

# ZAMBIA'S CONSTITUTIONAL GROUNDHOG DAY: WHY NATIONAL DEBATE ABOUT CONSTITUTIONAL REFORM IS NOT GOING AWAY ANYTIME SOON

GRANT MASTERSON<sup>1</sup>

## EXECUTIVE SUMMARY

Since independence, Zambia has had five major constitutional amendments (an average of one every 10 years), a fact that has raised concerns about the country's constitutional foundations. The constitution has been made a campaign issue in every presidential election since Zambia's return to multiparty politics in the 1990s. In recent years, constitutional reform has become increasingly politicised and intransigent. The latest constitutional amendment, announced in January 2016, offered Zambians provisions that had long formed part of their aspirations and demands. Why then was the 2016 constitution recently defeated in a national referendum? This policy briefing demonstrates how the interests of citizens have continually been placed behind the interests of Zambia's political elite, including in the 2016 referendum.

## RECOMMENDATIONS

- 1 Political parties should collaborate to find consensus before undertaking constitutional amendments. The APRM highlights that a country's constitution should enjoy popular legitimacy, and major amendments and revisions should not be undertaken lightly. Zambia highlights the dangers of politicising such a foundational aspect of any democracy.
- 2 Referendums should not be held concurrently with national general elections. Zambia's 2016 referendum clearly suffered due to the broader political environment, ultimately failing to secure the minimum turnout required to legally validate the final outcome.
- 3 Sufficient time should be allocated to sensitise citizens ahead of a national referendum. Clearly, less than six months was insufficient notice for Zambians, as demonstrated by the low turnout and significant number of rejected (spoilt) ballots.
- 4 Double-barrelled referendum questions should be avoided. Keep questions simple. The 2016 Zambian referendum question fails on both counts here, and the outcomes are evident.
- 5 The symbols used for 'Yes' and 'No' should be easy to understand. Using an eye for 'Yes' and an ear for 'No' proved contentious and confusing in the 2016 referendum.

## INTRODUCTION

Incumbent President Edgar Lungu was declared the winner of the Zambian presidential elections on 13 September 2016 by the Electoral Commission of Zambia (ECZ) and confirmed by the courts. Now the country can (hopefully) bring the curtain down on a period of acrimonious politicking and electoral upheaval stretching back to the untimely death of then president Levy Mwanawasa in 2008. Since then, Zambia has been almost perennially at the polls. The previous constitution required presidential elections to be held within 90 days if a sitting president died or became incapacitated. Mwanawasa's successor, Rupiah Banda, served for less than three years before losing to populist Michael Sata in 2011. Unwell, Sata himself died in office in 2014, triggering fresh polls that installed Lungu for the remainder of Sata's five-year term, 18 months before the scheduled presidential elections in August 2016.<sup>2</sup>

While regular elections are an important feature of modern African democracies, it is also important to promote intervening periods of policy stability. Zambia's constitution itself has impeded this stability, requiring elections when presidents vacate the office for any reason (resulting in four such elections in less than eight years since 2009). Little wonder then that for almost 20 years the constitution has been extensively debated and subjected to various constitutional review processes that have rarely led to tangible alterations.

When Sata unseated Banda and the Movement for Multiparty Democracy (MMD) in 2011, he was not the first Zambian president to promise a new constitution within '90 days in office'. However, Sata died with this pledge unfulfilled. So when Lungu stepped into the 18-month breach left by his predecessor, top of his list – and to pull the sting from opposition campaigning in 2016 – was the promise by the Patriotic Front (PF) to deliver Zambia a new constitution.

In a frenzy of legislative activity, Lungu presented Zambia with an amended constitution in January 2016, less than a year after taking office. Public participation, stakeholder engagement and expert analysis had been superficial at best by the time Lungu used his party's parliamentary majority to amend the 'people's draft' (as presented by the technical committee) into law. Although some key provisions were broadly welcomed, such as the adoption of a running mate on the presidential ballot (thereby resolving the line of succession should a president not

complete a full five-year term), Zambians in civil society have a powerful sense of *déjà vu*. Before the 2008 and 2011 elections there were similar conversations around proposed constitutional amendments (and citizen satisfaction with these), and these clearly contributed to the outcomes of those votes. Now, the key difference was that Lungu's PF had forced a major amendment through Parliament prior to securing a popular mandate from voters, rather than going to the polls with the amendment in its manifesto.

