

UNDERSTANDING THE FOUNDATIONS OF ZAMBIA'S CONSTITUTIONAL CHALLENGES

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POLICY BRIEF

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KEY FINDINGS

- Zambia has had several constitutional changes that have been unsuccessful in resetting the power structure of the state.
- The reforms undertaken fell short in addressing the core issues of the Constitution that pertain to the foundational constitutional challenges around national cohesion for the purposes of national unity, the use of law to repress rather than to empower citizens and limit governmental power, and the state's perceived illegitimacy by its own citizens.
- These issues continue to have a direct or indirect bearing on various areas of constitutional law.

POLICY IMPLICATIONS

- The nation needs a thorough contextual and historical diagnosis of its constitutional problems to understand why various constitutional reforms have not remedied them.
- Without understanding the foundational challenges and resetting the underlying power and incentive structures, the nation's efforts will persist in merely alleviating the symptoms of constitutional failure rather than tackling the root causes of the malaise.

INTRODUCTION

Zambia has had several constitutional changes. Yet the need for a more democratic and transformative constitution seems to double with every constitutional change. Just what did the previous constitutional reforms miss? What more can be achieved? Haven't previous reforms exhausted all major areas of dissatisfaction? This policy brief argues that the previous reforms have not addressed the foundational problems of the state, which continue to predispose the state to various constitutional challenges. Until these are addressed, the country will continue to treat symptoms rather than the cause of the challenges.

Zambia's constitutional and democratic challenges cannot be fully understood without appreciating the impact of colonialism on governance. The country's constitutional order, the laws, relevant legal practices and public law culture originate in colonial administration. The country's independence from colonial rule in 1964 did not mark any radical departure from colonial constitutional order. Instead, the newly independent state inherited a complete set of laws, practices, judicial precedents and cultures that survived political emancipation¹.

Thus, although independence was underpinned by a new constitution, its implementation was predicated on the pre-existing constitutional and legal order. Andras Sajó was correct when he observed:

A constitution is what it becomes during its life; but if we wish to define it, we must recognise that its creation is of utmost importance, and what happened before its adoption, is at least as crucial as its later vicissitudes².

Therefore, to understand the democratic and constitutional challenges of postcolonial Zambia, one has to delve into its colonial past. The goal should not be escapism and fashioning excuses for failure to craft a more democratic constitution. Indeed, postcolonial leaders bear

massive responsibility for many excesses and missed opportunities to create a better constitutional order. However, as Prempeh has argued, the failure of constitutionalism in postcolonial Africa cannot be fully understood without properly considering the African state in its historical context³. In view of this, this policy brief highlights some structural challenges stemming from the colonial era, which continue to predispose the country to a range of constitutional challenges. These include the lack of national cohesion, the use of oppressive laws to legitimise and justify power, and a deficit in state legitimacy.

1. LACK OF NATIONAL COHESION

Zambia is a colonial construct. Prior to colonial rule, various groups were self-governed in accordance with their distinct laws, customs and traditions with ethnic identities being relatively fluid. The 19th century, when Zambia came under colonial rule, marked a period of significant transformation across Sub-Saharan Africa, characterised by nation-building and migrations. It was a period of disruption, merger of groups and re-alignment of kingdoms and chiefdoms and cultures. It was during this time, for example, when the Ngoni broke away from Shaka Zulu and settled in Eastern Zambia; when Sebitwane and his followers settled among the Lozi people in Western province and when the Bemba people migrated from Congo to settle in Northern Zambia. As a result of these disruptions and developments, ethnic identity was not a permanent or fixed feature. It was “fluid and situational” and not a coherent permanent feature⁴. That said, however, it does not follow that groups of people were naturally compatible and able to co-exist peacefully. The various ethnic wars before colonial rule testify to that. What is significant is that ethnic margins were permeable, and in extreme cases, those not content within their group could easily leave as national boundaries were then not permanently fixed as they are today.

