Zambian constitutional amendment process

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Abstract: The Republic of Zambia has some similarities to the Republic of Cyprus, as proved by the fact that it became an independent state from scratch in form of (presidential) republic, on the basis of a constitution which was granted by the UK. The 1991 Constitution ratified the new era of democracy (neo-constitutionalism) after the one-party form of governance and was widely amended in 1996. Some changes were put into force in January 2016 whilst complementary ones were blocked because of the failure of the 2016 Constitutional Referendum. Besides, the 2019 Constitutional Amendment needs no referendum to pass but has raised severe criticism. Anyway, both the form of the amendment process and the structure of the constitution are complicated.

Keywords: African constitutionalism; Cyprus; constitutional amendment; convention of the constitution; neo-constitutionalism; people-driven constitution; referendum; turn-out quorum Zambia; 2019 constitutional amendment process; Zambia.

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1 Introduction: the recent amendment process of Zambian Constitution

The doctrine has characterised the process of writing about any constitution tricky business (Ndulo and Kent, 1996). If this remark is accurate, the grade of difficulty to take an approach to constitutional aspects of a landlocked country, having faced in the past very serious economic problems (Maniatis, 2018) and being far away from the mainstreaming decision-making process of the international context, is high. This is the

case of the Republic of Zambia, which is endowed with a relatively brief but very rich constitutional history, in the current era of independence.

It is also to signalise that the constitutional order of this commonwealth member has gained international interest, particularly due to its frequent amendment processes, not to speak to its similarities to other countries of Africa, particularly to those coming from the colonial rule of the UK.

The present analysis focuses on the topic of Constitutional Law of this former protectorate. More precisely, it examines some aspects of the pending process of the amendment of formal constitution, due to which research on Zambia is particularly actual.

First of all, this analysis takes an approach to the general phenomenon of constitutionalism in African countries. Although it constitutes a national case study, initially it proceeds to a general overview of African constitutionalism, as the basic point of reference of constitutional developments of a typical African State, as it is Zambia.

Afterwards, on the basis of this comparative approach, it focuses on the last, already completed, revision of a part of Zambian Constitution, occurred in 2016.

Besides, it examines the posterior case of a constitutional referendum for the amendment of another part of this constitution, which took place in the same year but in vain.

Furthermore, it analyses the process towards the adoption of the 2019 Constitutional Amendment Bill and the pending question of the approval of the proposed constitutional amendment.

Finally, it ends up to some global final remarks, particularly in the matter of the efforts to amend Zambian Constitution.

2 An overview of African Constitutionalism

French Revolution has been the mainstreaming fact for both human rights and adoption of constitutions. It was beneficial for various categories of human rights (Maniatis, 2019), implicating inter alia the abolition of slavery. The gradual abolition of that institution, by the two mainstreaming imperialist powers, France and the UK, led indirectly to the emergence of colonialism in Africa, in the 19th century, as European powers wanted to exploit the resources, particularly the mineral ones, of this continent. It is notable that not only slavery was a thing of the past during colonialism in Africa but also of the present, given that it was transformed into some substitutes, such as forced labour. Essentially, slavery survived, not to speak to the fact that the USA abolished it 71 years after France did. It is to pay special attention to the fact that it never disappeared fully. Indeed, slavery nowadays is a hidden crime that persists, in various forms, like human trafficking, in various regions (Skinner, 2008).

The political occupation of the area that was to be called Northern Rhodesia was spearheaded by Cecil Rhodes with his chartered company and by the British Government in the east (Chungu, https://www.academia.edu/26059873/Constitutional_making_in_Zambia_1890-2015). The decolonisation of African countries has been a very important process (Amadou, 2018), for which the doctrine has signalised that it was not accompanied by an economic decolonisation (Gonidec, 1996).

All African States are endowed with a written constitution (Metou, 2019). However, for Africa to move forward, there is the need to move toward constitution with constitutionalism, as long as there are countries without constitutionalism (Olasunkanmi, 2018).