## THANKS, BUT NO THANKS

To indicate just how rapidly the 2016 amended constitution was rammed through Parliament, witness the bewilderment and chagrin of Zambia's members of Parliament (MPs) once they digested their own work. The 2016 constitutional amendment<sup>3</sup> included a clause that raised the educational level required for all elective positions, including parliamentary candidates themselves, to an effective Grade 12, and required a qualifying certificate as proof. It is unclear whether Zambia's MPs had applied their minds to this clause, but the fact that it disqualified several incumbent MPs from standing in the 2016 elections saw the same Parliament that had passed the amendment taking its own constitution to court months later.<sup>4</sup> This did not inspire confidence among Zambian stakeholders and citizens.

At the heart of the issues with the Zambian constitution, however, lies its politicisation. While in opposition, Sata and the PF had loudly criticised the MMD's proposed constitutional amendments and actively campaigned against adopting what they described as a flawed draft. Once in power, the PF delivered a watered-down draft of the constitution it had promised while in opposition. Zambia's 2013 African Peer Review Mechanism (APRM) Country Review Report<sup>5</sup> noted that, since independence, Zambia has had four constitutions (five including the 2016 changes), and that such 'frequent constitutional changes ... may not necessarily be in [Zambia's] long term national interests'.<sup>6</sup> The APRM report goes on to say:<sup>7</sup>

Constitutionalism, in the sense in which it is used in the APRM founding documents, flourishes when the provisions of any given constitution enjoy legitimacy among the people, when there are sufficient and effective checks and balances in place on the exercise of power, and when respect for human rights is in evidence in its provisions ... However, how does the proposed constitution stand up to critical scrutiny?

The 2016 constitutional amendment was Zambia's fifth substantial constitutional revision since independence in 1964 – on average, the country has seen a major amendment approximately every 10 years. How is it, therefore, that the APRM report still queries whether the Zambian constitution stands up to 'critical scrutiny'? What has constrained Zambian legislators from delivering a people's constitution? And, intriguingly, why did Zambian voters, after decades of calling for social and economic rights to be added to their constitution, reject this proposal in a disappointing turnout during the August 2016 referendum on the matter? The answers require a brief trip back into Zambia's political history.

### KAUNDA'S LEGACY

After independence from Britain in 1964, Kenneth Kaunda's United National Independence Party (UNIP) took charge of the newly independent state. In Zambia's first post-independence elections, however, UNIP lost several key seats, weakening Kaunda's control of the state. In response, a 1969 referendum was called that bestowed absolute powers on Zambia's Parliament to amend the constitution. For Kaunda, this was an intermediary measure towards a one-party state. In practice, the 1969 referendum's consequences persist in 2016: any constitutional amendment must be adopted directly by Parliament to be legal. In the early 1990s, as Africa's one-party systems democratised, Kaunda simply instructed his docile Parliament to change the constitution again, repealing the one-party state clauses. However, as multiparty politics reasserted itself in Zambia, the aspirations of the country's citizens were increasingly at odds with those of their parliamentarians, leading to legislative stasis through multiple iterations of constitutional review.

Despite increasingly inclusive citizen and civil society participation in constitutional review commissions (CRCs), set up to prepare draft constitutions for consideration, Parliament would cherry-pick clauses and sections to determine which were passed and which were struck down. To the immense frustration of Zambian civil society organisations, the parochial self-interest of politicians and party apparatchiks neutered and denuded multiple and successive drafts proposed by the CRCs. Civil society and opposition parties (including the PF before 2011) actively campaigned against these watered-down drafts presented to the Zambian people. Yet despite five separate constitutional review processes between 1991 and 2016, the 1991 constitution driven through

Parliament by Kaunda to reintroduce multiparty politics in the country remains largely intact.

### THE REFERENDUM QUESTION

Lungu's January 2016 signature<sup>8</sup> on a substantially amended constitution therefore came as a surprise to many, given the historical under-delivery on constitutional amendments. While Zambians welcomed some changes – including the 'running mate' clause and the introduction of a threshold of over 50% for a winning candidate to be declared president-elect – the manner in which Lungu achieved this constitutional amendment smacked of Kaunda in 1991. He used his party's parliamentary numerical majority and his executive privileges (which remain substantial) to secure the required votes in the house. Public participation, citizens' concerns and adherence to democratic principles as espoused in instruments such as the African Charter on Democracy, Elections and Governance were given only notional consideration.

In his defence, Lungu might argue that this is unreasonably harsh, and point out that concurrently with the August 2016 elections, all Zambians (even those not registered on the voters' roll) were asked to vote in a referendum on the matter. This referendum was on whether to include a new bill of rights in the constitution as amended in 2016; and whether or not to repeal and replace Article 79 of the constitution.<sup>9</sup> Setting aside for a moment the problem of conflating two distinct issues into one immutable referendum question (voters could only vote 'Yes' or 'No'), holding a referendum concurrently with the national elections was controversial.

