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**THE ROLE AND INTERESTS OF FAITH-BASED ORGANIZATIONS IN
CONSTITUTION-MAKING IN ZAMBIA**

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ABSTRACT

The centrality of religion to life across Africa has given religion and, by extension, faith-based organizations a stronghold in providing guidance on governance and in constitution-making. In Zambia specifically, religious organizations have played an active role in contributing to the formulation of the Constitution since its inception as an independent nation in 1964. Following the adoption of the 2016 amended Constitution, faith-based organizations were critical of the limited extent to which necessary changes were made and of the failure to address issues including the inclusion of the people in the constitution-making process, fundamental human rights and freedoms, the excessive power of the President, and lack of inclusion of minority groups in government among others. Using the Council of Churches in Zambia as a case study for the modern-day religious organization involved in Zambian constitution-making, this paper aims to explore the gaps, lacunae, and further necessary changes that need to be made to the Constitution. This paper additionally aims to understand how these gaps affect the potential for accountable and balanced governance and a people-driven democracy and strives to address improvements that can be made in these areas for enhanced input from faith-based organizations on governance and constitution-making in Zambia. To research this topic, we conducted an extensive literature review focusing on the participation of faith-based organizations in constitution-making processes across Africa and in Zambia, issues currently present in Zambia's 2016 Constitution, and models of laudable governance and constitution-making which Zambia may look to in restructuring its own processes. We also conducted eight structured interviews with experts in the field. Through this process, we were able to determine that there are six areas of improvement that faith-based organizations should focus their constitution-making efforts on: [1] design of the Constitution and the constitution-making process, [2] fundamental human rights and freedoms, [3] administrative justice, [4] separation of powers, [5] devolution of governance, and [6] elections and the electoral process. In these sections, we synthesize our findings and lay the groundwork for recommendations made by scholars, practitioners, and other stakeholders in each area to ensure a future of improved governance that supports the wills and interests of the Zambian people.

ABBREVIATIONS

AIC – African Independent Churches

ANC – African National Conference

ATI – Access to Information Bill

CAF – Central African Federation

CCMG – Christian Churches Monitoring Group

CCZ – Council of Churches in Zambia

CDF – Constituency Development Fund

COI – Commission of Inquiry

CRC – Constitutional Review Commission

CSCCA – Cyber Security and Cyber Crimes Act

CSO – Civil Society Organization

ECZ – Electoral Commission of Zambia

EFZ – Evangelical Fellowship of Zambia

ESC – Economic, social and cultural rights

FBO – Faith-based Organization

GBV – Gender-Based violence

GEARS – Governance, Elections, Advocacy Research Services

HRC – Human Rights Commission

HRW – Human Rights Watch

IBA – Independent Broadcasting Authority

ICESCR – International Covenant on Economic, Social, and Cultural Rights

ISA – Intestate Succession Act

JCTR – Jesuit Center for Theological Reflection

LTO – Long-Term Observers

MP – Member of Parliament

MMP – Mixed Member Proportional (Representation System)

MNGRA – Ministry of National Guidance and Religious Affairs

NCC – National Constitutional Conference

POA – Public Order Act

RSF – Reporters Without Borders (Reporters Sans Frontiere)

SAIPAR- Southern African Institute of Policy and Research
TCDZC – Technical Committee on Drafting the Zambian Constitution
UNICEF – United Nations International Children's Emergency Fund
UNIP – United National Independent Party
UPND- United Party for National Development
USAID – United States Agency for International Development
ZAFOD – Zambia Federation of Disability Organizations
ZAPD – Zambia Agency for Persons with Disabilities
ZCCB – Zambia Conference of Catholic Bishops
ZCID – Zambia Center for Inter-Party Dialogue
ZICTA – Zambia Information and Communications Technology Authority

INTRODUCTION

Since Zambia's inception as an independent nation in 1964, religious organizations have vigorously participated in the nation's Constitution-making process and have heavily contributed to the formulation of its Constitution. Under Kenneth Kaunda's One-Party State, churches successfully amassed people to combat encroaching authoritarianism as they were some of the few formal organizations who could mobilize without fear of recourse from the State (Hinfelaar, 2011). After Kaunda's successor Frederick Chiluba declared Zambia a Christian Nation, Christianity took on a public role in Zambia's governance (Hinfelaar, 2011). Although the Declaration proved controversial in the eyes of mainline Protestant and Catholic church bodies and sparked debate surrounding the extent to which biblical principles should govern legal proceedings, Zambia's religious sector has since maintained a significant activist presence in Zambia's constitution-making process (Hinfelaar, 2011). According to diocesan priest Father Joe Komakoma, the Church is authorized to engage in this capacity as it "has a duty to speak for the voiceless, the poor and the disadvantaged... to challenge the elected leaders to translate their rhetoric into action... to demand accountability from those who are tasked with the responsibility of managing the affairs of the nation. This duty stems from the eternal concern the [C]hurch has for the welfare of the people." (Fr. Joe Komakoma's Ruminations, 2008) Zambians, 95.5 percent of whom are Christian (Kaunda and Hinfelaar, 2020), echo this belief that the Church is a credible institution whose opinion can and has made a difference in the past in Zambia and entrust their welfare to the Church. Conversely, the Church's participation in the constitution-making process has not always been met kindly by the government. Past administrations have attempted to minimize the voice of the Church by leveraging religious division and creating entities such as President Edgar Lungu's Ministry of National Guidance on Religious Affairs to enable the State to control religious affairs and by extension, cut the Church out of the constitution-making process altogether (Kaunda and Hinfelaar, 2020). Despite such government pushback, the people's trust in the religious sector has enabled it to continually and successfully engage in the constitution-making space to ensure good governance, uplift human rights and dignity, and promote a culture of constitutionalism (Hinfelaar, 2011). The Council for Churches in Zambia (CCZ), one of

Zambia's Three Mother Church Bodies, is prominent in providing guidance on good governance and contributing to Zambia's constitution-making process. Following the adoption of the 2016 amended Constitution, CCZ and the greater religious sector have been critical of the limited extent to which necessary changes were made in the areas of constitutional design and interpretation, the bill of rights, the separation of powers doctrine, devolution of governance, the electoral system, and administrative action. They believe that Zambia needs to mirror the progressive constitutional change of the countries whose models it draws on and models of more accountable governance in the region. Using CCZ as a case study for the modern-day religious organization calling for such change in Zambian constitution-making, this paper seeks to explore the gaps, lacunae, and further necessary changes that need to be made to the Constitution from scholarly and theological perspectives.

BACKGROUND

2.1 Religification of the Continent Makes Religion A Way of Life

To understand the centrality of religion to the psyche of Zambia, it is imperative to first understand the historical religification of Sub-Saharan Africa seeing as Zambia's current legal framework draws on models of other nations on the continent where religion factors into all aspects of cultural, social, legal, and political life.

The introduction of Christianity in Sub-Saharan Africa, which dominates the southern part of Africa, began with the Portuguese's arrival in the 15th century and later, in the 17th century, the establishment of the Dutch Reformed Church in South Africa (BBC World Service, n.d.). These initial attempts to introduce Christian missions were not very successful or long-lived as this influence was only brought to the coastal trading ports. The spread of Christianity wasn't prominent until the 19th and 20th century. This spread occurred due to an increase in Christian missionaries traveling to Africa during the colonial period in order to assimilate their respective colonies to European culture and uphold Christian values within these colonized societies. The evangelical revival encouraged many European and American religious leaders and abolitionists to suppress traditional African customs and convert Africans to Christianity in order to "civilize" and "educate". It is important to reconcile with the fact that although Christianity brought along education, it was also an actor that contributed to the horrors of slavery and colonial imbalance (HistoryVille, 2022).

Whereas the Western World has mainly practiced secularization in its modern development, religion remains a central and flourishing component of African society. The economic and socio-political development of African states during the post-independence period has seen the inclusion of dialogue from faith-based organizations (FBOs) during constitution-making and policy-making processes. Religious values are the consistent ethos in which Africans live their lives. According to Kenyan Anglican priest and philosopher John Mbiti, religion is crucial to the African way of life because human beings live in a religious universe. Furthermore, mere existence is religious and Mbiti argues that in order to properly exist in this religious world is to be religious (Agbiji and Swart, 2015). Mbiti also states that, "[a]ll African societies view life as one big whole and religion permeates all

aspects of life. In terms of this thinking, it is the whole that brings about the unification of the parts. There is no such thing as compartmentalisation or dichotomisation when it comes to human existence: there is no division between matter and spirit, soul and body, and religious practice and daily life.” (Agbiji and Swart, 2015, Introduction, para. 4) This means that since religion is viewed as the guiding principles that conduct life, society must also be governed in collaboration with these principles.

To account for tradition and customary life, many African countries operate under religious pluralism which spills over into all aspects of life. For instance, the prominence of Pentecostal Churches and African Independence Churches (AICs) in the religious sector has forced mainline Christian Churches to adopt their practices and beliefs (Agbiji and Swart, 2015). These practices include prayer-based religious expression, the power of the spoken word, and the use of music and dance; all influenced from traditional religious practices (Agbiji and Swart, 2015). Traditional African customs and mainstream Christianity are often interconnected within the lives and values of African people and are in accordance with the functionality and fundamental principles of society.

2.1.1 Faith-Based Organizations in Constitution-Making in Africa

The vitality of religious pluralism in Africa has given religion a place in politics across the continent and, by extension, has laid the ground for faith-based organizations to comment on issues of governance and contribute to constitution-making processes.

It is critical to note that faith-based organizations root their actions in the governance and constitution-making spaces in the high value religion attributes to the elevation and maintenance of human dignity and in the mystical belief that failure to properly organize and control power can yield dangerous results among others (Ellis and ter Haar, 1998). In this frame of mind, faith-based organizations’ perceived purposes in political affairs are to safeguard human rights to, in turn, uplift human dignity and act to ensure power is fairly balanced between the polity and the people. In the perspective of the leaders of FBOs themselves, they view their role in providing guidance on governance and contributing to constitution-making processes as defending religious and traditional moral values amid secular modernization (Clarke and Jennings, 2008, pg. 1).

Looking to the example of Kenya, “the Bible furnishes [its] shared national language of politics,” and Kenyan clergy specifically are very involved in political processes (Maupeu, 2008, para. 1). Notably, Kenya’s clergy and the Church as a greater institution played a prophetic role in tandem with other entities to more soundly secure human rights and encourage public discourse in the State’s struggle for democratization in the 1980s and 90s (Throup, 2011, pg. 343). Faith-based organizations in Tanzania, too, are involved in and focused on influencing policy, advocating for opportunities for vulnerable groups, and improving government policies and their implementation. These are just a couple of numerous instances in which faith-based organizations and churches, in order to uplift human dignity and ensure public morality, engaged politically with issues of governance.

2.2 Zambia: A Christian Nation

In lieu of centuries of Christianization of the region, most state leaders in southern Africa have been of the Christian faith. This has been especially true in Zambia where every one of the nation’s Presidents since it gained independence in 1964 has confirmed their personal commitments to Christianity (Kaunda and Hinfelaar, 2020). Following his election as Zambia’s second President, Frederick Chiluba uniformly confirmed his personal commitment to Christianity but furthered that personal commitment to the rest of the nation by declaring Zambia a Christian nation (Hinfelaar, 2011). This Christian-Nation Declaration established a Zambian Christian nationhood that enabled religion to take on a public role, thereby making the political religious and the religious political (Muwowo and Buitendag, 2010).

It is vital to note that Zambia, as a colony-turned-independent nation, operates under juristic legal pluralism. This legal pluralism is a two-fold legal system that balances the customary laws of African traditional religions and the laws of a formal legal tradition. The Declaration, as a clear statutory reference to the guiding principles of Christianity, arguably creates a third fold in Zambia’s legal pluralism that accounts for the religious values and principles of Christianity in addition to formal and customary law.

It is further vital to note that the initial intent behind the Declaration is unclear. At face value, it appears that the Declaration is a sensible statutory manifestation of the fact that 95.5 percent of Zambians identify as Christian, of which 75.3 percent identify as

Protestant and 20.2 percent identify as Catholic (United States Department of State, 2019). Some academics thus argue that the Declaration was an inevitable byproduct of the high numbers of national affiliation with Christianity (Cheyeka, 2016). Alternatively, some church bodies, notably the Catholic Church, have argued that the Declaration is meant to serve the political party in power as a stamp of God's approval against pushback for partisan policies and programs (Van der Vyer and Green, 2008). Whatever may have been its true original intent, the Declaration has indeed been employed as a means of legitimizing state power and, according to Kaunda and Hinfelaar, is contemporarily utilized to promote "an apparent religious hierarchy in which some traditions have positioned themselves as hegemonic by seeking to subordinate minority religious groups, especially those who perceived themselves as architects and protectors of Zambian Christian Nationalism." (Kaunda and Hinfelaar, 2020, pg. 1) In the present day, Christianity is characterized by politicization and division among different church bodies. In some churches, politics is prioritized over piety and while the Church once spoke in a unified representative voice, fragmentation now exists among religious factions (Kaunda and Hinfelaar, 2020).

This has not always been the case. During the first decade of President Kenneth Kaunda's rule, church bodies were a single unified unit and harmoniously coexisted with the government. As the Kaunda administration shifted their approach away from Zambian Humanism and began to embrace scientific socialism by propagating a "One Zambia, One Nation" mindset, church bodies fused together into an even stronger single unit in opposition to the government (Phiri, 1999). The Zambia Episcopal Conference (now the Zambia Council for Catholic Bishops, or ZCCB), the Christian Council of Zambia (now the Council of Churches in Zambia, or CCZ), and the Evangelical Fellowship of Zambia (EFZ) issued a joint statement in opposition of the State and called on their members to seriously engage in political life (Phiri, 1999).