However, two things happened as a result of colonialism in relation to ethnic identity, which have implications for national cohesion. Firstly, was the invention of the “tribe” as an immutable, permanent quality of ethnic groups. Thus, the colonial system “popularized the view that African communities in Northern Rhodesia had always been organized along tribal lines” and tribes had discernible features⁵. Thus, the various groups within the territory were considered closed and distinct. Tribal histories, colonial reports and missionary descriptions served to crystallise the beliefs and put them into practice, especially in selecting people for employment in certain sectors. These colonial stereotypes, for example, considered some tribes to be suitable for industrial labour, some to be friendly and amenable to law and order, some to be self-reliant and disinterested in formal employment, while some were considered to be only suitable for labour⁶. The effect of these stereotypes was to harden ethnic consciousness among various groups.

Thirdly, creating one nation from various groups brought together people who may not have wished to live together. Since the boundaries were drawn arbitrarily, they also cut through and separated people who were one⁷. Thus, without an inherent historical logic to the drawing of the borders, the colonial administration brought under one territory diverse groups with little consideration for their intrinsic desire to coexist. In effect, Zambia became a juridical state without its inhabitants having a sense of being one or a nation. In fact, the drive towards nationalism was largely driven by collective grievances against colonial rule and little else.

The cumulative effect of these factors is that upon gaining independence, the new Zambian leaders faced a formidable challenge of welding together into one nation the various groups in the country in order to mould a viable state. This has had constitutional implications in at least two ways. Firstly, the process of national building was driven from the centre by the new leaders based on top-down models of nation-building. This largely meant the creation of a more centralised unitary state and accumulation of power in the central government, predominantly in the President⁸. An example of this centralisation of power can be seen during the presidency of Kenneth Kaunda, the nation’s first president after independence. It was under his leadership that Zambia became a one-party state with the United National Independence Party (UNIP) as the sole legal political party.

Secondly, any assertion of diversity was perceived negatively by the state and seen as an obstruction to national-building. Diverse identities had either to be obliterated or subordinated to the national identity. Prempeh correctly captured this suspicion of sub-regional autonomy:

Thus, demand for some degree of federalism, or a reasonable degree of provincial devolution to preserve some degree of local self-governance for the post-colonial states territorially based sub-national communities, or to check on the part of national elites, were disparaged as tribalism-inspired under the conception of nationhood and national unity passed by Africa's postcolonial elites, not only did national interests and national identity, even if inchoate, trump all local or subnational sentiments and identities but, more importantly, only claims on behalf of the national were considered valid⁹.

These views led to gross violation of human rights, limiting participation in public affairs and suppressing those with divergent views. Those opposed to the collectivist views of nation-building were seen as enemies of the state or anarchists. All other rights were subordinated to the idea of national cohesion. Kenneth Kaunda firmly argued:

For a nation can flourish and its people benefit under a strong government but anarchy is the basic denial of freedom because every aspect of the nation's life is paralysed. National survival is the basic good; all other qualities such as unlimited freedom of expression are contingent upon it, the great enemy of freedom is not totalitarianism but chaos¹⁰.

These views permeated all institutions of the state, including the judiciary. For example, when Simon Mwansa Kapwepwe resigned from UNIP and formed his own party, a narrative was created by those in government that he intended to divide the country along tribal lines. As a result, he was arrested and detained without trial and his party banned. When he challenged his detention, the then Court of Appeal repeated the narrative thus:

As to the second [ground of detention], I consider that it is a notorious fact that the United Progressive Party is largely based on support from the Bemba and allied tribes and that the party is in the popular image a Bemba party. In this context it seems clear to me that this ground is an allegation that the detainee has been organizing the party as a tribal party which in the result is likely to cause conflict with other tribes and prejudice security¹¹.

These views later crystallised into the one-party state constitution in 1973, effectively outlawing any other party apart from the ruling UNIP.

It would be a mistake to think that reversion to multiparty democracy in 1991 resolved the challenge of ethnic identity and national cohesion. The question still begs an answer through appropriate constitutional mechanisms that can allow for harmonious co-existence while at the same time not freezing those identities. The suspicion of ethnic identity still characterises the various past constitution review processes. Although citizens have submitted on the issue and the need to directly redress it and design constitutional mechanisms for positive co-existence and accommodation, all previous constitution-making processes resorted to fear-mongering, conjecture, speculative reasoning and buck-passing in order to avoid dealing with the problem.

