dictatorial form of government;

No. 3 Recommend appropriate ways and means of entrenching and protecting human rights, the rule of law and good governance in the Constitution;

No. 9 Examine the effectiveness of the Office of the Auditor-General and that of the Investigator General and recommend means of improving their effectiveness where necessary; and

No. 26 Examine provisions relating to Government's accountability and transparency in the expenditure of public funds and those relating to the presentation of a financial report as required by Article 118 of the Constitution.

22.1 Introduction

The primary purpose for which the Office of the Auditor-General (OAG) is established is to conduct external audit of the expenditure of public funds and to audit accounts relating to the General Revenues of the Republic.

The OAG for any country plays a major role in the management and control of financial and other resources of the Government and parastatal entities. It occupies a very important position in the areas of accountability, transparency and good governance, which are essential to democracy and development. In view of this, governments have to ensure that its functions are carried out with a great measure of independence.

In this respect, the OAG is not only a watchdog in the management of public resources, but more importantly must ensure that the Office carries out a "preventive" function in addition to the "discovery and reporting" function. In

other words, the OAG should put in place measures that help prevent fraud or misapplication of resources instead of confining its role to reporting such vices after they have already occurred.

Conventional public audit is concerned with certifying that the revenues of a country have been spent according to law and that public accounts have been properly kept as stipulated by law. However, modern public audit is slowly responding to demands for a broader scope, incorporating non-traditional forms of audit such as performance audit and value for money audit. Although public audit in Zambia is tailored to the convention form, the latest strategic plan for the Office of the Auditor General has incorporated performance audit and value for audit functions.

The main functions of the OAG are:

- undertaking follow-up action on previous adverse reports in order to determine whether corrective action has been taken;

- auditing expenditure of public funds;

- auditing the mobilisation of public revenue;

- reviewing internal control systems for all Government departments and quasi-Government institutions. The main thrust under this function is to attest to the reliability and adequacy of public control systems;

- conducting performance audit, which entails carrying out systematic analysis of the economy, efficiency and effectiveness of the Government administration;

- advising the administration on general management of public funds; and

- ensuring that proper authority levels and proper management audit systems exist and that value for money is obtained.

One prerequisite for the effective functioning of the OAG is adequate constitutional and legislative mandate. Another is independence from all the arms and offices of the Government which it is expected to audit. The demands of its function also call for adequate financial, institutional and human resources.

If the OAG does not operate independently, no credence can be attached to the Office's reports. Independence of the Office is manifested in various forms such as:

- the OAG must plan and design audit programmes without any pressure being exerted from outside;

- the OAG must have a free hand in recruitment of employees, i.e. no employee should be imposed on the OAG;

- the OAG must be directly funded by Parliament, rather than depending on the Executive arm of the Government;

- it must have unlimited access to all information in government, public institutions and State-owned entities without exception;

- an independent OAG should posses powers to investigate and audit any Government office or quasi-Government institutions; and

- the OAG must have powers to prosecute or report to law enforcement agencies or administrative authorities where evidence of criminal or other irregular conduct is found.

Furthermore, the OAG must have autonomy in order effectively to undertake its oversight function. Since the Office is part of good governance structures, it should be separate from the Executive arm of the Government. It ought to have freedom to review the financial conduct of the latter.

Many governments have placed the OAG under the Legislature, subject to its independence and autonomy, in order to enhance its accountability. The Auditor-General is an officer of Parliament whose work is carried out in accordance with the Constitution. The Reports of the Auditor-General are submitted directly to the Speaker of the National Assembly or, if there is a vacancy in the Office of the Speaker or if for any reason the Speaker is unable to perform the functions of the office, to the Deputy Speaker, who should cause it to be laid before the National Assembly. The Reports should be submitted within a specified period after the end of the financial year.

In order to strengthen accountability within the OAG, some governments have created State Audit Commissions which act like a Board and give direction to the OAG. The State Audit Commission prepares the budget of the OAG which is then submitted to the National Assembly for approval. The budget, once approved by Parliament, is not subjected to any alterations by any authority other than Parliament. It is considered as charged on the general revenues of the country and is released to the OAG in full.

Current Constitutional Provisions

The OAG is provided for under Part X of the Constitution which deals with Finance.

Article 121 (1) provides for appointment of the Auditor-General by the President, subject to ratification by the National Assembly.

Clauses (2), (3), (4), (5) and (6) provide for functions and duties of the Auditor-General. According to Clause (6), in the exercise of the functions, the Auditor-General shall not be subject to the direction or control of any office.

It is the responsibility of the Auditor General to satisfy herself/himself that the Executive has conducted the government business satisfactorily. She/he must be satisfied that the money expended has been applied to the purposes for which it was appropriated by the Appropriation Act or in accordance with the approved supplementary estimates or in accordance with the Excess Expenditure Appropriation Act, as the case may be, and that the expenditure conforms to the authority that governs it. She/he must be satisfied that the accounts relating to general revenues of the nation, and the stocks and stores of the government have been properly recorded and all movements of funds have been duly authorised.

Article 122 provides for tenure of office of the Auditor-General. The holder should vacate office upon attaining the age of 60 years. However, the Auditor-General may only be removed from office for inability to perform the functions of the office, whether arising from infirmity of body or mind or from incompetence or for misbehaviour. The procedure as provided for under the Article is that the National Assembly would appoint a tribunal and, upon consideration of the tribunal's Report, the National Assembly may, by resolution, remove the officer.

In addition to the Constitution, the Public Audit Act and other statutes provide for functions of the Office of the Auditor-General.

The function of the Auditor-General is weakened by many factors, including lack of operational independence and inadequate funding and human resources. This situation is worsened by the fact that the budget of the office is prepared through the Ministry in charge of finance in the same manner as other general managers of institutions do. Although under Article 121 (4) the Auditor-General is required, within 12 months after the end of the financial year, to present a Report on public expenditure and accounts to the President, who should then cause it to be tabled before the National Assembly, neither the Auditor-General nor the National Assembly have the power to ensure that action is taken on their Reports. Also, the period within which the Auditor-General is required to present the Report is too long to facilitate meaningful scrutiny and remedial action.

Examples of some African countries with constitutions that address some of the issues of concern raised by petitioners are Ghana and Uganda. In the case of Ghana, the Constitution provides, among others, under Articles 187, 188 and 189 that:

"187.

(5) The Auditor-General shall, within six months after the end of the immediately preceding financial year to which ... the accounts ... relate, submit his report to parliament ....

(12) The salary and allowances payable to the Auditor-General, his rights in respect of leave of absence, retiring awards or retiring age shall not be varied to his disadvantage during his tenure of office.

(13) The provisions... relating to the removal of a justice of Superior Court of Judicature from office shall apply to the Auditor-General.

(14) The administrative expenses of the Office of the Auditor-General including all salaries, allowances, gratuities and pensions payable to or in respect of persons serving in the Audit Service shall be a charge on the Consolidated Fund.

(15) The Accounts of the Office of the Auditor-General shall be audited and reported upon by an Auditor appointed by Parliament.

188.

There shall be an audit service which shall form part of public services of Ghana.

189.

(1) There shall be an Audit Service Board....

(2) The Audit Service Board shall, act in consultation with the Public Service Commission-

1. determine the terms and conditions of service of officers and other employees of the Audit Service; and

2. by constitutional instrument, make regulations for the effective and efficient administration of the Audit Service."

Under the Constitution of Uganda, in order for a person to be appointed Auditor-General, he/she should be a qualified accountant of not less than 15 years standing. Further, one of the functions of the Auditor-General in Uganda is to conduct financial and value for money audits in respect of any project involving public funds. In addition, the Constitution requires the Report of the Auditor-General to be submitted to Parliament annually. The Constitution also provides

that the accounts of the OAG shall be audited and reported upon by an Auditor appointed by Parliament (Article 163 (2) (a), (3) (b), (4) and (9)).

Petitioners to the Mwanakatwe Commission stressed that the Office of the Auditor-General should not only be strengthened but that the affirmation of its independence should be clearly spelt out in the Constitution. In this regard, the Commission was of the view that making the Auditor-General an officer of the National Assembly would be one way of enhancing the effectiveness of that Office.

The Mwanakatwe Commission therefore recommended that:

- there should be an Auditor-General for the Republic whose office shall be a public office;
- the Auditor-General should be independent and impartial and should perform the functions of the Office subject only to the Constitution; and
- the Auditor-General should have security of tenure.

22.2 Submissions, Observations and Recommendations

Three hundred and ninety-seven (397) submissions were made on this subject.

Submissions

22.2.1 Independence and Autonomy of the Office

22.2.1.1 Operational Independence

A number of petitioners argued that the Auditor-General should be independent of all arms of the Government (40). Four petitioners, including the Office of the Auditor-General, said that the Constitution should provide that the Auditor-General should be an officer of the National Assembly (4). A few petitioners, including the Office of the Auditor-General, proposed that the Auditor-General should report directly to the National Assembly (8). There was one submission that the Report should be submitted to both the National Assembly and the President. It was explained that under the current constitutional arrangements, the Auditor-General's Report is required to be submitted to the President who should cause it to be tabled before the National Assembly.

22.2.1.2 Appointments

A number of petitioners said that the Auditor-General should not be appointed by the President, but by an independent body and ratified by the National Assembly (113).

On the other hand, the Auditor-General's Office said that the Auditor-General should be nominated by a State Audit Commission and approved by the National Assembly prior to appointment by the President (1).

A number of petitioners felt that the Auditor-General should be appointed by the National Assembly (76).

Some petitioners said that the present method of appointing the Auditor-General should be maintained (13). The current Constitution provides that the President appoints the Auditor-General, subject to ratification by the National Assembly.

Three petitioners said that the Auditor-General should be appointed on merit through a competitive and transparent process (3).

One petitioner felt that the Judiciary should appoint the Auditor-General (1).

22.2.1.3 Security of Tenure

Some petitioners said that the Constitution should continue to provide for security of tenure for the Office of the Auditor-General (18).

Three petitioners proposed that the Auditor-General should be employed for a renewable term of three to five years (3), while one petitioner said that the term should be limited (1). Two other petitioners said that the term of office of the Auditor-General should be five years to coincide with the term of office of the President (2).

A few petitioners argued that the Auditor-General should vacate office following change of government (6).

One petitioner said that the Constitution should provide that any person who holds or has held the office of Auditor-General shall not be appointed to hold or to act in any other public office (1).

One petitioner suggested that a person holding the Office of Auditor-General should be subject to removal on the recommendation of the President, subject to ratification by the National Assembly on the following grounds:

- incompetence in the exercise of his/her duties;
- compromise in the exercise of his/her duties to the extent that his/her financial probity is in serious question; or
- incapacity.

22.2.1.4 Funding

Eleven petitioners said that the Office of the Auditor-General should be adequately funded in order to make it more effective and autonomous (11).

Observations

Many petitioners made submissions on the subject of independence and autonomy of the Office of the Auditor-General and they addressed a range of issues.

Some petitioners wanted the Office to have operational independence and autonomy. Many petitioners called for the Auditor-General to be appointed by an independent body, subject to ratification by the National Assembly, while a few were of the view that the President should continue appointing the Auditor-General, subject to ratification by the National Assembly. The Office of the Auditor-General said that the President should appoint the Auditor General, subject to ratification by the National Assembly, on nomination by a State Audit Commission which should be established to supervise the operations of the Office.

The Commission further notes that some petitioners, who included the Office of the Auditor-General, said that the Auditor-General should be an officer of the National Assembly and that the Reports of the Office should be submitted directly to the National Assembly. However, one petitioner wanted the Reports to be submitted to the President as well.

The Commission also observes that though relatively few petitioners addressed the subject of security of tenure of the Office of the Auditor-General, the majority of these were in favour of it and expressed satisfaction with the current provisions of the Constitution. However, a few petitioners wanted the Auditor-General to vacate office whenever there is change of Government.

Some petitioners addressed the subject of funding of the Office of the Auditor-General. They were concerned that the Office is not adequately funded and that this adversely

affects its effectiveness and autonomy. The Office of the Auditor-General wanted its Budget to be submitted directly to the National Assembly and, once approved, not to be altered by anybody other than the National Assembly. The Office also wanted the approved budget to be a charge on the General Revenues of the Republic.

It is therefore clear from these submissions that petitioners were concerned about the independence of the Office of the Auditor-General. The Commission appreciates these concerns in view of the nature of the operations of the Office, which is essentially to ensure that public funds are utilised in accordance with the law.

The Commission concurs with the views of the majority of petitioners and feels that the independence and autonomy of the Office of the Auditor-General should be reflected in the mode of appointment of the Auditor-General, the manner of reporting, security of tenure and funding for the Office.

Article 121 (6) of the Constitution provides that the Auditor-General shall not be subject to the direction or control of any other person in exercising the functions of the Office. Further, the Constitution makes provision for the Auditor-General to be appointed by the President ,subject to ratification by the National Assembly. The Commission feels this arrangement may compromise the autonomy of the Office, as the Auditor-General may in some cases not be in a position to discharge her/his duties diligently where this involves making decisions that might have a negative effect on the appointing authority.

The view of the Commission is that an independent body should nominate the Auditor-General through a competitive and transparent process. The Commission therefore agrees with the recommendation of the Office of the Auditor-General that a State Audit Commission should nominate the Auditor-General, who should be approved by the National Assembly prior to appointment by the President. This would enhance the autonomy of the Auditor-General and allow her/him to audit all public institutions. In this regard, the Commission is also of the view that the constitutional provision that a person who holds or has held the position of Auditor-General shall not be appointed to hold or to act in any other public office is appropriate. It is intended to ensure that the office-holder performs the functions of the Office without compromise.

Regarding the submission that the Auditor-General should be an officer of the National Assembly, the Commission is of the view that this would be inconsistent with the principle of independence and autonomy of the office.

The Commission observes that very few petitioners addressed the related subject of term of office of the Auditor-General. Some of these wanted the Auditor-General to be appointed on a fixed term contract, with some suggesting a renewable term of three to five years and others five years to coincide with the term of office of the President. The latter suggestion also implies a desire that the office-holder should vacate office when there is change in the Office of the President.

The Commission notes that the Constitution only requires the office-holder to vacate office upon attaining the age of 60 years. The Commission feels that subjecting this office to a fixed term of office would undermine security of tenure and would not be in conformity with the principle of independence of the Office.

In terms of reporting, the Commission is of the view that the Report of the Auditor-General should be submitted directly to the Speaker, who should lay it before the National Assembly. However, the Report should be submitted to the President at the same time. The Commission observes that currently the Constitution requires the Report of the Auditor-General to be submitted to the President, who should cause it to be tabled before the National Assembly. The responsibility of laying the Report before the National Assembly should not lie with the President, as this undermines the independence of the Office of the Auditor-General and could also compromise the oversight role of the National Assembly.

The Auditor-General should be autonomous and should not be under the supervision of any organ of the State. This is to ensure that the Auditor-General's allegiance is to the Constitution, which should also guarantee the operational independence of the Office.

With respect to security of tenure, the Commission is of the view that the current provisions of the Constitution are adequate. According to Article 122 of the Constitution, the Auditor-General may only be removed by the National Assembly for inability to perform functions of the Office due to infirmity of body or mind, incompetence or misbehaviour. The procedure involves appointment of a tribunal.

On the issue of funding of the Office, the Commission observes that the operations of the Office of Auditor-General have been badly affected by irregular, untimely and inadequate funding from the Ministry responsible for finance. As such, the Office cannot be independent, efficient and effective in its operations. The National Assembly should directly fund the Office and its budget, once approved, should be a charge on the Consolidated Fund of the Republic. Also, its allocation should be adequate. Preparation of the budget should be done by the Office of the Auditor-General in consultation with the Ministry responsible for finance, taking into account the principle of equitable sharing of resources.

The Commission examined the Reports of previous Commissions on the subject of independence of the Office of the Auditor-General. The Chona Commission recommended that the Auditor-General should be appointed by the President. The Mwanakatwe Commission observed that the Office of the Auditor-General should not only be strengthened but also that the affirmation of its independence should be clearly spelt out in the Constitution. That Commission recommended that the Auditor-General should be independent and impartial and should exercise and perform her/his powers and functions subject only to the Constitution and the law.

Recommendations

The Commission recommends that the Constitution should provide that:

- the Auditor-General's Office shall be autonomous and independent in its operations;

- the Auditor-General shall be appointed by the President following nomination by a State Audit Commission and approved by the National Assembly;

- the office-holder shall continue to enjoy security of tenure, as currently provided for by the Constitution and retire upon attaining the age of 70 years;

- the Office of the Auditor-General shall prepare the budget of the Office in consultation with the Ministry responsible for finance, taking into account the principle of equitable sharing of resources;

- the Office shall receive funds directly from the National Assembly and that, once approved, its Budget should be a charge on the Consolidated Fund of the Republic;

- funding to the Office should be regular, timely and adequate;

- the Auditor-General's Report shall be presented to both the National Assembly and the President not later than nine months after the end of each financial year and the Speaker shall cause the Report to be tabled before the National Assembly not later than seven days after the first sitting of the National Assembly next after the receipt of such Report; and

- the President, National Assembly or any public officer may request the Auditor-General to carry out an audit, in terms of provisions of the Constitution or other law.

22.2.2 Qualifications

Observations

Although the Commission did not receive any submissions on the qualifications relating to the appointment of the Auditor-General, the Commission considered the issue as important and proceeded to analyse it. The Commission feels that the Auditor-General should have relevant professional qualifications and experience to perform the functions of the Office to expected standards. These qualifications and experience should be prescribed by an appropriate Act of Parliament.

Recommendations

The Commission recommends that appropriate legislation provide that the Auditor-General should be:

- a Zambian;
- an accountant with recognised professional qualifications;
- experienced, with at least 15 years experience in public finances;
- at least 45 years of age; and
- mature and a person of known integrity.

22.2.3 Establishment of a State Audit Commission

Submissions

The Office of the Auditor-General and a few other petitioners called for the establishment of a State Audit Commission to oversee the administration, financing and operations of the Office of the Auditor-General (5). The Office further proposed that this Commission should comprise members appointed by the Minister of Finance from professional bodies such as the Zambia Institute of Chartered Accountants, the Bankers Association of Zambia, the Law Association of Zambia and the Economic Association of Zambia.

The Office of the Auditor-General also said that the Auditor-General should, under the supervision of a State Commission to which the Office should report on its operations, have independent authority to recruit, remunerate, grade, promote and discipline staff. The staff should be civil servants engaged on Civil Service terms and conditions of service (1).

Observations

The Commission wishes to observe that the call for the establishment of a State Audit Commission was inspired by a desire by petitioners that the Office of the Auditor-General should be strengthened through the establishment of a supervisory body. In the same vein, the Auditor-General suggested the Office should have authority to independently recruit staff and that this was within the doctrine of independence and autonomy. The Commission shares this view with the OAG, but does not accept the recruitment of staff from the Civil Service, as this is not compatible with the principle of autonomy.

The Commission agrees with petitioners on the need to enhance the institutional capacity of the Office of the Auditor-General through the establishment of a supervisory body and recruitment of qualified staff. The Commission notes that apart from there being no institution to provide policy guidance to the operations of the Office, its personnel are seconded from various Ministries. Therefore, the competence, efficiency, loyalty and discipline of staff would not be within the direct control and supervision of the AG's Office.

The Commission is, however, of the view that the appointment of the members of the State Audit Commission should not be within the exclusive jurisdiction of the Executive, because this would compromise the independence of the Commission.

Instead, members should be nominated by respective private, professional and financial institutions and approved by the National Assembly prior to appointments by the President. The State Audit Commission should comprise five members who should be appointed from professional bodies in the private sector. This will ensure that the Office of Auditor-General is independent and benefits from the expertise and experience of professionals. The Commission agrees with the submission of the Office of the Auditor-General regarding the functions of the State Audit Commission. The State Audit Commission should nominate persons for appointment to the Office of Auditor-General and provide policy guidance to the operations of the Office. The Commission should make annual reports to the National Assembly on the operations of the Commission.

It is also the view of the Commission that the members of the State Audit Commission should serve for a term of three years and that they should be eligible to serve one further term only. In order to discharge the duties diligently, members should be accorded security of tenure.

Provisions of the Constitution on the State Audit Commission should be confined to powers, core functions, composition and mode of appointment of its members, while the rest of the details should be prescribed by an Act of Parliament.

In evaluating these matters, this Commission examined constitutions and practices in other countries.

The Constitution of Thailand provides that the State Audit Commission and the Auditor-General, who is independent and impartial, shall carry out State audit.

The State Audit Commission consists of the Chairman and nine other members. These Commissioners and the Auditor-General are appointed by the King on the advice of Senate, from persons with expertise and experience in state audit, internal audit, finance and other fields.

The State Audit Commission has an independent secretariat, with the Auditor-General as the superior responsible directly to the Chairman of the State Audit Commission.

Members of the State Audit Commission hold office for a term of six years and serve for only one term. Powers and duties of the State Audit Commission and the Auditor-General are prescribed by ordinary legislation.

The determination of the qualifications and procedure for the election of persons to be appointed as members of the State Audit Commission and the Auditor-General are made in a manner which secures persons of appropriate qualifications, competence and integrity and which guarantees independence in the performance of duties of such persons.

The Commission also notes that in the Republic of Albania, a State Supreme Audit Institution is established under an Act of Parliament which also governs its objectives, powers and duties. The State Supreme Audit Institution is the highest institution of economic and financial control of the Republic. In exercising its competencies, it is subordinate only to the Constitution and the law.

This Commission notes that in the submission to the Mvunga Commission, the Office of Auditor-General proposed the establishment of a National Audit Office as the supreme audit institution for all Government and parastatal sectors and that it should be aligned to Parliament.

Recommendations

The Commission recommends that the Constitution should provide that:

- there shall be established a State Audit Commission;

- there shall be five members of the State Audit Commission who shall be nominated by their respective private, professional and financial institutions with competence in public finance management and who shall be appointed by the President, subject to ratification by the National Assembly;

- members of the State Audit Commission shall serve a term of three years and be eligible to serve for one further term;

- a member of the State Audit Commission may only be removed from office for inability to perform the duties of office due to infirmity of body or mind, or for incompetence, misconduct or bankruptcy;

- the powers and functions of the State Audit Commission shall include to: recommend the appointment of the Auditor-General; provide policy guidance to the operations of the Office of the Auditor-General; advise and make recommendations to the Auditor-General on the discharge of the mandate of the Office as provided by or under the Constitution or other laws; and

- details concerning the establishment of the State Audit Commission shall be in an Act of Parliament.

The Commission further recommends that an Act of Parliament should provide that the Office of the Auditor-General should have authority to recruit, grade, remunerate, promote and discipline staff and that this authority shall be exercised by the Office under the supervision of the State Audit Commission.

22.2.4 Expansion of Mandate

Submissions

Three petitioners, including the Office of the Auditor-General, argued that the mandate of the Auditor-General should be expanded to include other types of audits such as value for money, performance, evaluation, benefit and impact (3). One petitioner said that the mandate of the Auditor-General should be extended to the local government sector (1).

A number of petitioners said that the Auditor-General should be given power to prosecute those found to have been involved in financial and other management irregularities (34). Three others said that the Auditor-General should have power to recommend prosecution to the Director of Public Prosecution or Police (3). Some petitioners said that the Office of the Auditor-General should be decentralised to all parts of Zambia (16).