### THE REFERENDUM QUESTION

Do you agree to the amendment to the Constitution to enhance the Bill of Rights contained in Part 3 of the Constitution of Zambia and to repeal and replace Article 79 of the Constitution of Zambia?



The AU and the EU observer missions to the 2016 Zambian elections, while noting the referendum taking place, advised in their preliminary statements<sup>10</sup> that in

future such plebiscites should be delinked from political processes such as national elections.<sup>11</sup> Certainly the referendum appeared to suffer in the boisterous political climate that centred on personalities rather than policies and manifestos. The decision by the opposition United Party for National Development (UPND) to link the referendum to Lungu's PF, hoping to secure a rejection of both the candidate and his referendum, further polarised pre-election opinion (perhaps accounting for some of the referendum's 739 000 rejected ballots). The most important reason why a revised bill of rights that would have granted all Zambians wide-ranging economic and social rights alongside their civil and political rights was rejected is that people simply were not given the time to understand what they were voting for.

In the end, apart from the period between January and August being too short for national sensitisation campaigns to take effect, there was also lack of clarity on whether the ECZ would conduct the referendum alongside the general elections. The ECZ has also cited the influence of international donor partners on the timeframes, reporting that some donors demanded that either the referendum take place concurrently with the elections or not go ahead at all, due to funding considerations.

TABLE 1 OUTCOME OF 2016 REFERENDUM		
Choice	Number	%
For	1,852,559	71.09
Against	753,549	28.91
Invalid votes	739,363	0.00
Total	3,345,471	100.00
Valid voters/turnout	7,528,091	44.44

Source: Electoral Commission of Zambia, 2016

## CONCLUSION

Ultimately, two significant hurdles stand between Zambia and a stable, consensus-driven constitution and bill of rights. First, Zambia remains constrained, arguably even handicapped, by Article 79 of the constitution, which limits the role of citizens in revising such matters to an advisory vote only (similar to the 'Brexit' imbroglio) and requires a minimum of 50% turnout to validate such a plebiscite. Second, Zambia remains captive to parochial self-interest among its elected officials, who, due to the failure to repeal and replace Article 79, remain the final arbiters of any future constitutional amendments.

That Zambia's citizens would knowingly preserve this status quo seems implausible. This raises the question: why did Lungu and the PF insist that the referendum go ahead under such tight time constraints? Why did the UPND campaign against it? In the final analysis, the 2016 constitution was not the hoped-for arrival of a people-driven constitution, and the referendum results show that Zambian citizens are left with more problematic questions than answers.

## ENDNOTES

- 1 Grant Masterson is a Programme Manager at the Electoral Institute for Sustainable Democracy in Africa (EISA). He has extensive experience in election observation, and was part of the AU Election Observation Mission to the Zambian elections in 2016.
- 2 Edgar Lungu's nomination by the PF papered over a nasty internal battle, which included acting president Guy Scott, who had stood as Michael Sata's running mate in 2011 but would have required a renewed mandate through general elections to remain in the position in his full capacity.
- 3 Republic of Zambia, Constitution Amendment Act No. 2 of 2016, <http://www.parliament.gov.zm/node/4834>, accessed 2 December 2016.
- 4 *Tumfweko* (Zambia), 'UPND takes Grade 12 certificate clause to Constitutional Court', 8 December 2016, <https://www.tumfweko.com/2016/04/20/upnd-takes-grade-12-certificate-clause-to-constitutional-court/>, accessed 2 December 2016.
- 5 APRM (African Peer Review Mechanism) Secretariat, *APRM Country Review Report No. 16: Republic of Zambia*, January 2013, <http://aprm-au.org/admin/pdfFiles/Country-Review-Report-No-16.pdf>, accessed 6 December 2016.
- 6 *Ibid.*, p. 274.
- 7 *Ibid.*, p. 275.
- 8 *Lusaka Times*, 'President Lungu ushers in a new constitution, calls for a new approach to politics', 5 January 2016, <https://www.lusakatimes.com/2016/01/05/president-lungu-ushers-in-a-new-constitution-calls-for-a-new-approach-to-politics/>, accessed 2 December 2016.
- 9 Article 79 of Zambia's constitution requires that a referendum be held when any changes to the constitution are proposed, and that 50% of the adult population of Zambia should participate in a referendum. Failure to achieve this figure renders the results invalid. Electoral Commission of Zambia, '2016 referendum', [https://www.elections.org.zm/results/2016\\_referendum](https://www.elections.org.zm/results/2016_referendum), accessed 29 November 2016.
- 10 AU, 'Preliminary Statement on the 2016 Zambian General Elections', 2016.
- 11 EU Observer Mission, 'Preliminary Statement on the Zambian Presidential, Parliamentary and Local Council Elections', 2016, p. 3.