Former colonies began their independence period through granted constitutions, like those being prepared and imposed by the UK according to the Westminster model. The first period of their free life, called 'post-independence' era, has to do with a constitutional process reminding of European Constitutions granted by the Monarch in the 19th century (Lauvaux, 2015). The doctrine (Kasimatis, 1980) remarks that the notion of democratic principle itself consists in the fact that the people alone have the exclusive power to determine the form and organisation of their form of state. According to this approach to democracy, the constitutional establishment and shaping of democracy by a body of power other than the people would be based on a fundamental contradiction, which would result in either disobedience to the constitution or its degeneration into an inactive constitution. The typical example is relevant to underdeveloped people, to which a democratic constitution is imposed, just after the abolition of colonial regime. This text has been prepared to cover the needs of developed people, without making use of procedures of full shaping and expression of the constituent will of the people. As a result, these constitutions, which were drawn up with such a difference between the natural body and the real body of constituent power, usually degenerate into virtual or inactive. This description of post-colonialism transition ends up to the remark that the fact that the people are granted a constitution formed by another factor facilitates the emergence of a dictatorship, by arguing that the people are immature and so they cannot enjoy a democratic form of state. The comment on this approach is that some have questioned the suitability of Western models for use in Sub-Saharan Africa, but the impact of history seems clear; one may interpret or reinterpret history, but one cannot repeal it (Ndulo and Kent, 1996).

The Zambian State apparatus and its constitutional foundations are a direct legacy of British imperialism (Gould, 2015). The 1964 Constitution appeared, in its principles and orientations, identical to the Constitution of Northern Rhodesia at the end of the colonial period.

The post-independence era (from 1960s to 1980s), indifferently to the fact that the former colony had a monarchical form of government (related to the UK's Queen represented by a governor-general) or not (as it was the case of the Republic of Cyprus and, some years later, of the Republic of Zambia), began with democracy and ended up to authoritarian forms of governance.

As already described, the democratic phase, shaped by constitutional texts prepared by the UK, proved to be brief. For instance, a socialist, one-party rule emerged in Zambia and was consecrated through its second constitution, adopted in 1973, like the case of neighbouring country of Tanzania (Quigley, 1992).

A study on the Zambian Constitutional History (Chipalo, 2016) refers to the fact that the 1964 Constitution of Zambia was negotiated after the dissolution of the Federation of Rhodesia and Nyasaland by the British government, the United National Independence Party (UNIP), the African National Congress (ANC) and the whites (only the National Progress Party). However, it did not mention the Barotse Royal Establishment, whose input was important to the attaining of the Zambia's independence (Kakanku, 2018).

It is to point out that the Barotse Agreement, which was concluded at the Commonwealth Relations office on 18 May 1964 and was signed by the then Prime

Minister of Northern Rhodesia, Dr. Kenneth David Kaunda, the then King of Barotseland, Sir Mwanawina Lewanika III and the Right Honourable Duncan Sandys M.P. the Secretary of the State for Commonwealth relations and colonies on behalf of Queen Elizabeth, was an agreement under which the two former protectorates (Northern Rhodesia and Barotseland) agreed to attain independence as a single republic to be called Zambia (Kakanku, 2018). This convention previewed the independence being subject to the various provisions and conditions laid down in it, to maintain within this single Republic of Zambia the position, powers and most aspects of the protection formerly provided to the protectorate of Barotseland (Kakanku, 2018).

Besides, the 1964 Constitution previewed that a bill to amend the constitution required the votes of not less than two-thirds of all members of the National Assembly, but an approval through referendum was also required, especially in case that the amendment had to do with any part of the constitution relating to fundamental rights (Ndulo and Kent, 1996). This democratic condition was eliminated in 1969, to facilitate amendments to the rights to property, but the implications of that change were far broader. The government desired to take over substantial sectors of private business through large scale nationalisations whilst the removal of the referendum clause was later to facilitate the adoption of a one-party system of government, as already signalised (Ndulo and Kent, 1996). It is to point out that the doctrine has to date very much underlined the political and constitutional impact of the change relevant to the amendment clause.