Observations

The Commission observes that the majority of petitioners who made submissions on this subject wanted the Auditor-General to be given power to prosecute suspects involved in financial irregularities. A few, who

included the Office of the Auditor-General, called for the mandate of the Auditor-General to be expanded to include other types of audits such as value for money and performance audits. Others said that the Office of the Auditor-General should be decentralised to all parts of Zambia.

The Auditor-General has authority, under the Constitution and other laws, to audit public expenditure and this includes expenditure incurred by public institutions other than the Government. In this regard, the Commission also observes that the question of "mandate" of the Office of the Auditor-General was dealt with by the Chona Commission. However, the Commission concerned itself only with the need to extend the mandate of the Office to public institutions which receive funds voted by Parliament on the same basis as Government departments.

Related to the subject of public audits, the Commission observes that private institutions that benefit from use of public funds should also be audited to the extent of their use of public funds. The Auditor-General should have authority to sub-contract private firms to conduct audits on its behalf. Further, the Office of the Auditor-General should have power to audit institutions other than those required to be audited by or under the Constitution or other laws and to charge fees thereon.

However, with respect to the scope of audits, this is designed in accordance with conventional methods of public audit, which do not include performance, value for money, benefit and impact evaluation. The Commission acknowledges the need for the mandate of the Office of the Auditor-General to be expanded so that such forms of audit are included.

While the Commission acknowledges the need for financial discipline among controlling Officers, it does not agree with the view that the Office should be given powers to prosecute those involved in financial irregularities, as it feels this would create unnecessary conflicts in the functions of the Office of the Auditor-General and dilute its focus. Prosecution should be left to specialised Offices and institutions. The Commission is, however, of the view that the Office should have the power to recommend cases to the DPP, the Anti-Corruption Commission or any other law enforcement agency for prosecution. The Commission feels that this is in conformity with the doctrine of separation of powers. In any event, even at present, there is no law prohibiting the Office of the Auditor-General to recommend cases to appropriate institutions for prosecution.

The issue of decentralisation of the OAG to all parts of Zambia was noted. However, the Commission is of the view that this should be dealt with administratively by the OAG.

Recommendations

In view of these observations, the Commission recommends that:

- the Constitution should stipulate the mandate of the Auditor-General as provided in the current Constitution, but expand this to include other types of audits such as value for money, performance, benefit, impact, evaluation, environment, forensic and any other necessary audits;

- constitutional provision should be made so that the Office of the Auditor-General has power to recommend cases for prosecution to the DPP, the Parliamentary Ombudsman, the Anti-Corruption Commission or any other law enforcement agency;

- the Constitution should provide that the Auditor-General shall perform such other duties and exercise such other powers and functions as may be prescribed by or under any law;

- the Office of the Auditor-General should continue to have constitutional powers to audit any office in the Government or quasi-Government institutions; and

- these recommendations should be effected through an appropriate Act of Parliament.

22.2.5 Reports

Submissions

22.2.5.1 Financial Reports of the Government

There was a submission from the OAG that the Constitution should provide for the Auditor-General to express a formal opinion on the Financial Report of the Government that is tabled before the National Assembly by the Minister of Finance (1).

22.2.5.2 Reports of the Auditor-General

There was one submission that the Report of the Auditor-General should be submitted to the National Assembly and the President not later than six months after the end of the financial year (1)

A few petitioners called for the Auditor-General's reports to be widely publicised for public scrutiny (5). Some added that these reports as well as the audits should be frequent, for example, quarterly (22).

Observations

The Commission notes that a number of petitioners were concerned about the frequency of Audit Reports. They also expressed dissatisfaction with the period within which the Report of the Auditor-General should be submitted after the close of the financial year. They felt that audits should be conducted regularly, for example, quarterly and that the Auditor-General's Report should be submitted to the National Assembly and the President within six months after the end of the financial year.

The Commission also notes that the OAG wanted to express an opinion on the Financial Report of the Government that is required by the Constitution to be tabled before the National Assembly.

The Commission observes that the Constitution requires the Financial Report of the Government to be tabled before the National Assembly within nine months after the end of the financial year. Similarly, the Constitution requires the Report of the Auditor-General to be presented to the President within 12 months after the end of the financial year. These time frames do not allow for meaningful scrutiny of public expenditure.

The view of this Commission is that the Financial Report by the Ministry responsible for finance should be prepared and submitted to the Auditor-General within six months for an opinion. This will give the Auditor-General an opportunity to express a formal opinion on the Financial Report of the Government. The Commission feels that it is important for the OAG to express a formal opinion on the Financial Report of the Government because it would give guidance to the National Assembly on whether or not money was expended on items for which it was appropriated and value for money has been realised. Thereafter, the Ministry in charge of finance shall submit to the National Assembly its Financial Report within nine months of the Audit Report.

In comparative terms, the Commission established that the Constitution of Ghana provides that the Auditor-General's Report should be presented to the National Assembly within six months after the end of the financial year.

On a related subject, this Commission notes that the Chona Commission observed that the Auditor-General's report did not always include all the answers and explanations submitted by controlling officers. The Chona Commission felt that the public should not be presented with a one-sided version, particularly because

some members of the public took seriously and without question whatever appeared in the Auditor-General's Report.

Recommendations

In view of these observations, the Commission recommends that the Constitution should:

- in addition to the existing provision on the tabling of the Financial Report of the Government before the National Assembly, provide that the Financial Report be prepared and submitted to the Auditor-General by the Ministry responsible for finance within six months after the end of each financial year; and

- provide that the Auditor-General's Report should be presented to both the National Assembly and President not later than nine months after the end of each financial year.

The Commission also recommends that appropriate legislation should provide that the Auditor-General's audits should be conducted frequently and regularly.

22.2.6 Auditing of the Office of the Auditor-General and the State Audit Commission

Submissions

Four petitioners, who included the OAG, said that the Constitution should provide for the OAG to be audited by external auditors appointed by the proposed State Audit Commission (4).

Observations

The Commission observes that petitioners who made submissions on this subject wanted the Constitution to provide for the OAG to be audited by external auditors appointed by the proposed State Audit Commission.

The Commission notes that transparency and integrity in the OAG can only be assured if the Office is itself audited by external auditors and findings made public. This should be provided for in the Constitution. In this regard, the Commission notes that the Constitution of Uganda has a provision that external Auditors appointed by the National Assembly shall audit the OAG.

The Commission agrees with the Office of the Auditor-General that it should be audited by external auditors appointed by the State Audit

Commission. The same should extend to auditing of the State Audit Commission.

Recommendations

The Commission recommends that the Constitution should make provision that:

- external auditors appointed by the State Audit Commission should audit the Office of the Auditor-General and the State Audit Commission;

- the report of the external auditors should be submitted to the President and the National Assembly simultaneously by the State Audit Commission; and

- the external auditors' report should be published.

CHAPTER 23

THE CENTRAL BANK

Term of Reference:

No. 26 Examine provisions relating to Government's accountability and transparency in the expenditure of public funds and those relating to the presentation of a financial report as required by Article 118 of the Constitution; and

No. 30 Examine and recommend on any matter that is connected with or incidental to the foregoing terms of reference.

23.1 Introduction

Central banks are usually established and exclusively owned by governments, as is the case with the Bank of Zambia. The primary function of a central bank is to issue and regulate legal tender, the nation's currency. Other traditional functions include:

- acting as banker, fiscal agent and financial advisor to the Government (operating the Government's revenue and payments account, providing credit facilities as stipulated by law, managing Government debt, registering Government stocks and securities, administering foreign exchange and playing other roles as agreed with the Government);

- acting as banker to the commercial banks (maintaining accounts for the banks, managing reserve requirements and providing credit as stipulated by law);

- acting as lender of last resort; and

- holding and managing a country's official foreign reserves.

Modern central banking has expanded to include functions such as:

- regulating and supervising the financial and banking system;

- regulating and supervising the development of the foreign exchange market; and

- undertaking, on behalf of the Government, quasi-fiscal activities aimed at promoting the growth of priority sectors.

The Bank of Zambia combines some of the traditional and modern functions outlined above.

Functions and objectives of central banks are sometimes mutually incompatible and this poses a challenge for them in their efforts to achieve set goals and objectives. The ability of central banks to succeed in their pursuit of set objectives requires that they enjoy maximum independence in discharging their functions. Such independence may be achieved through constitutional provisions establishing a central bank as an independent and autonomous institution and guaranteeing security of tenure of office for the Governor.

Petitioners to the Mwanakatwe Commission drew the attention of the Commissioners to the important role of the Central Bank in conducting monetary policies meant to ensure control of inflation. They were of the view that the Bank of Zambia had not played its role effectively resulting in the economy being managed by deficit financing. It was argued that high inflation, high interest rates, prohibitive costs of consumer goods and services and the flight of capital could be attributed to the manner in which the Central Bank operates.

Petitioners in particular pointed out the high turnover of Governors of the Central Bank and that, at one time, the Bank operated as an extension of the Government. To remedy this situation, petitioners called for the position of the Governor of the Bank to be protected by the Constitution and that the Bank should be granted at least semi-independent status. Some of the recommendations of the Mwanakatwe Commission were that:

- the Central Bank should be established by the Constitution and be independent from the Executive;

- the Governor and other Board Members should be appointed by the President, subject to ratification by the National Assembly; and

- there should be a clause in the Constitution which would permit the intervention of the National Assembly or the President in the operations of the Bank under exceptional circumstances.

Current Constitutional Provisions

The Bank of Zambia is established by an Act of Parliament and not under the Constitution as is the case, for example, in South Africa and Uganda. It was first established by the Bank of Zambia Act of 1964, which has since been repealed and replaced. Currently, its operations are provided for under two statutes, namely the Bank of Zambia Act, No. 43 of 1996 and the Banking and Financial Services Act, No. 185 of 1995.

Functions

The Bank's responsibility and primary objective, as provided for under the Bank of Zambia Act, is to "formulate and implement monetary and supervisory policies that will ensure the maintenance of price and financial systems stability so as to promote macro-economic development". To support this function, the Act also gives power to the Bank to:

- licence, supervise and regulate the activities of banks and financial institutions in order to promote the safe, sound and efficient operations and development of the financial system;
- promote efficient payment mechanisms;
- issue notes and coins to be legal tender;
- support the efficient operation of the exchange system;
- act as banker and fiscal agent to the Government;
- act as advisor to the Government on matters of economic and monetary management; and
- act as lender of last resort.

Monetary policy

Monetary policy is understood to mean the Central Government's policy with respect to the quantity of money supply in the economy, the rate of interest and the exchange rate. The essence of monetary policy objectives is to maintain price stability by controlling money supply. Thus, monetary policy is a process whereby a Central Bank affects the economy through its influence over the expansion of money and credit conditions.

Issuance of Notes and Coins

The Bank takes responsibility for ensuring that the demand for notes and coins in the country is met and that these meet the necessary standards in terms of quality and warranty against counterfeiting. The Bank prints and distributes bank notes and coins and withdraws those that are worn out or out of use.

Banking and Fiscal Services to Government

These services, which are provided by the Bank as agent, include:

- operation of Government's deposit accounts through which flow all its receipts and expenditures;

- providing advice on the execution of Government policy with respect to exchange rate policy and management of the exchange reserves; and

- providing advice on and arranging the sale of Government securities and servicing of its debt.

Lender of Last Resort

The Bank has the power to make secured or unsecured loans to banks and certain other financial institutions. There are essentially two types of situations which call for such liquidity support. These are:

- "ordinary" loans, which are made to those financial institutions that encounter shortfalls in their deposit balances at the Bank as a result of unexpected payment flows associated with the daily process of clearing cheques and other payments; and

- "extraordinary" loans, which are made to institutions which are solvent, but experiencing liquidity problems.

Licensing and Supervision of Banks and Financial Institutions

The Bank plays a direct and active role in the regulation and supervision of banks and financial institutions. To commence banking or financial business, a company has first to be licensed by the Bank through the Office of the Registrar of Banks and Financial Institutions.

Promotion of Payments Systems

The Bank has an important oversight role with respect to the evolution of the payments system and other systems for netting and settling financial transactions. The final settlement of payments in Zambia occurs on the books of the Bank.

Economic Advisor to Government

The Bank also acts as an advisor to the Government with respect to monetary and financial issues and helps to represent Zambia at international meetings (usually under the auspices of the International Monetary Fund and the World Bank Group).

Management

To a large extent, the Bank of Zambia Act has placed management of the Bank in the hands of a Board of Directors. However, in terms of section 5 of the Act, the Minister responsible for finance "may convey to the Governor such general or particular Government policies as may affect the conduct of the affairs of the Bank and the Bank shall implement or give effect to such policies".

The Governor is the Chief Executive of the Bank and Chairperson of the Board. The Minister for Finance appoints other Members of the Board, who should not be more than six, from amongst individuals with professional or academic experience in business or financial matters and who are not employees of the Bank. The Board Members choose from among themselves a Vice-Chairperson.

The Governor is appointed by the President, subject to ratification by the National Assembly, for a term of five years subject to renewal for a similar further term. The Deputy Governor(s) is (are) also appointed by the President for a renewable term not exceeding five years.

Accountability

The Bank of Zambia Act requires the Governor, in consultation with the Minister responsible for finance, to publish semi-annually a Monetary Policy Statement which contains certain prescribed information which the Minister is obliged to lay before the National Assembly.

23.2 Submissions, Observations and Recommendations

Twenty-two (22) submissions were made on this subject. Though relatively few petitioners addressed the subject of the Central Bank, these included the Bank of Zambia and others who had specialised knowledge in banking and finance. The main focus of submissions was the need for the Constitution to establish the Central Bank and to make provision for its operational independence, mode of appointment of the Governor as well as security of tenure of the Office.

23.2.1 Establishment

Submissions

The Bank of Zambia said that the Constitution should establish the Central Bank, leaving out operational details which can be dealt with by the Bank of Zambia Act (1). The Act should clearly set out the Bank's objectives against which its performance should be evaluated. These objectives should be unequivocal and achievable.

Observations

The Commission observes that only the Bank of Zambia made submissions on the subject of establishment of the Bank. The Bank wanted the Constitution to establish the Central Bank, leaving out operational details. The Bank further wanted the Bank of Zambia Act to clearly stipulate its objectives against which its performance would be assessed and that these should be achievable.

From the views submitted, the Commission discerns two areas of concern. One is that the Bank of Zambia plays an important role in the economic development of the country. It should therefore be empowered to function without undue control or influence. The other is that it is the Government which has responsibility for the overall economic policy of the country and that there should be avenues for inputs by the Government.

The Commission observes that the Bank is established by an Act of Parliament and not by the Constitution.

The Commission observes that the Mwanakatwe Commission dealt with the subject of the Central Bank and recommended that it should be established by the Constitution and be independent from the Executive. The Government did not accept the recommendation, arguing that it was not true that nearly all modern Constitutions provide for the creation of independent Central Banks. The Government further argued that the regulatory and monitoring powers of the Bank should be strengthened through an Act of Parliament, such as the Banking and Financial Services Act of 1994.

This Commission is of the view that the Bank should be established by the Constitution because of the important role it plays in the economy. Further, the Commission notes that the Bank is a permanent institution which cannot in its substantive existence be subject to ad hoc arrangements. The Commission notes that this would necessitate amendment to the Bank of Zambia Act.

Recommendations

The Commission recommends that the Constitution should establish the Bank of Zambia.

23.2.2 Operational Independence and Autonomy

23.2.2.1 Operational Independence

Submissions

The Bank of Zambia said that the Constitution should provide for and guarantee the operational independence of the Bank, i.e. freedom (without hindrance) to pursue monetary and regulatory policies within the parameters set by and agreed upon with the Government in order to achieve set goals and objectives against which its performance can be measured (1).

Observations

The Commission considered the submission made by the Bank of Zambia on the subject of operational independence of the Bank. The Commission observes that Section 4 (1) of the Bank of Zambia Act, Cap. 360, provides for liaison between the Bank and the Government. The view of the Commission is that the interaction between the Bank and the Government is essential because of the important role the Bank plays in the economy.

The Commission is also of the view that the Bank should have freedom to pursue monetary and regulatory policies within the parameters set by and agreed upon with the Government. However, the formulation of economic policies of the country should be the responsibility of the Government. In other words, the Bank should have instrument independence, that is, the freedom to determine how it pursues set objectives, while the Government on the other hand should retain goal independence, which is the responsibility to set goals and objectives.

Recommendations

The Commission recommends that the Constitution should provide for and guarantee the operational independence of the Bank.

23.2.2.2 Governor/Deputy Governor – Appointment

Submissions

The Bank of Zambia said that the Office of the Governor of the Central Bank should be constitutional and so should matters related to the Governor's appointment or removal. The Bank further said that the current provisions for appointment of the Governor, as provided for under the Bank of Zambia Act, should be stipulated in the Constitution, that is, the Governor should:

- be appointed by the President for a period not exceeding five years (renewable), subject to ratification by the National Assembly. However, the Governor should assume office only after ratification by the National Assembly;

- be a person with recognised professional qualifications and experience in financial and economic matters; and

- pursue set objectives and the law should spell out clearly how he/she is to be accountable (1).

A few petitioners said that the Governor should be appointed by the President, subject to ratification by the National Assembly (9).

Another petitioner, however, suggested that appointment of the Governor of the Central Bank should be made by Parliament and not the President (6).

The Bank of Zambia further proposed that the Bank of Zambia Act should be amended so as to provide that the Board of the Central Bank appoints the Deputy Governor(s). The Bank was of the view that the President should not appoint Deputy Governor(s).

One petitioner also said that the appointment of Governors and Deputy Governors of the Bank should be gender sensitive (1).

Observations

The Commission observes that the majority of petitioners who made submissions on this subject, including the Bank of Zambia, wanted the Governor to be appointed by the President, subject to ratification by National Assembly. A few petitioners said that the National Assembly, and not the President, should appoint the Governor of the Central Bank.

The Commission also notes that the Bank of Zambia wanted the Office of the Governor of the Central Bank to be constitutional and matters related to the Governor's appointment or removal to be stipulated in the Constitution.

The Commission acknowledges that in view of the key role that the Central Bank plays in the management of the economy, the Government should retain the power to appoint the Governor. The current system of the President appointing the Governor subject to ratification by the National Assembly has worked well. However, the Commission agrees with the submission by the Bank of Zambia that the Office of the Governor of the Bank should be constitutional. This is in order for the Constitution to protect the operational independence of the Bank. This, therefore, means that security of tenure of the Governor of the Bank of Zambia should be provided under the Constitution.

Further, the Commission agrees with the Bank that the Deputy Governor should not be appointed by the President, but by the Board. A Deputy Governor should have requisite qualifications in the field of finance or economics and should be appointed from amongst serving members of staff of the Bank, or from outside the Bank in consultation with the Governor of the Bank.

On the subject of qualifications for appointment to the Office of Governor of the Central Bank, the Commission agrees that professional qualifications should be extensive knowledge of and experience in banking, finance, law or any other field relevant to central banking. In addition, there should be a minimum age qualification of 45 years because the responsibilities of the Office demand that the holder should not only have extensive experience but also be mature.

Related to the subject of appointment of Governor of the Central Bank, the Commission observes that since 1964, eleven men have been appointed to the position of Governor of the Bank, but not a single woman has been appointed to that position. Only

one woman held the position of Deputy Governor for a short period of five years. This apparent discrimination against women ought to cease, as the country no longer lacks women with qualifications and experience in finance and economics.

Recommendations

In view of the observation made above, the Commission recommends that the Constitution should provide that:

- the Governor be appointed by the President on a renewable fixed term contract, subject to ratification by the National Assembly;

- the terms of the contract shall be prescribed in an Act of Parliament;

- there should be a minimum age qualification of 45 years for appointment to the Office of Governor of the Central Bank; and

- qualification for appointment to the Office of Governor of the Bank is extensive knowledge of and experience in banking, finance, law or any other field relevant to central banking.

The Commission further recommends that the Act of Parliament governing the operations of the Bank should make provision with respect to appointment of Deputy Governor(s).

In addition, the Commission recommends that as a matter of policy, appointments of Governor and Deputy Governor of the Bank should be gender sensitive.

23.2.2.3 Governor/Deputy Governor(s) – Tenure of Office and Conditions of Service

Submission

The Bank of Zambia proposed that:

- in order to guarantee the Governor's continuity in office and remove patronage, the term of office of the Governor should not run concurrently with the term of office of a particular Government;

- the Constitution should spell out that a Governor's term of office could be curtailed only for the dereliction of duty, misconduct in office or physical or mental incapacity;

- the Board should set terms and conditions of service of the Governor and Deputy Governor; and

- the Board should have powers to remove a non-performing Deputy Governor as determined by the set objectives (1).

Observations

The Bank of Zambia made submissions on the subject of tenure of office and conditions of service of the Governor and Deputy Governor of the Bank. The Bank wanted security of tenure and continuity to be accorded to the Office of the Bank Governor. It also wanted the Board to determine the conditions of service of the Governor and Deputy Governor and the power to remove the latter to be vested in the Board.

The Commission is of the view that since the Governor's Office will be constitutional, there is need for the Constitution to accord this Office security of tenure and, for the same reason, the issue of continuity in the Office of the Bank Governor becomes pertinent.

The Commission observes that the Bank of Zambia Governor is the Chairperson of the Board and therefore the Board would not exercise its objectivity if it sets the terms and conditions of service for the Governor, because he/she is an interested party. The Commission also observes that since the Governor of the Bank of Zambia would be a constitutional office-holder, her/his emoluments should be determined by the independent National Fiscal and Emoluments Commission in line with earlier recommendations in this Report.

The Board should determine the remuneration and other conditions of service of the Deputy Governor, and provision for this should be made in the Bank of Zambia Act. The Board should also have power to remove a non-performing Deputy Governor as determined in accordance with the set objectives, which should be defined by the Bank of Zambia Act.

Recommendations

The Commission recommends that the Constitution should provide that the emoluments of the governor be determined by the proposed National Fiscal and Emoluments Commission.

The Commission further recommends that the Constitution should provide that:

- removal from Office of the Governor of the Bank shall only be on grounds of incompetence, misconduct, bankruptcy or physical or mental incapacity;

- the procedure for removal of the Governor from office shall be prescribed by the Act of Parliament governing the operations of the Bank;

- the emoluments of the Governor shall be recommended for approval of the National Assembly by the Emoluments Commission; and

- the Board shall determine the emoluments and terms and conditions of service of the Deputy Governor(s).

23.2.3 The Board

Submissions

The Bank of Zambia proposed with respect to the Board that:

- the current arrangement of the Minister appointing the Board should be maintained. A mechanism of appointing Board members by a management consulting team may not be appropriate;

- in order to ensure transparency, the members of the Board of the Central Bank should be drawn from some key financial and economic institutions in the economy. They should be Zambian nationals with recognised and appropriate qualifications and experience in economic and financial matters;

- the Board members should serve a non-renewable term of five years. To ensure continuity, the appointment of Board members should be such that the contract periods are staggered;

- the Board members should elect the Vice-Chairperson from among themselves. This will ensure separation of management responsibilities from board mandate;

- the Governor should retain Chairpersonship of the Board because of the significant policy and institutional roles of the Board. This is in tandem with the practice in virtually all central banks the world over; and

- Deputy Governors should be members of the Board to ensure balanced representation between internal and external directors' views (1).

