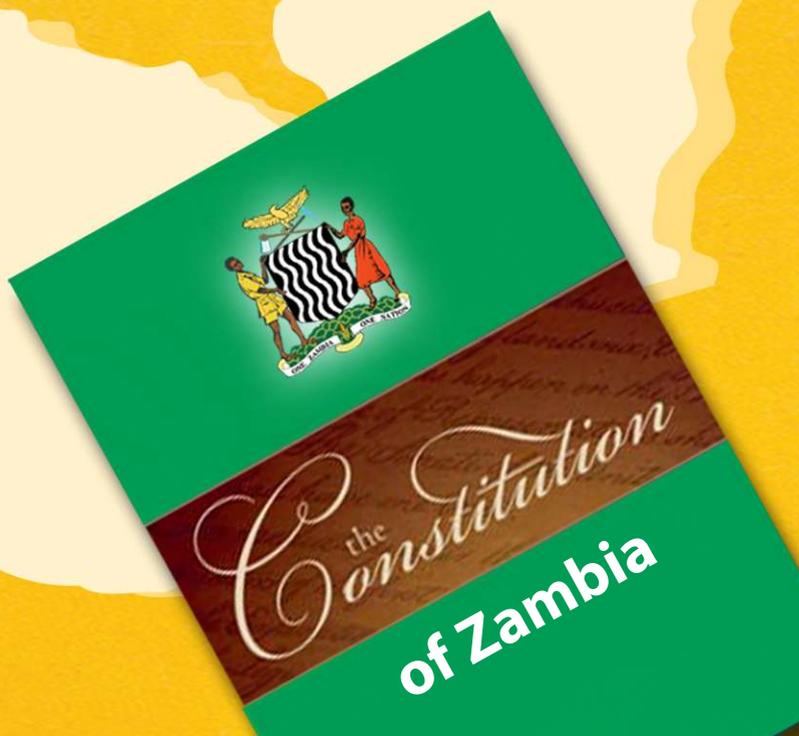


Campaign for a People Driven Constitution

Basic Minimum Principles for the Constitution of Zambia



**The Basic Minimum Principles were produced by a
Consortium of Civil Society Organisations Campaigning
for a People Driven Constitution.**

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1. Introduction

1.1. Background to Constitution Making in Zambia

Since independence in 1964, Zambia has had four¹ attempts at reforming the Republican Constitution.

The first attempt was in February 1972 when then President Kenneth Kaunda established a 19-member commission led by his Deputy, Mainza Chona. In October of the same year, the Chona Commission presented its final report which resulted in the transformation of Zambia into a one party state. The Chona Draft was enacted in August 1973 through Act No. 27 of 1973, which officially marked the start of the Second Republic.

The second attempt at reforming the country's constitution was in 1990, when President Kaunda appointed another commission led by lawyer Patrick Mvunga. The Mvunga Commission was appointed at a time when the country was experiencing growing intolerance of the one party system. That same year, amendments were made to the constitution leading to the return of multiparty politics. The Mvunga Commission's Draft Constitution was enacted in August 1991, leading to multi-party elections in October 1991.

The third attempt at reforming the republican Constitution was in November 1993 when then President Frederick Chiluba appointed a commission led by John Mwanakatwe. The Mwanakatwe Commission presented a draft which was widely viewed as progressive, but the government rejected a number of their recommendations. The resultant Constitution was enacted in 1996, and some of its key highlights were the declaration of Zambia as a Christian nation and the provision for a simple majority in the election of President.

The fourth attempt at reviewing the constitution was in April 2003 when third Republican President Levy Mwanawasa appointed a commission chaired by lawyer Willa Mung'omba. After public consultations, the Mung'omba Commission presented its report and draft Constitution to government in December 2005, leading to the establishment of the National Constitutional Conference. Due to public discontent on the NCC's approach to the process, the Mung'omba Draft Constitution was rejected after failing to garner enough support in Parliament.