This is perhaps best reflected in the views of the Mung'omba Constitution Review Commission. The Commission received 187 submissions proposing turning Zambia into a federal state, as opposed to 10 against¹². The reasons for supporting a federal State included perceptions of alienation from central government; regional marginalisation; tribal imbalances in appointments; lopsided development and control over local resources¹³. The Commission acknowledged these concerns raised by the petitioners, but instead of doing their bidding and drafting a constitutional framework that would take care of these concerns, the Commission resolved as follows: "The commission feels that a federal system that 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."¹⁴ Thus, previous constitutional-making processes have chosen to bury their heads in the sand at the expense of facing the ethnic problem head-on and designing a constitutional framework that is inclusive, accommodating, and celebrates the diversity of its people. Doing nothing merely postpones the problem, allowing it to fester and increasing the possibility of it exploding with intensity at some indeterminate future stage

That this should be a matter of urgent constitutional design is born by the findings of the Commission of Inquiry empanelled by President Lungu to look into the lopsided regional voting patterns and concomitant political violence in the country. The

Commission found that the main driver of political violence was tribal inclination, where voters give their support to the party led by candidates from their own tribe or region. According to the Commission, this explained “the teaming up of people from provinces on the south-western part of the country, on the one hand, and people from the provinces on the north-eastern side of the country, on the other hand” and that “politicians deployed tribal campaigns.... whereby they used tribal tags to influence tribesmen and tribal cousins to garner votes to benefit their political parties.”¹⁵

The issue of ethnic identity implicates many other aspects of constitutional interest, including the need for an inclusive electoral system, political mobilisation and public participation in governance, devolution of power to subnational tiers of government, and patronage and corruption in public affairs. The current approach to national building based on unitary nationalism and suspicion of diversity is not sustainable and can only survive on a mix of repression and patronage.

2. COMMAND BASED LEGAL ORDER

Colonial administration was not based on personal whims of the administrators. It was a system based on law. It was fairly progressive in the sense that, it was to some extent based on then contemporary liberal views and often times the law came to the aid of indigenous people. The paradox, however, is that, the colonial system was designed to maximize the exploitation of the country’s natural and human resources.¹⁶ As a result, the legal order was skewed towards the protection of the interests of white settlers (ruling class), and the interests of the indigenous majority were largely secondary.¹⁷

To accomplish the task of safeguarding the interests of the minority, a cocktail of repressive laws was passed in order to contain the rising discontent of the Africans. As a result, the seemingly liberal constitutional order and its trappings were used to give a veneer of legitimacy to the dispossession and despoliation of Africans. The law thus, “was primarily a mechanism for asserting, enabling and legitimating state power, not for constraining or limiting it.”¹⁸

Without containing the discontent of the majority, and silencing them, the colonial state could not function. As a result, order and stability were considered paramount, not citizen participation and human rights. In the words of Eghosa Osaghae, the colonial state was “primarily a law-and-order state” in that its primary concern for order and stability (preconditions for preserving colonial interests) meant heavy reliance on legal instruments of “coercion to sustain state power.”¹⁹

As the indigenous streams of nationalism gathered pace in Zambia, the colonial administration responded by enacting further restrictive rules and pieces of legislation to contain them. Some key legislation passed in this context is still used today either in their original or modified form. These include:

- The Printed Publications Act 1947, which limits and controls the publication and distribution of literature;
- The Emergency Powers Act 1957 and the Preservation of Public Security Act 1960, which allowed the suspension of human rights;
- The Societies Act 1957, which was “aimed at controlling nationalist political organisations by requiring them to register their branches and to supply the government with specific information about their activities and organisations,”
- The Public Order Act, which limited public assemblies, meetings and processions; and
- An amendment to the Penal Code to extend the definition of “seditious intention to include the bringing of any government into hatred or contempt.”²⁰

All institutions, including the judiciary, were co-opted to serve the colonial interests of order and stability. For example, in the case of *Queen v Chona* (1962), Mainza Chona, the national secretary for UNIP issued a document describing the evils of colonial rule and circulated it widely. He was charged with publication of a seditious publication under the Penal Code. In convicting him, the court noted that the publication “was a seditious publication because it intended to bring into hatred or contempt and to excite disaffection against the administration of justice in the territory.”²¹

