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## **THE ECONOMIC BOTTOM LINE OF CONSTITUTION DEVELOPMENT IN ZAMBIA**

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### **Abstract**

The paper provides a framework for systematic cost-benefit analysis of constitutional provisions that seek to enhance democracy in Zambia. Democracy is one of several variables that work together to generate human development index. Other variables include those that enhance the economic and social wellbeing of the people notably education, health and other social services, national security, public administration etc.

A five-year election cycle is the socially acceptable cost that is inevitable for the democracy component of human development. Costs for by-elections are optional in that there may be inexpensive alternatives to fill casual vacancies at all levels of elected office. For instance, filling a casual Presidential vacancy through a running mate can save the country a by-election costing equivalent of 10 boarding schools with 25 teacher houses each or 8 district hospitals with 10 staff houses each. When all options for filling casual vacancies at President, MP or Ward levels are examined, there is no democratic dividend to justify the cost of any by election as casual vacancies can be filled without that cost.

Indeed, apart from cost considerations, the requirement of a by-election in case of a 50% + 1 constitution provisions is not consistent with the spirit of respecting the will of the people.

**Keywords:** economic bottom line, opportunity cost, constitution, democracy, cost-benefit analysis, vigilant minority

### **1. Introduction**

The human development index today is seen from a broad range of factors that have a bearing on the wellbeing of the people. It includes, inter alia, the traditional economic and social factors, good governance, participation in critical decision processes that affect communities and society, access to justice etc. Good governance is generally ranked high because it impinges on the effective delivery of other factors that determine human development. Thus, the constitution which underpins good governance has justifiably been a significant matter of concern to political parties, NGOs, civil society, the Government, and indeed, the general public.

In discussing the constitution, we can benefit from the advice of the then Lusaka Catholic Archbishop, Telesphore Mpundu who cautioned against excessive expectations from a good constitution. There is no debate about the need for a good constitution. Even those who are reported to have said "you cannot eat a constitution" cannot be viewed as questioning the importance of a good constitution. Rather they are drawing our attention to the fact that the human development index in Zambia today has broad dimensions, and that the constitution is not the only urgent matter, but just one of the several challenges to be addressed as we seek balanced development.

The constitution making process and the constitution provisions themselves will entail costs which will be part of the overall costs of human development. Choices will have to be made based on costs that can be justified by the corresponding contribution to the human development. Specifically, constitutional provisions will have to be justified on the basis of their contributions to the democratic ideals and cost effectiveness, and in the context of other contributors to human development.

This paper attempts to provide a framework for systematic analysis of constitution related costs and justification of these costs in terms of good governance and other democratic objectives. We start with a socially accepted human development index of several human development factors. If each of these factors is costed, we have a socially accepted cost for each component of human development. If the socially accepted cost of any component is raised within the general constraint of fixed total cost, the factor whose cost has risen can only be fully achieved if the resources are taken from other factors in the human development matrix. The resultant decrease in those factors will reduce the human development level or social wellbeing of society.

The analysis provides an economic bottom line in terms of maintaining socially acceptable levels of costs for constitution provisions. This will entail justification of constitution costs on the basis of democratic ideals and objectives that can be achieved within the full context of other development objectives. Specifically, the economic bottom line aims at avoiding costs that cannot be justified on core democratic objectives but can distort the optimal human development index. While the paper brings out a number of significant examples of avoidable costs, it was not the intention of this brief paper to be exhaustive in this regard. The modest objective was to provide a systematic framework for economic and cost considerations that need to be analyzed as each article of the constitution is debated by appropriate organs.

The original version of this paper was presented in 2015 as a comment on the Constitutional Conference proposals before the National Assembly. In view of the continuous evolution of the constitution, the paper has been recast as a general analytical framework for economic and cost implications of constitutional development. As such it covers some constitution provisions that have been proposed, adopted or rejected, and some provisions that are in the current constitution.

The paper starts by presenting an analytical framework for conducting cost-benefit an analysis of constitutional development. It then looks at the process of constitution development and the cost implications of specific constitution provisions. It concludes with the way forward for economic and cost consideration in Zambia's constitution development.