One other petitioner said that, in order to maintain a separation between the functions of policy and management, the Governor of the Bank of Zambia should not be the Chairperson of the Board (1).

Observations

Only the Bank of Zambia and one other petitioner made submissions on the subject of the Board of the Bank. The Bank expressed satisfaction with the current arrangement whereby the Minister responsible for finance appoints members of the Board. On composition, the Bank called for members to be appointed from key financial and economic institutions and to have qualifications and experience in economic and financial matters.

The Bank said that the Governor should retain Chairmanship of the Board because of its policy and institutional roles and argued that this is the practice the world over. The Bank also wanted a balance between the external and internal Directors to be achieved through the inclusion of the Deputy Governor on the Board.

The Bank also wanted Board members to serve a non-renewable term of five years, subject to a provision that the terms of all the members should not run concurrently in order to ensure continuity.

The Commission notes that the Board is not only appointed for the purpose of the functions of the Bank, but also for the purpose of ensuring transparency and accountability. In view of this, the Board of Directors of the Bank should reflect representation of key financial, industrial and economic institutions of Zambia. Members should be appointed by the Minister responsible for finance in consultation with these institutions.

The Commission observes that the Mwanakatwe Commission recommended that the Governor and other Board members should be appointed by the President, subject to ratification by the National

Assembly. The Government did not accept this recommendation because it was felt that provisions of the Bank of Zambia Act were adequate.

This Commission is of the view that it is unnecessary to involve the President and National Assembly in the appointment of members of the Board of the Bank.

In contrast to the submission made by the Bank of Zambia, one petitioner challenged the propriety of the provisions of the Bank of Zambia Act which make the Governor of the Bank of Zambia Chairperson of the Board of Directors. The petitioner argued that best practice in corporate governance recommend the separation of the functions of a Chief Executive from those of a Chairperson and members of a Board. He elaborated that the Board initiates policy while the Chief Executive supervises management.

The Commission also observes that an external Chairperson of the Board would not in any way impair the efficiency and effectiveness of the Governor or management if such person had the necessary qualifications and experience. The Commission has not, however, received any evidence that the present arrangement has caused problems that justify change. In any event, the Commission has established that the current practice is common the world over.

Regarding the submission that the Deputy Governor should be a member of the Board, the Commission is of the view that whilst the Deputy Governor may attend Board meetings and participate in deliberations as part of the management team, it is unnecessary that he/she be a member of the Board.

Regarding the term of office, the Commission is of the view that Directors other than the Bank Governor should serve a non-renewable term of four years, but in order to ensure continuity, there should be a provision to ensure that Directors do not all vacate office at once.

Recommendations

The Commission recommends that the Bank of Zambia Act should provide that:

- the Board of Directors of the Bank of Zambia should reflect representation of key financial, industrial and economic institutions of Zambia and that they should be appointed by the Minister responsible for finance, in consultation with relevant institutions;

- the Board representation should comprise only Zambian nationals with proven and appropriate qualifications and experience, and should reflect gender balance;

- the Directors, excluding the Bank Governor, should serve a maximum of two four-year terms, provided that some Directors may when necessary vacate office earlier by lot in order to ensure continuity;

- the Governor should retain the chairmanship of the Board while the Vice-Chairperson should be elected by the Board from among themselves; and

- the Deputy Governor should not be a member of the Board, but may attend Board meetings as part of the management team of the Governor.

CHAPTER 24

LAND

Terms of Reference:

No. 5 Examine and recommend the elimination of provisions which are perceived to be discriminatory in the Constitution;

No. 16 Examine and recommend to what extent issues of gender equality should be addressed in the Zambian Constitution; and

No. 30 Examine and recommend on any matter that is connected with or incidental to the foregoing terms of reference.

24.1 Introduction

Land tenure and reforms is a broad subject, but for the purpose of this Report, the discussion is confined to submissions made to the Commission in the current constitution review process.

The Historical Background of the Land Tenure System

Prior to the colonial occupation of Northern Rhodesia, all land fell under the customary domain to be owned and regulated according to customary law. The year 1924, however, saw the commencement and implementation of the colonial land policy of land reservation, culminating in the 1928 Northern Rhodesia (Crown Lands and Native Reserves) Order in Council, followed by the 1929 Northern Rhodesia Crown Lands and Native Reserves (Tanganyika District) Order in Council and the 1929 Northern Rhodesia (Supplemental) Order in Council.

The conclusion of this policy of land reservation carved the territory into native Reserves and Crown Land. Reserves were to be the permanent habitat of the indigenous people and Crown Land was to be available to settlers for industrial and economic development purposes. In terms of the law, interests and rights in Reserves were to be governed by customary law while English law and local statutes were to apply to Crown Land. In terms of tenure, occupation and interests in Reserves, these were not available to non-indigenous people except for

Christian missionaries (limited to 33 years lease) and individuals (limited to a five-year lease).

There was, however, to be a variation in this land policy between 1935 and 1947 with the arrival on the scene of Governor H. Young from the neighbouring Protectorate of Nyasaland. Governor Young wanted to transplant the Nyasaland Trust land scheme into Northern Rhodesia, attacking the Native Reserves Scheme for excluding the assistance and participation of European settlers. He regarded the Scheme as rigid and impermissive to development. He argued that no European investment could be pumped into Reserves, which had leasehold interest of only five years. He saw in the Trust land policy emerging development centres under African occupation. This argument ultimately won the day, culminating in 1947 in the Native Trust Land Order in Council.

A third category of land was therefore created, carved out of the existing Crown Land. This land, like Reserves, was to be for occupation by indigenous people, but European involvement was not excluded. Grants of right of occupancy were all owed to European settlers. The policy of allowing these grants of occupancy of up to 99 years was intended to attract non-indigenous participation in the economic development of the Territory. Like in Reserves, customary law was to apply to all interests and rights in Native Trust land except for grants of rights of occupancy.

It is, however, important to note that these developments only related to North Eastern Rhodesia. Barotseland and North Western Rhodesia were subject to other arrangements initiated through Concessions granted by the Litunga (King of the Lozi people) to the British South Africa Company. The 1909 Supplementary Concession in this regard was of particular significance. By this Concession Barotseland was reserved and remained the exclusive domain of the Lozi King and his people.

These categories of land were inherited by the nationalist Government at Independence in 1964. The status of land in Barotseland was, however, in 1970 put at par with the Reserves elsewhere in the country. This was brought about through the enactment of the Western Province (Land and Miscellaneous Provisions) Act of 1970.

To date there have been only two significant developments in the land tenure system effected by the two successive post independence Governments. In 1975, Government abolished all freehold estates in what was before then Crown land, but by now State land, and abridged the maximum interest in such land to a duration of up to 100 years. This was effected through the Land (Conversion of Titles) Act, 1975. This was motivated by the Watershed Speech which was delivered by the First President of the Republic of Zambia, Dr. Kenneth Kaunda at Mulungushi Rock of Authority, Kabwe in July, 1975. In 1995, however, the Zambian Government, while retaining leasehold tenure, repealed the 1975 Act.

There is now a new Lands Act. The repeal appears to have been triggered off by delays in obtaining State consent to assign.

Current Constitutional and Legislative Provisions

The Constitution does not provide for matters of land tenure. The 1995 Lands Act just referred to deals with these matters.

The 1995 Lands Act No. 25

The main features of the Act are that while retaining State land, Reserves and Trust Land have been abolished and merged into Customary Land. The Act vests all land in Zambia in the President with wide powers of dispositions including the power to alienate land to a non-Zambian. Interests in customary land can also be very easily converted to leasehold tenure, thereby discarding all the features and characteristics of customary land. The main features of the Act are:

(a) Vesting of Title

Section 3 (1) of the 1995 Lands Act provides in part that:

> *" …… land in Zambia shall vest absolutely in the President and shall be held by him in perpetuity for and on behalf of the people of Zambia".*

There is a further assurance to the people of Zambia couched in these terms:

> *"All land in Zambia shall, subject to this Act, or any other law be administered and controlled by the President for the use or common benefit, direct or indirect, of the people of Zambia".*
> *(Section 3(5))*

(b) Powers of Alienation of Land by the President

Under Section 3 (2) and (3) of the Lands Act, the President can alienate land vested in him to both Zambians and non-Zambians. This land that can be alienated includes that which is held under customary tenure (Section 3 (4)).

(i) Alienation of Land to Zambians

There is here a general power to alienate land to Zambians. The right of a Zambian to own land is not enshrined in the Constitution and the Act is also silent on the issue. This right, it may be observed, is assumed but not spelt out and guaranteed.

(ii) Alienation of Land to non-Zambians

The categories of non-Zambians to whom land can be alienated are as follows:

- a permanent resident in the country;
- an investor within the meaning of investment laws of the country;
- a non-Zambian who has obtained the President's consent in writing and under her/his hand;
- a non-Zambian registered company with less than 25% of the issued share owned by non-Zambians;
- a non-Zambian statutory corporation created under an Act of Parliament;
- a non-Zambian registered co-operative society with less than 25% of its membership being non-Zambian;
- a non-Zambian body registered under the Land (Perpetual succession) Act which is non-profit making, charitable, religious, educational or philanthropic approved by the Minister;
- where the interest or right is being inherited or being transferred through survivorship or operation of law to a non-Zambian;
- a non-Zambian commercial bank registered under the Laws of Zambia; and
- a non-Zambian granted a concession or right under the National Parks and Wildlife Act. (This Act has been repealed and replaced by the Zambia Wildlife Act, No. 12 of 1998).

In relation to the President's power to alienate land to non-Zambians, it is worth noting that the President can grant land to a non-Zambian who is either resident or non-resident. This power under the Act, it must be noted, does not impose any restrictive conditions on the President, clearly suggesting that its exercise can be influenced by subjective considerations of the President.

The only restriction imposed on the President relates to the duration of tenure. The President is constrained from alienating land beyond periods of 99 years except with a two-thirds majority approval by the National Assembly. This restriction applies to grants relating to both Zambians and non-Zambians.

(c) Conversion of Customary Tenure to Leasehold Tenure

Under Section 8 (1) and (2) of the Act, a title holder of land under customary tenure can convert the same into leasehold tenure that does not exceed a period of 99 years. However, this conversion is conditioned on obtaining "the approval of the Chief and local authorities in whose area the land to be converted is situated, and in the case of a Game Management Area, the Director of National Parks and Wildlife Service ……"

What needs to be noted is that these provisions do not state the position when approval is unreasonably withheld. This negates a landholder's rights of property because there can be no conversion without approval of the two institutions.

In discussing the subject of land tenure in relation to rights to land, it is also important to deal with the long standing conceptual misunderstandings as to what "vesting" means. Some people think that vesting title means ownership of land in the person vested with title. This is not correct.

The Lands Act of 1995, as already stated, vests all land in the President who holds the same in perpetuity for and on behalf of the Zambian people. Further, this holding is for purposes of administration and control by the President "for the use or common benefit, direct or indirect, of the people of Zambia". This vesting, quite clearly, does not mean that the President is owner, but rather that he/she is trustee and administrator of the land. The President therefore does not own beneficial and proprietary interests; what the President has are powers of regulation and administration.

In the same manner that there is misunderstanding with regard to the President, so has the confusion spread to Chiefs. While Chiefs can own land in their individual capacities, it is a misconception that they own all customary land situated in their respective geographical areas.

A. N. Allott, an authority on land tenure in Africa, analyses this misunderstanding in a helpful and instructive manner. He draws the distinction between "interests of benefit" and "interests of

control". The former pertain to beneficial interests, which vest title in the landlord. The latter, however, pertain to control and regulation. The Chief and Headman play the role of control and regulation in acquisition of land and its use and cannot therefore, can be regarded as owner of the land.

To buttress this conclusion, various studies on customary tenure in Zambia clearly conclude that there is individual ownership of land throughout Zambia. Even in parts of Zambia such as Barotseland (now Western Province), individual title is recognised in addition to royal title to that land vested in the Royalty.

Acknowledgement of such individual title and the regulatory role of traditional institutions should clearly be reflected in the Constitution and supporting legislation.

Some modern constitutions make provision for land tenure systems and matters related thereto, including administration.

For example, Chapter 15 of the Constitution of Uganda is devoted to land and the environment. Article 237 vests land in the citizens, but also provides that the Government or a local government may acquire land in the public interest. In addition, the Article provides that natural lakes, rivers, wetlands, forest reserves, game reserves, national parks and any land to be reserved for ecological and touristic purposes for the common good of all citizens shall be held by the Government or a local government in trust and protection for the people. The Constitution also specifies the land tenure systems, makes provision for acquisition of certificates of ownership for land under customary tenure, acquisition of land by non-citizens, creates a Land Commission with specified functions and guarantees security of tenure for Commissioners.

In the case of Ghana, Article 257 of the Constitution provides that all public lands in Ghana shall be vested in the President on behalf of and in trust for the people of Ghana. The Constitution also establishes a Lands Commission and provides for its functions, including management, on behalf of the Government, of public lands or any other land vested in the President or in the Commission; and for its independence (Articles 258 and 265). The Constitution further makes provision for the establishment of a branch of the Commission in all regions of the country (Article 260). The Constitution limits leasehold on land by non-citizens to a maximum of 50 years (Article 266).

Land under traditional authority in Ghana, known as "stool lands", is vested in the appropriate "stool" (traditional authority) on behalf of and in trust for the subjects of the "stool", in accordance with customary law and usage (Article 267). The Constitution also establishes the Office of the Administrator of "Stool Lands" whose functions are the collection of rents, royalties and other dues which are distributed in percentages to the Office (10%) and the remainder to the traditional authority for maintenance of the "stool"(25%), traditional authority (20%) and District Assembly (55%).

The Chona Commission considered the subject of land. Specifically, the Commission considered the question whether non-Zambians should continue to hold and sell land. It also deliberated on the subject of limitation on land that an individual or corporate body could hold. Whilst observing that provisions of the law for acquisition of unutilised land were adequate in addressing the latter subject, the Commission recommended that aliens should not be allowed to hold freehold titles to land.

The Mvunga and Mwanakatwe Commissions did not address the subject of land.

24.2 Submissions, Observations and Recommendations

Five hundred and twenty-two (522) submissions were received on this subject.

There were petitioners to this Commission who were opposed to land being vested in the President and would like to see title to customary land vest in the Chiefs. Others of course are opposed to vesting land in the Chiefs, fearing potential abuse by Chiefs. Petitioners who have expressed concern on the subject have raised the following issues, that:

- customary land should be vested in Chiefs;
- title should be granted to land under the customary domain;
- land should not be vested in Chiefs because of the potential danger of abuse by some Chiefs;
- there should be a limitation in hectarage on how much land can be granted to an individual;
- a citizen should have a constitutional right to own land;
- women should have legal access to ownership of land; and

- tenure of land should be limited in duration, e.g. 10 years, 15 years, 20 years, particularly to foreign investors.

It is quite obvious from these concerns that the Constitution should be explicit on the subject. Constitutional provisions, however, need not be extensive because this subject is better provided for in the appropriate legislation on land matters.

24.2.1 Vesting of Title

Submissions

Some petitioners said that land under traditional authority should be vested in Chiefs (169). Three others said that Chiefs should have power over land and its wealth (3). Other petitioners, on the other hand, felt that all land should be vested in the President on behalf of the people of Zambia (25). A few petitioners said that traditional rulers should not have authority over land (8).

One petitioner argued that the State should only issue title deeds for land formerly known as Crown land while Chiefs issue title deeds for traditional land (1).

The House of Chiefs, on the other hand, argued that the Constitution should provide that State land shall vest in the President while customary land shall be vested in Chiefs on behalf of their subjects (1).

There was one submission that every person in a village owning land should be given title deeds (1).

Observations

The Commission observes that the majority of petitioners who made submissions on vesting of title wanted land under traditional authority to be vested in Chiefs. However, some petitioners felt that all land should be vested in the President on behalf of the people of Zambia. A few petitioners submitted that traditional rulers should not have authority over land.

The Commission feels that the call for land under customary law to be vested in Chiefs is partly inspired by the misconception that the vesting of all land in Zambia in the President entails that the President owns the land in his own right and not for or on behalf of the people. This perception is contrary to the provisions of the 1995 Lands Act, which makes it clear that this vesting is on behalf of the people of Zambia and that all land shall be administered and controlled by the President for the use or common

benefit of the people of Zambia. However, the Commission appreciates the concerns of the majority of petitioners on the subject in the light of the unrestricted powers and discretion that the Act vests in the President to alienate land to both Zambians and non-Zambians.

In its consideration of the subject of vesting of land, the Commission examined constitutions of other countries and found that vesting of land varied in many countries. For instance, Article 257 (1) of the Constitution of Ghana vests all public land in the President on behalf of and in trust for the people of Ghana, while the Ugandan Constitution vests land directly in the citizens. However, land under traditional authority in Ghana is vested in the respective traditional authorities on behalf of and in trust for the subjects, in accordance with customary law and usage.

It is the view of the Commission that the Constitution should address the subject of vesting of the land, considering its importance. In this regard, all land in Zambia should continue to be vested in the President for purposes of administration and regulation. This should be so because as Zambia has all along been a unitary state, the President is the sole representative of all the people. However, in the vesting of all land in the President, there should be added in the Constitution that this vesting is "for the use or common benefit, direct or indirect of the people of Zambia". This constitutes an assurance and guarantee that there will be no abuse in the management, use and disposition of land to the detriment of the people of Zambia. Further, in the regulation and administration of land, local authorities and Chiefs should have a part to play within the context of devolution of power.

The Commission is not persuaded by the petitioners who argued that land under traditional authority should be vested in Chiefs because Chiefdoms are integral components of Zambia. However, the Commission acknowledges the role of Chiefs in the administration of land in their Chiefdoms and therefore does not concur with the submission that traditional rulers should not have authority over land.

Recommendations

The Commission therefore recommends that the Constitution should explicitly provide that:

- all land in Zambia belongs to the citizens of Zambia and shall be vested in the President on behalf of the citizens for purposes of administration and regulation, for the use or common benefit, direct or indirect, of the citizens of Zambia; and

- in the regulation and administration of land, local authorities and Chiefs should have a part to play within the context of devolution of power.

24.2.2 Access, Acquisition and Ownership – Hectarage

Submissions

Some petitioners said that the Constitution should provide for a maximum area of land that can be acquired and owned by an individual (21). Some petitioners who made submissions on this issue added that vast tracts of land leased to individuals or corporate entities should be repossessed and redistributed.

One petitioner suggested that some forest reserves should be degazetted to allow farming activities (1).

There was a submission that the land tenure system should be reviewed in order to deal with the anticipated problem of shortage of land (1).

A number of petitioners argued that access to and ownership of land by Zambians should be guaranteed by the Constitution and that Zambians should be given priority in the allocation of land, while some of these also said that non-Zambians should not own land (65). Some petitioners expressed the view that leasehold to non-Zambians should be between 10 and 30 years (61).

A few petitioners were of the view that title deeds should not be issued in respect of land under traditional authority (10). One petitioner, however, expressed the view that the Constitution should guarantee security of tenure of land under traditional authority (1).

Eleven others were of the view that issuance of title deeds to land should be decentralised (11).

A number of petitioners said that the Land Act should be reviewed so that the majority of Zambians can have access to and own land (90). One petitioner said that the Government should develop a land tenure system that will minimise pressure (1).

Two petitioners argued that river frontages and lakeshores should be accessible to all the people and therefore should not be leased (2).

Three petitioners said that local communities should be consulted before investors are permitted to carry out projects on traditional land (3).

One petitioner felt that there should be gender equality in the acquisition of land (1).

Observations

On the subject of access to acquisition and ownership of land, the Commission notes that petitioners addressed a range of issues.

The majority of petitioners wanted citizens to have the right of access to land and the right to acquire and own land. A few petitioners did not want title deeds to be issued in respect of land held under customary tenure.

The Commission also notes that many petitioners did not want non-Zambians to own land, while others wanted Zambian citizens to have priority over non-Zambians in relation to access to and ownership of land. Related to this, some petitioners called for the decentralisation of issuance of title deeds. Others also wanted the law to reserve for the public the right of access to river frontages and lakeshores and complained of the current practices of leasing such land without reserving the right of way or access to the public.

Some petitioners were concerned that measures should be taken to prevent an impending crisis due to shortage of land. Suggested measures included repossession and redistribution of vast tracts of land leased to individuals or corporate entities, prohibiting non-Zambians from owning land, de-gazetting of forest reserves, review of the land tenure system to limit the amount of land a person can hold, and a requirement that traditional rulers do not allocate land to investors without consulting their subjects.

The Commission considered the subject of the right to land. Land is the paramount permanent asset to any country. Therefore, apart from regulations and dispositions, citizens must be guaranteed the right of access to and right to acquire land.

The Commission observes that land under customary tenure cannot be used as collateral to borrow money from financing institutions because of lack of registered title. The Commission acknowledges, however, that this land is guaranteed for future generations. It is occupied free of charge and hence the poor can afford access to it and use it without fear of eviction or dispossession.

On statutory tenure, it has been observed that it is easier to use this land as collateral than land held under customary law. However, land under statutory tenure only comprises about 6% of the land in the country. In addition, the procedures involved in obtaining statutory tenure, ranging

from allocation, surveying to registration, are too long, bureaucratic and costly.

The Commission notes that the problem of accessing and owning land is further compounded by the fact that the process is highly centralised. This makes the process of acquiring land costly in terms of time and financial and other resources. The Commission also observes that the legal framework governing land administration is found in several statutes. These statutes are not comprehensive and do not adequately address all the needs in the land administration and registration system.

Similarly, land matters are dealt with by a multiplicity of institutions, including the Ministry of Lands; the Ministry of Commerce, Trade and Industry; the Ministry of Tourism, Environment and Natural Resources; the Resettlement Department in the Office of the Vice-President; the Department of Physical Planning and Housing in the Ministry of Local Government and Housing; and the Land Use Planning Department of the Ministry of Agriculture and Co-operatives. There is no co-ordination among these institutions.

The Commission considers that in view of the importance of land to citizens' livelihoods, the right of access to and right to acquire land should be made explicit in the Constitution and include gender equity considerations. The State should be obligated to take necessary measures to facilitate citizens' exercise of this right. This should include ensuring that appropriate legislation makes provision that individual title to land, whether in State land or customary tenure, should be available. In relation to customary tenure, there should be included in the legislation that the Local Authority and Chief can withhold consent for good cause.

The Commission observes that under the Lands Act, foreign individuals can own land. Foreign corporate entities registered in Zambia may also own land, although in the case of a company or a co-operative society it is a requirement that at least 75% of the issued shares should be owned by Zambians. Some foreign investors have taken advantage of the weaknesses in the Act by using Zambians as "fronts" for the sole purpose of owning and obtaining title to land. The Commission is of the view that this practice deprives Zambian citizens of the opportunity to own land and poses the danger that vast tracts of land will gradually be lost to non-Zambians.

The Commission further observes that there is no legal restriction on the number of hectares a person can acquire in Zambia. It has been observed that some of the land allocated (to both Zambians and non-Zambians) remains undeveloped for a long period of time. Subsequently, the owners resort to selling the undeveloped large tracts of land which they originally

got at token fee from the Government. The Commission feels this promotes speculation in land and as such is a very serious abuse of the land tenure system.