At the heart of the law-and-order approach was the office of the colonial governor, who was the chief executive of the colonial administration. The colonial governor, subject to minor controls, had plenary powers over the territory. The Northern Rhodesia

Order in Council 1924, for example, clothed the office of governor with imperial power as the governor “empowered and commanded to exercise on His Majesty's behalf all such powers and jurisdiction as His Majesty at any time before or after the passing of this Order had or may have within the said Territory and to do and execute all things that belong to his said Office...”²² At independence, the president replaced the colonial governor, without any change in the underlying power structure. The president, therefore, could do whatever the colonial governor did. The Zambian presidency, in its current form, is nothing more than a colonial artefact, an instrument and symbol of holding the nation together through a cocktail of repressive laws and patronage networks.

The repressive laws and judicial precedents did not vanish at independence. They were preserved and passed on to the indigenous government, who, within a short period from independence, heavily relied on them to limit political space and suppress dissent and human rights. As Prempeh has noted:

the new Africa also received, as part of its colonial bequest, a command-based legal order- the full panoply of coercive legislation, orders, ordinances, by laws, and judicial precedents upon which colonial authority had been based. The inherited legal apparatus thus offered African elites real power and the bureaucratic machinery with which to exercise it effectively. By choosing the authoritarian model, Africa's new managers would not have to reinvent the wheel, the structures, laws, and usages of the colonial state, were readily at hand.²³

In the case of Zambia, the cocktail of oppressive laws was preserved at independence by operation of section 2(1) of the Zambia Independence Act 1964, which enjoined that all law which was in force at independence would remain in force unless the legislature specifically repealed it. It is, therefore, hardly surprising that various post-colonial regimes continued on this path and enacted their own repressive or limiting pieces of legislation. Recent examples of these are the Non-Governmental Organisations Act 2009 and the Cyber Crimes and Cyber Security Act 2021.

In this context, the constitution hardly serves as a transformative tool. Rather it is often interpreted by the judiciary to fit the pre-existing order instead of transforming the pre-existing legal order. This explains the plethora of human rights and constitutional law cases where the judiciary simply surrenders its interpretive role to the discretion of the executive. The constitution itself becomes a tool for masking the illiberal exercise of power, as the resulting judicial interpretation, reconciles the supposedly progressive standards of the constitution with repressive subordinate laws. In this manner, abuse of power becomes difficult to detect as its abuse is done “through, and not against the prevailing constitutional order.”²⁴

3. LEGITIMACY OF THE STATE

The manner in which the state was carved out caused a shift in relations between the leaders and the governed. A new power structure was superimposed on what held precolonial societies together. As a result, the incentive and motivation structure for responsive leadership were drastically altered. The full significance of colonial rule did not become apparent to the indigenous population “until it had set up a local administration and began collecting tax: it was this above all else which first showed the ordinary villager that both he and his chief had a new master.”²⁵ This new master, however, had no mandate or consent of the people nor did he govern on the basis of pre-existing conventions. This broke the reciprocal relationship between the people and their leaders. The state became a colonial project for extracting resources, domination and control.

Colonial rule has had at least two negative impacts on the African state, which predispose it to authoritarian rule. First, the colonial system was based on systematically denying indigenous Africans political and economic rights. Second, in order to govern extensive territories, the government had to co-opt traditional leaders to serve its interests.²⁶