The Declaration, however, created conflict among these three mother church bodies (Phiri, 2003). The Catholic Church criticized the declaration, advocating instead for the recognition of the right of the human person to religious freedom. Protestants and Catholics called for recognition of a more plural society and, seeing as Chiluba made the Declaration based on his own personal religion without insight or consultation from others,

called for more legal debate and theological clarification of it (Hinfelaar, 2011). Contrarily, Pentecostal church bodies celebrated the Declaration with the belief that it was a means through which they entered directly into a covenant with God (Kaunda, 2017). Today, they use the Declaration as their framework for engaging in the political sphere and as a means of excluding other church bodies in that sphere (Kaunda and Hinfelaar, 2020). This division has incited religious competition for recognition and has deepened polarization in religious engagement in Zambian politics (Kaunda and Hinfelaar, 2020).

Such division has also been leveraged by politicians to minimize Church engagement in the political sphere. According to CCZ's General Secretary, previous governments would attempt to meet with individual church bodies and employ divide and rule tactics that would bolster identity politics and further religious division. He further explained that the State further attempted to minimize Church engagement in the political sphere by making religious affairs a branch of the government, thus indirectly acknowledging the stronghold of the Church in politics rooted in the Declaration, as well as the credibility of the Church as a trustworthy institution whose opinion matters to the Zambian people. President Edward Lungu's Ministry of National Guidance on Religious Affairs (MNGRA) is just one example of the State's attempts to house religious affairs under the purview of the State and cut the Church out of politics altogether.

However, regardless of exploiting religious division to their hopeful advantage and attempting to cut the Church out of politics completely, the very fact alone that the Declaration established a foothold for the Church and Zambia's religious sector in the political sphere has enabled them to maintain a significant activist presence in issues of Zambia's governance.

2.3 Faith-Based Organizations in Constitution-Making in Zambia: The Council of Churches in Zambia

FBOS have been extremely influential in Zambia's constitution-making process. CCZ specifically has been very active in Zambia's governance and constitution-making spaces throughout the nation's history. To better understand their role throughout history in this regard, it is essential to follow CCZ's actions in the constitution-making process since independence.

2.3.1 The Independence Constitution

Following the dissolution of the Central African Federation (CAF) in 1963, a new Constitution based on the Westminster model was designed at independence in 1964 as a product of negotiations between the departing colonial power and African elites. These negotiations were held in May 1964 at Lancaster House in the United Kingdom (Mwanakatwe CRC, 1995).

The Constitution that resulted from the negotiations at Lancaster House included an entrenched Bill of Rights which provided that every person in Zambia, regardless of race, place of origin, political opinion, color, creed, or sex, was entitled to fundamental rights and freedoms. Those included the right to life, liberty, security, and the freedom of property, conscience, expression, and assembly. The Judiciary was independent from the Executive. The Constitution also provided for the procedure to amend or alter the Constitution. In order to amend the Constitution, the amendment bill had to be supported by not less than two-thirds of all the members of the National Assembly. Where the amendment bill concerned any of the fundamental rights and freedoms, the bill had to be submitted to a national referendum for approval (Mwanakatwe CRC, 1995).

At this time, the interest of African leaders was limited to acquisition of political power through political independence. The Church as a whole and CCZ in particular had little to do with the formulation of this Constitution as it was considered a circular document.

2.3.2 The One-Party Constitution

Zambia's experiment with multi-party democracy lasted for a brief period of time. As far as democratic principles are concerned, the 1964 Constitution made the Executive President too much of a key player in the political scene. Consequently, the president could exercise dominant influence on the Legislature. There were no sufficient safeguards in place to check the Executive branch in the exercise of its power. This lack of checks on the presidency and dominance of a political party would, in time, lead to frequent Constitutional amendments (Mwanakatwe CRC, 1995).

Additionally, in the mid-1960s and early 1970s there were internal and external factors that weakened the idea of a liberal democracy. Among these was the ideological

rivalry between world superpowers which created favorable conditions for Zambia and other African countries to adopt a one-party system. The adoption of a one-party system was justified as a historic variant of democracy best suited to African Circumstances and was masked as a facilitator for economic growth and the promotion of national unity (Mung'omba CRC, 2005). The idea of democracy was refined in such a way that political pluralism and the right for everyone to freely participate was no longer a basic attribute (Mung'omba CRC, 2005).

There was no doubt that the leadership of the United National Independent Party (UNIP) had ambitions of establishing one-party rule. It was President Kaunda's intention that UNIP would capture all parliamentary seats while other political parties would come out with nothing. To his surprise in the 1965 presidential and parliamentary election, Nkumbula African National Congress (ANC) made inroads in Western Province and Southern Province. Additionally, division in UNIP accelerated the transition to a one-party state (Mung'omba CRC, 2005). In 1972 President Kaunda announced in his cabinet the introduction of a one-party state in Zambia. The modality would be determined by the Commission of Inquiry.

2.3.3 The Chona Commission

The Chona CRC was appointed by President Kaunda in 1972. The commission was headed by Mainza Chona, then vice president, and the terms of reference of the Chona Commission was to get recommendations as to the formation of a one-party state the people wanted. The terms did not include whether or not the people were in support of the one-party system (Terms of Reference of Statutory Instrument).

The Commission in carrying out its work held public hearings and received submissions from Zambian citizens in all provincial headquarters of Zambia on the framework and features of the one-party state. The Chona CRC's report was praised for its thoroughness, balance, and thoughtfulness of how it handled the report (Ndulo and Kent, 1996). Among the recommendations was that the President should only serve for two terms, but strong provisions such as this were rejected by the Kaunda Government by issue of white paper No. 1 of 1973 (Ndulo and Kent, 1996).

The role of the Church in the Chona constitution-making process is not clearly known but one thing that is clear is that Kaunda was hostile to opposing views (Mwanakatwe CRC, 1995). Moreover, it is clear that the Chona Commission was open to receiving views from every citizen and stakeholder including the Church. It is against this backdrop that we argue that CCZ may have submitted its recommendation to the commission.

2.3.4 The Multi-Party System

In 1990, one-party rule in Zambia reached a decisive stage as Eastern Bloc countries witnessed the demise of socialism and one-party rule and the re-emergence of new democracies over the ashes of communism. The country faced economic hardship, endured food shortages and riots and the failed attempt in 1990 which was broadcast on Zambia's radio that Kaunda was overthrown (Mwanakatwe CRC, 2005). It is against this backdrop that President Kaunda appointed a special select parliamentary committee to study and make recommendations for the democratization of UNIP and the government. In 1990, President Kaunda adopted a constitutional arrangement for multi-party politics.

2.3.5 The Mvunga Commission

On October 18th, 1990, President Kaunda appointed the Mvunga Constitution Review Commission, to be headed by Professor M.P. Mvunga, SC, to determine the changes needed for a system of political pluralism. This system of political pluralism would ensure that the government would be strong enough to rule Zambia. Of importance to this research is the composition of CRCs over time to determine if members of the clergy of CCZ in specific or of the Three Church Mother Bodies more broadly were directly involved in constitution-making. Among the religious leaders appointed as members of the Mvunga CRC were Catholic, UCZ and EFZ church leaders (Mvunga CRC, 1990). There was no representative from CCZ, but other members of the Three Church Mother Bodies were present. Therefore, in this stage of Zambia's greater constitution-making process, CCZ's views were likely represented though its partner church bodies as the Three Church Mother Bodies work closely and regularly on practically all matters.

2.3.6 The Mwanakatwe Commission

In 1993, President Chiluba appointed a CRC, chaired by John Mwanakatwe, SC, under wide terms of reference. Notably, the Mwanakatwe CRC included in its composition Bishop Teleshore Mpundu from the Catholic Church who is a member of the Three Church Mother Bodies (Mwanakatwe CRC, 1995). Therefore, CCZ's participation in this stage of the constitution-making process can only be traced through Catholic opinion. That being said, however, it is important to note that this CRC submitted numerous notable recommendations that were unfortunately rejected by the issue of a white paper by the government. These recommendations included the removal of the Christian-Nation Declaration from the preamble of the Constitution, a position that CCZ has consistently maintained.

2.3.7 The Mung'omba Commission

This Commission was appointed by President Levy Mwanawasa in 2003 and was headed by Wila Mung'omba. The terms of reference of the commission were to recommend a constitution that exalts, effectively entrenches, and promotes the legal and institutional evolution of fundamental human rights. The composition of this commission factored in the church through Reverend David Masupa and Bishop Maambo (Mung'omba CRC, 2005). The composition once again did not include a member of CCZ but Bishop Maambo of EFZ can be taken to have represented all the views of the Three Church Mother Bodies.

2.3.8 Establishment of the National Constitutional Conferences

The Mung'omba CRC submitted its report on the 29th of December in 2005 but was followed by a stalemate between 2005 and 2007 that resulted from disagreements between Mwanawasa's government and the union of political parties and CSOs over the preferred method of adopting a constitution. Civil society was adamant that the Constitution could be adopted using the Constituent Assembly whereas Mwanawasa wished to follow his own roadmap of constitution-making (Mbao, 2007). It followed, therefore, that the civil society organization crafted their own road map and in early 2007, both the government and civil society related their distinct plans for constitution-making. Following a meeting of parliamentary political parties under the aegis of the Zambia Center

for Inter-Party Dialogue (ZCID), it was resolved that instead of a Constituent Assembly, a National Constitutional Conference (NCC) would adopt the Constitution. Therefore, following this discussion, the NCC Act was enacted and assented to by President Mwanawasa (Mbao, 2007).

The composition of the NCC included representatives from the Three Church Mother Bodies. However, the composition of NCC was regarded as skewed which led to heated national debate in the country. A total of 59 members were chosen from government agencies to participate in the NCC. The NCC failed to engage with numerous pertinent issues requiring attention and amendment, but the government failed to address such issues so 54 of the 59 delegates appointed did not participate in the NCC. Among these 54 were the three members from the church mother bodies, including CCZ (NCC, 2010). CCZ's decision to not participate in the NCC was strategic in the sense that they did not want to provide legitimacy to the NCC. In CCZ's mind, if they were to attend, their inclusion would make the NCC appear representative and attentive to the needs of their constituents. However, the lack of attention paid to stakeholder opinion and inclusion remains one of the highlights of the NCC.

2.3.9 The Technical Committee on Drafting the Zambian Constitution

President Michael Sata initiated the sixth phase in constitutional development in Zambia through the appointment of a Technical Committee of experts put together to draft and present a constitution that would reflect the will and aspirations of the Zambian people. The committee was referred to as the Technical Committee on Drafting the Zambian Constitution (TCDZC), headed by former Chief Justice Annel Silungwe, SC. The appointment of TCDZC was in response to public demand for a people-driven constitution (Technical Committee, 2012).

TCDZC was tasked with looking at previous CRCs' recommendations from Mvunga through the NCC to identify key issues to be presented to the provincial Constitutional Committee in all the ten provinces (Technical Committee, 2012). TCDZC included a number of stakeholders, among which were 10 members from the umbrella church bodies. CCZ was part of the Church bodies who submitted their proposals on the constitution (Technical Committee, 2012).

The Technical Committee released their first draft, reflecting one of the most progressive Constitutional documents in Zambia's history. Later they released guidelines on the Constitution's consultative process to address the concern expressed by civil society regarding the constitution-making process. In October of 2013, the committee issued a statement saying the draft constitution had been finalized but in November 2013, President Sata claimed that the constitutional process is not needed, and the current Constitution simply requires amendment (Technical Committee, 2012).

2.3.10 The National Democratic Forum

On the 3rd of September in 2019, CCZ released a press statement indicating its refusal to submit thoughts on controversial Bill 10 that would change the nation's Constitution. CCZ's refusal did not in any way mean that there was no need to amend the Constitution. Their main concern was refraining from giving legitimacy to the bill in question as it was considered to be an unfair, ambiguous, and undefined piece of legislation that did not serve the interests of the majority Zambians (CCZ, 2019).

According to CCZ, legitimacy can only be attained when people embrace the Constitution as their own child, without which they may not respect and safeguard it. CCZ refused to be part of the Constitutional Amendment Bill 10 because the process excluded the views of Zambia's citizens. They argued that the process was irregular and unfair. To them, the process protects content. They refuse to discuss the content if the process is flawed as discussing gives the fraud process legitimacy (Lusaka Times, 2019).

METHODOLOGY

This research employed a mixed methods approach combining literature review and stakeholder interviews. Literature review, the first method employed, was a desk-based approach involving review of primary and secondary sources. Stakeholder interviews, the second method employed in this research, was a qualitative approach involving consultation with relevant stakeholders. All research was conducted between June and July of 2022. This study was conducted in partnership with the Southern African Institute for Policy and Research (SAIPAR) and CCZ.

3.1 Literature Review

Literature review focused on three primary areas of concern and used a mix of primary and secondary sources such as legislation, reports, and journal articles. The first area of concern was the role of faith-based organizations in constitution-making processes across Africa and in the Zambian context as established in the background section of this paper. We primarily collected this information through the review of secondary sources. The second area of concern we focused on in literature review was understanding what the major issues in Zambia's 2016 Constitution are as it currently exists. This involved literature review of primary sources including the Constitution itself and secondary sources commenting on the Constitution. The third area of concern we focused on in literature review was identifying exemplary models of governance and constitution-making in other countries that could potentially be applied in the Zambian context. This involved review of secondary sources.

3.2 Stakeholder Interviews

We used the information gathered from our literature review about the gaps in the six major focus areas to formulate questions relevant to gaps in our knowledge. We conducted a total of eight interviews with stakeholders from diverse backgrounds. Stakeholders were asked questions in the focus areas of our research in which they are experts. Stakeholders were contacted via email and phone call. Each interviewee was informed of the purpose of this research. Participation in this research was voluntary and consent forms were signed by each interviewee. Seven interviews were conducted in person and permission to record

each session was solicited. All interviews lasted between 30–60 minutes, and handwritten notes were taken during the interviews with permission of the interviewees. One interviewee provided responses in written format via email. Stakeholders interviewed include civil society leaders, clergymen, government officials, legal scholars, and university lecturers.