The Chona Commission addressed the subject of limitation of the amount of land an individual or body corporate could own. The Chona Commission was unable to make a recommendation on the matter, but was of the view that provisions of the law for repossession of unutilised land were adequate. The Chona Commission also examined whether or not non-Zambians should continue to hold and sell land and concluded that it was not in the best interest of the nation to allow non-Zambians to hold freehold titles and that instead they should hold leasehold titles.

This Commission agrees that the amount of land a person should be entitled to acquire can be regulated within the framework of the existing law. Further, the Commission observes that freehold title no longer exists under the system of land tenure in Zambia. In evaluating this issue, this Commission established that in a number of countries, non-citizens cannot hold any interest in land other than a limited lease. This is the case, for instance, in Uganda where, by provision of the Constitution, whereas citizens are entitled to freehold land tenure, non-citizens are only entitled to leasehold tenure. In Ghana, non-Ghanians can only hold a lease of up to 50 years. Although in Zambia there is no freehold tenure, it is important that the law makes a distinction between citizens and non-Zambians in their respective entitlement to land and that the latters' entitlement is conditioned on strict criteria.

The Commission further observes that investors as well as those who buy or lease land near river banks and lakeshores end up fencing off their properties, thereby denying the local people access to a vital resource on which their livelihood depends. The Commission feels that this is undesirable and appropriate measures should be taken to safeguard the interests of Zambians.

The Commission also agrees with petitioners on the need for local communities to be consulted prior to land being allocated for development projects in order to ensure that their interests are not adversely affected.

On the related subject of conversion of land under customary tenure, the Commission observes that under the Lands Act, any person who holds land under customary tenure may convert it into leasehold tenure not exceeding 99 years on application, in a manner prescribed by law. The Act is silent on the re-conversion of land held under leasehold tenure into customary tenure. The Commission is of the view that the Act should make provision that land held under leasehold tenure which was

previously held under customary tenure shall convert to customary tenure on re-entry, voluntary surrender or compulsory acquisition.

On the issue of assigning or subdividing undeveloped land, the Commission observes that although there were no submissions on the matter, the practice of speculating on land has been abused and has created a critical shortage of land. In most towns and cities, it has been observed that those who were offered land by the Commissioner of Lands or councils rushed to resell or even to subdivide their undeveloped land to the detriment of development. The Commission is, therefore, of the view that although land has value, there should be legislation to regulate against speculation and subdivision of undeveloped land.

Recommendations

The Commission therefore recommends that the Constitution should provide that:

- citizens shall have the right of access to and right to acquire land without any impediment, all conditions of acquisition having been met and, at the expiry of a lease, the lease shall be renewed as a matter of right;

- women shall have the right of access to and the right to own and acquire property including land; and

- the Constitution shall guarantee to all Zambians the right to communal use and access to islands, river frontages and lakeshores and these shall not be sold, leased or fenced off for private use.

With respect to non-Zambians acquiring land in Zambia, the Constitution should explicitly state that these shall be entitled as follows:

- an investor within the meaning of investment laws of the country;

- a company incorporated in Zambia by non-Zambians of which 75% or more of its shares are owned by Zambians;

- a non-Zambian statutory corporation created under an Act of Parliament;

- a non-Zambian registered co-operative society with less than 25% of its membership being non-Zambian;

- a non-Zambian body registered under the Land (Perpetual Succession) Act which is non-profit making, charitable, religious,

educational or philanthropic, and approved by the Minister responsible for lands;

- where the interest or right is being inherited or being transferred through survivorship or operation of law to a non-Zambian;

- a non-Zambian commercial bank registered under the Laws of Zambia; or

- a non-Zambian granted a concession or right under the Zambia Wildlife Act, No. 12 of 1998.

The Commission further recommends that:

- individual title to land, whether in State land or customary tenure, should be made available through appropriate legislation. In customary tenure, there should be included in the legislation that the Local Authority and Chief can withhold consent for a good cause; and

- the amount of land to be alienated in individual cases should be left to the appropriate legislation and the existing regulation under the leasehold system.

In relation to conversion of tenure, the Commission recommends that the Lands Act should make provision that land held under leasehold tenure, which was previously held under customary tenure, shall revert to customary tenure on re-entry, voluntary surrender or compulsory acquisition.

The Commission further recommends that the Lands Act should make provision that:

- If land held under leasehold tenure is not developed, it shall be repossessed by and revert to the State and if the leasehold was originally customary tenure, it should revert to customary tenure; and

- if land is used for any purpose other than for which it was originally granted, it shall be immediately repossessed by and revert to the State other than rezoned land.

Further, the Commission recommends that:

- institutional reforms among institutions dealing in land should be introduced, while a body to coordinate the operations of these institutions should be established; and

- there should be a comprehensive review, harmonisation and up-dating of the various land related laws in order to provide a clear regulatory framework for policy implementation.

In addition, the Commission recommends that appropriate legislation should be put in place to regulate against assignment and subdivision of undeveloped land.

24.2.3 Delineation

Submissions

Nine petitioners called for State land and land under traditional authority to be properly delineated (9).

Observations

The Commission notes petitioners' submissions on the need for State land and customary land to be clearly delineated, but is of the view that the two types of land are already clearly defined. The Commission is also aware that the development of a land tenure system is currently being addressed under the Lands Act and Lands Policy, which are being revised and developed, respectively.

24.2.4 Duration of Tenure

Submissions

There were a few petitioners who proposed that the period of leasehold of land should be reduced from the current 99 years (28). The suggested tenure ranged from 10 to 50 years and the reason advanced for this proposal was that this would make it easy to review tenure and, whenever necessary, repossess land that has not been developed.

However, three petitioners were of the view that leasehold of land should remain at 99 years (3).

Observations

The Commission notes that, on the subject of the duration of land tenure, the majority of the petitioners were of the view that the period of leasehold of land should be reduced from the current 99 years, while a few wanted the duration to remain unchanged. Those who wanted the duration reduced argued that this would make it easy to repossess and re-distribute undeveloped land.

The Commission is, however, of the view that reducing the duration of leasehold tenure would be an unnecessary impediment on security of tenure. Leasehold tenure should remain at 99 years, as this gives adequate time to the lessee and subsequent generations to develop and utilise the land. Repossession and redistribution of undeveloped land can be effectively done through regulatory measures within the existing laws and the leasehold tenure system.

Recommendations

The Commission recommends that:

- both existing tenure systems should be allowed to evolve and develop into a system that would provide better security and access to land for the majority of Zambians; and

- leasehold of land should remain 99 years in order to allow Zambians optimum utilisation of their land, but repossession and re-entry of undeveloped land should be left to the appropriate legislation and the existing regulations under the leasehold system.

24.2.5 Commissioner of Lands

Submissions

One petitioner said that the Office of Commissioner of Lands should be a constitutional office and the holder appointed by the President, subject to ratification by the National Assembly. The petitioner further suggested that the holder of that Office should be employed on a three-year contract renewable only twice (1). The reason given was that the holder should enjoy security of tenure in order to execute duties without fear or unnecessary political interference. On the other hand, there was a submission that the Office of Commissioner of Lands should be abolished and replaced by a Lands Tribunal or a Lands Commission (1).

Observations

The Commission notes that there were two petitioners with contrary views on the subject of the Office of Commissioner of Lands. One petitioner wanted the Office to be constitutional and to be accorded security of tenure. This petitioner also wanted the office-holder to be appointed by the President, subject to ratification by the National Assembly. The other petitioner wanted the Office to be abolished and replaced by a Lands Tribunal or a Lands Commission.

The Commission reiterates that land is of vital importance, hence the need for accountability and transparency in its management. Currently, the President has delegated the day-to-day administration of land matters in the Republic to the Commissioner of Lands in the Ministry of responsible for land. The Commissioner of Lands has powers to make grants and dispositions of land to any person, subject to special or general directions of the Minister responsible for land.

The Commission also notes that the powers of the Commissioner of Lands are derived from Statutory Instrument No. 7 of 1964. This is in addition to Circular No. 1 of 1985, which provides rules with regard to procedures on land alienation. There is no statute, however, defining the authority, jurisdiction and powers of the Commissioner of Lands. It is the view of the Commission that the Commissioner of Lands should not be responsible for approval and allocation of lands, because this is too vast a function to be discharged by an individual.

The Commission examined the Constitutions of Uganda and Ghana and notes that in Uganda, there is a Land Commission established under the Constitution. The functions of the Commission are to hold and manage any land in Uganda. The Commission may also have such other functions as may be prescribed by Parliament. Members of the Commission enjoy security of tenure and may only be removed on restricted specified grounds. The salaries and allowances of the members of the Commission are charged to the Consolidated Fund.

In the case of Ghana, there is established by the Constitution a Lands Commission whose functions are also stipulated in the Constitution and include management of land on behalf of the Government. The Constitution also guarantees the independence of the Lands Commission and makes provision for the establishment of a branch of the Commission in all regions of the country.

In the light of the above considerations, the Commission is of the view that a Lands Commission should be established by the Constitution. The functions of the Lands Commission would be to hold, alienate and manage

any land in Zambia in accordance with the provisions of the Constitution and any law, and to carry out such functions as may be prescribed by an Act of Parliament. The Office of Commissioner of Lands can be retained, but the functions of the Office will be subject to supervision of the Lands Commission.

With regard to membership of the Lands Commission, this Commission is of the view that it should comprise the Commissioner of Lands and representatives of LAZ; farmers' unions; local authorities and the Permanent Secretary in the Ministry of Lands. Members of the Lands Commission should hold office for a non-renewable term of three years. This is with the exception of the Commissioner of Lands, who should serve on a five-year contract which should be renewable for one further term only. In addition, members of the Commission should enjoy security of tenure.

Recommendations

The Commission recommends that the Constitution should:

- establish a Lands Commission;

- provide that functions of the Lands Commission should include to hold, alienate and manage any land in Zambia in accordance with the provisions of the Constitution and other laws, including regular review of the status of all land leased to Zambians and non-Zambians, and to carry out such other functions as may be prescribed by an Act of Parliament;

- state that the Lands Commission shall comprise the Commissioner of Lands and five members to be selected from various institutions, including the Government;

- provide that members of the Commission shall be appointed by the President, subject to ratification by the National Assembly, for a non-renewable term of three years;

- provide that members of the Lands Commission may only be removed from Office for inability to perform the functions of the Office arising from infirmity of body or mind, or for incompetence or misconduct;

- establish the Office of Commissioner of Lands and provide that the Commissioner shall be appointed by the President and ratified by Parliament; and

- the Office of the Commissioner of Lands shall carry out the functions of the Office under the supervision of the Lands Commission.

24.2.6 Lands Tribunal – Composition and Jurisdiction

Submissions

Two petitioners argued that the Lands Tribunal should be decentralised and that Chiefs should be represented on it (2). The main reason advanced by the petitioners was that this would give Chiefs an opportunity to participate in the resolution of land disputes. One petitioner, however, felt that the Ministry of Lands should settle disputes relating to customary land (1).

Observations

The Commission observes that very few petitioners made submissions on this subject. Among these were two petitioners who called for Chiefs to be represented on the Tribunal. Another petitioner was of the view that the Ministry of Lands should settle land disputes.

The Commission observes that the Lands Tribunal is established under the Lands Act. The spirit behind its establishment was to make provision for the dispensation of justice and efficient resolution of disputes in land matters. The Tribunal has concurrent jurisdiction with the High Court in land disputes falling under the Lands Act. According to the Act, the tribunal's jurisdiction is to:

> *"i) Inquire into and make awards and decisions in any disputes relating to land under this Act;*
>
> *ii) To inquire into and make awards and decisions relating to any dispute of compensation to be paid under this Act;*
>
> *iii) Generally to inquire and adjudicate upon any matter affecting the land rights and obligations, under this Act, of any person or the Government; and*
>
> *iv) To perform such acts and carry out such duties as may be prescribed under this Act or any other written law."*

The Commission observes, however, that the jurisdiction and powers of the Lands Tribunal are so limited that it has not been effective in its operations. For instance, the Tribunal has no jurisdiction to hear matters falling under the Housing (Statutory and Improvement Areas) Act, Cap.

194, from which several land disputes arise. Further, the operations of the Tribunal are centralised in Lusaka, a situation which has adversely affected the dispensation of justice and efficient resolution of disputes in land matters.

The Commission appreciates the problems the Tribunal faces, among which are understaffing and poor funding. These problems have also adversely affected its operations.

The Commission is, however, aware of the responsibilities of the Lands Tribunal and the expectations of the people of Zambia. The Commission also acknowledges the importance of the Tribunal in the dispensation of justice and efficient resolution of land disputes. The Commission is therefore of the view that the Tribunal should be strengthened in order to enhance the effectiveness of its operations.

Recommendations

The Commission recommends that:

- the jurisdiction of the Lands Tribunal should be widened to cover all land disputes under the Lands Act and those arising under the Housing (Statutory and Improvement Areas) Act; and

- the Lands Tribunal should be decentralised.

CHAPTER 25

THE ENVIRONMENT

Terms of Reference:

No. 30 Examine and recommend on any matter that is connected with or incidental to the foregoing terms of reference.

25.1 Introduction

Zambia is endowed with abundant natural resources. These include land, mineral resources, water, animals, plants and micro-organisms. Natural resources are significant for, among other things, their being a source of livelihood, their economic uses, their use in the ecological balance, their health aspects, aesthetic and recreational use, as well as scientific use. However, in spite of their importance to sustainable human development, natural resources are under threat, mainly due to their unsustainable use and management. The National Environmental Action Plan outlines five main areas of environmental concern, namely deforestation, wildlife depletion, land degradation, air and water pollution, and inadequate sanitation.

Some of the natural resources that are important for the nation's livelihood and socio-economic development are briefly discussed here. The purpose is to put into perspective the concerns raised by petitioners to the Commission in connection with environmental management.

Land

Zambia has a land area of 750,000 sq km (75 million hectares). The country has a historical heritage of different land uses. Land use includes the exploitation of minerals (mining), forestry, animal production, agriculture, and fisheries. The major environmental threat to land is degradation due to deforestation and unsustainable land use practices, especially in agriculture and mining.

Water and Wetlands

Zambia is endowed with sufficient ground and surface water resources to meet the present and foreseeable future demands for water. The country is drained by three river basins, namely the Zambezi, Chambeshi/Luapula and Tanganyika River basins. The Zambezi basin is the largest and covers more than two-thirds of the

country. The Chambeshi/Luapula River basin is the second largest and drains most of Northern and Luapula Provinces. Zambia has five main rivers, namely Zambezi, Kafue, Luangwa, Luapula and Chambeshi. The Victoria Falls on the Zambezi River in Livingstone is one of the seven wonders of the world. In addition to rivers, Zambia has various perennial and seasonal streams. The country also has natural lakes, namely Tanganyika, Mweru, Mweru-Wa-Ntipa, Bangweulu, and man-made lakes, namely Kariba and Itezi-tezhi. Ground water is fairly evenly distributed and most areas of the country depend on it, while rainfall is unevenly distributed, resulting in some areas, especially in the southern parts of the country, experiencing shortages.

The water in the country is mainly utilised for hydropower generation, agriculture, industry, and domestic consumption and sanitation. Improved health cannot be achieved without adequate safe drinking water, sewerage and sanitation facilities. Unless the water resource is utilised in a sustainable manner, it will be difficult to ensure its continued availability in terms of both quantity and quality.

A major environmental concern affecting water, especially surface water, is pollution, mainly attributed to mining, agriculture and manufacturing activities, largely along the line of rail. Ground water pollution is due to leachate. The Kafue River is probably the most polluted river in Zambia, being in the nerve centre of Zambia's social and economic development. The Kafue River basin caters for about 40% of the Zambian population and provides for about 85% of the total land under irrigation. It receives sewage and effluents from various activities, including mining, manufacturing industry and agriculture. Added to these problems is the fact that water and sanitation service delivery has been inadequate and inefficient.

Apart from the main water sources outlined above, Zambia has wetlands of local and international importance. Altogether, wetland habitats cover approximately 14% of the country's surface area and include wet forests, dambos, swamps, marshes and flood plains. Wetlands are habitat for animals, water birds, fish and vegetation. They host some of the country's endemic, rare, and endangered species. They are also important for economic activities such as crop farming, cattle grazing, fishing and crafts production. Threats to conservation of these wetlands include agriculture, human settlements, over-grazing, over-fishing, deforestation, poaching, irrigation and pollution from agro-chemicals and industrial and domestic waste.

Minerals and Mining

The economy of Zambia has been dependent on mining of copper and cobalt. Other minerals that are mined include lead, zinc and precious stones such as emeralds. In terms of environmental problems, localised air pollution in the vicinity of smelters on the Copperbelt and Kabwe town, and loss of aquatic life downstream along the Kafue River have been cited as major sources of concern.

Others include the solid wastes and abandoned open excavations (open pits) and underground mines.

Forestry

Some 45% of land in Zambia is forest, consisting of forest cover of about 33 million hectares. Of the total land area of Zambia, 9.6% is gazetted forest. In addition to natural forests, plantation forests are estimated to cover about 60,000 hectares. Zambia has Protected Forest Areas, National Forests and Local Forest Areas. Forests also occur in Game Management Areas, National Parks and land under traditional rulers. Forests provide fuel wood, timber for the construction industry, non-wood products such as honey and caterpillars, and shelter for people, animals and vegetation. Forests are also important for biodiversity conservation.

In National Forests, logging and collection of forest produce is regulated by the Forestry Department, whereas Local Forest Reserves are meant to serve the needs of local people in the surrounding areas.

Deforestation, mainly caused by the uncontrolled exploitation of forest products, illegal settlements, encroachment, clearing of land for agricultural purposes and bush fires, is a serious source of environmental concern. Deforestation is estimated to be occurring at a rate of roughly 850,000 hectares per year.

Excessive cutting down of trees for charcoal production, illegal settlements and cultivation in protected forest reserves and over-exploitation of timber are especially rampant. In areas where there is population pressure and high demand for more agricultural land, significant encroachment into the forest reserves has occurred. Forests in open areas (outside forest reserves) under customary law are especially vulnerable to deforestation. The pressure on forests is especially heavy near big towns and along the main roads. Wood fuel is still the major source of energy at household level, supplying about 90% of urban households.

Wildlife

Zambia has abundant wildlife. The country has the second largest amount of land converted into protected areas in the Southern African Region, with approximately 225,000 sq. km designated as protected areas. This amounts to 30% of the total land cover and, of this, 8% is National Parks and 22% is Game Management Areas. In general terms, wildlife may be defined as all components of the ecosystems in national parks and all wild animals and their habitats outside national parks. Due to lack of monitoring capacity, it is difficult to establish realistic statistics of the wildlife populations.

Although the designated area of National Parks is impressive, close to 50% of the parks are either depleted of game or encroached. Over 59% of the 35 Game Management Areas are depleted of game. According to the World Monitoring Centre (1993), 28 animal species/sub-species found in Zambia are considered endangered or vulnerable. The fact that human settlements and other land uses are permitted in the Game Management Areas predisposes these areas to stock depletion and degradation.

Fisheries

Approximately 6% of the total surface area of Zambia is gazetted as commercial fishing areas. The fishing industry provides many people with employment and is also a source of protein. The fisheries are usually divided into three categories. The major areas include Lake Bangweulu and swamps, Kafue Flood Plain, Lake Mweru-Wa-Ntipa, Mweru – Luapula, Lake Tanganyika, and the upper Zambezi. The second category includes Lake Itezhi-Tezhi, the Lukanga Swamps, Lake Lusiwasi, and the Lower Zambezi River. The third category is made up of small rivers, streams and reservoirs.

There are statutory provisions for controlling fishing. Regulatory measures include gazetting major water bodies as commercial fishery areas for easier management. In spite of this, the fisheries of Zambia are under increasing pressure from many factors, including unsustainable fishing practices ecological changes and industrial and aquaculture pollution.

The Poverty-Environment Nexus

The extreme level of poverty in the country is one of the greatest menaces to the environment, as the poor tend to rely almost entirely on the environment for their livelihood. In turn, environmental degradation exacerbates poverty, as the environment can no longer sustain livelihoods. At the same time, the poor are affected by the way others around them use environmental resources. For example, the urban poor are affected by poor environmental services such as inadequate or polluted water, lack of sanitation and solid waste systems, outdoor air pollution, and indoor air pollution from low quality cooking fuels. Thus, the link between poverty and the environment is characterised as a " vicious circle" or a "downward spiral". The need to maintain a balance between human socio-economic activities that affect the environment, environmental conservation and utilisation of resources poses a serious challenge.

Economic reforms have also complicated the poverty-environment chain. For instance, the increase in electricity tariffs aimed at removing subsidies and improving the energy economy has led to increased use of fuel wood, leading to increased deforestation. Equally, cuts on forestry and wildlife management services in order to reduce public expenditure have led to unsupervised logging,

illegal harvesting of timber, and poaching, resulting in the acceleration of forest degradation and wildlife depletion.

Zambia has a long history of natural resource conservation. Since the country attained political independence in 1964, its list of legal instruments in support of natural resources conservation and pollution control has grown steadily.

The Mwanakatwe Commission recommended that the Chapter on Directive Principles of State Policy should include provisions that the State should assure a healthy environment for all and safeguard the ecological balance.

Current Constitutional Provisions

Issues of environmental management are provided for under Part IX of the Constitution. However, the scope is narrow and it addresses the subject in the form of non-justiciable Directive Principles of State Policy. Article 112 states in part:

> *" (d) The State shall endeavour to provide clean and safe water ...;*
>
> *(h) The state shall strive to provide a clean and healthy environment for all; and*
>
> *(i) The State shall promote sustenance, development and public awareness of the need to manage the land, air and water resources in a balanced and suitable manner for the present and future generation."*

In addition, there are a number of environmental statutes, including the Environmental Protection and Pollution Control Act, Cap. 204; Forests Act, Cap. 311; Zambia Wildlife Act No.12 of 1998; Fisheries Act, Cap. 200; Land Act, Cap. 184; Agricultural Lands Act, Cap. 292; Mines and Minerals Act, Cap. 213; and Water Act, Cap. 198.

In comparative terms, the Constitution of Uganda provides in the Bill of Rights that every Ugandan has a right to a clean and healthy environment (Article 39). In addition, under Chapter 15, which deals with land and the environment, Articles 244 and 245 provide, in part, that:

> *" 244. (1) ...Parliament shall make laws regulating –*
>
> *(b) The sharing of royalties arising from mineral exploitation;*
>
> *(c) The conditions for payment of indemnities arising out of exploitation of minerals; and*

(c) The conditions regarding the restoration of derelict lands.

(2) Minerals and mineral ores shall be exploited taking into account the interests of the individual land owners, local governments and the Government.

245. Parliament shall, by law, provide for measures intended-

(a) To protect and preserve the environment from abuse, pollution and degradation;

(b) To manage the environment for sustainable development; and

(c) To promote environment awareness."

Similarly, the Constitution of South Africa provides in the Bill of Rights (Section 24) that:

"Everyone has a right-

(a) To an environment that is not harmful to their health or well-being; and

(b) To have the environment protected, for the benefit of and future generations, through reasonable legislative and other measures that -

(i) Prevent pollution and ecological degradation;

(ii) Promote conservation; and

(iii) Secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development."