Upon assuming office as Republican President, His Excellency Michael Sata in November 2011 appointed a Technical Committee to draft the Republican Constitution. At its appointment, the Technical Committee Drafting the Zambian Constitution was mandated to deliver a draft Constitution and Constitutional amendment bill before consideration for enactment, whether by Parliament or through a referendum. This process has been ongoing since November 2011 and is expected to conclude by end of July 2013 or thereafter².

¹ There have been four Zambian Constitutional reviews since 1972. The Chona Commission appointed in 1972, the Mvunga Commission was appointed in 1990, the Mwanakatwe Commission, appointed in 1993, and the Mung'omba Commission of 2003 which ended in stalemate in 2010.

² The Technical Committee drafting the Constitution made a request to government for a six-months extension to conclude and deliver the draft Constitution. Government through the Ministry of Justice has publicly rejected this extension. While there is no clear agreement on the extended period it is clear that the June 30 deadline for handing in the final draft of the Constitution may not be attained.

1.2. The Civil Society Campaign for a People Driven Constitution

Concerned by a number of irregularities and the lack of transparency in the Constitutional review process, about 260 civil society organisations from across Zambia came together to address key issues in the process.

As the process draws to an end³, the CSOs are seriously concerned about the lack of clarity on next steps after the final stage of consultations. This has also raised anxieties on the future of the Zambia's Constitutional review process. It is not clear as to whether the provisions of the draft Constitution approved by the National Convention will be protected from alterations without consultation and if a Referendum will be held to ensure that people finally endorse it before it is approved by the President.

These concerns remain unresolved, prompting various stakeholders to heighten actions to safeguard both the content and process, so that the aspirations to achieve a people-driven Constitution are realized. One such intervention, is the initiative by CSOs calling on the Zambian government to announce a concrete timetable leading to a referendum - and highlighting 10 minimum conditions that the draft Constitution and process must adhere to⁴.

There are a number of issues relating to Zambia's land administration which is currently riddled with challenges that include inefficiency and lack of transparency and accountability. As a result, a lot of Zambians have no access or ownership of land, or have been displaced from their land. Further, land administration is too centralized and spearheaded by a Commissioner of Lands who acts on behalf of the President.

1.3 The June 2013 Chisamba Validation Meeting

Under the auspices of Panos Institute southern Africa (PSAf) and its partners, a coalition of CSOs representing membership of over 260 constituent NGOs and CBOs got together in Chisamba to validate the proposed basic minimum constitution document, undertake a constitution scenario analysis, private members bill and agree on joint advocacy actions. The validation meeting forms the basis of a united position of CSOs on the content and process of the constitution, including a clear framework of advocacy issues and messages that should be communicated to the public and the government.

³ This end is based on the mandate of the Technical Committee, and does not necessarily indicate the conclusion of the process, as the Constitution is expected to be subjected to other processes, including its adoption and enactment after it is simultaneously handed over to the Republican President and the public.

⁴ Representatives of a cross section of CSOs met for two-days at Protea Chisamba to deliberate and reach consensus on the minimum standards to be followed on in the anticipated Draft Constitution.

2. Why the Basic Minimum Principles

The minimum standards presented in this document are informed by the various individual and collective position papers made by all participating CSOs who are party to this document, and have been engaged at different levels of the consultations, including making submissions to the Technical Committee drafting the Zambian Constitution. The same positions by the CSOs continued to be used in shaping the content and outcomes of the district forums, provincial conventions, the sector groups and finally the National Convention on the Constitution.

It is worth mentioning that the minimum standards are also informed and inspired by the draft resolutions of the National Convention organized by the Technical Committee drafting the Zambian Constitution, held in April 2013.

The Basic minimum standards proposed for the Constitution, are aimed at ensuring that both the content and process of achieving a progressive people-driven Constitution are realized, and to safeguard the country from having yet another failed Constitution⁵. By providing these basic minimums, CSOs are of the shared view that the new Constitution will help to promote human rights, entrench democracy and support sustainable socio-economic development for all Zambians.

The Basic Minimum standards are premised on ensuring that the fourth attempt on the Constitution yields an all inclusive, legitimate supreme legal framework for Zambia.