Another important parameter of the political system, which could be characterised as a tacit 'convention of the constitution', consists in the fact that Zambian regimes have the tendency to abstain significantly from the proposals of the competent constitutional review process commissions. More precisely, the last three constitutional review commissions, the one appointed by the aforementioned President of the Republic Kaunda, headed by Lawyer Mvunga in 1990, whose recommendations led into the new constitution that brought back multipartyism in 1991, the one by the Movement for Multi-party Democracy (MMD) and President Chiluba, headed by John Mwanakatwe in 1993 and the last one appointed by President Mwanawasa, headed by another lawyer, Mung'omba in 2003, all did draft reports that were regarded as being widely progressive, recommending many points that the people wanted to be included into the constitution (Kakanku, 2018). However, in the end these recommendations were sieved to meet the choices of the leadership leading into half-baked pieces of constitutions having been passed on each occasion (Kakanku, 2018).

In Africa, in contrast to the precited phase of authoritarian governance, being opposite to the initial imposition of Western models, from 1990s and on the countries lead the post-cold period. This era consists in a new wave of constitutions meeting the needs of the people. It is about the movement of neo-constitutionalism, establishing a democratic Republic with emphasis on the recognition and the protection of human rights. However, many parts of Africa have far failed to develop democratic institutions and modes of conducting public affairs and, as a result, Africa has been strife-torn for most of the post-colonial era (Ndulo, 2003). Rwanda, for example, was the scene of the world's biggest genocidal massacre in half a century (Ndulo, 2003).

Besides, countries involved in the so-called Arab Spring, such as Tunisia and Egypt, seemed to be moving from authoritarian systems toward more democratic and constitutionalist ones (Tushnet and Abati Ninet, 2015).

Anyway, the current era of constitutionalism is not exempted from problems, such as the following categories of infringement (Senou, 2019):

2.1 The power monopoly of the head of the state

In traditional African societies, State power is not shared, it may be at the limit delegated by the head, but it remains in its whole in his hands.

2.2 Ineffectiveness of human rights and transgression of constitutional rules on governance

Certain African Constitutions continue to be façade because of the ineffectiveness of the rights consecrated and the transgression of their rules on governance. Neo-constitutionalism from this point of view is not totally at odds with the practices of authoritarian regimes of the previous period (1960s–1980s). Violations of human rights keep preoccupying NGOs and UN agencies, even if a progress has taken place in some countries.

2.3 Connivance of constitutional courts with political power

In some African States, there is a connivance of constitutional courts with political power. Of course, their existence itself constitutes a major advancement in institutional and democratic terms, but they should be much more daring and responsible, especially in the countries in which the mandate of judges is not renewable.

2.4 Ambient impunity within the ruling class by aligning with the governing party

On the one hand, there is a context of impunity within the ruling class and also within the society in general, through the bonds fostered with the governing political party. On the other hand, a blackmail of a lawsuit is made to some persons in order to obtain their silence or their rallying to the regime. This ambient impunity creates and maintains the feeling that citizens are not equal before the law. It results therefore a de facto institutionalisation of a juridical apartheid. The public prosecutor refuses to prosecute certain notables or their protégés either on the orders of the Ministry of Justice or for fear of retaliation from the hierarchy.

3 The 2016 Amendment of the Constitution

In virtue of Zambian Constitution, amendments to the Bill of Rights and Article 79 require a referendum, in which citizens either accept or reject the proposed changes (Lumina, 2016a). Thus, Parliament had the possibility uniquely to approve changes other than those proposed on these two subjects. It was decided that changes to these provisions would be subject to a referendum, to be held alongside the presidential, parliamentary and local government elections in August 2016. Changes contained in the draft constitution, being prepared by the technical committee following popular consultation, such as a devolved system of governance through elected provincial