The Constitution of Ghana, however, as in the case of Zambia, provides in the Directive Principles of State Policy, which are not justiciable that:

"The State shall take appropriate measures needed to protect and safeguard the national environment for posterity…."

The foregoing underscore the importance of the environment in social and economic development.

25.2 Submissions, Observations and Recommendations

One hundred and thirty-one (131) submissions were received on this subject.

25.2.1 Natural Resources Conservation and Utilisation

Submissions

Some petitioners argued that the Constitution should make provision for protection of the environment and sustainable utilisation of natural resources (18). Other petitioners said that the Government should put in place effective systems and structures to take care of the environment (9).

One petitioner suggested that the law providing for conservation of endangered and rare species of flora and fauna should be enforced in order to safeguard certain species (1).

A few petitioners called for the review of the forestry/fisheries policies (9). Some of these explained that this is with a view to promoting conservation.

Three petitioners said that fish must be preserved by declaring certain areas as breeding areas during fishing seasons (3). On the other hand, two petitioners said that there should be no fishing ban (2).

Observations

The Commission observes that the majority of petitioners who made submissions on the subject of natural resources conservation and utilisation wanted the Constitution to make provision for protection of the environment and sustainable utilisation of natural resources. A few others were concerned about the need to conserve fisheries as well as endangered and rare species of flora and fauna.

The Commission observes that a clean and healthy environment is the responsibility of both the State and its citizens and that both should work towards its protection. Sustainable management and utilisation of the environment and natural resources is necessary for both present and future generations. The Commission also notes that under international conventions to which Zambia is a State Party, the country has an obligation to protect the environment. It is therefore regrettable that unsustainable use of the environment has been going on relatively unabated in the country.

The Commission further observes that unlike in some countries, a clean environment is not an enforceable right in Zambia. However, Article 112 of the Constitution contains non-justiciable provisions that the State shall endeavour to provide a clean and healthy environment for all and promote sustenance, development and public awareness on the need to manage the land, air and water resources in a balanced and suitable manner for present and future generations. The Commission feels that this provision should be in the Bill of Rights. Additionally, there should be a corresponding duty on every citizen to protect the environment.

In the case of Uganda, the right of every citizen to a clean and healthy environment is guaranteed in the Bill of Rights. Similarly, the Constitution of South Africa provides, in the Bill of Rights, that everyone has a right to an environment that is not harmful to their health or well-being and to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures.

However, like in Zambia, in Ghana the provision on environmental protection is contained in the part of the Constitution that makes provision for Directive Principles of State Policy and is therefore not justiciable.

The Commission feels that it is necessary for the Constitution to guarantee the right of citizens to a clean and healthy environment.

Recommendations

The Commission therefore recommends that the Constitution should provide in the Bill of Rights that everyone has a right to:

(a) an environment that is not harmful to their health or well-being; and

(b) have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that -

(i) prevent pollution and ecological degradation;

(iv) promote conservation; and

(v) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development .”

The Commission further recommends that the Constitution should impose a civic duty on citizens to protect the environment from harmful use and ensure the well-being of the people, and that this duty be weighed against the right of the citizen in determining the justifiability of the same.

25.2.2 Wildlife Conservation and Human Settlements

Submissions

25.2.2.1 Wildlife Conservation – Protection of Human Settlements

Some petitioners said that the Zambia Wildlife Act should be reviewed in order to safeguard peoples' lives (22). A few petitioners felt that there should be a reasonable balance between the protection of wildlife and the protection of human life and people's livelihood (5). Others said that the Government should adequately compensate people for injury, death or damage to property occasioned by wild animals (15). Petitioners argued that the law tends to give protection to animals at the expense of human beings.

25.2.2.2 Game Management Areas

Five petitioners proposed that declaration of Game Management Areas should be done in consultation with and with the approval of the people in the area (5). One petitioner said that Game Management Areas should be degazetted in order to eliminate the conflict between humans and wildlife (1).

Observations

The Commission notes that a number of petitioners living in protected wildlife areas made submissions on the subject of wildlife conservation and human settlements. Many of these petitioners complained about what they perceived to be lack of concern for human life and property on the part of wildlife authorities where conflicts arose between human beings and wildlife. They called for a balanced approach in dealing with these conflicts and, in particular, demanded that people should be adequately compensated for death, injury or damage to property occasioned by wildlife.

The Commission also notes that among communities living in Game Management Areas, some petitioners wanted the declaration of Game Management Areas to be done in consultation with and with the approval of the people in the area. There was also one submission that Game Management Areas should be degazetted in order to eliminate the conflict between humans and wildlife.

In making these submissions petitioners, mostly those who live near game parks and in Game Management Areas such as Kaputa, Chiengi, Itezhi-Tezhi, Mfuwe and Lusitu, complained of injury, deaths and damage to crops occasioned by wild animals and what they described as lack of concern on the part of the Zambia Wildlife Authority (ZAWA). They accused the Authority of being more interested in animal life than in human life. They said that when injury or death of a person was reported, officers were reluctant to render help, but were quick in responding to reports of animal injury or death. They also accused game rangers of killing suspected poachers.

The Commission observes that under the Zambia Wildlife Act, the Authority has the mandate to look after wildlife on behalf of the Government and its people. However, under Sections 78 and 79 of the Act, the public has power to kill any animal or wildlife that encroaches on human settlements, as long as this is done in self-defence. Once this occurs, the Act demands that this event be reported to ZAWA within 48 hours. The Commission observes, however, that not much sensitisation has been done to make the public aware of this. It is the view of the Commission that this may have led to the misunderstanding between the Authority and the public. There is therefore need to educate the public on their rights as well as those of animals.

The Commission is aware of and supports the policy of ZAWA that an effective community-based natural resources management programme is key to the resolution of conflicts between wildlife and humans, on the one hand, and ZAWA and the people, on the other.

The Commission observes that the capacity of the Government to regulate and monitor the exploitation and management of natural resources is inadequate. In any case, the world over, the concept of government regulation and control of natural resources is being challenged by modern thinking, which emphasises human-centred development. The rationale is that, as owners of the natural heritage, people have a right to be actively involved in and to benefit from the management of these resources. The concept of joint management of natural resources involving the Government and local communities has gained root in many countries. The Commission agrees with this approach and is of the view that this policy, if effectively implemented, would minimise conflicts between human beings and wildlife.

The Commission feels that it is the Government's responsibility and not that of ZAWA to compensate the public for injury, death or damage to property

occasioned by wildlife, because the Authority is simply an agent of the Government. The Commission also feels that the Government should strengthen the implementation of the animal population policy in order to achieve a balance between protection of human life and wildlife.

The Commission notes that the Authority is poorly funded in spite of the fact that tourism is second on Government's priority list. This is evident from the poor infrastructure, such as roads, in areas under its jurisdiction and its over-dependency on donor funding. It is the view of the Commission that this has contributed to poor wildlife management in the country.

Recommendations

The Commission recommends that:

- the Zambia Wildlife Act should be reviewed to provide for compensation for injury, death or damage to crops occasioned by wild animals in exceptional circumstances;

- the Government should prioritise and initiate investment in infrustractural development in national parks;

- the animal population policy relating to the control of animal population should be strengthened;

- natural resources management should emphasise the concept of community-based natural resources management and that this should be implemented in consultation with the communities concerned;

- benefits accruing from wildlife conservation and products should be re-invested in the communities; and

- ZAWA should be funded adequately and on time.

25.2.3 Benefits from Exploitation of Natural Resources

Submissions

Two petitioners argued that local communities should benefit from the exploitation of natural resources such as minerals, wildlife and timber, and that investors in particular should be compelled to invest part of their profits in the local community (20). Others said that investment in exploitation of natural resources such as timber should be restricted to Zambians (15).

Observations

The majority of petitioners who made submissions on this subject wanted local communities to benefit from the exploitation of natural resources such as minerals, wildlife and timber. They called for investors to be compelled to invest part of their profits in the local community. Other petitioners said that investment in the exploitation of natural resources such as timber should be restricted to Zambians. The Commission is of the view that these submissions have merit.

The Commission observes that while certain areas are rich in mineral and forestry resources, local communities have not benefited from the exploitation of these resources by investors. The meagre fees that are levied on exploitation of natural resources are remitted to the national Treasury without local communities benefiting.

The Commission observes that uncontrolled forest products exploitation by foreign investors has greatly disadvantaged Zambians. It is the view of the Commission that non-Zambians should only invest in the timber business if they are in partnership with Zambians.

The Commission notes that non-Zambians have been issued with licences to operate small-scale mining concerns. The view of the Commission is that this should be restricted to Zambians. Non-Zambians should only be involved in large-scale mining operations and, where engaged in such large-scale operations, it must be in partnership with Zambians.

In addition, there has been over-exploitation of natural resources, especially timber, due to inadequate monitoring and supervision.

The Commission observes that ineffective implementation of the Zambia Wildlife and Forestry Policies has contributed to disadvantaging Zambians. These policies should be implemented and, in this regard, exploitation of natural resources should be in harmony with the principle of devolution of powers, functions and resources to lower levels of local government. This will ensure that local communities benefit from the exploitation of natural resources.

Recommendations

In view of these observations, the Commission recommends that:

- exploitation of natural resources should be effectively monitored and supervised to prevent over-exploitation;

- a percentage of royalties and other fees levied for the exploitation of natural resources should be retained by local authorities and communities;

- the royalties and other fees charged for exploitation of natural resources should adequately reflect the value of these resources;

- small-scale mining and timber licences should be issued to Zambians only and, where necessary, Zambians should partner with non-Zambians; and

- the Government should devise a policy that will promote employment of local people in rural mining undertakings.

25.2.4 Compensation for Environmental Degradation

Submissions

A few petitioners said that local communities should be adequately compensated for adverse environmental impacts resulting from exploitation of natural resources, such as pollution from mining activities (6).

Observations

The Commission observes that though the subject of compensation for environmental degradation is very important, very few petitioners addressed it.

The Commission notes that the country depends largely on mining for its revenue. However, this does not mean that mining should be done without regard to the concerns of the local community.

In this regard, the Commission also observes that the various Acts that deal with the environment, such as the Environmental Protection and Pollution Control Act, the Zambia Wildlife Act, the Agricultural Lands Act, the Lands Act and the Mines and Minerals Act are not harmonised and are administered by various Government Ministries and institutions. This makes the co-ordination of the sector difficult. The Commission is of the view that these Acts should be harmonised and their administration should be co-ordinated in order to regulate and monitor environmental impacts resulting from exploitation of natural resources.

The Commission also observes that once issued with investment licences to conduct businesses in Zambia, most investors do not operate these businesses in an environmentally-sustainable and friendly manner. This

has resulted in increased levels of environmental degradation. The view of the Commission is that investors should be compelled to make good any damage done to the environment and should also be involved in taking appropriate preventive measures.

Recommendations

The Commission recommends that appropriate legislation should make provisions for:

- mining and minerals exploitation to comply with and take into account the environmental concerns and interests of the people and the Government, including local authorities; and

- local and foreign investors to be compelled to compensate for any damage to the environment or for death or injury of persons or damage to property arising from exploitation of natural resources and also take part in preventive measures to avoid damage to the environment.

The Commission also recommends that the various Acts relating to the environment should be harmonised and that the administration of these Acts should be co-ordinated.

CHAPTER 26

METHOD OF ADOPTION OF THE CONSTITUTION

Terms of Reference:

No. 21 Recommend on whether the Constitution should be adopted, altered or re-enacted by the National Assembly, by a Constituent Assembly, by a national Referendum or by other method; and

No. 22 Recommend ways and means of implementing the recommendation made under item 21 in view of existing constitutional provisions.

26.1 Introduction

The method of constitution making has been a subject of controversial debate in many countries. Throughout the history of constitutional reform there has often been tension between the need to encourage consensus and popular involvement on the one hand and need to ensure that government's authority is not undermined on the other hand. Mistrust between government and citizens over the ground rules of constitution making have led to stalemates and political instability. There are at least four main approaches to constitution making. The four models are the Philadelphia, the Parliamentary, the Constitution Commission and the Constituent Assembly.

The Philadelphia model is based on the Philadelphia Convention of 1787, which debated and drafted the United States Constitution. Thereafter, State Legislatures adopted the Constitution through the act of ratification.

The Parliamentary model is based on a system where a committee of Parliament drafts a constitution, which thereafter is approved by the whole House. Under this model Parliament has control over the process, presumably because of Parliamentary supremacy.

In the Constitutional Commission model, the Executive appoints a group of Commissioners of eminent citizens representing various interests to organise public hearings and draft a constitution on the basis of submissions. In this process the public is directly and actively involved. However, the Report of such

a commission is presented to the President who then decides whether or not to accept all the recommendations.

In the Constituent Assembly model, members of the Assembly are elected to debate and approve a draft constitution. The function of a Constituent Assembly is primarily to ensure further inclusiveness and legitimacy of the Constitution.

Current Constitutional Provisions

The manner in which a constitution is finally adopted is crucial in determining its legitimacy, popularity and acceptability. The success or failure of the present constitution making process may, therefore, hinge on the mode of its adoption. The Zambian Constitution, however, has no provision relating to "adoption" of the Constitution.

The Constitution vests legislative power in Parliament. It defines the power of the National Assembly to pass ordinary and constitutional Bills and the process through which Bills become statutes after Presidential assent. Adoption is a concept which is not recognised by the Zambian Constitution and is not part of the practice of the Zambian Parliament.

The Inquiries Act

The Zambian Government has always initiated fundamental constitutional changes through Review Commissions under the Inquiries Act. There is no doubt that through the collection of evidence from the petitioners the Government engages the public to make recommendations on the premise that the Constitution is made by the people for the people. But this has over the years been perceived as a contradictory and futile exercise because the Government reserves to itself the power to:

- Appointment members of the Commission;
- Accept any recommendations;
- Reject any or all recommendations; and
- Make any other modifications.

Under this method, the Commission submits its Report to the President and the Government in turn issues a White Paper representing Government reaction to the Commission's recommendations. It is not in dispute that the Zambian people have always made recommendations to all the Review Commissions on important constitutional matters such as good governance, the separation of powers, respect for human rights, an impartial and independent judiciary, independent investigative institutions and a limited government. However, many of these

recommendations have been rejected and in some cases substituted with Government's views through the White Paper.

It is against this background that there is a strong counter argument that a Constitution is no ordinary legislation and that it is the people's sovereign and inalienable right to determine the form of governance for their country by giving to themselves a Constitution of their own making. Moreover, it is argued that the Review Commissions initiated through the Inquiries Act have not been reassuring to the public given the history dominance of Political party in the Zambian Legislature. In the light of this, the concept of adoption of the Constitution by popular means has evolved. Though the term "adoption" is not defined in the Constitution, "adoption of the Constitution by popular mode" is ordinarily understood to mean that the people themselves make the Constitution and give it their seal of approval.

On the other hand, others have argued that Zambia is a representative democracy and elected leaders have a legitimate right to decide on what is good for the people hence it is the role and prerogative of Government to make the decisions on behalf of the people.

It is this dichotomy which is at the heart of the debate on the mode of adoption of the Constitution.

The main criticism of initiating constitutional reforms through the Inquiries Act and the accompanying White Paper is that the Government's selective acceptance of recommendations defies the collective wisdom of the people and popular sovereignty. Friction and suspicion in such a situation is unavoidable.

The Mvunga Commission

Some petitioners to the Mvunga Commission argued that a Constitution must be seen as the actual will of the people as well as a means by which the will of the people should be expressed and that in this regard, the Legislature is subordinate to the Constitution and it cannot approve or bring about a new Constitution. They further argued that the method of adoption of the Constitution should be considered as an important factor in determining its legitimacy. They, therefore, submitted that the draft Constitution should be debated and adopted by a Constituent Assembly or National Convention. The Commission, however, recommended that the Constitution should be adopted and enacted by Parliament and argued that there was no need for a Constituent Assembly since there was in place a legitimate and lawfully constituted National Assembly.

The Mwanakatwe Commission

Petitioners to the Mwanakatwe Commission overwhelmingly submitted that the Constitution should be adopted through a Constituent Assembly and a national

Referendum. They argued that adoption by the current Legislature would be risky because Parliament was dominated by one party. The Commission went further to recommend the composition of the Constituent Assembly, that is, all MPs; one representative from each district; representatives from political parties not represented in Parliament, civil society organisations, academia, civil and professional associations, traditional rulers, women's organisations, churches and other religious organisations. In making this recommendation, the Commission addressed itself to the views of the people and the need for legitimacy and durability of the Constitution.

Government rejected this recommendation. In rejecting the recommendation, Government made the following observations regarding what it perceived to be legal and practical limitations in the recommendations:

> *"(a) The provisions of Article 62 in the present Constitution make it inconsistent for Parliament to abdicate its vested power to legislate in favour of any subordinate body such as the Constituent Assembly in these circumstances. The concept of Parliamentary Sovereignty and its legitimacy in a democracy makes it a betrayal of confidence of the electorate for Parliament to abdicate its authority to legislate;*
>
> *(b) Article 79 in the existing Constitution is unambiguous in its provisions on the procedures for the alteration, amendment, re-enactment, modification or replacement or suspension of any of the provisions or parts of a provision of the Constitution. It is not constitutionally permissible to adopt a procedure other than the procedure provided for in the existing Constitution, prior to the amendment of Article 79;*
>
> *(c) As the genesis of the extra-constitutional amendment efforts, the Statutory Instrument under the Inquiries Act proposed for the establishment of the "Preliminary Constituent Assembly" would expressly offend the provisions of Article 79 in the existing Constitution and thus become void for inconsistency with the provisions of Article 79. (see also Article 80 (3) of the present Constitution;*
>
> *(d) The Preliminary Constituency Assembly would not engage in any `"inquiry", within the meaning of the word in the Inquiries Act. The Statutory Instrument and consequently the Preliminary Constituent Assembly would be unlawful as being outside the enabling Act;*
>
> *(e) The true import of Article 79 in the existing Constitution as to its legal, logistical, financial and material imperatives is*

unfortunately glossed over. To amend or remove Article 79, it is necessary to:

- Conduct a national census to determine the number of people "entitled to be registered as voters for the purposes of Presidential and Parliamentary elections" i.e. all persons of or above the age of eighteen (18);

- The above is necessary in order to determine accurately the numerical threshold constituting the fifty per cent (50 %) plus one required to pass the amendment, removal or replacement of Article 79 at the National Referendum;

- The time necessary to put together the logistical and financial requirements to undertake (the Referendum) above is, by many years, outside the time framework the Commission envisages; and

- The possibility of failure to meet the stringent requirements of amending or replacing Article 79 of the existing Constitution, far outweigh the possibility of success.

In arriving at the above decisions, Government wishes to emphasise that a Constituent Assembly is a transitional measure to be used where a Parliament is not universally constituted by the majority of citizens as was the case in Namibia and South Africa. The issue of a Constituent Assembly does not therefore arise in the Zambian situation where a Parliament is constituted through universal adult suffrage".

A Constituent Assembly under the Constitution

Existing constitutional provisions are examined in the light of the people's quest for the constitution to be adopted by a Constituent Assembly and views expressed by the previous administration.

Term of Reference No. 22 empowers the Commission to recommend ways and methods of implementing the recommendations made under Term of Reference No. 21 in view of existing constitutional provisions. There was no similar Term of Reference in the Mwanakatwe Commission.

Parliament is sovereign in all matters that do not come in conflict with the authority of the Constitution. The only power that limits Parliament is the Constitution itself. Parliament can therefore alter the Constitution, pass any other law, create any institution or do any other thing within the provisions of the Constitution but only to the extent that Parliament cannot alter the entrenched provisions under Part III of the Constitution.

In this regard, a Constituent Assembly is not impossible under the provisions of the Constitution. It requires enabling legislation which would determine the powers, composition and functions of the Constituent Assembly. An ordinary Bill would be required if the purpose is confined to approving the Draft Constitution before it is passed on to the National Assembly. In this respect, a Constituent Assembly could be the equivalent of a White Paper by the people. But on the other hand, the Constituent Assembly could be vested with legislative powers, if this was desired. This would require amendment of Article 62 which vests legislative power exclusively in Parliament. Parliament would have, therefore, to part with some of its legislative powers to allow the Constituent Assembly adopt and enact the Constitution. This amendment, however, would not dispense with the Constitutional requirement of holding a Referendum. This is mandatory whenever Part III of the Constitution is to be affected by any amendment. A referendum is equally mandatory if Article 79 is to be amended.

This said, the Commission, however, feels that there is no need to give the Constituent Assembly legislative powers for the specific purpose of bringing about a new Constitution. It would suffice that the Constituent Assembly's role is confined to adoption. If Article 62 were to be amended it would only be for purposes of formally giving the Constituent Assembly power to adopt. The Commission, however, acknowledges that strictly speaking there is no need to amend Article 62 for this purpose. Enactment of an enabling Act to create the Constituent Assembly would suffice.

Developments in other Jurisdictions

The development of new Constitutions in other parts of Africa has taken a different approach from the Zambian experience.

In Uganda, a legal framework was created through the Constitution Review Commission Act. The Act provided for the composition and election of delegates to the Constituent Assembly. The Constituent Assembly debated constitutional principles which were finally enacted into a Constitution by the Constituent Assembly.

Similarly, in South Africa legislation created a Constituent Assembly through which delegates enacted a post apartheid Constitution.

In Kenya, a Constitution Review Commission was empowered to collect views from the people and to formulate them into constitutional principles which were eventually passed over to a Constitutional Conference for final approval. Both the Constitution Review Commission and the Constitutional Conference were created by legislation.

In these three examples, the process of review from the beginning to the end, was statute-driven and therefore predictable.

In some jurisdictions, delegates to "popular" constitutional bodies have been elected by universal adult suffrage while in others they have been selected from identified interest groups. The rationale for election of delegates by universal adult suffrage is that this is the logical meaning of "popular body". It is argued that ordinarily the mandate to pass laws is vested in Parliament, thus the creation of an extra-Parliamentary body is a mistrust of Parliament which makes it imperative that the people must choose for themselves representatives to this body.

26.2 Submissions, Observations and Recommendations

There were three thousand one hundred and nineteen (3,119) submissions on this subject. Submissions received by the Commission on this subject, showed an overwhelming demand for adoption of the Constitution by a Constituent Assembly. Other petitioners also called for adoption of the Constitution through Parliament, a National Referendum and other modes.

26.2.1 Constituent Assembly

Submissions

An overwhelming number of petitioners submitted that the Constitution should be adopted by a Constituent Assembly, a Constitutional Conference or any popular body that would represent the views of the people (2,166). The reasons advanced for a Constituent Assembly or other popular body included that Parliament is not representative enough of all the various social interests in the country; the formulation of a new Constitution should be more inclusive, broad-based, gender representative and encourage the participation of citizens in order to give the constitution making process legitimacy. Many petitioners observed that adoption of the Constitution through a Commission established under the Inquiries Act or the current National Assembly could easily be manipulated by the Executive.

Further, petitioners argued that the need to have the Constitution, which is the supreme law of the land, adopted through a broad based representative body overrides concerns about the costs involved.