FINDINGS AND DISCUSSION

4.1 DESIGN OF THE CONSTITUTION AND CONSTITUTION-MAKING PROCESS

Zambia has had four Constitutions since it became an independent nation: the 1964 independence Constitution, 1973 Constitution, 1991 Constitution, and 2016 Constitution. Zambia has also undergone several major constitutional amendments, most notably the 1969 amendment to the 1964 Constitution and the 1996 amendment to the 1991 Constitution. Further, there have been a number of CRCs over the years that have solicited public opinion but ultimately did not produce a definitive Constitution reflecting the wants and needs of the people. Among these efforts were the Chona Commission of 1972, the Mvunga Commission of 1991, the Mwanakatwe Commission of 1995, the Mung’omba Commission of 2003, the Technical Committee of 2001, and the Constitutional Conference of 2019.

Each of Zambia’s four Constitutions have presented challenges in terms of their content. The 1964 independence Constitution was concerned with making Zambia an independent nation, had little input from the people apart from a few politicians, and was fundamentally a colonial construction based on the British Act administered by Westminster granting Zambia its independence. The 1973 Constitution was primarily aimed at ushering in a one-party state under the Kaunda administration in which human rights were abused and opposing voices were silenced. The 1991 Constitution attributed too much power to the President without instituting sufficient checks and balances which has historically led to Executive abuse of power. Finally, Zambia’s current Constitution, the 2016 Constitution, was crafted through a process that was neither consultative nor inclusive of the Zambian people. The people, who should be the main stakeholder in

Zambia's constitution-making process, were made to be spectators and as a result, do not identify themselves with this Constitution.

Professor Muna Ndulo rightly points out that in order to have a constitution that stands the test of time and that is widely acceptable, “[a] [C]onstitution should be the product of the integration of ideas of all the major stakeholders in the country i.e., all political parties both within and without Parliament, organized civil society and individual citizens.” (Chungu, 2018, 26) In other words, in order to achieve consensus in constitution-making, the process should be participatory, inclusive, bottom-up, and people-driven rather than top-down or elite-driven. The former Chief of Justice of South Africa Justice Ismail Mohammed once observed that a constitution is not simply a statute which defines the structure of a government and the relations between the government and the governed, but it is “[A] mirror reflecting the national soul, the identification of ideas and aspirations of a nation; the articulation of the values binding its people and disciplining its government.” (Hatchard et. al., 2004)

Since the Constitution is the mirror reflecting the nation's soul, getting the adoption process right is a cardinal issue in ensuring that the Zambian Constitution is acceptable and stands the test of time. Historically, Zambia's governments have all appointed CRCs under the Inquiries Act which, while it may be used to establish Commissions of Inquiry (COIs) on various key matters that warrant investigation, has been a source of contention in constitutional reviews. The Act empowers the President to determine the terms of reference of review commissions as well as have exclusive access to and control over commission reports (The Inquiries Act). The Act further establishes the government's authority to accept or reject any or all recommendations from a CRC, as well as to make any other changes they deem fit. The accepted recommendations are published in a Government White Paper which is final and closed off to further contributions from the people (Mung'omba CRC, 2005, p. 30). Critically, the method of review and adoption of the Constitution under this Act allows the government to override the wishes of the people. The approach of mandating constitutional reviews using the Inquiries Act has historically been criticized by CRCs themselves, and by civil society at large, for giving the sitting President a monopoly on the work of these commissions. This approach has therefore been a major source of contention for all constitutional reviews in Zambia (Motsamai, 2014).

Hatchard, a legal scholar, affirms that the biggest flaw with the constitution-making process in Zambia is that CRCs are not independent and report directly to the government who then have the power to reject, adopt, accept, amend, or replace the commissions (Hatchard et. al., 2004). Legal scholar Anyangwe further asserts that Constitutions adopted through CRCs do not endure as they do not serve the interests of the people:

"Generally drafted by a political coterie, in a hurry, upon a calculation of exigencies, without even consultation with other major stakeholders, many of these so-called Constitutions are often a mere collection of rules of convenience administered by each ephemeral regime. They never really constitute the legal basis of the states themselves. Aware of the ProClarity of his own power and the fleeting nature of his own regime, each succeeding head of state never bothers to produce a durable Constitution." (Anyangwe, 1997)

Further, in an interview for this paper, an Evangelical Bishop from the Evangelical Fellowship of Zambia (EFZ) confirmed the assertion that the establishment of the CRC through the Inquiries Act has failed to produce a people-driven Constitution. He cited a number of reasons for this failure, most notably the government's authority to reject some of the recommendations that do not sit well with them through the issuance of the Government White Paper. According to this participant, Zambia needs a different method of adopting the Constitution, one which is people-driven and protects the views of the people. He concluded by indicating that having a constitutional adoption process that cannot easily be manipulated by the government is key if Zambia is to have a people-driven Constitution as the process protects the content.

From these numerous assertions, it is abundantly clear that the constitution-making process in Zambia wrongfully enables politicians to essentially single-handedly determine which recommendations to choose in crafting the Constitution to serve their own interests and ultimately reject those that are in the democratic interest of the people (Ndulo, 2021).

There are multiple courses of action that need to be explored in order to ensure that Zambia's constitutional adoption process will result in a people-driven Constitution in line with recommendations made in this regard throughout the course of stakeholder interviews conducted for this paper. These recommendations included the need of the State to consider adopting core national values to guide its actions, to include CSOs more in

the constitution-making process, and to use Kenya's constitution-making process as a model for Zambia to follow.

As it relates to adopting national principles that positively drive State action, these principles should be guided by international standards of what is foundationally necessary to run a society. According to Professor Ndulo, "African States must establish stable political and constitutional orders that promote development and aid the conquest of poverty, hunger, disease and ignorance, while also guaranteeing citizens the rule of law and equal protection of the law regardless of the citizen's sex, color, race, or ethnic origin." (Ndulo, 2001, pg. 105) This is seen in Kenya's 2010 Constitution, which asserts its national values in Article 10(2): "The national values and principles of justice include ... participation of the people,... human dignity, equity, social justice, inclusiveness, [and] equality..." (Constitution of Kenya, 2010). While these values cannot be enforced directly, they are reasserted throughout the Constitution and provide a backbone of broad values that constitutional reform can reference and must make sure to encompass. Additionally, Article 10 can be used as the standard rule of law in matters of jurisdiction (Murray, 2013). Principles are an important interpretational framework in many different sections of the Kenyan Constitution, notably in interpreting the Bill of Rights. This constitutional model is exemplary in its foundation and gives Kenya much more potential in practicing good governance. This is also seen in South Africa where government action is guided by 34 key principles that clearly align with international standards of good governance and people-driven democracy. For example, Article 1 of the South African Constitution of 1996 provides that "[t]he Constitution of South Africa shall provide for the establishment of one sovereign state, a common South African citizenship and a democratic system of government committed to achieving equality between men and women and people of all races." (Constitution of South Africa, 1996) Similar to Kenya's principles, these principles allow for a broad evolution and evaluation of the law but still create regulations in which the Constitution must be contained. This can help avoid an abuse of governmental power and a dramatic transition of power between each new presidential regime. Put simply, principles allow the president and the government as a whole to be checked by a sturdy people-driven document.

Seeing as the process protects the content, it is therefore of extreme importance to also establish the need for CSOs to be more centrally included in constitution-making. These independent organizations are important stakeholders in the constitution-making process and require a more central role in it as they are, in the public opinion, credible institutions that truly advocate for and act in the people's best interests. As history makes abundantly clear, the people have been excluded from Zambia's constitution-making process for far too long. The inclusion and active consideration of CSOs contributions would ensure that the people's voice is more audible in decision-making and that their wants are more visible in that which directly affects them. Looking at the example of Tunisia in this instance, the inclusion of civil society and public representation in the composition of its 2014 Constitution was similarly problematic. It is evident that for a constitution to be truly people-driven, it must include all the different segments in society. However, it is also important to point out that inclusion does not always equate adequate influence. For years leading up to Tunisia's constitutional reforms, civil society groups were largely not always listened to and not factored into the decision-making process. The relationship between civil society and the Assembly has evolved from a state of negation to an incremental acceptance and inclusion (Ben Mbarek, n.d.). The first phase of negation of civil society during democratic transition was first characterized by the expansion of the Higher Authority for the Realization of the Objectives of the Revolution, Political Reform, and Democratic Transition (Ben Mbarek, n.d.). This body, which has historically been majorly composed of civil society organization representatives, was overtaken by political parties who limited CSO access to the electoral process with the adoption of a new electoral law (Ben Mbarek, n.d.). Political parties also, in turn, dominated the Constituent Assembly which enabled politicians to engage in the practice of blank page theory where lawmakers would draft the Constitution on a blank page without recognition of CSO input (Ben Mbarek, n.d.). Much like Zambia, religion plays an immense role in Tunisia and the only way for the Tunisian constitution-making process to be effective and more people-driven was for reconciliation between Islamists and the old regime, which came in 2013. Reconciliation was achieved through the Assembly's active acceptance of CSOs' contributions to construct a constitution that was more representative and inclusive for all people in Tunisia. Although recent developments make clear that the Assembly is

neglecting CSOs again, Zambia can look at the brief moment in 2013-2014 in which the blank page theory was abandoned and democracy prevailed in order to strengthen the legitimacy of and public's trust in its own Constitution (Saati, 2017).

It is important to consider that some may argue that the process is not the primary problem in this regard, rather the content is what requires more focused attention. However, the fact that the process does indeed protect the content of the Constitution is reflected in the government's rejection of the recommendations made by the Mwanakatwe and Mung'omba CRCs. The Mwanakatwe CRC made progressive recommendations, notably that the Constitution should be adopted through a Constituent Assembly and further, recommended that the national referendum soliciting public opinion should be held at the end of the constitution-making process to ensure that the people get final say and that their voice prevails. The Mung'omba CRC reemphasized the benefits of a Constituent Assembly and the Majoritarian system (50+1) of electing the President. However, all these important provisions were rejected by the government at the time, through the issue of a white paper.

As much as involving CSOs more in the process is an extremely important consideration in this regard, a framework that ensures this will happen in actuality is required. Another participant interviewed for this paper from the Jesuit Centre for Theological Reflection (JCTR) reaffirmed Zambia's need for a people-driven Constitution in which the people take center stage in its development. He quoted Jesuit Peter Enrico on a people-driven Constitution who says, "there will simply be no pro-poor policies without pro-poor governance, and there will be no pro-poor governance without a people-oriented Constitution, and there will be no people-oriented Constitution without a people-driven Constitution." To ensure that the people's voice is audibly heard and that their contributions are accounted for in constitution-making, he concluded by citing the design of Kenya's constitution-making process as a model from which Zambia may learn.

The 2008 Kenyan Review Act set in motion the Constitution review process. It identified four organs for the review of the Constitution: a committee of experts; a multiparty parliamentary committee, the National Assembly, and a referendum. Each of these organs had a specific role in a tightly timetabled process and, in different ways, each acted as a check on the other. Essentially, the new Constitution was to be debated back and forth between experts and politicians, and if it made it through this process, a referendum

would allow the people to have the last say (Murray, 2010). The Committee of experts identified contentious issues from the then Constitution and came up with a draft Constitution which considered all the contentious issues. The committee of experts then submitted the draft to a multiparty parliamentary committee to review the proposed amendments and make changes. The idea of having the multi-Party parliamentary Committee is to ensure that parliamentarians are involved from the beginning so that the chances of the Constitution being struck down in parliament are reduced. The amendments made by the parliamentarians are taken on board by the Committee of experts and they come up with another Constitution draft to be submitted to the national assembly through the stages of a Bill. Thereafter the bill goes through referendum in which the people vote yes or no to a constitutional draft whose content they know.

It is vital to note that many governments argue that a Constituent Assembly would abrogate the powers of the Legislature. However, Article 61 of the Zambian Constitution makes clear that the legislative authority of the Republic derives from the people of Zambia. The Legislature is merely a body that is constituted to exercise the legislative powers of the people. The Legislature merely employs the people's legislative power on their behalf. Moreover, Chungu argues that a Constituent Assembly is beneficial due to its inclusive nature as it incorporates persons from all walks of life. It operates on an all-rounded approach that ensures all groups are adequately represented, with no person facing discrimination during the process due to race, ethnicity, color, tribe, gender, political affiliation, religion, social or economic status, profession, or geographical positioning among others (Chungu, 2018). It is clear that what Zambia requires most in constitution-making is a process in which the people are sovereign. This will ensure that the Constitution is ultimately legitimate, credible, and enduring (Nwabueze, 1973).

As established, the structure of the constitution-making process safeguards the content in the interest of the people. There is nothing that stops Parliament from enacting legislation that enables the formation of a Constituent Assembly. What is required to achieve a legitimate Constitution adopted by a Constituent Assembly is the political will of the government to invest in the creation of a new democratic Constitution that recognizes and contains the values, principles, and wider views of the people. The government needs to have the political will to invest in a constitution-making process that brings about a

constitution that people understand, identify with, and recognize. Political will must ensure that the Constitution to be created is one that upholds the principles of democracy, patriotism, rule of law and constitutionalism.

4.2 FUNDAMENTAL HUMAN RIGHTS AND FREEDOMS

Human rights, as defined by the United Nations, are all rights inherent to human beings (United Nations). The concept involves claims, rights, and privileges which every individual can expect, irrespective of color, race, sex, religion, status in life, or origin. The Mung'omba Commission broke these rights into three categories: [1] civil and political rights (first generation rights), [2] economic, social, and cultural rights (second generation rights), and [3] group or solidarity rights (third generation rights). First generation rights are considerably non-controversial guarantees in which national governments should have no interference. These rights include the freedoms of expression, conscience, assembly, association, and movement among others. Second generation rights are considered aspirational rather than actual in many developing national contexts, including the Zambian context where the national government arguably may not have enough economic resources to support their actualization. Third generation rights include the rights to a sustainable environment, peace, and development among others which have only more recently gained recognition (Mung'omba CRC, 2005). In common constitution-making practice, these fundamental human rights and freedoms are enshrined in Zambia's Bill of Rights.