assemblies, the mixed member representation electoral system, and the appointment of cabinet ministers from outside the National Assembly, were rejected, as it was the case of some progressive changes proposed by previous amendment commissions, as already signalised. It is notable that the doctrine made use of the term 'people-driven constitution' against the government of the day (Lumina, 2016a). This term is based on the fundamental principle of democracy and is also strictly related to the mechanism of constitutional referendums, being the symbol of direct democracy. More precisely, for many commentators, the parliamentary process to achieve the amendment of the constitution fell far short of what was required for a truly people-driven constitution and a new constitution that would reflect the wishes and aspirations of the Zambian people. In reality, the new version of the constitution has caused a rather contradictory assessment, as there are also positive approaches to this normativity. For instance, this text has been considered as very progressive, with the argument that many, if not all, of the submissions that were made to the Mung'omba Constitutional Review Commission have been included, with the exception of the creation of the provincial parliaments, which were considered to be too costly for the nation (Chipalo, 2016). Among the very good amendments, were mentioned the establishment of the constitutional and appeal courts, dual citizenship and the pension law whilst the opposition just complained about one clause, that of the requirement of a minimum academic qualification of grade 12 for one citizen to become a member of Parliament or councillor (Chipalo, 2016).

In December 2015, Parliament passed parts of the Constitution of Zambia (Amendment) Bill, namely those which were exempted from the constitutional referendum procedure (Lumina, 2016a). They came into force on 5 January 2016, after President Edgar Lungu signed the new constitution into law.

4 The 2016 Constitutional Referendum

On 11 August 2015, Zambia held polls to elect the President of the Republic, members of Parliament, mayors and councillors, alongside a referendum on changes to the Bill of Rights in the national constitution and replacement of the provision on the amendment of the constitution (Lumina, 2019). The electoral commission eight days later announced that the referendum failed to reach the threshold of 50% of eligible voters, required for the result to be valid. The doctrine has estimated that the failure of this political voting procedure was attributable to a variety of factors, such as the timing, the controversy surrounding the reform process and the lack of public education about the constitutional referendum issues (Lumina, 2016b).

In virtue of the Referendum Act, at least 50% of Zambians who are entitled to be registered as voters for the purposes of presidential and parliamentary elections must vote in the referendum. In other words, the absolute majority of citizens above 18 years were required to participate in the procedure. It was difficult to establish the number of 'eligible voters', as the last population census was carried out in 2010. The Central Statistical Office estimated in March 2016 that there were 7,528,091 Zambians eligible to vote in the referendum, simply on the total projected population for the period 2011 to 2035. If this projection is accurate, at least 3,764,046 of the eligible voters must have voted but only 3,345,471 (namely 44.44%) of eligible voters participated.

First of all, it is to put the stress on the fact that the 50% clause is a condition leading to the alteration of democracy. Indeed, this condition is excessive, if not useless, given that the political voting guarantee is an authentic right of all voters, who should not be pushed to participate through regulations like this. The right to political voting has not merely its positive dimension but also the negative one, in form of electoral abstention. As far as Europe is concerned, the existence of threshold has appeared particularly the last decades in some Republics of Eastern Europe, coming from the collapse of socialist governance. According to article 7 of the Code of Good Practice on Referendums, adopted by the Council for Democratic Elections at its 18th meeting, on 12 October 2006 and the Venice Commission at its 68th plenary session, on 13–14 October 2006, quorums are avoidable. It is advisable not to provide for a turn-out quorum (threshold, minimum percentage), because it assimilates voters who abstain to those who vote no [European Commission for Democracy through Law (Venice Commission), 2018]. The same guideline is valid for the approval quorum (approval by a minimum percentage of registered voters), since it risks a difficult political situation if the draft is adopted by a simple majority lower than the necessary threshold. This form of quorum may be so high as to make change excessively difficult. If a text is approved – even by a substantial margin - by a majority of voters without the quorum being reached, the political situation becomes extremely awkward, as the majority will feel that they have been deprived of victory without an adequate reason. Last but not least, the risk of the turn-out rate being falsified is the same as for a turn-out quorum [European Commission for Democracy through Law (Venice Commission), 2018]. It is to signalise that the irony of the story is that while the (old) Zambian Constitution provided for not less than 50% of those 'entitled to be registered' as voters for purposes of presidential and parliamentary elections, the proposed amendment clause provided for a referendum threshold of 50% of 'registered voters' voting and more than 50% voting in favour (Lumina, 2016a). In other words, an attempt was made to duplicate the required quorums, which would implicate a very demanding procedure for the achievement of constitutional changes.