To this effect, the minimum standards will assist in checking the anticipated final draft of the Constitution and the extent to which it would have integrated these issues. They are a reminder of salient issues advocated for, and positions taken for the betterment of the future Zambian Constitution.

⁵ All constitutional making processes have been a great drain on the national economy, and in many ways viewed as way of appeasing individuals to support the cause of the political party in power.

3. The Minimum Principles

Principle 1: Enjoyment of fundamental rights:

The Constitution is the Supreme Law of the land, and it is vital that it provides for the rights and freedoms that will be enjoyed by persons in the country. Human rights are rights that one individual has as a result of being human. Human rights protect human dignity, and are essential for individual well-being and fulfillment. They are also necessary for the preservation of peace and justice.

Over the years, the Zambian people have been consistent in expressing a strong desire for the Constitution to strengthen the scope of fundamental rights and freedoms. The concept involves claims, rights and privileges which every individual can expect, irrespective of color, race, sex, religion, status in life, or origin.

Notwithstanding, Part III of the 1996 Zambian Constitution has a Bill of Rights that recognizes fundamental human rights and freedoms, mostly providing for civil and political rights. However, it does not cover the full range of rights and freedoms, such as equality before the law, the right to take part in government, an enforceable right to compensation for unlawful arrest or detention, the right to leave one's country, and gender equality. These have been points of advocacy for civil society organizations over a long period.

It is worth noting that in the draft Constitution, there is an expanded Bill of Rights⁶ that incorporates civil and political rights and provides for the Economic, Social and Cultural Rights, especially those detailed between Articles 60 to 67. In many ways this is a response to the demands of many Zambians who want greater enjoyment of these entitlements⁷. Though previously provided under the "Directive Principles of State Policy"⁸, the Economic, Social and Cultural Rights remained non-justiciable and irrelevant to the use and enjoyment by Zambians.

It is important that all citizens feel and know that they are valued members of society and that they have rights in respect of human dignity, development, equality and freedom are not only guaranteed but enforced. Their inclusion will reinforce the country's efforts of building a State based on democratic principles.

6 Article 24 (1) states that the Bill of Rights is fundamental to Zambia's democracy and Constitutionalism and shall be the basis for the adoption of social, political, economic and cultural policies. Article 24(2) is for the purpose of preserving the dignity of individuals and communities promoting social justice and realizing the potential of all human beings, while Article 25 (1) provides that the State shall respect, protect, promote and fulfill the Bill of Rights .

7 The over-arching principle is the call to ensure that human rights are entrenched and justiciable. This presumes that "all universally accepted" rights shall be enjoyed, and that such documents as the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights and/or the Africa Charter would be logical reference points, and inferred to or directly incorporated.

8 Socio-economic rights were included in the preamble as mere aspirations of the state and thus were not rights in the real sense of the word.

The Minimum Principles

For the Constitution to meet the aspirations of the people of Zambia, the following Basic Principles must be included:

Specifically, the Constitution shall provide for the respect, protection and fulfillment of the following rights:

- a) Economic, social and cultural rights which shall be interpreted broadly
- b) Civil and political rights as provided and protected by international human rights norms and standards.

For example:

- Action to address imbalances, such as rights or special provisions for the women, children, youths, elderly, disabled, disadvantaged
- Access to information so that there can be open and accountable administration at all levels of government.
- Recognition of diversity of language and culture shall be acknowledged and protected, and conditions for their promotion shall be encouraged.
- Right to assembly and right to join any society including linguistic, cultural and religious associations, shall, on the basis of non-discrimination and free association, be recognized and protected.
- The right of employers and employees to join and form labour unions and right to fair labor practices.

Principle 2: Status of the Constitution Constitution and Amendments to Constitution

This provides for the procedure of effecting amendments in the Constitution that do not require a Referendum, which is provided for by Article 307 of the Draft Constitution. These should be retained and reinforced such procedures to be determined by special majorities. Amendments to the Bill of Rights it must for this to be subjected to provisions in Article 308.