In relation to the first impact, there were many ways indigenous people were disempowered and denied participation in public affairs. However, the most glaring was their disenfranchisement. The Northern Rhodesia franchise was based on a common roll since 1925. However, in practice, representation in the legislative council was based on racial divisions whereby whites directly elected their own representatives while Africans were marginalised or only had whites appointed by the governor to sit in the legislature to speak to the interests of the Africans.²⁷ The participation of Africans in the elections as candidates or electorates was only improved as the country moved towards independence. But even then, there were still restrictive property and literacy

qualifications that tended to exclude them.²⁸ There was no universal suffrage for Africans until 1964. In relation to the second impact, the colonial settlers were far outnumbered by indigenous Africans. For example, in 1924 there were only 4, 182 whites against 1, 100, 000 Africans.²⁹ In order to effect control over the territory, the colonial authorities relied heavily on African collaborators, mostly chiefs and the nascent civil service, who now became instruments of colonial rule. Co-optation of chiefs in this manner gave chiefs power they never had and, therefore, strengthened their hold on power while undermining traditional mechanisms that were a fetter on arbitrary use of power. This co-optation of chiefs or “big men” played a cardinal role in “shaping the way in which leaders have had to operate ever since.”³⁰ This engendered the culture of exercise of power without adequate countervailing mechanisms to contain that power.

This also led to the building up of a culture of bureaucratic government that was insufficiently accountable to the people. The nascent civil service was beholden to the colonial administration and not answerable to the people. Due to inadequate control mechanisms, the nascent civil service often preyed on the people, establishing a culture of accumulation and illicit enrichment. The Boma class, as the nascent civil service was called, often misappropriated funds; they would withhold revenue collected or would take advantage of the ignorance of the people and illegally introduce fines, levies and taxes and pocketed these proceeds.³¹

Public resources were effectively used for personal enrichment. As Chipungu noted:

When all forms of illicit access to the Native Treasury funds are considered, an impression that emerges is that of the Boma class consciously fraudulently turning the state resources into private capital. The class had the tendency of viewing the state resources, represented by the Treasury, as a target to rip off, regardless of personal consequences.³²

This is still what characterises the civil service today. It is not the president or the ministers an ordinary citizen meets every day. The average citizen encounters the state often at the point of seeking public services, such as at police stations, council offices, health facilities or road tax offices. The encounter of the citizen with the state at this level is often characterised by abuse of power manifest through demands for bribes, extortion, unjustified delays, and discrimination. The state is not conceptualised primarily as a mechanism for delivering goods to citizens but as something to milk for the private gain of those who hold office.

The cause for this appears to be a lack of legitimacy for the state in the eyes of the people. As a colonial construct, the state was an alien establishment not primarily intended for their well-being. The anti-colonial movements fought for independence on account that the state was alienating Africans. After independence, there was no moment of re-founding to reset the relationship between the state and the citizen. The new government carried on from where the colonial system left. As a result, the perception of the state being alien to the citizen is still deeply ingrained in the popular consciousness. The consequence, it goes without saying, has been the failure to develop any strong bond or public interest in affairs of the state, which has a consequence for the realisation of key constitutional values such as accountability, transparency, and government responsiveness to the people. Lacking a sense of duty and passion for the well-being of the state, public resources are easily plundered for private ends.

CONCLUSION

Constitution reform in Zambia requires deep introspection and revisiting the very foundations of the Zambian state. Without attending to the issues of national cohesion and harmonious co-existence of its people; reorienting law as a tool for limiting government and not repressing citizens; and creating state legitimacy in the people, constitutional reforms will continue to miss what is at the core of the failure of constitutionalism in Zambia. These affect all other areas of constitutional law, directly or indirectly. Failure to find a solution to these challenges risks simply treating symptoms and not the underlying causes for the multiple constitutional challenges. It requires a reset of the state. The underlying incentive structure and power map must be understood and redesigned. There must be a fundamental change in the structure of incentives driving practices and key players in the political and legal arena. Without this change, constitutional provisions, no matter how positive they may appear on the surface, will only be ritualistic and continue to mask where the real pockets of power and constitutional malaise reside.

POLICY RECOMMENDATIONS

In order to remedy the constitutional challenges stemming from the country's colonialism history, the Constitution makers should;

1. Embrace Diversity:

- Prioritize fostering national cohesion and harmonious co-existence among diverse groups through constitutional mechanisms that allows for co-existence.
- Enact provisions in the Constitution that recognize cultural, ethnic, and regional identities as valuable assets.
- Embed safeguards within the Constitution to ensure the protection and recognition of marginalized perspectives.