Over time, however, the Bill of Rights has been the subject of much debate and has undergone numerous amendments that have infringed on the people's fundamental human rights and freedoms. Following the publication of the Chona CRC's recommendations in 1972, "executive-led reforms... expunged the referendum clause required for constitutional amendments that impinge on the Bill of Rights..." (Motsamai, 2014, History of Constitution-Making in Zambia section, para. 5). This enabled Kaunda's one-party state administration to severely minimize the people's freedom of conscience, expression, and association by prohibiting them from forming or joining political associations or associations viewed as "harmful to national interests." (Chona CRC, 1972, Protection of Fundamental Rights and Freedoms of the Individual section, para. 1) Further, the people's power was minimized by

silencing ministers serving in Parliament from publicly criticizing government policy so as not to undermine the socialist ideal of collective responsibility (Chona CRC, 1972). Prior to the adoption of the 1991 Constitution, the Mvunga CRC received submissions calling for a Bill of Rights to be enshrined in the Constitution. These calls for a Bill of Rights expressed concerns over lacking freedom of the press and freedom of movement and underpinning the need for stronger statutory recognition of rights for women, individuals with disabilities, and the family unit (Mvunga CRC, 1990). These calls for progressive realization of these and more rights were echoed during the convention of the Mwanakatwe CRC, the Mung'omba CRC, and the Technical Committee assembled prior to the adoption of the 2016 Constitution. Of significant note was the report Zambia's Human Rights Commission (HRC) submitted to the Technical Committee in July of 2012. The report commended the growing progressive and inclusive nature of the Bill of Rights but also recounted the need for stronger and less bulky statutory provisions concerning protection from discrimination, right to life, protection from inhuman treatment, freedom of media, and freedom of association among others (Human Rights Commission, 2012).

Even still, especially considering that the Bill of Rights was not adopted in 2016, the HRC emphasizes the pressing need for the State to take positive action to ensure that basic and fundamental human rights are progressively realized. In their 2017-2018 report on the State of Human Rights in Zambia, the HRC highlighted almost twenty unique freedoms and rights that require State action and statutory attention in the Bill of Rights. These rights include the freedom of assembly and association; freedom of opinion, expression, and information; right to life; right to property; right to liberty and issues relating to those detained and incarcerated; protection against discrimination; rights of persons with disabilities; freedom from torture and other cruel treatment; right to legal representation; secure protection of the law; protection against violence against women and girls; right to education; and corporate accountability (Human Rights Commission, 2019). It is clear that although statutory provisions have been drafted and included in the Constitution, they need to be more guarantorial rather than aspirational in their actualization.

CSOs and FBOs further push for this true actualization of fundamental human rights and freedoms. Specifically, CCZ continues to push for reform to end infringement on the first-generation rights of freedom of assembly, association, expression, opinion,

information and the press. Recently, they have issued statements on and partaken in initiatives criticizing the Independent Broadcasting Authority (IBA) Act, reforming the Public Order Act (POA), adopting the Access to Information (ATI) Bill, and analyzing the Cyber Security and Cyber Crimes Act (CSCCA). Moreover, from our interviews with CCZ and other key stakeholders, it has been made clear that there is dire need for provisions that more strongly support equality and access to fundamental rights for women, children, and individuals with disabilities. Additionally, many stakeholders have advocated for the inclusion of the rights of the family in the Bill of Rights as well as amendments that ensure the true actualization of socioeconomic rights for all.

As such, this section will focus primarily on first- and second-generation rights as described by the Mung'omba CRC. First generation rights to be covered include the freedom of assembly and association; freedom of opinion, expression, and information; freedom of the press; freedom of movement for individuals with disabilities; non-discrimination for women, children, and individuals with disabilities; property rights for women; and protection for families. Second generation rights will focus on the right to education and access to medical services, healthcare, and housing for women, children, and individuals with disabilities. It is vital to consider that the following sections will reference the 1991 Zambian Constitution as it is the latest version of Zambia's Constitution that included an adopted Bill of Rights. Further, while this report will not discuss third generation rights at length due to limitations of time, the rights of the Zambian people to a healthy and sustainable environment, to peace, and to development among many others should not be overlooked.

4.2.1 First Generation Rights: Civil and Political Rights

4.2.1.1 Freedom of Opinion, Expression, Information, and the Press

Article 20(1) of the 1991 Constitution enshrines protection of freedom of expression and ensures that all Zambians are free to hold opinions, receive ideas and information, and impart and communicate ideas and information without interference (Constitution of Zambia, 1991). At first glance, the provision cleanly purports democratic principles and arguably poses no problems. However, Article 20(3) establishes derogations under which the government and other arms of authority can easily limit these freedoms. The people's freedom of opinion, expression, and information may be infringed upon to uphold interests

of defense; uphold public safety, order, morality, or health; protect the reputations and rights of others; protect privacy; maintain the authority and independence of the courts; regulate educational institutions in the interests of their students; and regulate the technical administration and operation of news and media outlets (Constitution of Zambia, 1991). Laws imposing restrictions on public officers in this regard are also permissible under Article 20(3)(c) (Constitution of Zambia, 1991). With so many derogations so broad in nature, there is great potential for the government to infringe upon the freedoms of opinion, expression, and information based on the interests of the ruling party at any given time. It is this very reasoning that has propelled many, including CCZ's General Secretary, to proclaim that it is not a good man or a good woman that Zambia needs in office, rather it is a good Constitution that safeguards the rights and freedoms of the people against any and all whims of governing parties. To ensure the Constitution is strong in its protection of the freedoms of opinion, expression, and information, the wording of these derogations must be changed to ensure that there is no space in civic society for supplemental legislation that is inconsistent with the freedom of expression. Further, supplemental legislation shall positively elaborate upon the freedom of expression in a manner consistent with the Constitution. Two such pieces of legislation are the ATI Bill and CSCCA of 2021. The ATI Bill, had it been adopted, would protect public interest and the freedom of information by ensuring that the public can rightfully obtain information of interest to them with little exceptions in a facile and efficient manner (Lesa, 2018). On the other hand, the CSCCA is a prime and topical example of a well-intentioned Act that falls short in upholding fundamental rights and freedoms. Had Article 20's derogation clauses been made more specific and narrower in scope, the CSCCA would have been found inconsistent with the Constitution and requiring amendment.

The ATI Bill, in opposite fashion, seeks to bolster Article 20(1)'s guaranteed "freedom to receive ideas and information without interference." (Constitution of Zambia, 1991) The ATI Bill would do so by providing access to information concerning the government and held by public institutions so that the people may make more informed decisions as members of the polity (Kapeya, 2013). Despite recommendation by the United Nations Member States and past executive promises of enough political will to enact the ATI Bill (Muleya, 2018), Zambia has yet to adopt it since its initiation in 2002. This has

maintained the potential for the ruling party to operate in secrecy (Kapeya, 2013). This has had negative impacts on people's attitudes towards the polity. This has also contributed to the perpetual exclusion of groups such as individuals with disabilities as books, audio recordings, and other materials for public consumption are not disability friendly. The ATI Bill and the failure of past governments to enact it into law also has extensive implications for freedom of the press to be discussed later.

The CSCCA, while intended to ensure public safety against cyber security threats, may prove threatening to people's freedom of expression as it has "the potential to facilitate and even enhance the wanton surveillance and censorship of members of the public through interception with communications." (Kasonde, 2021, para. 2) The Act fails to explicitly mandate that the Zambia Information and Communications Technology Authority (ZICTA) must have due regard for fundamental rights and freedoms which, since it has so much power, can potentially result in unchecked oversight (Haambote, 2021). Among the Act's other problems, CSOs and FBOs argue that the Act has disregarded the increasing popularization of social media and alternative platforms as means through which the public engages in freedom of expression. The Act will further instill fear of being investigated for vaguely defined cybercrime (Kasonde, 2021). The Act, while again commendable in its intentions and in its potential to safeguard the people from cyber threats, establishes potential for State entities to further shrink the public's civil space and ability to criticize the government and policy honestly without fear of recourse.

It is laws like the CSCCA that make clear the dire need to narrow the scope of the derogations laid out in the Bill of Rights. It is also vital to note that the Courts' interpretation of constitutional derogation clauses may serve as either an enabler or inhibitor of governmental abuse of power in limiting the rights of the individual. Whereas current derogations enable rights to be infringed upon to uphold broad and vague interests of national security, privacy, and institutional regulation, more specific derogations will prevent the proliferation of legislation that infringes on fundamental human rights and freedoms. Looking to the South African Bill of Rights, rights and freedoms are generously provided for and supplemented by a general limitations clause. This general limitations clause allows for rights to be limited "to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and

freedom, taking into account all relevant factors, including... less restrictive means to achieve the purpose.” (Constitution of South Africa, 1996, Section 36) The South African model is exemplary in this regard as it ensures maximum protection for well-established and wide-ranging fundamental human rights and freedoms. It is important to note that it does so while also accounting for the reality that people’s rights may conflict and so, they may be limited. However, the South African model goes a step further than Zambia’s derogation clauses as it recognizes that the conditions under which rights may be limited so that they are not conflicting must be strict (Constitutional Court of South Africa). Broad and vague derogations do not create strict conditions, rather they create the potential for a vast array of restrictions, thus undermining the very purpose of a Bill of Rights.

4.2.1.1.1 Freedom of the Press

Under the purview of freedom of expression as established by Article 20 is the freedom of the press which, in line with Article 20(2), is to be protected without any margin for derogations as it states, “no law can make any provision that derogates from freedom of the press.” (Constitution of Zambia, 1991) In Zambia’s context, freedom of the press has been severely curtailed for decades and has been expressly referenced as an area of concern in every CRC report produced since the convention of the Mvunga Commission. In their 2012 comments on the Draft Constitution of the Republic of Zambia launched by the Technical Committee, the HRC applauded the inclusion of an article committed in whole to the freedom of the media (Human Rights Commission, 2012). However, since the threshold for a national referendum was not met in 2016 and the proposed amendments for the Bill of Rights were never adopted, Article 20(2) remains the sole provision covering freedom of the press which, in reality, does nothing tangible to ensure a truly free press in Zambia.

However, Reporters Without Borders (RSF) has noted that press freedom has improved since President Hichilema’s triumph over his predecessor Edgar Lungu and the Patriotic Front (PF), notorious for prosecuting journalists on claims of defamation for criticizing the government. Zambia’s media landscape is now more pluralistic in which both government- and privately-owned newspapers, radio stations, and television channels are available for public consumption. Journalists have not been tried under the Defamation Act, an Act

criminalizing libel and slander, or detained by authorities since President Hichilema took office. Moreover, the February 2022 court ruling that the closure of independent newspaper *The Post* in 2015 was illegal has been reassuring that this new government is committed to upholding true freedom of the press (Reporters Without Borders, 2022).

While President Hichilema has done well to bolster freedom of press in Zambia, it is not guaranteed that his successors will similarly protect the rights of the people to a free press and to access information. Because journalism as a professional field and “the media as the Fourth Estate of Government after the Executive, Legislature, and Judiciary” (Human Rights Commission, Muleya, 2021, para. 2) are entirely reliant on the right of the people to access information, it is imperative to revisit the ATI Bill and its adoption to statutorily solidify best practices in enabling the public to access information of public interest.

It is also vital to note that equal access to the press and media outlets for citizens, especially political candidates in elections, is an equally important consideration in this regard. Information should be accessible to all individuals in equal capacities and individuals should have equal access to both the consumption and use of public media outlets. In the case of elections, political candidates should be granted equivalent airtime to proliferate their personal platforms.

4.2.1.2 Freedom of Assembly and Association

The freedom of assembly and association is essential to the smooth functioning of a democracy as it ensures a free civil society and enables citizens to actively engage in issues that directly affect them. Article 21(1) of the Constitution establishes this freedom by guaranteeing people “the right to assemble freely and associate with other persons and in particular to form or belong to any political party, trade union, or other association for the protection of his interests.” (Constitution of Zambia, 1991) This is in direct contrast to the 1973 Constitution which only allowed people to join Kaunda’s political party and form and associate with non-political organizations that aligned with national interests which, as such, marks progressive recognition of this right over time (Chona CRC, 1972). However, Article 21 contains the same problematic structure as Article 20. It establishes the freedom of assembly and association in line with democratic principles but institutes a number of derogations under which this freedom may be infringed upon immediately thereafter,

thereby limiting this freedom of the people. These derogations as established by 21(2) enable freedom of assembly and association to be limited to uphold interests of defense; uphold public safety, order, morality, or health; protect the rights of others; protect privacy; and regulate the conditions of registration of political parties or trade unions in a national register (Constitution of Zambia, 1991). In similar fashion to Article 20, laws imposing restrictions on public officers in this regard are also permissible under Article 21(2)(c) (Constitution of Zambia, 1991).

With these derogations in place, the government has been able to enact and uphold laws that continually minimize people's freedom of assembly and association such as the Public Order Act (POA). The POA is meant to safeguard public order but in reality, infringes on democratic participation in the civil society and governance spaces (Bwayla, 2018). As noted in an interview with the Executive Director of GEARS, the Act is extremely controversial and proves problematic on two counts: [1] it is an archaic remnant of colonialism that predates Zambia's independence and [2] it gives police discretionary authority which results in disproportionate treatment. Where it should facilitate the right of the people to assemble and associate, it regulates it on unsound grounds and in ways that leave margin for discrimination. Police do not apply the law fairly as they allow certain groups to engage in concerted activities but not others based on a given group's political interests and affiliations. It is thus necessary, so as to ensure that the freedom of assembly and association is able to be exercised in a manner that is free by all Zambians equally, for the POA to be repealed and reworked. The Hichilema administration understands this as it has relaunched a review of the POA and stated that a draft of the new version will be submitted to the Executive Cabinet for approval by September 29th, 2022.