Given that that the Constitution is the supreme law of the land, alterations and/or amendments to the Constitution shall require special procedures involving special majorities, for example referendum for the bill of rights and 2/3 or 50% plus 1 for other provisions.

Principle 3: Equality before the law and Rule of Law

Various aspects need to be considered under this provision, but ultimately should ensure that it protects human dignity. The State should, pursue policies and practices that enhance the observance of human rights, and these are provided in various international instruments to which Zambia is a party.

It is important that the Constitution makes and retains provision on equality of all persons before the law because the most general application of equality in the legal context is the principle that the rule of law should apply equally to all members of the community and that nobody should be exempt or treated differently.

Suspects and arrested persons deserve dignified treatment and should be protected from torture and inhuman and degrading treatment. It is important to have a provision in the Constitution to guarantee the rights of suspects and arrested persons.

Taking into account the realities of the circumstances of women in relation to men, the situation warrants remedial Constitutional intervention in order to enable women to enjoy fundamental rights and freedoms on an equal basis with men. ConstitutionIt is therefore vital that the new Constitution should reaffirm the principle of equality of men and women in all respects and that there should be affirmative action in favor of women. 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 outlawed.

The legal system shall ensure the equality of all before the law and an equitable legal process. Equality before the law includes laws, programmes or activities that have as their object the improvement of the conditions of the disadvantaged, including those disadvantaged on the grounds of race, religion or gender.

Principle 4: Separation of Powers

Various discussions point to the fact that most African Constitutions entrust the Presidency with too much power - risking in practice - the tenets of democracy. Absolute power entrusted in the executive powers of the President has been at the core of eroded efforts to build democratic practices as many office holders act without mechanisms to limit arbitrariness. Efforts to strike a balance of power, and in particular by way of finding legal and/or administrative means of reducing the powers vested in the Presidency and the Executive has preoccupied the debate. There is a great opportunity for Zambia through the Constitutional making process to define this Separation of powers amongst the three arms of government, namely the Executive, Legislature and Judiciary.

The Draft Constitution through Articles 91 and 92(4) provides for checking and/or reducing the excessive or anticipated abuse arising from the exercise of Executive powers through the National Assembly, by introducing provisions that would enable the National Assembly to approve certain matters and ratify Presidential appointments. Some of the provisions under Article 91 and 92 (4) need to be strengthened no to make the National Assembly a rubber stamp of Presidential decisions.

The Establishment of the institution of Parliament is provided for by Article 125, and its functions stipulated in Article 128 of the Draft Constitution. There should be further provisions to strengthen the independence of Parliament (through a Parliamentary Service Commission) besides the proposition to appoint Cabinet from outside the National Assembly. Since this is the highest legislative body in the land, its independence is paramount and should enjoy complete freedom from the Executive. One of the key functions that Parliament performs is its oversight on national public expenditure and in the contraction of debt (with the limitation of the powers of the Executive with regard to this) and its power to ratify appointments made by the President should be explicitly provided for.

The Judiciary is the third arm of government and plays a vital role in interpreting and adjudicating the rule of law. It is the duty of the Courts to ensure that there is compliance with the laid down rules and procedures. An independent, autonomous Judiciary will in turn ensure the principle of Separation of Powers is actualized.

The Draft Constitution provides for the establishment of a Constitutional Court to enhance and maintain a proper system of checks and balances amongst the three organs of the State, especially on Constitutional matters and fundamental rights. Constitution

The Minimum Principles

There shall be a separation of powers between the legislature, executive and judiciary, with appropriate duties and checks and balances to ensure accountability, responsiveness and openness.

Accordingly;

- a) The Vice President shall be a running mate observing the equality clause from preamble
- b) Cabinet ministers shall be appointed from outside the national assembly
- c) Judges and magistrates shall be appointed and removed by an independent body
- d) There shall be a Constitutional Court which shall be a special court with exclusive jurisdiction in Constitutional matters and is supreme in interpreting and enforcing the bill of rights

Principle 5: Representation of the People

The Constitution should address the weaknesses in the current electoral system, such as not being representative and open to manipulation and that these weaknesses need to be addressed through a revised electoral system. Building confidence in the outcomes of elections is critical to democratic electoral for both Parliamentary and Local Government elections. This will replace the first-past-the post system that has existed over a long period of time, and has in many instances raised concerns at outcomes of Presidential elections.