Some of the petitioners submitted that the Constituent Assembly should be composed of various interest groups and these included the following: the President, former Presidents and former Vice Presidents, former Speakers of the National Assembly, MPs, House of Chiefs, all judges; leaders of registered political parties; representatives of civil society organisations,

trade unions, employers' associations, the LAZ, Association of Chambers of Commerce and farmers' associations.

Others submitted that the Constituent Assembly should be composed of up to five elected persons from each parliamentary constituency. The justification advanced was that delegates to this body should be representatives of the people who should derive their authority from the people.

Some petitioners submitted that those organisations and individuals who boycotted the Commission should not be eligible to sit in the Constituent Assembly.

26.2.2 National Assembly

A large number of petitioners submitted that the National Assembly should adopt the Constitution (862). The main reason advanced by petitioners was that Members of Parliament have the mandate to represent the people and are paid for this whereas other methods would be costly and the Government cannot afford the cost. The other argument was that the concept of constituent assembly was alien and not well understood by the people.

26.2.3 National Referendum

A number of petitioners submitted that the Constitution should be adopted by a national Referendum (86). They reasoned that the adoption of a Constitution is a very serious and important matter, which cannot be left to Parliament alone and hence needed the direct participation of the people.

26.2.4 The President

There were two submissions that the President should adopt the Constitution (2).

26.2.5 Constitution Review Commission

One petitioner submitted that the Commission should adopt the Constitution (1). Another petitioner submitted that the Commission should present its Report to the people in their constituencies for adoption (1).

26.2.6 The House of Chiefs

One petitioner submitted that the House of Chiefs should adopt the Constitution (1).

Observations

The Commission notes the overwhelming number of petitioners who submitted on this issue. An overwhelming majority of these submitted that the Constitution should be adopted by a Constituent Assembly. A relatively large number preferred the Constitution to be adopted by the National Assembly whilst a small number wanted the Constitution to be adopted through a national Referendum. Two petitioners called for the Constitution to be adopted by the President while one petitioner wanted the Commission to adopt the Constitution and another called for the House of Chiefs to adopt the Constitution.

The Commission evaluated the views advanced by petitioners for each mode of adoption, that is, adoption by a Constituent Assembly, Parliament, Referendum, adoption by the President, adoption by the Commission, adoption by the people in their constituencies and adoption by the House of Chiefs.

With regard to the submission that the Constitution be adopted through a national Referendum, the Commission is of the view that though attractive and undoubtedly the most democratic, the use of the Referendum is inappropriate on account of constitutional requirements as well as the limited scope of participation by the people. In terms of amending the Bill of Rights, either by enhancement or reduction of these rights a Referendum becomes mandatory in terms of Article 79. Indeed if it is Article 79 that is intended to be amended, a Referendum by virtue of this very Article becomes mandatory. Apart from Part III of the Bill of Rights the Constitution does not require a Referendum in the amendment or alteration of the rest of the Constitution. A Referendum though as pointed out, is narrower in the scope of participation by the people. It does not provide opportunity for debate as the question put must be answered in the affirmative "YES" or in the negative "NO".

On account of this limited scope of participation, the most ideal method of debate in the view of the Commission, is a popularly assembled broad based body of the people's representatives. The entire Constitution would be discussed and debated and let the consensus emerge as to the contents of the supreme law of the land. Thus, Part III, the Bill of Rights, and the rest of the provisions of the Constitution can also be debated. After the debate, however, Part III of the Bill of Rights would have to be subjected to a Referendum. However, to give sanctity to the whole document, this opportunity for a referendum can be extended to the entire Constitution.

Once the Constitution has been endorsed by the people through the national Referendum, in terms of the law and principles governing constitution making, Parliament or any other authority cannot debate or change the Constitution. This is because all laws and institutions are subordinate to the Constitution and the sovereign will of the people. The role of Parliament would be confined to

enacting a Bill into law to bring the Constitution into force and to provide for incidental matters.

The Commission observes that as between the 7 competing views namely, adoption by:

a) The Constituent Assembly;

b) The National Assembly;

c) The national Referendum;

d) The President;

e) The Constitution Review Commission;

f) People in their respective Constituencies; and

g) The House of Chiefs.

The most practical and assuring method is adoption by the Constituent Assembly.

With regard to adoption by the National Assembly, the Commission observes that those petitioners who favour the Constituent Assembly outnumber by far those in favour of the National Assembly. Those in favour of adoption by the National Referendum, President, Constitution Review Commission, people in their respective constituencies or the House of Chiefs are relatively insignificant minority views not shared by a preponderous majority of the petitioners. In real terms the only two formidable competing views are adoption by the Constituent Assembly or the National Assembly. In this conclusion, the Commission notes that except for adoption through the National Referendum, these minority views are not at all backed by any reasons or justification for submissions made.

Those in favour of adoption by a Referendum although relatively few, represent a higher number of the minority views. The reason advanced is quite formidable, although in the view of the Commission untenable on account of the limited scope of participation through this method of adoption in that it entails no debate but an answer to the question signifying approval or disapproval of the proposed Constitution. These petitioners advanced the argument that a Constitution is a very serious and important matter which can not be left to Parliament alone but to direct participation of the people.

As between adoption by the Constituent Assembly or National Assembly, the Commission is more persuaded and convinced by reasons advanced by advocates of the Constituent Assembly. These petitioners argued that the National Assembly was not representative enough of all the various social interests in the

country. They argued further that formulation of the new Constitution needed a more inclusive, broad based gender representative body to give legitimacy to the adoption process. These petitioners observed that adoption through the Inquiries Act or the current National Assembly was susceptible to manipulation by the Executive.

In the considered view of this Commission, the argument on manipulation by the Executive need not be belaboured. Suffice it to say that past experience has shown how skillfully and successfully the Executive can manipulate the Constitution making process. Past Government White Papers on the subject speak for themselves and it is a matter of common knowledge to the citizens of Zambia.

As for adoption by people themselves in their respective constituencies, the Commission feels that this is very related to the idea of the Constituent Assembly, but from the point of view of logistics, it would appear to the Commission that a Constituent Assembly is more easily manageable than adoption in constituencies. The latter appears to be as involving as preparing for general elections. The two methods, however, would achieve the same purpose.

On adoption by Parliament, proponents of this view argued that Parliament represented all Zambians and was therefore the legitimate body to adopt the Constitution. They also reasoned that assigning this responsibility to a body other than Parliament was a waste of time and resources.

However, the Commission observes that these arguments not withstanding, Parliament is not the best body to adopt the Constitution given past experiences. In addition, the Commission is of the view that, the Constitution being the supreme law of the land should be made directly and proceed from the people as Parliament, like all other organs of the State, is a creation of the Constitution.

The Commission further observes the submission that the President adopts the Constitution, which was one of the least preferred by the petitioners. The Commission does not favour adoption by the President because apart from this view being submitted by only two people out of over two thousand petitioners, it is also undemocratic and out of line with the principle of popular sovereignty. Besides, there are dangers of repeating past experiences in formulation of the Constitution which may invite public acrimony.

The Commission also notes that one petitioner wanted the Constitution to be adopted by the Commission whilst another petitioner called for the Constitution to be adopted by the House of Chiefs. The Commission is of the view that these submissions are untenable because they are not in line with democratic norms. Both the Commission and the House of Chiefs are not suitable institutions as they do not represent the people of Zambia.

The Commission notes that the majority of petitioners to the Mvunga Commission called for the Constitution to be debated and adopted by a Constituent Assembly or National Convention. They reasoned that a Constitution should be seen as the actual will of the people and that in this regard the Legislature is subordinate to the Constitution and as such it cannot approve or bring about a new Constitution. However, the Mvunga Commission recommended that the Constitution be adopted and enacted by the National Assembly arguing that the National Assembly was seised with power and authority to do so. In this recommendation the Commission wishes to note that the time lapse between the Mvunga Commission to date has given momentum for a Constituent Assembly and that support for this mode is overwhelming.

Petitioners to the Mwanakatwe Commission also overwhelmingly called for the Constitution to be adopted through a Constituent Assembly and national Referendum. They argued that adoption by the Legislature would be inappropriate because of the dangers of one party dominance and repetition of past constitution making experiences. The Mwanakatwe Commission in evaluating the best method of adoption addressed itself to the need for legitimacy and durability of the Constitution as well as the views of the people. Following overwhelming submissions that the Constitution be adopted through the Constituent Assembly and given the rationale, the Mwanakatwe Commission recommended adoption through a Constituent Assembly and a national Referendum.

The Commission observes that an overwhelming number of petitioners preferred a Constituent Assembly as the mode of adopting the Constitution. At the risk of repetition it is here necessary for purposes of emphasis that petitioners argued that the constitution making process should be broad based, inclusive and representative in order to give the Constitution the necessary legitimacy. Considering the overwhelming petitions and expectations for the Constituent Assembly, and recognising the value of democracy and re-affirming the supremacy of the people in governance and constitutionalism, the Commission is persuaded that the new Constitution should be adopted through a Constituent Assembly and a national Referendum. And in this conclusion, the Commission is unanimous.

As for the legal implications and modalities of using a Constituent Assembly to adopt the Constitution, the Commission is of the view that the Constituent Assembly should be created by an Act of Parliament that should lay down its composition, procedures and functions.

The Commission also observes that some petitioners suggested that the composition of the Constituent Assembly should include various interest groups and eminent persons such as former Presidents, former Vice-Presidents, former Speakers of the National Assembly, MPs, members of the House of Chiefs, Judges, leaders of registered political parties, representatives of civil society organizations, trade unions, employers' associations, the LAZ, Association of

Chambers of Commerce and farmers' associations. Other petitioners preferred that the Constituent Assembly be composed of five elected members from each parliamentary constituency.

After evaluating the submissions on the composition of the Constituent Assembly, the Commission is of the view that membership should be drawn democratically from all districts so as to eliminate eliticism, and also from specific stakeholders such as the Government, political parties, NGOs, women, youth, trade unions, the church, business and professional associations as well as other interest groups able to articulate issues of constitutionalism.

The Commission observes that because of cost, logistics and time constraints it would not be feasible to hold elections in all constituencies as submitted by some petitioners. It is the view of the Commission that some representatives to the Constituent Assembly should instead be elected at district level while others should be selected or elected by their respective interest groups. The Commission also observes that as this is an important national duty, certain participants of the Constituent Assembly should be sponsored by their own organisations. This will reduce on the cost of conducting the Constituent Assembly.

The Commission did not see the need to cost the process of adopting the Constitution through a Constituent Assembly because its Terms of Reference Nos. 21 and 22 are specific and enjoin the Commission to recommend whether the Constitution should be adopted, altered or re-enacted by the National Assembly, by a Constituent Assembly, by a national Referendum or by other method and in doing so to take into account the existing constitutional provisions. It is also the the Commission's view that the exercise of costing the recommended method of adopting the Constitution is better undertaken by the Government.

Recommendations

The Commission, therefore, recommends that:

- the current Constitution should be repealed and replaced;

- the Constitution should be adopted by a Constituent Assembly followed by a national Referendum;

- the Constituent Assembly should be composed as follows:

    1. all Members of Parliament;

    2. two representatives elected from each district to consist of one man and one woman (148);

3. one (1) representative each elected from registered political parties represented in Parliament;

4. three (3) representatives from the Law Association of Zambia;

5. two (2) representative from the Economics Association of Zambia;

6. four (4) representatives from the Local Government Association of Zambia;

7. three (3) representatives from the Zambia Congress of Trade Unions;

8. two (2) representatives from the Federation of Free Trade Unions of Zambia;

9. two (2) representatives from the Zambia Federation of Employers;

10. two (2) representatives from the Zambia Association of Chambers of Commerce and Industry;

11. four (4) representatives from farmers' organisations;

12. eighteen (18) representatives from the Chieftaincy, that is, two (2) representatives elected from each province by the Chiefs' Council;

13. three (3) representatives elected from women's organisations;

14. ten (10) representatives of eminent persons appointed by the President, including past Republican Presidents and Chairpersons of previous Commissions;

15. eight (8) representatives from religious organisations (two from the Council of Churches of Zambia, two from the Zambia Episcopal Conference, two from the Evangelical Fellowship of Zambia and two from Independent Churches of Zambia);

16. four (4) representatives elected from the Media Associations;

17. six (6) representatives elected from universities, that is, two (2) from each of the two public universities and two (2) from private universities, if any;

18. two (2) representatives elected from the Students Union at the University of Zambia and two (2) representatives elected from the Copperbelt University Students' Union and four (4) other representatives elected from the Zambia National Students' Union;

19. two (2) representatives elected from youth organisations;

20. four (4) representatives elected from organisations representing persons with disabilities;

21. one (1) representative from the Islamic Association;

22. one (1) representative from the Hindu Association;

23. four (4) representatives from the Non-Governmental Organisations not provided for;

24. ten (10) representatives from the Defence and Security Service and Public Service Commissions;

25. two (2) representative from the Zambia Institute of Certified Accountants;

26. two (2) representatives from the Medical Council of Zambia;

27. two (2) representatives from the Human Rights Commission;

28. two (2) representatives from the Judiciary;

29. all the members of the Constitution Review Commission attending and participating in the Constituent Assembly as ex-officio delegates; and

30. eighteen (18) randomly selected petitioners to the Constitution Review Commission.

In order to bring the Constituent Assembly and the Adoption process into operation, the Commission further recommends that:

- all members of the Constituent Assembly should be citizens of Zambia;

- the Constituent Assembly should be given legal effect by an Act of Parliament laying down the processes/procedures and allocating the necessary resources, and stating the composition and functions of the Constituent Assembly which should*, inter alia*, include:

    a) deliberating on the report of the Constitution Review Commission and Draft Constitution;

    b) adopting the Constitution, subject to a national Referendum; and

    c) referring the adopted Constitution to a national Referendum.

- the result of the Constituent Assembly should be final and legally binding, subject to the outcome of the national Referendum, and implemented by resolution of the Constituent Assembly;

- the Constituent Assembly should elect its own Chairperson and Deputy Chairperson who will serve until the mandate of the Constituent Assembly is over;

- the Constituent Assembly should elect its Chairperson and Deputy Chairperson at its first meeting or sitting presided over by the Chief Justice;

- the Constituent Assembly should prepare and adopt its own rules of procedure;

- the quorum of the Constituent Assembly should be half the members;

- the decisions of the Constituent Assembly should be by consensus as far as possible. However, where consensus has not been obtained, the matter should be resolved by voting and a motion should be carried if it is supported by at least two-thirds of the delegates voting. The Chairperson may cast an extra vote to decide the matter;

- all delegates to the Constituent Assembly should be sworn in by the Chief Justice;

- the Chairperson of the Constituent Assembly should chair the proceedings in a role akin to that of the Speaker of the National Assembly. In the absence of the Chairperson, the Deputy Chairperson should chair the proceedings;

- the Republican President should hand over to the Chairperson of the Constituent Assembly the instruments of the Constituent Assembly, which should include the Report of the Constitution Review Commission and the draft Constitution, as well as the Act establishing the Constituent Assembly;

- the Constituent Assembly should establish committees to facilitate its work, such as the legal and drafting committee whose role would be to deal with the content, text and wording of the Constitution as well as synchronising the necessary constitutional amendments in the ensuing debates and resolutions;

- the Constituent Assembly should hold its deliberations in public and not in camera, with provision for orderly conduct by the public in attendance;

- The Constituent Assembly should publicise its deliberations;

- the statute establishing the Constituent Assembly should also establish a Commission for the Constituent Assembly consisting of one Commissioner and two Deputies to be appointed by the President in consultation with Cabinet. The functions of the Commission should include to be the secretariat for the Constituent Assembly and to organise elections for the Constituent Assembly in liaison with the Electoral Commission of Zambia;

- a person found to falsely present themselves in the Constituent Assembly should be punished by specific prison term or fine;

- if a Constituent Assembly delegate falsifies his/her declared status, he/she should be punished by a prison term or fine to be stated in the legislation;

- the Constituent Assembly should determine its timeframe according to its workload before it; and

- delegates to the Constituent Assembly who shall be nominated by institutions shall be sponsored by their respective organisations.

CHAPTER 27

METHOD OF AMENDING THE CONSTITUTION

Term of Reference:

No. 20 Recommend a suitable method of amending any part of the Constitution.

27.1 Introduction

A Constitution, being the fundamental law of any country, needs sanctity and should command the confidence of the people. One school of thought is that the Constitution should be rigid, that is, it should not be amenable to easy amendments that are characteristic of ordinary legislation. Proponents of this school of thought argue that in order for a Constitution to maintain its sanctity and stand the test of time, it should be protected against easy amendments by those who wield political power. They contend that such amendments are often inspired by ulterior motives such as partisan political expediency.

The other school of thought is that a Constitution should be flexible, that is, it should be easily amended to keep up with the dynamics of change.

A rigid Constitution would, for instance, require amendment of the Constitution or any part of it to be effected through a national Referendum or at least two-thirds majority in Parliament. An example of a flexible Constitution is one that may be amended by at least two-thirds or simple majority in Parliament.

The Mvunga Commission

Among the findings of the Mvunga Commission were that petitioners unanimously urged for a Constitution that was not amenable to frequent changes and called for amendment of the Constitution, if need arose, to be done through a National Referendum. The Commission recommended that amendments affecting entrenched provisions in the Constitution should only be made through a national Referendum and that any other part of the Constitution be amended by a two-thirds majority in Parliament.

The Mwanakatwe Commission

Petitioners to the Mwanakatwe Commission were wary that executive power continuously influenced amendments of the Constitution to suit political designs of the moment. Some petitioners suggested that provisions relating to fundamental human rights should be amended through a national Referendum, while others suggested that amendments to any part of the Constitution should be through a special commission. The Commission recommended that amendments to the Constitution should be through a national Referendum.

Current Constitutional Provisions

Article 79 of the Constitution provides procedures for alteration of the Constitution. Under this provision, any Bill for the alteration of any part of the Constitution must be published in the Gazette not less than 30 days prior to the first reading in the National Assembly.

In addition, a Bill to alter any part of the Constitution, other than Part III (Fundamental Rights and Freedoms of the Individual) and Article 79 of the Constitution, must receive the supporting votes of not less than two-thirds of all members of the National Assembly on second and third readings.

Any Bill for the alteration of any part or the whole of Part III and/or Article 79 requires to be put to a national Referendum and passed by not less than 50% of persons eligible to be registered as voters for purposes of presidential and parliamentary elections. The Referendum must be conducted before the Bill is presented to the National Assembly for the first reading. In addition to the Referendum, such a Bill requires the support of not less than two-thirds of all members of the National Assembly on second and third readings.

These procedures apply in respect of any alteration, which is defined by Clause (5) of the Article *to "include references to the amendment, modification or re-enactment with or without amendment or modification, of any provision… of this Constitution, that Act, Part or Article, the suspension or repeal or [sic] any such provision, and the addition of new provisions, to this Constitution, that Act, Part or Article."*

It is worth noting that the Constitution of Zambia makes reference to "alteration" of the Constitution in the broad terms just outlined, which include "amendment". The term "amendment" is, however, not defined. The question whether "alteration", as defined by Clause 5, includes complete repeal and replacement of the Constitution is debatable.

Under the Constitution of Uganda, some amendments require the support of at least two-thirds majority in Parliament and a national Referendum. These relate to provisions dealing with sovereignty and supremacy of the Constitution, non-

derogable rights, change of political system, functions of Parliament, change to tenure of office of the President, independence of the Judiciary, and institution of traditional or cultural leaders. Some amendments, on the other hand, require ratification supported by at least two-thirds of the members of the District Council in each of at least two-thirds of all districts of Uganda in addition to support at least two-thirds majority in Parliament. These include changes to district boundaries, provisions relating to taxation, and provisions relating to the local government system.

In the case of South Africa, the provisions dealing with the values on which the Republic is founded and amendment of the said provisions require a supporting vote of at least 75% of the members of the National Assembly and a supporting vote of at least six provinces (out of the nine provinces of the Republic) in the National Council of Provinces, which is the other chamber of Parliament. The Bill of Rights may be amended by the National Assembly with a supporting vote of at least two-thirds of its members and by the National Council of Provinces with a supporting vote of at least six provinces. Any other provision of the Constitution may be amended by the National Assembly with a supporting vote of at least two-thirds of its members. If such an amendment relates to a matter that affects the Council, or alters provincial boundaries, powers, functions or institutions, or amends a provision that deals specifically with a provincial matter, then in addition it should be passed by the National Council of Provinces with a supporting vote of at least six provinces. Further, the Constitution requires publication of a Bill amending the Constitution in the national Government Gazette for public comment as well as submission of the same to the provincial legislatures and the National Council of Provinces for their views, in case of the latter where the amendment does not require a resolution of the Council.

27.2 Submissions, Observations and Recommendations

There were four hundred and sixty-eight (468) submissions received on this subject. The majority of those that addressed themselves to this issue called for amendments to the Constitution to be effected by the National Assembly. A lesser number of petitioners said that any amendment should be effected by a Constituent Assembly or a Constitutional Conference. Others recommended that amendments to the Constitution be effected through national Referenda.

27.2.1 National Assembly

Submissions

A number of petitioners proposed that the Constitution should be amended by the National Assembly which is composed of people's representatives (215). Among these petitioners were two who said that the Constitution should be amended by Parliament except as regards fundamental rights or the current Part III of the Constitution.

27.2.2 National Referendum

Submissions

A number of petitioners said that the Constitution should be amended only through a national Referendum (82), whilst one argued that only the part dealing with the Bill of Rights should be amended through a Referendum (1). Another petitioner said that where the Bill of Rights is being amended to subtract from existing rights of citizens, then a Referendum should be required, but where the purpose is to increase the rights of citizens, a Referendum should not be required (1).

One petitioner said that amendments to Part III and/or Article 79 of the Constitution should be possible after resolution by not less than two-thirds of all the members of the National Assembly, followed by a Referendum (1).

27.2.3 Constituent Assembly

Submissions

A number of petitioners who made submissions on the method of amending the Constitution proposed a Constituent Assembly or a Constitutional Conference (154).

27.2.4 Frequency of Amendments

Submissions

One petitioner said that the Constitution should be brief and confined to general principles. This allows greater judicial activism and reduces the frequency of amendments (1).

Some petitioners warned that the Constitution should not be amended too often. This was supported by other petitioners who added that it should not be amended for between 15 and 50 years in order to prevent a situation in which each President who assumes the Office initiates reviewing of the Constitution (11).

On the other hand, one petitioner said that the Constitution should be flexible enough to accommodate changing times (1).

27.2.5 Restriction on Amendments

Submissions

There was a submission that any amendment to the Constitution should not dilute the rights, freedoms and power enjoyed by citizens (1).

Observations

The Commission notes the submissions by the majority of petitioners who addressed this subject that the Constitution should be amended by the National Assembly, which is composed of the people's representatives. The Commission is unanimous that the process of amending a Constitution is universally recognised as a function of the Legislature. Even if the people approved the new Constitution in a Referendum, it would still be the duty of Parliament to effect any amendments to the Constitution.
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The Commission also notes a related submission that the Constitution should be amended by Parliament, except as regards the Bill of Rights and Article 79 of the Constitution, which should only be amended after a resolution passed by not less than two-thirds of all the Members of Parliament followed by a national Referendum. The call by petitioners to have these provisions entrenched reflects people's mistrust of the Government and hence the need by the people to find ways of protecting themselves through the Constitution. The Commission concurs with this view because of the importance of human rights to good governance.