4.2.1.3 Freedom of Movement for Individuals with Disabilities

Article 22(1)(a) guarantees all Zambians, including individuals with physical disabilities, the right to move freely throughout Zambia (Constitution of Zambia, 1991). In characteristic fashion, this ideal is followed by derogation clauses which, contrary to previous discussion, mark clear-cut and specific instances in which the freedom of movement of individuals may be inhibited such as the movement of non-citizens, public officers, and individuals to be extradited.

Despite the relative specificity of these derogations, nowhere in Article 22 are individuals with disabilities mentioned. According to an interview with the Executive Director of GEARS, individuals with disabilities continually contend with lacking accessibility to buildings and other physical facilities. While plans for improvement in this area are being headed by the Zambia Agency for Persons with Disabilities (ZAPD), those plans do not make specific mention of increasing access to physical structures (ZAPD, 2017). It is therefore imperative to consider the inclusion of a clause in Article 22 explicitly protecting individuals with disabilities. This will ensure that this need is enshrined in the Constitution which will ensure that awareness for it is raised as it will become justiciable.

4.2.1.4 Non-Discrimination for Women, Children, and Individuals with Disabilities

Many stakeholders expressed in interviews for this paper the evident and palpable need for more recognition of the rights of women, children, and individuals with disabilities throughout the Constitution so that they are not subject to discrimination. Article 8 of the amended 2016 Constitution establishes “human dignity, equity, social justice, equality and non-discrimination,” as national values and principles to be recognized and respected, protecting all Zambians from discrimination. Article 11 explicitly establishes protected classes that are entitled to enjoy fundamental rights and freedoms equally which, in theory, should be all Zambians. However, the Article is non-exhaustive as it ensures that every individual may enjoy rights and freedoms regardless of an individual’s “race, place of origin, political opinions, color, creed, sex, or marital status,” but does not include age or ability. Their explicit inclusion would help ensure that they are equally regarded as protected classes of individuals able to fully enjoy fundamental human rights and freedoms under the Constitution (Briefing Note on Human Rights in Zambia, 2017).

Despite their inclusion in Article 11 under the category of sex, one of the most pressing non-discrimination issues impacting Zambia is the discrimination faced by women and young girls due to traditional practices and norms upheld by customary law (Briefing Note on Human Rights in Zambia, 2017). Article 23(4) includes two problematic derogation clauses in this regard that allow for laws to make discriminatory provisions “with respect to adoption, marriage, divorce, burial, devolution of property on death or other matters of personal law,” and “for the application in the case of members of a particular race or tribe,

of customary law with respect to any matter to the exclusion of any law with respect to that matter...” (Constitution of Zambia, 1991, Article 23, Clause 4 Subsection D) Such derogations set back women’s rights (Ndulo, 2016). Stakeholders further expressed in interviews that such provisions have perpetuated customary practices that detract from gender equality which inherently undercuts the constitutional provision of non-discrimination. Some scholars therefore argue that “governments must address the areas that need reform, discard the discriminatory aspects of traditional institutions, and confront the traditional values that underpin gender discrimination...” (Ndulo, 2019, Traditional Authorities section, para. 3).

4.2.1.5 Protection Against Gender-Based Violence

Growing statistics of Gender-Based Violence (GBV) propelled the HRC in a 2019 press statement to call on the government “to take extraordinary measures to empower and protect economically disadvantaged women...” (Human Rights Commission, Mulumbi, 2019, para. 1) and urge the people to report all cases of GBV to authorities. The passage of the Anti-Gender Based Violence Act of 2011 was a step towards more sound protection for women from such violence, but a total of 20,540 cases of GBV were reported for 2021 which is a clear indication that the State has a great deal of work to do in this area (Malumo, n.d.). It is thus further evident that the State needs to align customary and formal law at large, but also as it relates to derogation clauses in the Constitution to ensure that human rights are upheld, women are protected, and customary laws are preserved so that the non-discriminatory aspects of it can live onward.

4.2.1.6 Property Rights

Article 11(d) of the Constitution protects the privacy of people’s homes and other property, as well individual’s property against the deprivation of property without compensation, elaborated upon in Article 16. Under Article 16, derogation clauses prove problematic to women’s equal protection under the law as well as protection of privately owned property from government interference.

4.2.1.6.1 Women and Land Ownership

It is vital to consider that most land is owned under customary law and under such laws, women are not granted equal rights to land. This is not to say that all women have been barred from owning land. Some educated single and married women own plots of land in their own names or jointly with their spouses. Further, tribe chiefs may allot a plot of land to a single mother for farming so that she may support her children, but more common in rural and peri-urban areas is that land is owned by the male heads of the household (WeEffect, 2021). Additionally, widowed women have been subject to property grabbing, a practice in which relatives of the widow's deceased husband claim the widow and the husband's estate as their own. This common practice makes evident the great need for the State to align customary practices and laws with human rights standards. It is necessary to note that the Intestate Succession Act (ISA) protects against the practice of property grabbing in instances where the incident is reported to authorities. However, in accordance with a number of stakeholders, many incidents go unreported.

4.2.1.6.2 Presidential Seizure of Property

Article 16(2) provisions (y) and (z), supplemented by the Lands Acquisition Act, allow the President to seize land that is deemed desirable or expedient for national interests and convert titles of land from freehold, a status of private ownership, to leasehold. These provisions of Article 16 further allow the President to impose any restrictions on subdivision, assignment, or subletting (Constitution of Zambia, 1991). These provisions make clear that the right to property can be infringed upon without restraint, as it states impositions can be made without "any restrictions," which essentially undermines any claim to private ownership for all citizens. Like the derogation clauses under the purview of freedom of expression and freedom of assembly and association, this ability of the President to act in this manner and, further, for the government to enact laws that enable such practices and are deemed consistent with the Constitution undermines democratic principles. These derogations need to be reevaluated so as to ensure that the autonomous and private ownership of property by individuals is a right protected and justiciable under the Constitution.

4.2.1.7 Protection for Children and Families

The Preamble of the 1991 Constitution expressly states, “that the State shall respect the rights and dignity of the human family.” (Constitution of Zambia, 1991) This is the only allusion to the rights of the family and recognition of the importance of the family as a foundational unit in society throughout the Constitution. According to an Evangelical Bishop, the place of the family needs to be more clearly expressed in the Constitution and input of the family unit needs to be both solicited and accounted for in decision-making processes. He cited the implementation of compulsory reproductive sex education in elementary environments as an example of an issue on which the family unit should have been consulted. He further explained that western ideologies such as teaching elementary students about reproductive sex do not mirror Zambian family values and argued that a constitution governing the Zambian people needs to propagate Zambian family values and the place of the family in society.

While it is vital to note that the bishop’s example might not be a sentiment shared across all groups in Zambia, “[a] large and established body of research evidence has shown the significance of the family as a major institution for carrying out essential production, consumption, reproduction, and accumulation functions...” (Mokomane, 2012, Social and Economic Power of Individuals section, para. 1). This body of research has established the family unit as foundational to human development and socialization and, in stable family situations, a constant source of support through all changes and hardships to which individuals may turn (Mokomane, 2012). In the Zambian context specifically, it has been argued that families are central to all aspects of life so much so that the Constitution should statutorily establish them as such and further establish protections for their involvement in decision-making.

It is also of extreme importance to note in this regard that family dynamics directly impact child development, and child growth is “embedded in their social relations with household members, relatives, peers, and other adults in the community.” (Day and Evans, 2011, Introduction section, para. 7) It has thus been argued that child protections need to be discussed within the context of the rights and role of the family unit in Zambian society, as well as the intersection between the role of the family unit and customary practices and

laws. Article 24 of the amended 2016 Constitution provides for the protection of young persons from exploitation, specifically from employment that might negatively affect their physical or mental health, neglect, cruelty, and human trafficking among others (Constitution of Zambia, 2016). This provision has been argued to be incomplete. Children need to be expressly protected from the perpetuation of customary practices such as child marriage, a practice that inhibits young girls from attaining their full potential and exercising their rights to education and health among others (UNFPA, 2017). UNICEF cites the primary basis for child marriage as lacking access to economic opportunities that will advance children's socioeconomic positions in life. They also acknowledge that children endure a great deal of violence around which there is little awareness and no preventative action taken (UNICEF Child Protection Program, n.d.). UNICEF has thus declared the primary courses of necessary action in this regard to be, among other things, ending child marriage and addressing violence against children (UNICEF Child Protection Program, n.d.). While Zambia's government has taken positive action in this regard by enacting the National Child Policy and instituting a national plan on ending child marriage, inclusion of children and their need for protection in the Constitution will ensure ultimate protection of them as a vulnerable group.

4.2.2 Second Generation Rights: Economic, Social, and Cultural Rights

Zambia committed to upholding the economic, social, and cultural rights of its people when it acceded to the International Covenant on Economic, Social, and Cultural Rights (ICESCR). ICESCR requires each signatory nation to "take steps, individually and through international assistance and cooperation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures." (OHCHR, ICESCR, Article 2, Section 1) Some have argued, including an Evangelical Bishop in an interview for this paper, that Zambia's economic position precludes the nation from adopting provisions that guarantee socioeconomic rights as they are too expensive for the State to support. However, according to a university lecturer at the University of Zambia and a member of JCTR, the costs of the State ensuring these rights are provided for and progressively

realized are overblown. Moreover, there are means through which the State may attain gradual progressive realization of these rights over time by adopting “the minimum core standard in enforcing socioeconomic rights.” (Kasonde, 2014, The Affordability of Socioeconomic Rights in Zambia section, para. 1) Scholars argue that in line with the South African reasonableness test, which establishes the standard that countries need only provide what they can afford to support, there is no reason that Zambia should not be able to prioritize and optimize the use of its resources to support the people’s most dire needs (Kasonde, 2014).

There are numerous needs in the realm of economic, social, and cultural rights that require State and statutory attention. It is vital to consider that rights to culture and tradition, as well as the right to work and rights in the realm of labor and employment are of key consideration in the call for an amended Bill of Rights. For the purposes of this paper, in alignment with opinions expressed by CCZ stakeholders, some of the direst needs in this area are the right to education for women, children, and individuals with disabilities; access to medical services and healthcare for women, children, and individuals with disabilities; access to water, sanitation, and hygiene; and access to housing.

4.2.2.1 Right to Education for Women, Children, and Individuals with Disabilities

Article 112(e) of the 1991 Constitution provides in its directive principles of state policy that “the State shall endeavor to provide equal and adequate educational opportunities in all fields and at all levels for all.” (Constitution of Zambia, 1991) It is clear by both the title of this Article and the nature of the wording of this provision that this is an aspirational principle to guide State policy rather than a true and implementable guarantee to the right of an education. Nowhere else in the Constitution is the right to education guaranteed or even alluded to for any persons, including women, children, and individuals with disabilities.

Ensuring the right to education is guaranteed ranks at the top of the United Nations’ Sustainable Development Goals as it “breaks the cycle of poverty... [and] helps to reduce inequalities between the rich and the poor, the rural and urban areas and indeed to reach gender equity and equality...” (Zambia CSOs’ Shadow Report on the Voluntary National Review of Progress on the Implementation of the Sustainable Development Goals, 2020,

SDG 4 CSOs initiatives section, para. 1). Budget gaps in the State’s financing of education and completion rates for people ages 15-24 vary across the provinces and are getting lower with each progressive sequential class year. CSOs thus recommend that the government enforce compulsory education for all children (Zambia CSOs’ Shadow Report on the Voluntary National Review of Progress on the Implementation of the Sustainable Development Goals, 2020). This may be underwritten by including compulsory education and enforcement mechanisms to ensure regular attendance among the Constitution’s provisions. Further, a constitutional provision mandating “Teaching at the Right Level” across provinces for all grade levels will contribute to standardization that will help equalize the quality of education for all Zambians (UNICEF Education Program).

The express inclusion of young girls, at the secondary school level especially, and individuals with disabilities as groups equally requiring compulsory education and assistive implements to ensure their regular attendance and accommodation in school is necessary to secure the guarantee of their rights to education.

4.2.2.1.1 Zambia’s Re-Entry Policy for Young Girls

Human Rights Watch (HRW), in a letter they sent to Minister of Education David Mabumba in 2018, called for the equal education of pregnant girls and adolescent mothers. The letter lauded Zambia for being one of the first African Union member countries to adopt a re-entry policy but criticized the policy for not including implementation mechanisms such as family support and school counseling. HRW recommended in their letter to Minister Mabumba that Zambia should “[c]onsider adopting a new policy that focuses on guaranteeing compulsory education for all girls... [and] [w]ork with civil society actors to adopt a strong implementation plan...” (Human Rights Watch, 2018) CSOs such as USAID have acknowledged the many problems with the Re-entry Policy in its own rights and have noted the needs for implementation of mentoring for girls before pregnancy, counseling for mothers during and after their pregnancies, financial support mechanisms, awareness raising and community outreach, and the involvement of children’s fathers (USAID Time to Learn Case Study Series, 2015).

Acknowledging the need for policies safeguarding the educational rights of women and young girls such as this Re-Entry Policy, CSOs further acknowledge that there is a great

need for the State to prioritize education more in budgeting. More schools need to be constructed to accommodate all Zambian students and, specific to young girls engaging in courses of study, and more schools need to be constructed closer to rural communities to reduce distances of travel to schools. According to CCZ General Secretary, the far distances between homes and schools in rural areas has made school inaccessible in ways that are dangerous to young girls for a number of reasons. Young girls are at risk of being “attacked or molested along the way. In some cases, there are illegal boarding houses because the children will go and stay for the week... away from parental control,” which may also put them at risk for other things. It is thus necessary for Constitutional provisions to not only mandate compulsory education with enforcement mechanisms, but further to mandate that more secondary schools be built to accommodate all Zambian students and more schools be built closer to rural communities. Supplemental laws may elaborate on these proposed constitutional provisions at length, but their mention in the Constitution is necessary as it will ensure these needs in the realm of the right to education are unequivocally accounted for.