For the election of President a majoritarian system where the winning candidate must receive not less than fifty per cent plus one (50%+1) of the valid votes cast should be retained as provided for in the Draft Constitution.

The provision on the date of holding Elections should be retained as currently provided for in Article 82 (1) of the current Constitution, that the election date shall be the last Thursday of September after the last general elections in a five-year cycle. This is progressive and will bring in predictability in the conduct of elections, and reduce on the elections date being a preserve of the Presidency and the ruling elite.

The Minimum Principles

There shall be a representative government abiding by the principle of multi-party democracy, regular elections, universal adult suffrage, and a common voters' roll.

The electoral systems shall be as follows:

- a) The President shall be elected by a 50% + 1 electoral system or majoritarian system of election
- b) For the Parliamentary and local government elections; (*mixed member proportion (MMP)*) representation that will guarantee the following
 - Guaranteed representation of women, youths and persons with disabilities
 - Responsiveness to the constituency or electorate
- c) The elections date shall be enshrined in the Constitution provided that such elections shall be held as general or tripartite elections

Principle 6: Traditional Leaders and Customs

It is necessary for the Constitution to provide for the continued existence and guarantee of the institution of chieftaincy with its traditional councils as established by customary law given that chiefs play an important role in the governance of the country and in the preservation of customs and traditions. However, there has been a lot of debate around the participation of traditional leaders in the affairs of the country, and in particular politics.

Specific provisions have to be made that allow traditional leaders (to include Chiefs, headpersons and functionaries associated to the traditional hierarchy such as Ngambelas) to seek and hold public office but will be prohibited from participating in active party politics. Article 228 provides for that. This provision provides for their participation provided that the person who seeks political office, as a candidate, resigns from their traditional role as chiefs. This will help them enjoy their civil and political rights.

Indigenous law shall be recognized and applied by the courts, as long as it does not go against fundamental rights contained in the Constitution.

The role, institution, status of traditional leadership shall be recognized and protected in the Constitution.

Principle 7: Structure of Government (decentralization and devolution of power)

A devolved system of governance is seen in many ways as an empowerment process for local communities and may spur local development. The devolved system of government and governance is espoused in the Decentralization Policy approved by Cabinet in 2002, and largely requires for a legal backing to make most of its provisions operational. Through the ongoing Constitution making process, submissions point to the fact that citizens are demanding a more localized governance which will give powers of direct self-governance to the people living in the provinces and districts (inclusive of sub-structures) in order to enhance their participation in the governance of the State and the making of decisions that affect them. Provisions have been made to further espouse the spirit of mutual trust and good faith between central and local level governance institutions by stipulating the basis of devolution and presenting the principles that will permeate that system of governance. The national, provincial and district level sub-structures will require clearly stipulated roles and mandates to ensure that the process operates smoothly and reduces or avoids domineering and conflicts.

Since devolution requires that central government transfers responsibilities and matching resources to the district, there is need to provide for the devolution of economic and financial functions to the local level. Article 197 in the draft Constitution provides for that, and needs to be retained. The justification for this arrangement is that economic and financial functions are best left to the central government for reasons that provinces and districts in the country are not equally endowed with resources and that devolving these functions to local level government would disadvantage some areas. The role of central government is, therefore, to mobilize resources from all parts of the country and equitably distribute the resources to all areas, irrespective of a particular province's or local area's capacity to generate revenues. There is need to provide for the Local Government Equalization Fund to be established and streamline provisions that will strengthen local government financing in Zambia.

There shall be decentralization and devolution of power at national, provincial and local levels.