As regards Article 79, petitioners wanted the Article to be entrenched in order to safeguard the sanctity of the Constitution. The Commission also agrees with these petitioners and is of the view that Article 79 should be entrenched. Further, the Commission is of the view that entrenched provisions should include:

- the Bill of Rights;
- procedures for amending the Constitution; and
- provisions on sovereignty of the State; citizenship; election to the Office of the President; the President and MPs and their terms of office; powers of the President; immunity of the President and former President; removal from Office of the President; and independence of the Judiciary, and institutions of Chieftaincy.

Further, any amendment to provisions relating to objectives, principles and structures of Local Government shall not be effected except with prior approval by a simple majority resolution of not less than two thirds of all the Councils in the country and a National Assembly resolution supported by not less than-two thirds of all the MPs.

The Commission is also of the view that any amendment to any other provision of the Constitution should require the support of not less than two-thirds of all the MPs.

The Commission observes that both the Mvunga and Mwanakatwe Commissions received similar submissions. Petitioners to the Mvunga Commission called for a Constitution that was not amenable to frequent changes and that constitutional amendments should be through a Referendum. The Mvunga Commission, however, recommended that only entrenched provisions should be amended through a national Referendum, while amendments to other parts of the Constitution should require a two-thirds majority in Parliament. Similarly, some petitioners to the Mwanakatwe Commission called for amendments to entrenched provisions of the Constitution to be effected through a Referendum. However, the Commission recommended that all amendments should be effected through a national Referendum.

The Commission notes the submission by a relatively smaller number of petitioners that the Constitution be amended by a Constituent Assembly or a Referendum. The Commission is of the view that these submissions reflect either a lack of knowledge and public awareness about parliamentary functions or a lack of faith in Parliament itself. The Commission wishes to restate the fact that Parliament is the supreme legislative body and therefore ordinarily should be responsible for enacting and amending all laws, including the Constitution.

The Commission further notes the submission that the Constitution should be brief and confined to general principles in order to allow greater judicial activism and reduce frequency of amendments. Related to this is the call for amendments not to be made too often. It is the view of the Commission that the Constitution should be confined to general values and principles. However, this should not be at the expense of clarity and protection of democratic values. As the supreme law of the land the Constitution should be clear and unambiguous so that it is not subject to misunderstanding.

As regards the frequency of amendments, the Commission agrees with petitioners that the Constitution should not be amenable to frequent amendments.

The Commission equally notes the submission calling for the Constitution to be flexible enough in order to accommodate changing times. The Commission agrees with the petitioner that for a Constitution to stand the test of time, it should be flexible so as to accommodate changing social economic and cultural conditions. It is necessary, however, that certain provisions of the Constitution are protected from easy amendments.

In furtherance of constitutionalism, the Commission observes the need for periodic review of the implementation of the Constitution and that an appropriate

framework for this should be put in place. Further, it is important that all laws are in harmony with the Constitution. The Law Development Commission should be given the task of facilitating this.

On the related subject of review, repeal and replacement of the whole Constitution, the Commission is of the view that once the country achieves a durable Constitution, there should be no need for such an exercise. Only amendment to specific provisions of the Constitution might be required from time to time.

It is necessary, however, for the Constitution to provide for the remote possibility that the Constitution might need to be reviewed, repealed and replaced in whole. The Commission is of the view that this should be done through a Constituent Assembly, which should be an *ad hoc* body to be established under an Act of Parliament, which should also lay down the functions, composition, the mode of appointment of the members, procedures, funding and other related matters.

The draft Constitution should be adopted by a Constituent Assembly and endorsed by at least 50% of the voters participating in a national Referendum. Thereafter, the Constitution should be brought into effect by an Act of Parliament.

Further, the Commission is of the view that an exercise to review the Constitution should not be undertaken without prior decision of the Constituent Assembly which should also determine the terms of reference.

Recommendations

The Commission therefore recommends that the Constitution should provide that:

- amendments to specific provisions of the Constitution should be made by an Act of Parliament;

- in order to be amended, entrenched provisions of the Constitution should require the support of not less than two-thirds of all members of Parliament and a national Referendum in which at least 50% of the voters participating vote in favour;

- any amendment to any provision relating to objectives, principles and structures of Local Government shall not be effected except with prior approval by simple majority resolution of not less than two thirds of all the Councils in the country and a National Assembly resolution supported by not less two-thirds of all the MPs; and

- the amendment of any other provision of the Constitution shall require the support of not less than two-thirds of all the members of the National Assembly.

The Commission further recommends that the Constitution should provide that entrenched provisions are:

- the Bill of Rights;

- the procedure for amending the Constitution; and

- provisions on sovereignty of the State and Defence of the Constitution; citizenship; key provisions on representation of the people; election to the Office of the President, Vice-President and MPs and their terms of office; powers of the President; immunity of the President and former President from legal proceedings; impeachment and removal from Office of the President and Vice-President; prohibition of retrospective legislation; appointment of Ministers; and protection of the independence of the Judiciary and Institution of Chieftaincy.

Further, the Commission recommends that:

- the Constitution should not be amended too often;

- the Constitution should be clear, unambiguous and confined to general principles and values;

- there should be periodic review of the implementation of the Constitution and a framework should be put in place for this; and

- the Law Development Commission should undertake review of laws with the aim of ensuring that they are in harmony with provisions of the Constitution.

In addition, the Commission recommends that the Constitution should provide that review, repeal and replacement of the whole Constitution should be undertaken only after the need to do so has been decided by an *ad hoc* Constituent Assembly, which should also determine the terms of reference. A Constituent Assembly should be constituted under an Act of Parliament when the need arises. The Act should also define its composition, powers and functions and make provision as to financing and procedures of the Assembly. The composition of a Constituent Assembly should represent the breadth of social interests in the country.

Further, the Constitution should state that the process of review of the Constitution shall be undertaken:

- through a Constituent Assembly; and

- after adoption by the Constituent Assembly, through a national Referendum in which at least 50% of the voters participating vote in favour of the Constitution.

The Commission also recommends that the Constitution should state that once a Constitution has been endorsed by a national Referendum, it shall be brought into effect by an Act of Parliament without alteration.

CHAPTER 28

MISCELLANEOUS ISSUES

Term of Reference:

No. 30 Examine and recommend on any matter which is connected with or incidental to the foregoing terms of reference.

28.1 Introduction

There were various issues that did not fit in any of the thematic Chapters. Most of these submissions dealt with issues of policy, some of which may require legislation and/or administrative action.

28.2 Submissions, Observations and Recommendations

Nine hundred and ninety-six (996) submissions were received on this Chapter.

28.2.1 Price Controls

Submissions

Some petitioners argued that the Government should re-introduce price controls (20) whilst one petitioner submitted that emoluments in the private sector should be regulated so as to control inflation (1).

Observations

Petitioners who made submissions on this matter were concerned about the persistent increase in the cost of goods and services and wanted the Government to intervene by reintroducing price controls.

The Commission notes the concerns of the petitioners. However, it feels that it is not necessary to reintroduce price controls because in liberalised economies, prices and emoluments are determined by market forces.

Recommendations

The Commission recommends that the current practice where prices and emoluments are determined by market forces should be maintained.

28.2.2 Sale of Government Houses

Submissions

A few suggested that Government houses should not be sold (3).

Observations

The Commission notes that only three petitioners made submissions on the subject of the sale of Government houses. However, the Commission acknowledges that Government operations have been adversely affected, as civil servants and other public service workers can no longer be transferred due to the critical shortage of accommodation that is largely as a result of the sale of Government houses.

The Commission also observes that following the sale of Government houses the Government has, on occasions, failed or delayed in paying housing allowances to civil servants who are not housed by the Government.

The view of the Commission is that the few remaining Government houses should not be sold and that the Government should put in place a policy that will encourage workers to own houses instead of paying them housing allowances.

Recommendations

The Commission recommends that the remaining Government houses should not be sold and that necessary measures should be taken to encourage workers to own houses through mortgages.

28.2.3 Freedom Fighters

Submissions

Four petitioners argued that freedom fighters should be compensated in recognition of their contribution to the liberation of the country (4). Three others said that heroes' cemeteries should be established to honour Zambian heroes (3).

Observations

The Commission observes that only a few petitioners addressed this subject. Out of these, some wanted freedom fighters to be compensated for their contribution to the freedom struggle, while a few others wanted heroes' cemeteries to be established to honour Zambia's heroes.

The Commission acknowledges the need for the Government to seriously consider the issue of compensation to those who made distinguished contribution to the freedom struggle for the independence of the country. Related to this subject, the Commission also considered the plight of victims of the Southern African liberation wars and families of those who lost their lives as a result of these wars.

The Commission also feels that the Government should consider the feasibility of establishing heroes' cemeteries and a square in honour of freedom fighters.

Recommendations

The Commission recommends that the Government gives serious consideration to criteria and modalities of compensating late and living freedom fighters as well as victims of the Southern African liberation wars.

Further, the Government should consider the feasibility of establishing a heroes' cemetery and square.

28.2.4 Drug Trafficking/Abuse

Submissions

Two petitioners said that drug trafficking/abuse should carry stiffer penalties, such as 30 years imprisonment (2).

Observations

The Commission notes that petitioners who made submissions on the subject of drug trafficking and/or abuse wanted the offence to carry stiffer penalties in order to deter people from committing such offences.

The Commission observes that there is sufficient legislation in place under the Narcotic Drugs and Psychotropic Substances Act to deal with this matter.

Recommendations

The Commission recommends that current provisions pertaining to drug trafficking/abuse are sufficient to deal with this matter.

28.2.5 Public Service Vehicle Licence - Minimum Age

Submissions

There was a submission that the minimum age for obtaining a PSV licence should be increased from 21 years to 30 years in order to reduce road accidents (1).

Observations

The Commission notes that petitioners who made submissions on the subject of PSV licences wanted the minimum age for obtaining a PSV licence increased to 30 years in order to reduce road accidents.

The Commission observes that according to the Road Traffic Act No. 11 of 2002, "…No person shall obtain or attempt to obtain a driving licence or provisional driving licence to drive a public service vehicle carrying passengers for hire or reward, or a private motor minibus used otherwise than for private or domestic purposes, unless that person has attained the age of 25 and acquired, at least, two years of driving experience."

The Commission has difficulty in associating the number of road accidents involving public service vehicles to the age of drivers. The Commission feels that other factors are equally responsible for the road carnage. These include the state of the road infrastructure, the state of vehicles, drivers operating without adequate rest, and inadequate driver testing to mention but a few.

The Commission feels that increasing the age limit for obtaining PSV Licence would disadvantage some sections of society and escalate the rate of unemployment.

Recommendations

The Commission recommends that current provisions restricting the issuance of PSV driving licences to 25 years and above and prohibiting unauthorised passengers be maintained.

28.2.6 Incentives for Professionals in Rural Areas

Submissions

A few petitioners argued that incentives should be provided for professionals such as teachers and doctors working in rural areas (3).

Observations

The Commission notes that only three petitioners made submissions on the subject of incentives for professionals working in rural areas.

The Commission wishes to observe that rural areas are less developed than urban areas. The underdevelopment of the rural areas can be traced back to the colonial period which turned rural areas into a source of cheap labour and food for urban centres.

The Zambian economy has been significantly influenced by three factors which have characterised its development. These are rural to urban migration, the structure of the labour force, and dependence of urban areas on rural areas.

The Commission also observes that Zambia is one of the most highly urbanised countries in Africa. This is largely due to the fact that the Zambian economy was overly dependent on large-scale mining, which required high concentration of labour for the mines and the industries that serviced them. Due to the unique requirements of the mining industry, rural areas were seen as reservoirs of cheap labour and were designed to be devoid of viable economic activities. The programmes aimed at rural development such as the development of mono-crop agriculture (maize), subsidies of agricultural inputs and the building of roads and other infrastructural developments were largely aimed at producing cheap food to feed the population in urban centres.

The Commission further observes that rural areas have continued to lose human resource capital to the urban areas. This situation has been compounded by the poor and underdeveloped infrastructure in rural areas such as transport, communications and energy, to mention but a few. Consequently, rural areas have become so unattractive that people are unwilling to work and live in these areas.

In view of the undeveloped state of rural areas in comparison to urban areas, the Commission agrees with petitioners who suggested that incentives should be provided for professionals such as teachers and

doctors working in rural areas. The Commission notes that there is already a policy in place to deal with this matter. However, there is need for the Employment Act to define "Rural Areas", as it is not clear at the moment what constitutes a "Rural Area".

Above all, the Commission is of the view that the Government should urgently devise and implement a policy to develop rural areas so as to integrate them into the mainstream of the country's economy.

Recommendations

The Commission recommends that:

- the current policy on incentives for working in rural areas should be maintained and enhanced, but the Employment Act should define the term "Rural Areas"; and

- the Government should urgently devise and implement a policy to develop rural areas.

28.2.7 HIV/STIs

Submissions

Five petitioners said that deliberately infecting others with HIV/STD should be a crime (5).

Observations

The Commission notes that only five petitioners made submissions on the subject of infecting others with HIV/AIDS.

The Commission notes that HIV/AIDS is contributing to the most profound reversal of development Zambia faces today. Some of the social and economic reversals due to the HIV/AIDS epidemic include decimating the active age group required for economic growth in the country; reduced life expectancy; increased number of orphans; and high burden of disease which has overwhelmed the health care delivery system.

The Commission also observes that the societal impact of HIV/AIDS on all sectors of the economy, communities, households and at the individual level will continue to be enormous unless some urgent interventions are put in place. Although the population of Zambia will continue to grow, the rate of growth is expected to decline because of the AIDS epidemic.

The Commission notes that the national HIV/AIDS intervention strategy has been formulated from an analysis of the critical causal factors in the spread of the HIV/AIDS epidemic and the social impacts of the epidemic on Zambian society. The major issues of concern identified during the HIV/AIDS strategic framework review were: unsafe sex; vertical mother to child transmission of HIV; transfusion and/or transplant with infected blood, blood products, body parts and use of contaminated needles, syringes and other sharp instruments; silent transmission of HIV by infected people without symptoms; poor health status of the HIV infected with symptoms; increased number of orphans due to deaths; inadequate monitoring of the HIV/AIDS response; and inadequate co-ordination of the HIV/AIDS response.

Voluntary counselling and testing (VCT) for HIV has been adopted as part of the strategic interventions to prevent and control HIV/AIDS. The Commission is concerned with the increase in the number of new HIV/STIs infections and the fact that some of these infections are deliberately passed on to uninfected persons by those who know their status. The law should, therefore, respond by making this a criminal offence.

Recommendations

The Commission recommends that deliberately infecting others with HIV/AIDS should be a criminal offence punishable by law.

28.2.8 Defilement and Rape

Submissions

A large number of petitioners argued that the law should prescribe stiffer penalties for the offences of rape and defilement. Petitioners bemoaned the current high incidences of rape and defilement as well as the light sentences prescribed in the current laws. They also argued that the situation was worsened in the administration of the law, as courts tended to mete out inadequate sentences (543).

Observations

The Commission notes that a large number of petitioners made submissions on the subject of defilers and rapists. The Commission observes that cases of defilement in the country have been rising at an alarming rate and that there is urgent need to protect children against this form of violence.

In a democratic state, every person has the right to protection of his or her dignity and should therefore not be subjected to physical, mental or emotional torture. The Commission accepts the view that issues raised by petitioners amounted to torture or conditions that detract from the person's dignity and worth as a human being and should therefore not be allowed in a democratic State.

The Commission also notes that the Mwanakatwe Commission, when dealing with the subject of inhuman and degrading treatment, observed that in a democratic society, the physical and mental integrity of every individual must be preserved. That Commission therefore recommended that, "no person should be subjected to torture of any kind, whether physical, mental or emotional nor should any person be subjected to cruel, inhuman or degrading treatment or punishment".

The current Constitution does provide protection from torture, inhuman or degrading punishment or other like treatment. In terms of comparison, similar provisions are found in the constitutions of Uganda, South Africa and Ghana. The Commission is, however, of the view that there should be special provisions in the Constitution to protect women and children from violence in view of their vulnerability, as already recommended in this Report under the Chapter dealing with Fundamental Rights and Freedoms (Chapter 3).

The Commission also observed that the current penalties for the offences of defilement and rape are inadequate in that no minimum sentence is prescribed by the law. However, the Commission also notes that in the recent past, Subordinate Courts have referred such cases for enhancement of sentence to the High Court and these sentences have accordingly been enhanced.

Recommendations

The Commission recommends that:

- in addition to the provision in the Constitution that guarantees protection from inhuman and degrading treatment, there should be special provisions protecting women and children from violence as already recommended under the Chapter dealing with fundamental rights and freedoms; and

- the law should provide for stiffer penalties for the offences of defilement and rape by way of stipulating the minimum sentence.

28.2.9 Dress Code

Submissions

A large number of petitioners proposed that the Constitution should provide for a decent dress code (386). They argued that scanty dressing by some women undermines morality and has contributed to the increase in cases of rape and defilement. On the other hand, some said that there should be no dress code, as this would be an infringement on people's rights (10).

Observations

The Commission observes that a large number of petitioners expressed concern at the scanty manner of dress by some women and wanted the law to prescribe a dress code for women.

The Commission notes that prescribing a dress code for women would be contrary to the right of the individual to determine their own way of life.

The Commission further notes that subjecting women to a dress code would amount to discrimination on the basis of sex.

Recommendations

The Commission recommends that there should be no legislated dress code.

28.2.10 Theft of Public Funds

Submissions

There was a submission that former Presidents convicted of theft of public funds during their term of office should forfeit their benefits (1). A few suggested that cases of corruption and misuse of public funds should attract stiffer penalties (14).

Observations

The Commission agrees with petitioners and is of the view that corrupt leaders can ruin the country. Therefore, stern measures should be taken in order to deter those who have the privilege of occupying the highest office in the land from this type of conduct.

Recommendations

The Commission recommends that:

- former Presidents convicted of theft of public funds should also lose their benefits and forfeit the stolen wealth; and

- cases of corruption and misuse of public funds should attract stiffer penalties such as loss of terminal and retirement benefits and forfeiture of embezzled property.

GROUP MINORITY REPORT

of the Mung'omba Constitution Review Commission (CRC)

ELECTION OF PRESIDENT

- Qualification
- Parentage Clause

Wednesday June 29, 2005

GROUP MINORITY REPORT

ELECTION OF PRESIDENT

- **QUALIFICATION**

- **Parentage Clause (in relation to Terms of Reference No. 1 and 5)**

We, the undersigned Commissioners, recognizing our rights to submit a position paper on any section of the draft Report of the Mung'omba Constitution Review Commission, do hereby declare our position on the above subject for inclusion in the said report.

The Commission has recommended that the Constitution, amongst other things, provide that a presidential candidate must have parents who are citizens by birth. This provision exists in the current Constitution.

Under the two terms of reference contained in Statutory Instrument No. 40 of 2003, the Commissions was mandated to:

1. Collect views by all practical means from the general public, in such places, within Zambia, as you may consider necessary, and from Zambians outside Zambia, on what type of Constitution Zambia should enact, bearing in mind that the Constitution should exalt and effectively entrench and promote legal and institutional protection of fundamental human rights and stand the test of time.

5. Examine and recommend the elimination of provisions which are perceived to be discriminatory in the Constitution.

We note with great concern and disbelief that the Commission has totally disregarded the fact that the majority of petitioners who submitted on this most fundamental issue petitioned that the parentage clause in the current Constitution be repealed. Out of 242 petitioners, 151 recommended the repeal of the parentage clause whilst only 91 recommended that it be retained.

Since the year 1996, the contentious and controversial parentage clause was introduced through Article 34 requiring that both parents of a Presidential candidate be Zambians by birth or descent. This clause has since been regarded as discriminatory, vindictive and deliberately designed to bar one man, a former President, from contesting the 1996 General Elections **. If anything, the parentage clause is THE most discriminatory clause in the current Constitution.**

It must also be noted that in the 1996 Presidential petition, the Supreme Court of Zambia in its ruling expressed misgivings and doubt on the constitutional validity of the parentage clause requiring that both parents of a Presidential candidate be Zambian by

birth or descent. Further, in almost all countries, the qualifications for presidency are confined to the candidate.

What is also of concern is that many Zambians living along the border areas and have regarded themselves as so-called "indigenous" could be negatively affected by the Commissions' recommendation. It is an open secret that many Zambians in these areas may be privileged enough to produce birth certificates of their parents, those less fortunate citizens would have to rely on sworn affidavits to prove their Zambian parentage.

Of further concern is the fact that the Commission is recommending the enactment of a Constitution that in essence and in reality seeks to classify Zambians where on the one hand all Zambians are equal (with equal social, economic and political opportunities), but where some are more equal than others in a particular circumstance i.e. Presidency.

At this juncture, we wish to quote some important reservations from the Mwanakatwe Commission Report.

Quote: "At the center of all mankind's conflicts is discrimination. No Constitution can last any respectable duration if it is not broadly accommodating and all-embracing. This is usually reflected by avoiding the entrenchment of controversy and discrimination in a Constitution. Provisions that give one type of citizenry special privileges or rights which other citizens are denied, no matter how popular at the beginning can never be a foundation for a lasting Constitution. The strange recommendation by the Commission on the citizenship and qualifications to the Office of Republican President are neither backed by meaningful statistics of the evidence availed to the Commission nor sound juridical principles. The effort to exclude, rather than accommodate Zambians who may be third generation has been stretched to its' most absurd limits. The retrospectiveness inherent in these recommendations is repugnant to justice and all modern legislative processes. It is virtually impossible to escape the political motivation of these recommendations.

A broadest possible consensus must be achieved among those to be governed by any Constitution if the same Constitution must stand the test of time. The fact that the Commission was unable to achieve this crucial test on most fundamental constitution principles …….. Consequently, the Commission's recommendations on those principles cannot be a reflection of anybody's views other than those of petitioners and Commissioners who supported such views." End of Quote.

The issue in hand is similar and we therefore totally and unreservedly support the foregoing remarks.

What should also be noted is that Zambia, just like all other countries in the world today is fast becoming part of the global village through globalisation. Accordingly, many citizens are travelling abroad for various reasons. Whilst abroad, some are engaging in

marriages to foreign nationals before returning to Zambia with their spouses. It is not unrealistic to imagine at time or situation in the not-too-distant future when the number of such relationships will have increased greatly, rendering a large number of offspring citizens disadvantaged. The recommendation will not therefore stand the test of time.

The recommendation of the Commission is grossly inconsistent with and in direct conflict with its own observations highlighted in the Interim Report. The opening sentence of the observations clearly states that most of the petitioners who addressed the subject of the parentage clause in the qualifications for presidential candidates demanded that the provision be repealed because it is discriminatory.

The Commission also further observes that citizenship should be confined to the candidate and not extended to parentage.
Last but not least, the Commission does not provide any convincing justifications and reasonable arguments to support its recommendation other than being in the national interest. This argument is highly debatable.

CONCLUSION.