4.2.2.2 Access to Medical Services and Healthcare for Women, Children, and Individuals with Disabilities

Article 112(d) of the 1991 Constitution establishes that “the State shall endeavor to provide... adequate medical and health facilities... and take measures to constantly improve such facilities and amenities...” (Constitution of Zambia, 1991) In characteristic fashion as it relates to the lack of inclusion of economic, social, and cultural rights, the Constitution does not expressly guarantee the right to health anywhere in its provisions. Scholars argue that Zambia should make explicit mention of the right to health in its Constitution and further, look to Mozambique and Malawi’s Constitutions for provisional inspiration (Mulumba et al., 2010). In the case of Mozambique’s Constitution, section 116(4) establishes that “[t]he State shall promote the expansion of medical and health care and the equal access of all citizens to the enjoyment of this right.” Clear and explicit provisions for access to health care ensure that the people of Mozambique can access health care facilities and services as needed whereas in Zambia, there are inequalities in access to medical services and health facilities due to differing distances to facilities and burdensome costs (Hjortsberg, 2002).

Moreover, Article 13(c) of the Constitution of Malawi states that “[t]he State shall actively promote the welfare and development of the people... by progressively adopting and implementing policies... to provide adequate health care, commensurate with the health needs... of society and international standards of health.” Like in Mozambique, Malawi’s Constitution requires the State to progressively realize people’s right to health and further, attributes the responsibility of implementing policy to defend the rights of the people. Zambia should take note from these models of protections implemented to protect the right of the people to health so that Zambians’ right to health may similarly be progressively realized.

4.2.2.3 Access to Water, Sanitation, and Hygiene

Article 112(d) additionally establishes in the State’s directive principles of state policy that “the State shall endeavor to provide clean and safe water...” (Constitution of Zambia, 1991). Again, the allusion to the need of the people for clean and safe water is aspirational rather than actual, meaning that it comes with no true recognition, guarantee, or mechanisms of enforcement. The United Nations ranks ensuring availability and sustainable management of water and sanitation for all sixth in their sustainable development goals, citing access to clean water as especially critical to development and human safety in the Zambian context since “water-borne disease outbreaks... often ravage the Zambian overcrowded peri-urban communities.” (Zambia CSOs’ Shadow Report on the Voluntary National Review of Progress on the Implementation of the Sustainable Development Goals, 2020, SDG 6 Introduction section) In Zambia, water is not universally accessible or a basic human right but a privilege for which Zambians must pay to access. Although Zambia has adopted a National Water Policy to ensure “equitable provision of an adequate quantity and quality of water... at an acceptable cost, on a sustainable basis,” (Phiri, 1999, National Water Policy section, para. 1) the policy does not emphasize the urgent need to provide water to those underserved. This need may arguably continue to be neglected because the Constitution does not establish or guarantee access to water and sanitation as a basic human right. CSOs have thus called for the inclusion of access to water, sanitation, and hygiene in the Constitution’s provisions on fundamental human rights and freedoms so as to ensure that the State will prioritize serving this need necessary for basic human subsistence.

4.2.2.4 Access to Housing

Access to shelter and housing is also referenced in Article 112(d) of the 1991 Constitution which establishes that “the State shall endeavor to provide... decent shelter for all persons...” (Constitution of Zambia, 1991). Zambia’s population in urban areas increased between 2000 and 2016 from approximately 3.4 million to 6.7 million people which has led to a housing deficit of over a million units because the nation is underperforming in housing production (PMRC Housing Briefing Document, 2018). Zambia’s Housing Policy, in addition to a plethora of legislation in this area, has sought to ensure that people have access to decent housing across various income groups but due to lacking provisions for implementation, such policies are dysfunctional and do not truly serve to accomplish any tangible change. Poor implementation of policy supporting access to housing, in addition to other economic, social, and cultural rights, makes clear that there needs to be constitutional provision for the right to housing. There is great need “to have clear language about ESC rights in the Bill of Rights to legally compel government to realize these rights for its citizens... because the current Constitution does not include the full range of rights, Government has not lived up to the commitment of honoring basic rights such as adequate housing...” (UN-Habitat, n.d.).

4.3 ADMINISTRATIVE JUSTICE

Zambia’s current administrative justice system is anchored primarily in judicial review, defined as the process of reviewing administrative action by the judiciary, but includes some non-judicial conflict resolution mechanisms such as the Public Protector and Tribunals. However, this system has been rendered irresponsible and inconsistent due to the lack of a clause in the Constitution that expressly establishes the right to fair administrative justice which would require institutions to adhere to due process principles as they take administrative action. The Constitution must include provisions to ensure that individuals can access strong and reliable administrative justice and further, establish frameworks that will build up public confidence in the different judicial institutions that Zambians interact with every day.

It is vital to consider that accessing effective and efficient administrative justice may be especially difficult as Zambia's judicial system is ravaged by inconsistencies. For instance, Article 121 of the Constitution states that "the Supreme Court and the Constitutional Court rank equivalently" which can prove to be extremely dangerous. With the courts ranking equivalently, it would become impossible for lower courts to know which decision to follow and would question the overall legitimacy of precedence (Kaaba, 2018). The contradictions caused by this twin apex statute is seen clearly in the opposite rulings on cases *Access Bank (Zambia) Limited v Group Five/ZCON Business Park Joint Venture (Suing as a Firm) SCZ/8/52/2014* and *Henry Kapoko v The People 2016/CC/0023*. Regarding the interpretation of Article 118(2)(e) which states "justice shall be administered without undue regard to procedural technicalities." The Supreme Court ruled in *Access Bank (Zambia) Limited v Group Five/ZCON Business Park Joint Venture (Suing as a Firm) SCZ/8/52/2014* that the Article "never means to oust the obligations of litigants to comply with procedural imperatives as they seek justice from the courts." The Constitutional Court viewed the Article differently in *Henry Kapoko v The People 2016/CC/0023*, holding that the Article is a mandatory standard and should be applied at all levels of the administrative justice system.

Many stakeholders and scholars have expressed two schools of thought to rectify legal concerns surrounding the equivalent ranking of the Supreme and Constitutional Courts. One school of thought believes that the Supreme Court should be the court of final jurisdiction for the entire judicial system as is standard in most democracies, for the Constitutional Court to be disbanded, and for its work to be delegated to special constitutional committees within the Supreme and High Courts. The second school of thought in this regard involves keeping both courts but demoting the Constitutional Court to rank below the Supreme Court, which would mean that the Constitutional Court could maintain its original jurisdiction but that the Supreme Court is alone in its attribution of final jurisdiction.

The Constitution provides an insufficient framework that allows for courts to issue inconsistent rulings, which fundamentally undermines a strong administrative justice system. Jurisprudence is currently influenced by Article 173 of the Constitution which outlines the guiding values of public administrative service which are "effectiveness,

impartiality, fairness, and the equitable provision of services, public participation and accountability.” (Kalunga and Kaaba, 2019) These guiding values supplement the national values of “democracy and constitutionalism; human dignity, equity, social justice, equality and non-discrimination; good governance and integrity...” provided for in Articles 8 and 9 which are meant to guide administrative action and govern the framework that the courts should use in issuing rulings (Kalunga and Kaaba, 2019, pg. 22).

If the courts applied these broad frameworks consistently, then administrative justice could be ensured. However, in *Gordon Mwewa and Others v. The Attorney General and Another*, a High Court held that “national values and principles ... cannot be taken as a forceful embodiment...because as aspirations, they do not attach any immediate obligation on the Government to implement them.” (Kalunga and Kaaba, 2019, pg. 23) This ruling confirms that the courts cannot be depended on for implementing these principles in their decision-making. Additionally, a lecturer at the University of Zambia added that even if the Court rules in favor of a complainant in a case in which the government is the defendant, which isn’t common, governmental institutions have traditionally found ways to use formerly unacceptable approaches of administration, because judicial review looks at the process of administration and not the substance. This means that decisions are problematically based on whether an institution completed an administrative action, regardless of the substance of the action. He also strongly advocated for the inclusion of this right to fair administrative justice in the Bill of Rights to ensure everyone has the right to fair, reasonable, and efficient administration of justice. In order for this right to be effectively implemented and enforced, legislation mirroring South Africa’s Private and Public Administration Justice Act can provide these guidelines (Public Administration Management Act, 2014).

While the gaps in the legal framework governing administrative justice prove problematic to the effectiveness and efficiency of the justice system, courts have also failed to be creative in their remedies. According to a lecturer at the University of Zambia, courts have been reluctant to expand the grounds of judicial review beyond its current common-law grounds. These current remedies that are strictly used in judicial review are provided by Order 53 of the Rules of the Supreme Court of England, “which have their origins in the prerogative writs of certiorari, mandamus and prohibition.” (Kalunga and Kaaba, 2019, pg.

34) These rules have foundations in colonial rule and when strictly followed, can be problematic or irrelevant to the Zambian context. However, some have unsuccessfully applied for the inclusion of different remedies, which may be more relevant to the Zambian context, such as providing damages for certain lost costs during poor administrative action (Kalunga and Kaaba, 2019, pg. 33). The lecturer at the University of Zambia interviewed for this paper recommends that in order to dispel the narrow-mindedness of the judicial review process, Zambian courts should follow South African court practice of meaningful engagement in order to make decisions that are informed by broad public and stakeholder considerations rather than strictly the law. He adds that this would be particularly useful in mining disputes. By being more considerate of external factors and public considerations in administrative justice cases, justice will be served more frequently. Issues must be resolved with the consensus of communities, the people, and stakeholders involved in order to establish a stronger administrative law system and stronger stakeholder confidence in that system.

Although judicial review and the legal system need to be changed, it's crucial to acknowledge the time and money people spend on court appearances. Constitutional reform must also put an emphasis on creating lower-level trustworthy systems that can efficiently deliver administrative justice that is more accessible and less expensive for persons seeking justice. One strategy is to resolve conflicts through conciliation and mediation. More precisely, disputes in Zambia should be settled within a broad framework based on solidarity, interconnectedness and coexistence that allows for mediation and offers a platform for productive interaction rather than imposing solutions (Faibt, 2019). The Nile River issues, in which Egypt, Sudan, and Ethiopia used mediation to reach a mutually beneficial agreement, is one example of how mediation has shown to be an amicable means of resolving conflict. As an alternative, public inquiries offer a more thorough examination of bad management than the courts do. Due to the opportunity for people to express their opinions regarding potential courses of action, inquiries enable citizens to take part in the decision-making process.

For the purpose of obtaining administrative justice, the perspective gained by commissions of inquiry is helpful. The Commission of Inquiry, however, is limited to offering recommendations. This is so because the President, who reserves the right to

cherry-pick, reject, and accept that which is advantageous to them, sets the terms of reference. If the Commission of Inquiry is to make its recommendations more effectively, the aforementioned situation needs to be corrected (Kalunga and Kaaba, 2019). Additionally, tribunals offer a substitute for judicial review. These tribunals are focused on a particular area of law, and those in charge are experts in that sector. Tribunals provide a quicker, less expensive, and more accessible alternative to the regular Court (Wade et al, 2014). The Public Protector, a new position created by the 2016 Constitution, has enormous authority in decision-making and provides the opportunity for a majority vote (Kalunga and Kaaba, 2019). This increases public hearing transparency and dispute resolution certainty. It should be highlighted that because the President appoints the Public Protector, they are not autonomous. For these judicial review alternatives to be reliable, they must be enhanced by making them independent entities.

Stakeholders and academics have underlined the need for a more robust administrative justice system through the employment of independent alternatives, creative judicial review grounds, and a vastly improved legislative framework.

4.4 SEPARATION OF POWERS

The Separation of Powers doctrine inherent to any democratic system establishes the framework for the three distinct branches of government, the Executive, Legislature, and Judiciary, to effectively balance one another. The Executive branch exercises executive powers, the Legislature enacts legislation and exercises discretion in the ratification of presidential appointments and measures, and the Judiciary exercises judicial review to uphold the laws of the land as provided for by the Constitution and common law (Legal Information Institute). In balancing the exercise of power of these three branches of government, the Separation of Powers doctrine invokes two necessary conditions: [1] no branch of the government is to interfere with the function or work of another branch and [2] no branch of the government is to have more power than another branch (Electoral Commission of Zambia).

From stakeholders interviewed for the purposes of this paper, it has become amply clear that these two conditions of the doctrine are not satisfied in the Zambian context. It is vital to note that the relationship between the Legislature and Judiciary is one of relative

balance. The Legislature enacts legislation and ratifies Judicial presidential appointments and the Judiciary exercises judicial review in ensuring that which is ratified by the Legislature upholds the Constitution and laws of the land (Mwinga, 2014). However, the Executive branch, namely the President, is believed to possess a disproportionate amount of power relative to the other two branches of government. This disproportionality manifests primarily in the area of presidential appointments. In the Executive branch's respective interactions with the Legislature and Judiciary, presidential appointments in both branches serve to severely undercut the separation of powers doctrine as it relates to both necessary conditions for the smooth functioning of a democratic system. Attributing the power to appoint officials in both realms is a discretionary form of Executive interference in these two branches that directly affects their functioning and work, thereby undermining the first stipulation that no branch of the government is to interfere with the function or work of another branch.

Moreover, Article 270 of Zambia's Constitution provides that the "power to appoint a person to hold or act in an office includes the power to confirm appointments, to exercise disciplinary control over the person holding or acting in the office and to remove that person from office." (Constitution of Zambia, 2016) As established by Article 270, the presidential power to appoint also translates into the presidential power to remove appointees from their positions. This power of removal is dually problematic as the Constitution provides no bases for which a removal may occur and further, creates potential for those appointed to become beholden to the Executive. Because removals are left up to presidential discretion, appointed officials are susceptible to bending to Executive will and acting in ruling party interests to maintain their positions. In an interview for this paper, the Executive Director of GEARS affirmed such appointee adherence to Executive will, sharing that "[t]his is where loyalty comes into play. It's the hand that feeds you. You have to care. Loyalty will always be well, and they will not refuse when the President says come." When the President calls on those he has appointed, they will go. When the President wants them to do something, they will do it. This is the very basis for all arguments claiming the power ascribed to the President by the current Constitution, namely the power to appoint, upsets the government's systematic checks and balances.