Provided that;

- a) **At each level of government there shall be democratic representation;**
- b) **The national government shall not exercise its powers (exclusive or concurrent) so as to encroach upon the geographical, functional or institutional integrity of the provinces;**

- c) A framework for local government powers, functions and structures shall be set out in the Constitution. The comprehensive powers, functions and other features of local government shall be set out in Parliamentary statutes or in provincial legislation or in both;
- d) The national government and provincial governments shall have fiscal powers and functions which will be provided for and defined in the Constitution;
- e) Each level of government shall have a Constitutional right to an equitable share of revenue collected nationally so as to ensure that provinces and local governments are able to provide basic services and execute the functions allocated to them. Accordingly, provisions shall be made pertaining to issues to do with equitable sharing of proceeds realized from natural resources in provinces and communities

Principle 8: Public Bodies, Authorities and Commissions

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 and that these institutions enable the President perform and discharge the functions of the Government. The Constitution should have clear provisions for the creation and abolition of offices or commissions. Such establishment should be ratified by Parliament. The Commissions should play a recommendation role to the President on appointments especially to Constitutional offices, and such appointees should be directly accountable to Parliament.

It is necessary for the Constitution to provide perform their duties based on values and principles enshrined in the Constitution, of which principles of transparency and accountability are cardinal to good governance should be adhered to. This will guide public officials who make a wide range of decisions pertaining to Constitutional, statutory, administrative, financial, operational and other matters that have a direct bearing on the nation and citizens. Besides the principles should be specific prohibitions for public officers, in order to avoid improper conduct and conflict of interest in the performance of functions of public offices.

The establishment, independence and impartiality of Constitutional offices, authorities and Commissions shall be provided for and safeguarded by the Constitution and shall be accountable to Parliament.

Principle 9: Land Protection

The other aspect as it relates to land administration is that the Zambian Laws vest land in the President, for and on behalf of the people of Zambia. This position up until now has been controversial due mainly to the potential abuse of authority by those charged with the responsibility to hold all Zambian land on behalf of and for the people of Zambia. The Constitution must not give a right to the person of President to alienate land to anyone, whether a citizen or non-Zambian. In light of democratic governance and the principles of transparency and accountability, land alienation should be handled by a popular body such as the proposed National Lands Board.

Since the majority of land is customary land, it is an important resource, but its administration of customary must be strengthened. A critical issue is to promote more consultation or participation of local communities in alienating land, particularly for large investments in land where people's rights will be disturbed to a point where their livelihood strategies have to change. This will persuade traditional leaders to seek approval from their citizens when making decisions regarding land at all times. In addition, in line with the provision that citizens holding customary land have the inherent right to the land and any other resources including minerals found where they live, such individual(s) should not be forced to leave their land arbitrarily as the case is at the moment. Where it becomes necessary for such community members to be relocated, prompt payment of full and fair compensation shall be made prior to assuming occupation or possession of the property.

The Constitution shall protect Zambian land by having clear provisions ensuring that land usage is audited and properly accounted for, with clearly defined measures for recourse.

Principle 10: Adoption and Enactment of the Constitution

Adoption of the New Constitution

In order to allow for the national consensus and give legitimacy to the new legal document, the new Constitution should be adopted through a national Referendum as provided for in the Referendum Act, CAP 14 of the Laws of the Zambia. That Referendum should be conducted⁹ at least within 12 months after the report has been handed over to the President in order to allow the Electoral Commission of Zambia to prepare for the exercise.

⁹ Resolution of the National Constitutional Convention, April 2013

The Government also needs to:

- a) Establish a Referendum Commission as a matter of urgency to allow for the body to start preparing for this important process;
- b) Set the Referendum date as soon as possible;
- c) Assign the Electoral Commission of Zambia (ECZ) to manage the Referendum process;
- d) Ensure that the Electoral Commission of Zambia should embark on the process of updating the voter's roll;
- e) Conduct civil education on the referendum process, in collaboration with ECZ;
- f) Give Zambians a chance to vote for the new Constitution; and
- g) Announce Referendum results within a reasonable time after voting.

Enactment of the Constitution

For the enactment of the Constitution the following shall be required:

- a) Presentation of approved and adopted Constitution Bill to the National Assembly
- b) Enactment of the adopted Constitution Bill without any changes



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