The question of the 2016 referendum was: "Do you agree to the amendment to the constitution to enhance the Bill of Rights contained in Part III of the Constitution of Zambia and to repeal and replace Article 79 of the Constitution of Zambia?" This question raised criticism (Lumila, 2016b), as the formulation on the matter did not consist of one dilemma but included two different parts. The first part, being relevant to the Bill of Rights, was clear whilst the other one was problematic, given that many citizens ignored the implications of the proposed changes relevant to the constitutional amendment clause. Thus a 'separability problem' emerged, which led to confusion.

This problem is very serious but not frequent in Europe. According to the above-mentioned code, questions submitted to a referendum must respect the unity of content: except in the case of total revision of a text (constitution, law), there must be an intrinsic connection between the various parts of each connection put to the vote, in order to guarantee the free suffrage of the voter, who must not be called to accept or refuse as a whole provisions without an intrinsic link (given that they may be in favour of one and against another). In this chain of ideas, the revision of several chapters of a text at the same time is equivalent to a total one. Clearly, this does not mean the different chapters cannot be put separately to the popular vote [European Commission for Democracy through Law (Venice Commission), 2018].

The questions of principle on the failure of the referendum were the quorum clause and the transgression of the principle of the unity of content, but various other obstacles

for a wider participation have been noticed, particularly on account of the country's low literacy rate, estimated at 61.4% (Lumina, 2016b). A referendum requires that those proposing changes advance cogent arguments to persuade a majority of the voters to support the changes, but this was not the case of the referendum on the matter (Lumina, 2016b). As a matter of fact, the failure of the referendum means that the Bill of Rights remains intact, as do the dispositions on the constitutional amendment. The popular disapproval of the proposed reform blocked inter alia some regressive provisions, such as the article which effectively outlawed abortions by stating that life begins at conception (Lumina, 2016b).

5 The 2019 Constitutional Amendment Bill

In the above-mentioned presidential election, the President Edgar Lungu, coming from the ruling political party 'patriotic front' (PF), secured a narrow victory over Hakainde Hichilema, being the candidate of the United Party for National Development (UPND) (Lumina, 2019). The opposition party contested the result of the election in the constitutional court, but the petition was dismissed on a technicality. This jurisprudence caused uncertainty and tension, which were aggravated by, inter alia, the detention of Hichilema on treason charges and the temporary suspension of 48 opposition members of Parliament for boycotting the President's official opening of Parliament.

In June 2018, the Zambia Council for Interparty Dialogue (ZCID) convened a two-day meeting of all the major political parties at Siavonga, which adopted some resolutions on potential constitutional, institutional and electoral reforms, including the following matters:

- separation of powers and judicial independence
- tolerance, freedom of assembly and civility in politics
- integrity of the electoral process (Lumina, 2019).

The meeting unanimously resolved that the national dialogue process should be facilitated by the ZCID and chaired by the church mother bodies, namely the Council of Churches in Zambia, the Evangelical Fellowship of Zambia and the Zambia Conference of Catholic Bishops (Lumina, 2019). It ended up also to the resolution that changes to the constitution should be adopted by a 'people's assembly'.

However, framework for dialogue and reconciliation, to be undertaken over two years, was launched in January 2019 but stalled through the abstention of the party 'PF'.

In March 2019, the government decided to introduce a national dialogue process, through Bill No. 6 of 2019, which was enacted by Parliament a month later (Lumina, 2019). This National Dialogue Act established a dialogue forum, which adopted 9 of the 15 Siavonga resolutions and 3 draft bills, such as the Constitution of Zambia (Amendment) Bill 2019. The Government was based on this draft bill, but also added some proposals that were not a part of the Forum's recommendations and therefore, on 21 June 2019, released the Constitution of Zambia (Amendment) Bill No. 10 of 2019 for public comment.