As it relates to the Judiciary in this regard, the President possesses the power to appoint justices and judges among other senior-ranking government officials. Article 140 of the Constitution provides that “[t]he President shall appoint the Chief Justice, Deputy Chief Justice, President of the Constitutional Court, Deputy President of the Constitutional Court, and other judges on the recommendation of the Judicial Complaints Commission and subject to ratification by the National Assembly.” (Constitution of Zambia, 2016) This provision raises concern because these justices and judges wield a great deal of power, namely the Chief Justice who serves as the head of the Judiciary and a justice on the Supreme Court. The fact that the President appoints the highest ranking and most influential judges and all other judges in the nation raises an extreme concern about direct interference of the Executive arm in the Judicial branch of government. As discussed previously, there is great concern that appointed judges and justices will be beholden to the President which, in turn, may lead to the inadequate administration of justice for the Zambian people.

This issue extends to the President’s relationship to the Legislature. Article 69 of the Constitution enables the President to nominate members to the National Assembly “to enhance the representation of special interests, skills, or gender.” (Constitution of Zambia, 2016) The same concern that members of another branch of government, in this instance the Judiciary, will be beholden to the Executive and act in governmental interests rather than the best interests of the people arises. This concern becomes even more salient considering the fact that Article 116(1) enables the President to appoint a number of MPs as Ministers who, in accordance with Article 116(2), report directly to the Executive branch (Constitution of Zambia, 2016). The appointment of Ministers from among the members of Parliament undermines the principle of separation of power as individuals become members of both the Executive and Legislature. Overlap in these two branches arguably dampens the Legislature’s ability to fully check the Executive.

It is of vital importance to emphasize that the Legislature, as prescribed, is meant to serve as a check on Executive power. In the case of presidential appointments, referring back to Article 140 clarifies this as it establishes that the President’s appointments of justices and judges in the Judiciary are subject to ratification by the National Assembly. However, the framework of ratification within the National Assembly limits the power of

parliamentarian decision-making. Article 95 of the Constitution explains that the President may appoint someone for a position and that that nomination must be ratified by the National Assembly. If the Legislature refuses or delays the ratification of the appointment, the President nominates another candidate for the appointment. If the National Assembly refuses or delays the process again, the President will again nominate another candidate for the appointment, but if the process is delayed or refused for a third time, the appointment will automatically take effect (Constitution of Zambia, 2016). The ability for presidential will to supersede checks by the Legislative branch is extremely concerning as it not only undermines the separation of powers doctrine, but also limits parliamentary power to be intentional in their decision-making on behalf of the people. In a different vein, some have argued that Parliament's ratification power is not only limited by the contents of Article 95 alone but further, by floor-crossing. Floor-crossing is a practice that undermines plural politics in which members of minority parties distance themselves from their own parties and cross the floor of Parliament to align themselves more closely with the ruling party (Mudenda, 2019). Some argue that the primary impetus behind floor-crossing is the President's appointment of members of opposing parties as Ministers and Cabinet members, as discussed earlier. While this practice is not expressly considered floor-crossing under the law, the upward mobility MPs gain when taking on the status of a Minister and Cabinet member is arguably a strong thread of loyalty tying them to the President and, by extension, the ruling party's interests (Mudenda, 2019). Because MPs may bend to the wishes and interests of the ruling party in instances of floor-crossing, the legislative check on presidential appointments by the National Assembly is susceptible to corruption.

Concerns surrounding the presidential power to appoint members of the government further extends to senior government officials and the composition of national commissions. In accordance with the provisions of Articles 174–185, the President maintains the power to appoint Zambia's Attorney-General, Solicitor General, Director of Public Prosecutions, and Secretary to the Treasury. The President, in accordance with Article 185 specifically, has "the power to appoint and confirm public officers, exercise disciplinary control over public offices, and terminate the employment of a public officer." (Constitution of Zambia, 2016) Senior government officials, like Ministers and Cabinet

members, answer directly to the President and presidential disciplinary control rather than the laws of the land. As it relates to commission appointments, it is necessary to note that 16 independent Commissions as established by Articles 217–237 of the Constitution are themselves meant to aid the President in nominations and appointments by recommending people for posts. Article 216 states that these commissions are to operate independently. Moreover, Article 241 states that the commission body is responsible for appointing its own staff through mechanisms to be prescribed as mentioned by Article 242 (Constitution of Zambia, 2016). Generally, that which is meant to occur “as prescribed” manifests in a law supplemental to a given constitutional provision. One such law that prescribes the appointment mechanisms of the commissions is the Service Commission Act. The Act makes very clear that the members of the service commissions are to be appointed by the President in full. The one commission whose appointments are structured differently is the Judicial Service Commission where some members are appointed by the Chief Justice, but even then, the Chief Justice is appointed by the President.

If anything is clear, it is that government officials and entities that should be independent and answer only to the law of the land at large directly report to the President. The President has too much power and, again, this is made clear through the presidential power to appoint members of government.

To uphold the separation of powers doctrine more truly, many stakeholders have suggested that the President should maintain the power to appoint but that the options for people to fill the appointed role should come from a shortlist put together by an impartial third party. How this third party might actually be formed is unclear and surely is an area for further research, but the ideal would be that it would be diverse and representative in its composition to account for all groups including minorities and the range of political parties. There may need to be one central one or one for each branch of government. They will recommend to the President who is well-suited for all these different positions and the President will have to choose from that list. Further, the Constitution will need to more clearly lay out the circumstances under which these officials may be removed from office and remove presidential discretion in the reconstructed guidelines of government officials’ removal.

4.5 DEVOLUTION OF GOVERNMENT

Article 147(1) of the Zambian Constitution provides that “the management and administration of the political, social and economic affairs of the state shall be devolved from the national government level to the local government level.” (Constitution of Zambia, 2016) This article classifies Zambia as a State that operates under a system of devolved governance. Devolution of governance can be best defined as the transfer or delegation of political, administrative, or economic authority from the national government to lower levels of government (Hatchard et. al, 2004). The benefits of this system are evident as it entrusts local communities with decisions on social, political, and economic matters of importance to them (Ndulo, 2021). Devolution is essential to achieving a truly people-driven democracy because it strengthens the voices of the diverse sectors of the Zambian population and acts as a check on the currently highly centralized government. It will additionally provide a degree of security for constitutional order and social stability that are vital for economic order and development.

Although Zambia’s Constitution provides for a devolved system of government, the framework lacks strength in ensuring genuine devolution. According to Ndulo, multiple constitution making processes have mistaken decentralization for devolution (Ndulo, 2021). Decentralization is the outsourcing of government functions from the Executive to lower positions, for instance power devolved from the President to executive appointed ministers (Ndulo, 2021). Ndulo further argues that devolution is about devolving constitutional authority to sub-national governance structures (Ndulo, 2021). These sub-national governance structures must be democratic in nature and independent from absolute executive influence. Our literature review emphasizes that genuine devolution must require the political, administrative, and financial autonomy of the central government. If these elements are not autonomous, devolution turns into an undemocratic and unrepresentative decentralized system.

As it relates to political and administrative autonomy, the Constitution must provide a clearer framework governing power-sharing between the central and local governments. This framework must also provide clear guidance on how disputes between the central and local governments may be resolved. In an ideal situation of power-sharing between the

central and local governments, the Executive authority of the provincial government must reside in the provincial government. In the amended 2016 Constitution, the Provincial Minister, who will be head of the province, is appointed by the President. It is necessary to note that the Provincial Minister is not an autonomous entity seeing as their post is dependent on their relationship with the President as opposed to the people they are meant to serve. The Provincial Minister may thus bend to the interests of the national ruling party and with Executive interference at the local level of government, this may prove a real danger to the people's interests. Laws governing local governance also attribute a great deal of power to the Provincial Minister and, by extension, the Executive. Notably, the Local Government Act allows the Provincial Minister to interfere in the way elected Mayors conduct themselves and has the power to suspend an elected Mayor as it was in 2021 when the Mayor for Lusaka and Kitwe were suspended by the minister on allegations of corruption. In order to enhance the autonomy of subnational governments, the Constitution should provide for a two-tier system of government in which power-sharing between the Central government and local governments and the mechanisms for resolving conflict in the exercise of such powers are clearly spelled out. The two-tier system will help to do away with the issue of tribalism and tribal politics that have been used by those seeking political office in the past. The two-tier system will further ensure unity in diversity and will purport the ideal of "One Zambia, One Nation."

In terms of financial autonomy, the Articles 161-163 of the Constitution provides for funding of local government. According to these provisions, the finances of the local government come from three sources: revenue collection by local councils, the equalization fund, and the Constituency Development Fund (CDF). The financing of local government through the means of tax collection is minimal and insufficient in providing adequate government structure. As a result, they depend heavily on funding from the central government to sustain their operation. In the 2022 budget for instance, the Government increased CDF funding to lower levels of government from 1.6 million to 26 million Kwacha (Silumina, 2022). Although this seems to be positive in increasing the funding for infrastructure, schools, hospitals, and other dire needs, the large financial dependence on the national government provides the potential for presidential abuse of local government's self-determination. Additionally, local governments lack structural strength

as much of the CDF spending is misused and the dependence on the central government has led to corruption by local officials. (Silumina, 2022) This calls for a restructuring of the financing of lower levels of government in order for them to run independently with more accountability.

Another Constitutional weakness that prevents genuine devolution is Article 148(2), which states that the government shall provide funding for the smooth running of local government through sub-structure. These constitutional provisions do not in any way provide an environment for financial autonomy to realize true devolution, rather these provisions enhance dependence of the local government on the central government. As a result, the local government cannot provide free and credible checks and balances to the central government as local government leaders may fear that if they become too critical of the central government, funds may be delayed being given to them or not given at all.

Therefore, in order for local governments to reduce dependence on the central government the financial regime for local government in the constitution should be crafted in such a way that local governments receive less funding from the central government and raise more from tax collection, levy, entertainment, and other means.

4.6 ELECTIONS AND THE ELECTORAL PROCESS

As it currently stands, the electoral process in Zambia lacks transparency. However, given its current legal and institutional framework, Zambia should, in theory, operate under a more sound and democratic electoral process. In fact, a former government elections official claimed that the law is “very well spelled out,” and is written in a way that ensures efficient and smooth management of elections and embodies the freedoms of expression, speech, and movement during campaigns. Contrarily, stakeholders have noted credibility concerns in relation to the current application of the electoral legal framework and the management process of elections. The Mung’omba CRC’s report argued that in order to have credible elections, elections must satisfy the following conditions: [1] the entire adult population should be given the right to vote for candidates at their free will, [2] elections should be a regular occurrence and take place during specific time limits, [3] everyone should be allowed to form a political party and nominate candidates, [4] campaigns should be conducted fairly under provisions of the Electoral Act, and [5] votes should be casted

freely, counted freely, and reported honestly, with the winner being officially appointed to their seat in office (Mung'omba CRC, 2005). Fair and free elections are crucial in ushering a democratic government that is widely accepted and commands respect from the people.

From our literature review and stakeholder interviews, we have identified the following issues in relation to Zambia's elections and electoral process: [1] design of the electoral system, [2] composition of ECZ, [3] management mechanisms of the electoral process by ECZ, [4] minority representation in elections, [5] the Church's role in monitoring elections, and [6] the Court's role in settling election disputes.

4.6.1 Design of the Electoral System

Currently, Zambia's general election system is a majoritarian system in which candidates must receive more than fifty percent of the vote in order to be elected President. If no candidate receives at least the fifty percent threshold of votes, a second round will occur in which only the two candidates with the highest and second highest number of votes qualify to be on the ballot. The National Assembly, Council Chairperson, and Councilors get elected on the premise of the First-Past-The-Post system, used in presidential elections prior to 2016. The First-Past-The-Post System is a system where the candidate with the highest number of votes wins, regardless of percentage or threshold. These elections are held every five years and the Electoral Commission of Zambia (ECZ) must manage elections in accordance with the 2016 Electoral Code of Conduct.

The new majoritarian system for presidential elections has been applauded by many academics and stakeholders, including the General Secretary of CCZ, as it can ensure that the absolute majority of the country approves of a certain candidate. This system has been viewed as more representative of constituents because a majority votes the President into office. This system is superior to the election of a candidate that may have won plurally but still only garnered a minority percentage of support as this can decrease the legitimacy of the candidate who assumes the position of the presidency.

Regarding the legislative election process that practices First-Past-The-Post elections, however, many have argued that this process isn't representative of certain minority and interest groups. To address this concern, a program officer of JCTR has pointed to the South African proportional representation electoral system as a more

representative model in which parties are represented in Parliament in proportion to their electoral support. He stated that this system respects minority voters but concedes that it can lead to a more coalition-based governmental system because there is not enough majority to form an effective government. Coalition governments don't work well because it would encourage inefficient political gridlocks. Therefore, stakeholders have made the claim that a mixture of the current plurality system and proportional representation would be beneficial to balance governmental efficiency and minority representation. The implementation of minority representation through mixed member representation is crucial because, according to the Executive Director of GEARS, although Article 259 of the Constitution states that 50 percent of each gender should be appointed to public office, unless not practicable, and that the appointer should equate representation to the youth and people with disabilities, this has not been practiced. However, he adds that a pure proportional system that would, in theory, account for all of society's different interest groups may make political parties accountable to the people rather than an individual leader.

In conclusion, a system clearly established in the Constitution that prescribes the voter with two votes, one for the representative of their single-seat constituency and one for their preferred political party, would be beneficial. Seats in the Legislature would then first be filled by the plurality winning constituent candidates followed by party candidates, selected from a party list, based on the percentage of votes that the party received from the second vote. This would require either an expansion of the Legislature or a constitutionally prescribed percentage of representatives elected in the manner of First-Past-The-Post and through party list proportional representation. In addition, the Mung'omba Commission Report adds that legislation should provide guidance for the party list compilation and that they should include marginalized groups. This system will encourage better representation of parties and minority groups, stronger voter turnout, a decrease in by-elections caused by floor crossing, and would overall be more representative of the people.