2. Devolve Power:

- Devolving power to subnational levels allows for diffusion of tensions from the centre; enlarges scope for public participation; and ensures decisions are made closer to people who are affected.

3. Constitutional Implementation:

- There is need to put in place a long term constitutional implementation mechanism to repeal all outdated “law and order” legislation and replace it with legislation consistent with constitutional norms and standards.

¹Jeremy Gould, *Postcolonial Legality: Law, Power and Politics in Zambia* (Routledge, 2023), 16

²Andras Sajo, *Limiting Government: An Introduction to Constitutionalism* (Central European University Press, 1999), 14

³H Kwasi Prempeh, “Marbury in Africa: Judicial Review and the Challenges of Constitutionalism in Contemporary Africa,” (2006) 80 *Tulane Law Review*, 35

⁴Giacomo Macola, “The Historical and Ethnographical Publications in the Vernaculars of Colonial Zambia: Missionary Contribution to the Creation of Tribalism,” 11

⁵*Ibid*

⁶Chipasha Luchembe, “Ethnic Stereotypes, Violence and Labour in Early Colonial Zambia, 1889-1924,” in Samuel N Chipungu (eds), *Guardians in Their Time: Experiences of Zambians Under Colonial Rule, 1890-1964* (MacMillan, 1992), 85

⁷For example, the Lozi kingdom extended into present day Angola, Botswana and Namibia; and the Chewa kingdom extended into Malawi and Mozambique.

⁸*Ibid*

⁹H Kwasi Prempeh, “Africa’s Constitutionalism Revival: False Start or New Dawn?” (2007) 5 *International Journal of Constitutional Law*, 476

¹⁰Kenneth Kaunda, *A Humanist in Africa* (Veritas, 1966), 99

¹¹*In Re Kapwepwe and Kaenga Court of Appeal 1972*

¹²Report of the Constitution Review Commission 29th December 2005, para1.2.1

¹³*Ibid*

¹⁴*Ibid*

¹⁵Report of the Commission of Inquiry into voting Patterns and Electoral Violence (January 2019) xiv

¹⁶Jeremy Gould, *Postcolonial Legality: Law, Power and Politics in Zambia* (Routledge, 2023), 16

¹⁷*Ibid*

¹⁸H Kwasi Prempeh, “Marbury in Africa: Judicial Review and the Challenges of Constitutionalism in Contemporary Africa,” (2006) 80 *Tulane Law Review*, 24

¹⁹Eghosa E Osaghae, *Crippled Giant: Nigeria Since Independence* (Indiana University Press, 1998), 19

²⁰David C Mulford, *Zambia: The Politics of Independence 1957-1964* (Oxford University Press, 1967), 66

²¹*Queen v Chona 1962*

²²Section 7 Northern Rhodesia Order in Council 1924

²³H Kwasi Prempeh, “Africa’s Constitutional Revival: False Start or New Dawn?” (2007) 5 *International Journal of Constitutional Law*, 479

²⁴Jeremy Gould, *Postcolonial Legality: Law, Power and Politics in Zambia* (Routledge, 2023), 43

²⁵Andrew Roberts, *A Political History of Zambia* (Heinemann, 1976), 170

²⁶Nic Cheeseman and Jonathan Fisher, *Authoritarian Africa: Repression, Resistance and the Power of Ideas* (Oxford University Press, 2019), 57

²⁷David C Mulford, *Zambia: The Politics of Independence 1957-1964* (Oxford University Press, 1967), 57

²⁸Alfred Winstone Chanda, *Constitutional Law in Zambia* (University of Zambia Press, 2007), 118

²⁹Jeremy Gould, *Postcolonial Legality: Law, Power and Politics in Zambia* (Routledge, 2023), 105

³⁰Nic Cheeseman and Jonathan Fisher, *Authoritarian Africa: Repression, Resistance and the Power of Ideas* (Oxford University Press, 2019), 14

³¹Samuel N Chipungu, “Accumulation from Within: The Boma Class and the Native Treasury in Colonial Zambia,” in Samuel N Chipungu, *Guardians in Their Time: Experiences of Zambians Under Colonial Rule, 1890-1964* (MacMillan, 1992), 85

³²*Ibid*, 86



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