As for the substantial part of the bill, the proposal includes 'Christian morality and ethics' as one of the national values and principles (Lumina, 2019). Besides, the proposed

changes anticipate the likely formation of a 'coalition' government to prevent the need for runoff presidential elections. Furthermore, if one of the principal aspects of the 2016 Constitutional Reforms was the attempt to constrain the powers of the President, particularly in the matter of the appointment of key officeholders, the new reform attempt reverses many of these constraints. The proposals also replace the first-past-the-post with a mixed-member electoral system, and abolish nominated members of Parliament. Last but not least, while the bill does not officially aim at changing any aspect of the judiciary, it evinces profound changes to this power, including procedures for removal of judges from office and composition of the supreme and constitutional courts, whilst the judiciary was endowed with the international legal standards of independence already before the 2016 Constitutional Amendment (Sakala, 2013).

The government has tabled the bill in the National Assembly, which can adopt it with the majority of two-thirds of all members (that is 110 of 166) (Lumina, 2019). Although no referendum is required, the bill is unlikely to pass, as the main opposition party, UPND, has the number to block the reforms, if it stays cohesive.

Finally, the Law Association of Zambia (LAZ) has petitioned the constitutional court for a declaration that the respondents' decision, to the extent to which it seeks to amend the constitution in the manner set out in the Bill, is unconstitutional, as well as for an order (of Certiorari) quashing the bill (Lumina, 2019).

Anyway, the attempt to achieve this amendment has raised severe criticism.

6 Conclusions: Byzantinism in the constitutional amendment process

The current analysis ends up to the following final remarks:

6.1 Constitutional similarity of Zambia to Cyprus

The Republic of Zambia has been similar to another member of the Commonwealth, the Republic of Cyprus. On the one hand, Zambia became just the second former colony of the UK, after the sui generis case of Cyprus, to become a Sovereign State with the form of republic, from scratch. This novelty of Zambia was not presented by the UK as an indication that its so-called friends in Northern Rhodesia had any antipathy to the connection with the crown. Rather it should be seen as a realistic acceptance, right at the outset, of what many African countries had found, after only a brief period of independence, the medium best adapted to their political aspirations (HL, 1964). Anyway, according to the doctrine (Aïvo, 2019), focusing on presidential republic in black French-language Africa, the reading grids of the institution of the President of the republic appear limited for some and exceeded for others. On the other hand, the UK granted to Zambia a constitution being related to the Barotseland agreement of the same year. The proportions kept, this provision of privileges in favour of a minority is reminiscent of the defective content of the Constitution of the Republic of Cyprus, which foresaw the privileges of Turkish Cypriot citizens, who could elect up to the Vice-Head of the republic (Maniatis, 2000). As it is quite normal, the institutionalisation of internal division of the people of a non-federal sovereign State is conducive to tensions and potentially to conflicts.

6.2 Byzantinism of the constitutional amendment process

Zambia has a meaningful constitutional history, with a gradual enrichment of the Bill of Rights whilst initially the socio-economic rights were absent (Kasonde, 2008). It is not plausible that there is a big number of amendments and amendment attempts. Both the form of the amendment process and the structure of the constitution are complicated. From 1964 to 1996, changes of the formal constitution were frequent whilst the opposite outcome emerged afterwards, without resigning from the tendency to amend the constitution. In other words, the Republic of Zambia was in need of about 13 years to amend the 1996 version of the 1991 Constitution, let alone the fact that the amendment process was not completed, as the required constitutional referendum failed.

6.3 Negativism on constitutional referendums

It is remarkable that constitutional referendums have become a very typical taboo, as for Zambian constitutionalism. There is essentially a 'fear' of politicians for this form of political voting, as it was obvious in the case of the 'referendum to end all referenda' (Ndulo and Kent, 1996). Even the comeback of the referendum clause in the constitution was not exempted from problems, as proved by the failure of the 2016 referendum (mainly as far as the quorum condition is concerned). This political or institutionalised negativism on the mechanism of constitutional referendums is comparable with a relatively recent political tendency of regimes against referendums in Europe. This politicians' attitude, with starting point the 2005 referendum processes on the Treaty establishing a Constitution for Europe, proved to be efficient, particularly for the application of measures to cope with the posterior economic crisis, but is far away from the current model of participatory democracy. In conclusion, the metropolis of constitutionalism is in a crisis of values insofar as it is removed from institutions of direct democracy.

The protection of human rights and the normal operation of a constitutional State are in need of simplicity.

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