We therefore wish to place on record that we DO NOT SUPPORT the recommendation on the parentage clause in respect of Presidential qualification because:

1. **It is BETRAYAL of the common aspiration and wish of the Zambian people;**

2. **It WILL CREATE A CLASS OF CITIZENS with "special" privileges, a society where some Zambians are more Zambian than others, when Zambia is supposed to be a classless society as per our National Anthem and motto;**

3. **It is DISCRIMINATORY and DRACONIAN;**

4. **It is AGAINST THE VERY TENETS OF DEMOCRACY AND GOOD GOVERNANCE;**

5. **It is potentially DIVISIVE**

6. **It is a RECIPE FOR FUTURE CONFLICT;**

7. **It is AGAINST THE EXPRESSED WISHES OF THE MAJORITY OF PETITIONERS who submitted on the subject to the CRC as well as to the Electoral Reform Technical Committee (ERTC);**

8. **It is AGAINST THE SPIRIT OF TERMS OF REFERENCE No. 1 and No. 5;**

9. **It WILL FAIL TO STAND THE TEST OF TIME; and**

10. It is NOT SUPPORTED AND JUSTIFIED BY ANY CONVINCING ARGUMENTS

RECOMMENDATION.

We are of the considered view that for a candidate to qualify for election as President of the Republic of Zambia, at least one of his or her parents must be Zambian by birth.

WE DESIRE THAT OUR REPORT BE PLACED ON RECORD OF THE CONSTITUTION REVIEW COMMISSION.

ATTACHMENT

EXCERPTS FROM JUDGMENT OF THE SUPREME COURT OF ZAMBIA

HOLDEN AT LUSAKA

DELIVERED BY MATHEW NGULUBE, C.J.

IN THE MATTER of the Presidential Election held in Zambia on the 18th day of November 1996

B E T W E E N

5 PETITIONERS

AND

FREDERICK JACOB TITUS CHILUBA **RESPONDENT**

SUPREME COURT OF ZAMBIA

HOLDEN AT LUSAKA

IN THE MATER of the Presidential Election held in Zambia on the 18th day of November 1996

BETWEEN

5 PETITIONERS

FREDERICK JACOB TITUS CHILUBA **RESPONDENT**

Excerpts from JUDGMENT of the court delivered by Ngulube, C.J.,

Page 22

Quote ***"The current and latest position under the Constitution (In fact since 1973 – see Act 27/73) is that a person born in or outside Zambia becomes a citizen at birth if at least one his parents is a citizen, thus ensuring citizen by birth or descent. However, the position is that we have to consider the citizenship of person who became Zambians on 24th October 1964, a matter which is governed by the Zambia Independence Order and the Constitution which was scheduled to it"*** End of quote

Page 28

Quote ***"Thus it is seen that those who granted this country its nationhood made provision that, until replaced, the existing law, that is to say existing before independence day, should continue to operate in relation to the country as well as to "persons and things belonging to our connected to Zambia" as if Northern Rhodesia had simply changed its named without change in status. We should also draw attention to the fact that the terms of the citizenship provisions at independence which we are about to set out made no suggestion that being native or indigenous or of any particular race would be part of the definition or criteria."*** End of quote

Page 39

Quote ***"Other questions arising include whether parents born before independence can be regarded as citizens of Zambia by birth or decent or if the provision should be***

construed as including only the parents who are or where literally Zambians by birth or descent (none of whom would be older than our independence so as to have any child of not less than 35 years old as required for presidential candidates." End of quote

Page 45

Quote ***"In the not too distant future, there will be second and third generation Zambians descended from ancestors who originated from a variety of continents and countries all over the world which ancestors are now "disqualified" Zambians. We consider that the point has to be made that the parentage qualifications introduced into the constitution in 1996 post a number apparently solutionless problems and difficulties."*** End of quote.

Page 47

Quote ***"Another point already dealt with but worth noting again was the assertion by the petitioner …….. and other witnesses that there were no Zambian citizenship and nationality only commenced on 24th October 1964. This assertion which we accept as technically and legally correct means that the constitutional provision regarding parents or anyone born prior to independence who are or were Zambian by birth or by descent can meaningfully only be construed as a reference to those who became Zambians on 24th October 1964 or who would, but their prior death, have become Zambians on that day."*** End of quote

It can be concluded from the foregoing Supreme Court judgment that all citizens over the age of 41 years as at 2005 (i.e. Citizens born before 24th October 1964) and whose parents were born before that date are technically and legally disqualified from aspiring and contesting in the next election for the office of President of the Republic of Zambia if the Presidential qualifications in the current Constitution are maintained.

NOTE OF RESERVATION BY MS JOYCE C NONDE – ACIArb., COMMISSIONER

1. Dual Citizenship

Introduction

The current constitution review process has generated considerable debate on the issue of dual citizenship and the CRC has on the basis of submissions recommended that the Constitution should permit dual citizenship only in respect of Zambian citizenship acquired by birth or descent. I beg to give a contrary and opposite view on the issue as a concerned Zambian citizen.

Contention

Whereas I agree that the system of dual citizenship allows individuals opportunities in more than one country and that it makes it easy for such individuals to invest in a given country, my concern is about dual and compromised aspirations of such individuals. For example, there could be an immense security risk should such persons choose to migrate to their **"other homes"** and carry along sensitive information.

In this regard, we cannot even on chance risk the Presidency of Zambia to one with one foreign parentage as this would compromise his/her allegiance to the country. I wish to consolidate my contention with the following arguments:

- That where people have become citizens of other countries, there have been many negative factors. For example, the DRC case as involves the Tutsi people of eastern DRC and the destructive wars in that country. These problems abound in countries such as Ivory Coast. Mauritania, Liberia, Sierra Leone and the Sudan.

- That the public interest would not be served by individuals whose loyalty and allegiance is divided.

- That we cannot give the sovereignty of our country to dubious characters who can ditch us in times of national crisis and despair.

- That persons with dual citizenship can easily compromise the security of the country should they be in custody of sensitive information of a security nature.

- That we are better of entrusting the posterity of our nation to an indigenous Zambian.

Conclusion

Allow me to conclude this brief minority report with absolute satisfaction with my inalienable right to dissent and to place my hope in the people of Zambia as the repository of the national values and consciousness and offer myself to be judged by posterity by what I have stated.

……..
Joyce C Nonde (Ms) – ACIArb., Commissioner

NOTE OF RESERVATION BY MR JITESH NAIK, COMMISSIONER

1. Declaration of Zambia as a Christian Nation

I wish to place on record my objection to the declaration of the country as a Christian Nation.

By retaining the declaration, the Constitution Review Commission has abrogated its responsibility and duty by failing to observe the Commission's Terms of Reference and in particular term of reference 5 which directed the Commission to "examine and recommend the elimination of provisions which are perceived to be discriminatory in the Constitution." The important words here are "perceived to be discriminatory."

The declaration is discriminatory to citizens of our country who subscribe to other faiths. I disagree with those who have claimed that the declaration does not discriminate against believers of other faiths. The justification given by petitioners for the retention of the declaration was that the majority of the people in the country are Christians. However, when some of these petitioners who appeared before the Commission were asked if they would support the declaration if it stated that Zambia was a Christian Nation based on Catholic teachings (the Catholic Church being the largest in the Country) the same petitioners opposed the idea stating that would be discriminatory against other Christian churches and it would divide the Christians. If it is discriminatory within one faith, it is even more discriminatory when other faiths are concerned.

The declaration is also in direct conflict with provisions in the Bill of Rights which provides for equality before the law (Article 35 of the draft Constitution) and the protection from discrimination (Article 42 of the draft Constitution) which protects individuals from direct or indirect discrimination against, *inter alia,* religion.

…….
Jitesh Naik (Mr), Commissioner

SCHEDULE

(CONSEQUENTIAL LEGISLATION)

LEGISLATION TO BE ENACTED BY PARLIAMENT

PART AND TITLE OF ARTICLE	ARTICLE	TIME SPECIFICATION WITHIN
PAR II **REPUBLIC OF ZAMBIA AND ITS SOVEREIGNTY**		
Official languages Act	Article 7 (2)	5 years
PART IV		
English (Extent of Application) Act	Article 14 (d)	2 years
British Acts Extension Act	Article 14 (d)	2 years
PART V **CITIZENSHIP**		
Citizenship Act	Article 23 (2) and (26)	2 years
PART VI **BILL OF RIGHTS**		
Fair Administration Act	Article 34 (2)	2 years
Public Order Act	Article 62	"
Gender Equality Act	Article 41 (8)	"
Social Security for Older Members of Society Act		"
Children's Act	Article 43	"
Youth Act	Article 44 (8)	"
Marriage Act	Article 45 (3)	"
Persons with disabilities Act	Article 47	"
Political Parties Act	Article 48	"
Freedom of Media Act	Article 54 (5)	"
Public Media Act	Article 57	"
Access to Information Act	Article 59 (2)	"
Social Economic and Cultural (Measures to be taken) Act	Article 56 (5)	"
Immigration Act	Article 67	''
Refugees Act	Article 63 (5)	''
Consumer Protection Act	Article 64	''
Education Act	Article 66 (3)	''
Town and Country Planning Act	Article 72	''
Freedom of Information Act	Article 65 (4)	''
Matrimonial causes Act	Article 56 (5)	''
Gender violence Act	Article 42 (6)	''
Human Rights Commission Act	Article 42 (4)	''
Employment of Young Persons Act	Article 87	''
	Article 45	''

PART VII **CODE OF CONDUCT FOR PUBLIC OFFICERS AND OTHER OFFICE HOLDERS**		
Leadership and integrity Act	Articles 89, 92	2 years
PART VIII **REPRESENTATION OF THE PEOPLE**		
Electoral Act	Article 110	1 year
Regulation of Political Parties Act	Articles 115, 119, 120	1 year
PART IX **THE EXECUTIVE**		
Electoral Act	Article 110	
President Emoluments Act	Article 134 (1)	1 year
Former Presidents Emoluments Act	Article 134 (3)	"
Emergency Powers Act	Articles 137, 138	"
Vice-Presidents Emoluments Act	Article 143 (8)	"
Ministerial Emoluments Act	Article 146 (3)	"
Coalition Government Act	Article 162	"
Preservation of Public Security Act	Article 139	"
PART X **THE LEGISLATURE**		
House of Representatives Act	Article 157 (1)	
National Assembly Emoluments Act	Article 164	
Speaker and Deputy Speaker Emoluments Act	Article 166 (9)	2 years
National Assembly (Powers and Privileges) Act	Article 183	
Parliamentary Services Act	Article 192	
PART XI **THE JUDICIARY**		
Supreme and Constitutional Court Act	Article 199	
Court of Appeal Act	Article 205	1 year
High Court Act	Article 208	"
Subordinate Courts Act	Article 222	"
Local Courts Act	Article 222	"
Judicial Officers Act	Article 221 (3)	"
Administration of Justice Act	Article 229	"

PART XII **LOCAL GOVERNMENT**		
Local Government Act	Article 232	2 years
Local Government Elections Act	Article 257	"
PART XIII **CHIEFS AND HOUSE OF CHIEFS**		
Chiefs Act	Article 258	1 year
House of Chiefs	Article 261	"
PART XIV **CONSTITUTIONAL COMMISSIONS**		
Prosecutions Act	Article 277 (4)	6 months
Anti-drug abuse Act	Article 277	"
Anti-Corruption Act	Article 277	"
Judicial Complaints Act	Article 277	"
Police and Complaints Act	Article 277	"
Public Pensions Act	Article 287	"
Pension Schemes Act	Article 287	"
PART XI **PARLIAMENTARY OMBUDSMAN**		
Ombudsman	Article 288	-
PART XVI **DEFENCE AND NATIONAL SECURITY**		
Defence Forces Act	Article 303	1 year
Police Service Act	Article 303	"
Prisons Act	Article 303	"
Intelligence Service Act	Article 303	"
Zambia National Service Act	Article 303	"

PART XVII **PUBLIC FINANCE AND BUDGET**		
Customs and Exercise Act	Article 304	1 year
Income Tax Act	Article 304	"
VAT Act	Article 304	"
Local Authority (Raising of Taxes) Act	Article 304	"
Compensation Fund Act	Article 308	"
Budget Act	Article 310	"
Appropriation and Supplementary Funds Act	Article 311	"
The Loans and Guarantees Act	Article 312	"
Auditor-General Act	Article 317	"
State Audit Commission Act	Article 316	"
National Fiscal and Emoluments Commission Act	Article 522	"
Bank of Zambia Act	Article 326	"
PART XVIII **LAND AND PROPERTY**		
Lands Act	Articles 338, 336	2 years
PART XX **ENVIRONMENT AND NATURAL RESOURCES**		
Environment Protection Act Zambia Wildlife Act Water Act Mines and Minerals Act Forests Act	Part XX	2 years
PART XXI **AMENDMENTS TO, AND REVIEW OF, CONSTITUTION**		
Constitutional Review Act	Article 344	1 year
PART XXII **MISCELLANEOUS**		
Legal Aid Act	Article 348	1 year
State Proceedings Act	Article 349	1 year

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GLOSSARY

Act - A Bill which has passed through all its stages and has

received assent becomes an Act of Parliament.

Adjudication - The judgment or decision of a court.

Appropriation - It is one of the cardinal rules of the system of public expenditure that no money may be spent for any other purpose than that for which it was authorised by Parliament.

Assent - To agree to and append a signature to a document. A Bill becomes effective after it has been assented to.

Bail - In criminal proceedings, a person admitted to bail is released from police custody to the custody of sureties who are bound to produce her/him to answer the charge(s) or forfeit the sum fixed when bail was granted. Under section 123 of the Criminal Procedure Code (Cap. 88 of the Laws of Zambia), "When any person is arrested or detained, or appears before or is brought before a subordinate court, the High Court or Supreme Court he may, at any time while he is in custody, or at any stage of the proceedings before such court, be admitted to bail upon providing a surety or sureties sufficient, in the opinion of the police officer concerned or court, to secure his appearance or be released upon his own recognisance if such officer or court thinks fit…"

Bi-Cameral System - System of government in which the Legislature consists of two houses, commonly modelled on the British House of Lords and House of Commons or the U.S. Senate and House of Representatives.

Bill - A legislative proposal to amend or repeal (cancel) existing law or to create new law.

Bill of Rights - The general term for general statements declaratory of the human or civil rights which the advocates assert individuals should enjoy against States and governments. By themselves such general statements may generate public opinion and influence governments, but have no legal force or validity. They can have such force only if accepted by a government as a limitation of its own powers and if the rights declared are enforceable against the government and actually recognised by it.

Biodiversity - The variety and variability among living organisations and

the ecological complexes in which they occur.

By-laws - A form of subordinate legislation made by an authority less than Parliament on a matter entrusted to that authority, having the force of law, but applicable only to that particular area or scope of the responsibility of the authority.

Citizenship - The legal link between an individual and a particular State or political community under which the individual receives certain rights, privileges and protection in return for allegiance and duties.

Coalition Government Government formed by two or more political Parties.

Code of Conduct - Rules and regulations for the conduct or practice of members of an association or professional body.

Commercial Court - Court set up to deal with matters pertaining to commerce or trade.

Constitution - The body of rules prescribing the major elements of the structure and organisation of any group of persons, including clubs, associations, trade unions, political parties and the citizens of a State.

Constitutional Court - A special court that decides disputes of a constitutional nature.

Constitutive Act - An Act of Parliament enacted to establish a legal body or organ.

Crossing the Floor - Change of political allegiance by a Member of Parliament by joining another political party represented in Parliament.

Delimitation of Constituencies - Set limits of, draw up the boundaries or demarcate a defined geographical area that is to be represented by a Member of Parliament. Normally, constituencies should have roughly an equal number of electors, but not necessarily be equal in size. To attain this, regular revision of constituency boundaries must be undertaken.

Derogation Clauses - Clauses that give exceptions to the application of certain provisions within the law.

Devolution of Power	-	The political device of delegating or transferring certain powers to another body while retaining some power over the same matters.
Domestication of International Instruments	-	Incorporating international agreements to domestic law.
Dual Citizenship	-	Holding citizenship or being a citizen of two countries at the same time.
Ecosystems	-	Habitats within which species occur.
Election Petition	-	A petition calling for inquiry into the validity of an election of a President or Member of Parliament, based on her/his ineligibility for election, corrupt or illegal practices or on other grounds inferring invalidity. In Zambia, such petitions are heard by ordinary courts, while in other countries they are heard by special election petition courts.
Emoluments	-	Sum total of salaries and allowances payable to a person.
Enactment	-	A general term for a statute or Act of Parliament, Statutory Instrument, by-law or other statement of law made by a person or body with legislative powers by the appropriate means.
Environment	-	Land, water, air and other external influences and conditions which affect the development of life all organisms including man.
Executive President	-	President who is both head of State and head of Government.
Ex-officio Member	-	A person who is a member of a group by virtue of holding an office or having a special status. Usually, an ex-officio member does not have a right to vote.
Federal State	-	A system of government of a country under which there exists simultaneously a central government and several State or provincial legislatures and governments.

First-Past- The-Post System - This is a system in which the country is divided into geographical areas known as constituencies or wards. Voters in each constituency or ward return one MP or local government Councillor, who has received more votes than others.

Freedom of Assembly - The liberty to meet or come together with others in pursuit of a common goal or cause.

Freedom of Association - The liberty to join with others for the pursuit or furtherance of any of a wide variety of ends: social, artistic, literary, scientific, cultural, political religious or other.

Freedom of Speech and Expression - The freedom to communicate orally, in writing, print, by broadcasting or otherwise, statements or views on any matter.

Freedom of the Press - Freedom enjoyed by the Press to publish any material or information without hindrance.

Freedom of Conscience - The right to hold and live by one's beliefs.

Gender - Masculinity or feminity.

Gender Neutrality - Having or showing no gender bias.

Gender Equality - Equality between men and women before the law or the right of both men and women to enjoy rights on equal basis.

Government - The machinery ruling and directing the affairs of a State or part thereof; the body of persons having the function of ruling and directing, particularly the Cabinet or Ministry, Ministers, the Civil Service and the executive officials generally.

Habeas Corpus - A legal writ or order that commands the authorities holding an individual in custody to bring that person into court. The authorities must then explain in court why the person is being held. The Judge can

order the release of the individual if the explanation is unsatisfactory.

Human Rights - All those conditions of life that men and women have a right to expect by virtue of being human. The concept involves claims, rights and privileges which every individual can expect irrespective of colour, race, sex, religion, status in life, or origin.

Impeachment - The Act of charging and removing a public official for misconduct in office. An impeached official can be forbidden from holding a public office again. The person may also be tried in regular courts for any criminal offences.

Industrial Relations Court - Court established to deal with industrial and/or labour related cases.

Inquiries Act - An Act to provide for the issue of Commissions and for the appointment by the President of Commissioners to inquire into and report on matters referred to them to prescribe their functions; and to provide for incidental matters.

Intestate Estate - Estate of a person who has died without leaving a Will.

Judicial Power - The power to try all cases and to settle disputes between individuals and the State and between individuals. The Constitution creates a judicial arm of government that is separate from the legislative and executive arms. Courts have the power to determine if laws are in compliance with the Constitution.

Judicial Review - The process by which the validity of an act or omission of a public authority may be challenged before and adjudicated on by a judicial body. This means that courts can nullify legislative or executive acts by declaring them unconstitutional

Jurisdiction - The power of a sovereign State to affect the rights of persons by legislation, by executive decree or by judgment of a court, intimately connected with the concept of independence of a territory.

Jury System - This is a system of justice where a group of

		Laymen, usually twelve in number, are summoned to assist a court by deciding a disputed issue of fact on evidence heard.
Juvenile Court	-	A special sitting of a magistrates' court held for the hearing of a charge against a child or young person or to determine the best treatment for a neglected, abandoned, or ill-treated child or young person.
Legislature	-	Arm of government in a country which has the function of making and changing laws by legislation. In Zambia, the Legislature consists of the National Assembly and the President.
Locus Standi	-	The right of a party to appear before and be heard by a tribunal.
Matrimonial Property	-	Property acquired in the course of a marriage.
Mixed-Member Representation	-	Combines the First-Past-The-Post (FPTP) and the Proportional Representation electoral (PR) system. This system provides for some Members of Parliament to be elected through the FPTP system while others are elected through the PR System from party lists submitted at nomination time.
Nolle Prosequi	-	Power of the Director of Public Prosecutions (DPP) to discontinue any criminal proceedings at any time. Once a nolle prosequi has been entered, the court will not allow any further proceedings in the case nor inquire into the reasons or justification for the DPP's decision. However, the person who has been discharged can be rearrested and charged again on the same facts.
Ombudsman	-	A person appointed by Parliament to investigate citizen's complaints of executive or bureaucratic incompetence or injustice.
Parliamentary System	-	The system of government which centres on a Parliament or assembly in which an elected house of representative is the major element from which the chief executives are drawn and to which and

through which, to the general body of the community, the chief executives are individually and collectively responsible.

Pension - Regular income a person receives after retirement.

Preamble - The introductory paragraph to the Constitution, which begins "We the People of Zambia".

Prerogative of Mercy - Power vested in the President to pardon or commute a death sentence to one of life imprisonment.

Presidential Immunity - A state of freedom enjoyed by a President from legal proceedings for acts committed or omissions made while in office.

Presidential System - System of government where the President is both Head of State and Head of Government. In this system, the President is not a member of the Legislature, but is elected directly by the people. He/she has a fixed term of office and may only be removed before the expiry of the term on restricted conditions such as impeachment.

Proportional Representation - A system under which political parties obtain seats based on the percentage of the total votes obtained in an election.

Proviso - A clause in a deed or statute, beginning "Provided that" and operating as a condition or qualification, frequently inserted to save or except from the effect of the preceding words some rights, or instances, or cases.

Public Order Act - An Act that regulates assemblies, public meetings and processions.

Quorum - The necessary persons or number of persons who must be present for a meeting of members, shareholders, directors, creditors, or the like, to be entitled to do business.

Ratification - Confirmation of an act of the Executive, such as appointment of a constitutional office bearer, by the National Assembly.

Recall Election	-	This is similar to a vote of no confidence on an elected representative who fails to perform to the expectation of the electorate and results in loss of a seat.
Referendum	-	A piece of constitutional machinery for obtaining from the electorate an expression of view on a specific question or questions. Usually, a question(s) submitted to a referendum is/are framed in such a manner as to require no other answer other than "yes" or "no".
Secret Ballot	-	A vote cast in secret.
Single-Member Majority System	-	A system in which voters in each constituency return one Member of Parliament, who has received more than 50% plus one vote. If this is not achieved then a second ballot is conducted.
Sovereignty	-	The concept of supremacy or superiority in a State by virtue of which some person or body or group in that political society is supreme and can, in the last resort, impose his or its will on all other bodies and persons therein.
State of Emergency	-	National danger and/or circumstances under which national security is at risk.
Status Quo	-	The current position.
Territorial Integrity (Sovereignty)	-	The concept of the exercise by a State of actual power and control over parts of the surface of the world.
Titular President	-	Ceremonial President who does not have executive powers.
Ultra Vires	-	Beyond the powers.
Unicameral Legislature	-	Legislature comprising one chamber or House.
Unitary State	-	A State in which the major institutions of Government, Legislature, Executive and Judiciary have power in all matters over the whole area and all the persons in the territory of the State.
Universal Adult	-	The legal right or privilege of voting in presidential,

Suffrage		parliamentary and local government elections being extended to all persons of full age. In Zambia this is 18 years and above.
Winning Threshold	-	Number of votes required for a person to obtain out of all valid votes cast in order to be declared winner.