4.6.2 Composition of ECZ

The Constitution declares the election management body of Zambia to be the Electoral Commission of Zambia (ECZ). ECZ should function independently as broadly stated in

Article 216(b) which establishes “that commissions shall be independent and not be subject to the control of a person or an authority in the performance of its functions.” However, many have argued that ECZ lacks autonomy and independence because Article 5(1) of the Electoral Commission of Zambia Act No. 25 gives the President the authority to appoint the Chairperson and members of the Commission. Additionally, Article 270 of the Constitution allows the President to remove members of the Commission at his or her discretion as discussed previously in the Separation of Powers section of this paper. The problem with this, as described by the Executive Director of GEARS, is that if commissioners can be easily appointed and removed by the Executive, then commissioners are more likely to be beholden and loyal to the President, invoking the expression, “the hands that feeds you must be cared for, otherwise, if you bite it, you will not fit tomorrow.” This relationship between ECZ and the President can create a great deal of distrust in the monitoring processes of elections. To resolve the potential lack of transparency and autonomy abounding under the current Constitution’s legal framework, a former government elections official suggested the following recommendations: “the initial selection of the chairperson, and commissioners should be done by a separate body to which those who seek office must apply, and then that body or committee will vet those names, do background checks and everything, and then come up with a recommended shortlist that the President must appoint from.” A member of JCTR added to this recommendation by stating that this separate body must be a diverse, representative committee that includes different interest groups. These provisions will create the legal framework for a more transparent, effective, and independent ECZ.

4.6.3 Management Mechanisms of the Electoral Process by ECZ

Article 229 of the Constitution attributes the following functions to ECZ: “(a) implement the electoral process; (b) conduct elections and referenda; (c) register voters; (d) settle minor electoral disputes, as prescribed; (e) regulate the conduct of voters and candidates; (f) accredit observers and election agents, as prescribed; (g) delimit electoral boundaries; and (h) perform such other functions as prescribed.” The functions lay out the different roles and responsibilities of the Commission and a former government elections official points out that Zambia has one of the best legal frameworks that can ensure democratic, fair, and

free elections. It is well-defined and spelled out and embodies freedom of expression, freedom of movement during campaigns, and freedom of speech. However, some argue that certain ECZ mechanisms need to be reformed in the areas of by-elections and the lack of trust the people have towards ECZ.

By-elections in Zambia are conducted by ECZ when an elected member of the Legislature needs to be replaced due to death, resignation, or a member disaffiliated from party lines. The issue of by-elections has been controversial as many have viewed by-elections as a costly and time-consuming measure. However, the Executive Director of GEARS described by-elections as a “necessary evil” because they keep ECZ engaged as a full-time commission rather than an ad-hoc one. If by-elections are removed, ECZ will not be functioning for large gaps of time between general elections which could lead to various inconsistencies. Additionally, he argues that by-elections are important to gauge the population’s acceptability of a political party and they can act as a midpoint reflection. Finally, by-elections can be useful to test out different election management mechanisms such as online ballot casting before being broadly used in general elections. Unprecedented events, such as the COVID-19 pandemic, requires ECZ to alter the ways in which elections can be run and to establish voter credibility in general elections. These new ways need to be put to the test during by-election periods. However, whilst recognizing the importance of ECZ activity and party accountability that occurs through the functions of by-elections, a former government elections official argues that for most by-elections, the winner is evident, and by-elections are unnecessary. Instead, he argues that Zambia should implement a system where if an MP of Party A resigns, Party B as the runner-up party should put forward a candidate to take the spot of Party A’s resigned MP. This would prevent floor-crossing and maintain checks on the ruling party. However, it was noted that if an MP of the theoretical Party A dies, Party A would be allowed to put forward another candidate to take the spot of the late MP. This former official acknowledges that this practice would make ECZ a part-time commission, but the overbearing funds used for by-elections can be put towards voter education and reform programs that may be run through ECZ. These two points of view can advance discussion about the usage of by-elections and other mechanisms that ECZ may implement in the electoral process.

Another pressing concern revolving around ECZ is the people's lack of trust in this commission. Given Zambia's historical political context, stakeholder and constituent confidence has always been low in the electoral process as a whole because of the lack of a people-driven constitution-making process and a concentrated central government. Additionally, people still don't have trust in the management of elections based on the controversial 2016 and 2021 elections. In fact, it was observed that at the first stages of the electoral process of voting at polling stations, there is transparency, and this progressively diminishes once the results are transmitted to the higher results collation centers. (Mwape, 2015) One way in which credibility can be improved, according to the Executive Director of GEARS, is for the Commission to print ballot papers in Zambia instead of engaging in the current practice which consists of printing ballot papers outside of the country. Additionally, a former government elections official argues that in order to build stakeholder confidence, ECZ must communicate with stakeholders regularly about the mechanisms used throughout the electoral process. This will give credibility to the Commission which, according to a former government election official, performs very strongly and efficiently in comparison to other global management bodies. All in all, ECZ must be more transparent and more active in communicating to stakeholders and interest groups in order to gain more legitimacy.

4.6.4 Minority Representation in the Electoral Process

As established in previous sections, the most vulnerable groups in Zambian society are women, the youth, and the differently abled. Stakeholders have expressed the need for these groups to be represented more abundantly throughout the electoral process and in government. Currently, these groups are grossly underrepresented in government and public participation despite the amended 2016 Constitution. In 2015, women held 6.3 percent of local council seats and 13.9 percent of parliamentary seats while currently, only 15.2 percent of parliamentary seats are held by women (Katongo, 2021). This was despite all four major parties committing themselves to the attainment of 50/50 gender equality in the National Assembly through nominations for the 2016 General Elections (Katongo, 2021). In addition, during the 2011 general elections, only one of ten presidential candidates was a woman, and only 111 of the 769 candidates for the National Assembly

were women (Mwape, 2015). In the case of the inclusion of individuals with disabilities, the Zambia Federation for the Disabled (ZAFOD) instituted legal action against ECZ on the basis of ECZ's alleged failure to initiate legislative reform to ensure equitable participation in the electoral process by individuals with disabilities (Mwape, 2015).

This historical negligence of these groups in public participation demonstrates the need for constitutional change. According to a former government elections official, social factors such as society's traditional view of women prevent women from seeking office. He added that the youth are prevented from seeking office due to lack of resources, whether that be economic or academic. Lastly, individuals with disabilities are disadvantaged due to Zambia's lack of a disability-friendly environment which would put these individuals on equal footing with non-disabled individuals. These groups require constitutional provisions and separate protection in order for them to be properly represented in government and society as a whole.

Firstly, as mentioned previously, a MMP system would be beneficial in including different groups of society proportionally. Another plan of action that can encourage greater minority representation in public office would be to institute affirmative action quotas. Uganda, for example, has implemented affirmative action programs to include a greater female presence in local government. Currently, "women hold 46% of local government positions, 33 % of parliamentary seats and 43% of the cabinet positions." (Tripp, 2022) However, both male and female Ugandan public office holders collectively agree that women have not significantly influenced governmental decisions and are often disregarded in decision-making. Despite the current status of women in decision-making, Uganda as a whole has had positive shifting attitudes towards the role of women in top positions and this inclusion should spark a more equal society. According to a former government election official, the legal framework in Zambia should include a similar affirmative action plan where political parties should adopt a required threshold of at least 30-40 percent of women candidates. This will encourage political parties to seek out qualified and capable women to fill this threshold. Furthermore, an affirmative action plan could encourage women to become more educated and for the government to promote greater access to education for women. This quota system could also be applied to other disenfranchised groups such as individuals with disabilities and the youth. By changing the

rhetoric and the salient societal views of these different groups to become more positive, public participation and representation will be more easily attainable. Minority representation is extremely important in government and will lead to a more equitable and people-driven society.

4.6.5 Role of the Faith Based Organizations in Elections

As in many other facets of Zambian life, religion plays a considerable role in the electoral process. The Christian Churches Monitoring Group (CCMG) is a coalition of faith-based organizations consisting of CCZ, EFZ, JCTR, and ZCCB which launched prior to the 2015 elections (NDI, 2015). CCMG is responsible for observing key election processes such as voter registration, national registration, civic and voter education, nomination of candidates and campaigns. According to CCMG, they deploy non-partisan and trained observers called Long-Term Observers (LTOs) who observe the compliance of electoral laws, voter participation, the functions of the ECZ, and electoral violence. Additionally, CCMG collects polling data, analyzes this data, and publicizes this information to stakeholders and interested parties. This role has made the Church more central to checking the power of electoral management bodies. The General Secretary of CCZ explains that CCMG must play a role in monitoring elections because this coalition can provide a strong, unified, and credible voice in ensuring a fair and free election process. CCMG can make sure that people are accurately represented and that different regions are equally and fairly treated throughout the electoral process. A Catholic Bishop adds that the role of the Church in the election process is to educate the Zambian people and that elections that affect Zambian Christians, in turn, must involve regulation and input from the Church. According to multiple stakeholders, the Church is a credible institution and a representation of Zambian voters' voice, interests, and needs due to Zambia's 95% Christian population. In addition to the Church's credible nature, a former government elections official adds that CCMG and the inclusion of faith-based organizations help to provide reforms and point out areas of improvement. However, as mentioned by a Clergymen in the Catholic Church, the role of the Church in elections is clearly not to influence the outcome of elections and pick political sides. If the Church remains apolitical

in its monitoring approach, it can enhance its credibility and maintain its strong position as the people's representative during the electoral process.

4.6.6 The Court's Role in Election Disputes

It is important to recognize that the Judiciary plays an immense role in the resolution of electoral disputes, which factor into the legitimacy, or lack thereof, of the electoral process. Due to the lack of conflict resolution mechanisms for resolving electoral issues and despite the general distrust in the Judiciary, political parties and individuals continue to take pre-election and post-election cases to court (Kaaba et. al, 2021). The courts typically hear electoral dispute cases that involve the validity of electoral results, criminal prosecutions, and suffrage right issues (Kaaba et. al, 2021). In the case of these issues, however, courts have traditionally ruled in favor of the ruling party or have been conservative in instituting progressive change. One prime example of this is seen in the ruling of the 2016 presidential election petition. This petition was dismissed on the basis that the 14 days of hearing the case had elapsed, the dismissal was not based on the merits or demerits of the case but rather on technicalities. The majority of the Court were of the view that the time frame was to be rigidly followed and couldn't allow for more lenient discretion. According to a legal scholar, this performance was poor from the court because the PF candidate, Edgar Lungu, won the election by an extremely narrow margin with 50.35% of the vote, which was close enough for the opposing party, UPND, and constituents to challenge the validity of the election. The decision to throw out the election severely delegitimized the electoral process and was the cause of further tension and political polarization in the country (Kaaba et. al, 2021). Therefore, this legal scholar has argued to broaden procedures to allow for discrepancies because according to a former government elections official, election petitions must be heard to their full extent with all matters of evidence before a judgment can be made. Another major concern with the legal framework of electoral disputes, according to the Executive Director of GEARS, is that petitioners have the burden of proof beyond a reasonable doubt that the election environment was decisive in affecting the electoral process. He recommends that these cases should be decided on a preponderance of the evidence standard instead so that court decisions regarding the electoral process can be more progressive and easier to prove. The difficulty in successfully meeting a burden of

proof comes from the lack of independence the Judiciary has as judges may be beholden to the ruling party. Lastly, in order for Judiciary decisions to be trusted and for the electoral process to be deemed legitimate, a former government elections official claims that it is imperative that judiciary decisions are clear and legitimize the elected official. To conclude, the legal framework and current jurisdiction is lacking in regard to election disputes. Courts must increase equitable measures in decision making in order for political parties, individuals, and the public to build trust in the electoral process. In order for the electoral process to gain public confidence, the electoral process must be independent of political and executive influence, transparent, and more representative of the public.

IMPLICATIONS AND CONCLUSION

Through literature review and consultation with clergymen, constituents, government officials, and legal experts, it is clear that the Zambian Constitution requires further consideration, amendments, and State action in the six major areas of design of the Constitution and Constitution-making process, the Bill of Rights, administrative justice, separation of powers, devolution of government, and elections and the electoral process.

Our findings reveal that in order for Zambia to achieve a more just and fair civic society in which the government acts solely in the best interests of the people, action needs to be taken in all these areas. The Constitution-making process needs to become more people-driven and account for people's perspectives and input at all stages. The Bill of Rights needs to move away from broad and vague derogation clauses and statutorily provide for second generation economic, social, and cultural rights. Furthermore, discriminatory customary laws need to be reevaluated to ensure that customary law aligns with international standards of human rights and that non-discriminatory customary law can harmoniously coexist alongside the promotion of human rights. Further, the Constitution should provide for fair, accessible, and efficient administrative justice for all Zambians as accessing a judicial system is one of the most foundational individual human rights in any democratic society. In the realm of separation of powers, it is imperative that the power of the President be checked and that Articles providing for presidential appointments be reevaluated to check that power. Moreover, governmental power should also be checked and become more evenly distributed between two levels of government

that will serve the interests of Zambians on the regional and national levels. Finally, the electoral process needs to be independent of political party and Executive influence, should be more transparent and more clearly communicated to the people, and more representative of all political parties and minority groups.

Our findings through community engagement have further underscored the constituent demand for the progressive realization of the wants and needs of the Zambian people in spaces of constitution-making and governance. It is our hope that Zambian faith-based organizations can successfully apply these findings to their activity in providing guidance on governance and advocating on behalf of the Zambian people for a more equitable and representative future.

LIMITATIONS

This project encountered multiple limitations throughout the course of the research process. The most notable limitation to the depth and breadth of this research was lack of time. There simply was not enough time to cover all the aspects of each area within the Constitution this paper focused on and there continues to be a great deal of work that needs to be done on this subject matter. With more time, more literature review could have been conducted and a broader scope of opinion could have been solicited and derived from a wider range of stakeholders.

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