## **2. Costing of Constitutional Provisions**

Many constitution provisions can be expected to have some cost implications. While a cost burden is accepted as inevitable, the basic national challenge is to minimize the cost as we achieve our constitutional objectives. The actual rationalization of constitutional provisions will entail cost-benefit analysis which compares benefits of constitutional provisions with their cost burden and the alternative developments to be sacrificed by the constitution provision.

In typical economic analysis, the full cost of constitutional activities will be broken into two parts: a) Direct costs which cover expenses directly spent on constitutional activities, and b) Opportunity cost which is the value of the best alternative in the human development metric that

has been sacrificed by spending on the constitutional activity. Overall rationalization and economic justification of any purchase of goods or services takes account of both costs. Within the category of direct costs, we have identified two subcategories: 1) Inevitable costs which are basic costs that cannot be avoided if we are to achieve specified democratic objectives, and 2) Optional costs which are not absolutely necessary to the achievement of core democratic ideals and can be avoided without sacrificing the fundamental democratic objectives.

### *2.1 Direct Costs*

The direct cost of a product is the observable price at which a product is purchased. For instance, the direct cost of a presidential election is the price paid by the Electoral Commission of Zambia for conducting the election.

Given the complexity and multiplicity of channels of achieving democratic objectives, it is necessary to recognize two variants of direct cost i.e., the inevitable costs and optional costs which are described below:

#### *2.1.1 Inevitable Costs*

Inevitable costs are costs that have to be met to fulfill fundamental constitutional provisions such as general elections every 5 years that are necessary to facilitate essential democratic choices of the people. We cannot run away from such costs, and the best we can do is to explore ways of managing or rationalizing the costs. The basic guiding assumption is that the democratic objective is pursued simultaneously with the other components of a multi-dimensional human development metric. The other components include education, health and other social services; economic infrastructure and services; national security services; judicial and public services etc.

With a fixed resource envelope, an optimal human development metric can be established giving the best-balanced combination of all the factors in the human development index. The cost for each factor can be said to be socially acceptable in the sense that it reflects the social valuation of the contribution of each factor to total social wellbeing. It also reflects the socially acceptable tradeoffs among all factors in the human development index. If society determines, as is the case in Zambia, that there will be a general election every 5 years to give people chance to elect their President and the Parliamentary and ward representatives, then the cost of general election reflects the social valuation of the contribution of democratic choices to human development or social wellbeing. Therefore, the cost of general election is socially acceptable and is inevitable cost for well-balanced human development metric.

#### *2. 1.2 Optional Costs*

Optional costs are those costs that can be avoided without fundamental departures from the democratic ideals that the constitution seeks to protect. In constitutional development the optional costs refer to costs associated with constitutional provisions that have more than one option to achieve the desired democratic objective. For instance, when a casual vacancy in the presidency arises due to death or incapacity of the incumbent, the country has a few options to fill that vacancy. It can hold a national by election or let the Vice President assume office for the remainder of the term. It can also have the National Assembly rather than the whole country

elect President for the remainder of the term. In the determination of the option to be adopted, rational behavior will entail cost consideration in addition to any other considerations. The cost involved here are optional in the sense that the country has a choice of ways to meet its democratic objectives of filling the casual vacancy.

### *2.2. Opportunity Cost*

In a comprehensive analysis of costs, the economist does not stop at the observable direct costs as examined in section 2.1. The total cost to the country includes what the economist calls "Opportunity Cost" to reflect the alternative opportunity that is sacrificed or missed by spending resources on a particular factor. For every expenditure on a constitutional provision there are many alternative areas of human development that are sacrificed. The best of these alternatives is called the opportunity cost. In a developing country like Zambia, there are many pressing needs in education, health, water, housing and sanitation, public administrative systems and other areas.

In order to simplify the analysis, this paper confines opportunity cost examples to social infrastructure in education and health services. The social infrastructure units used are based on 2015 nominal prices. Assuming a uniform impact of inflation on the election costs and infrastructure costs, the social infrastructure units used here are realistic estimates of opportunity costs of constitutional development expenses at any time.

### *2.3 Cost-Benefit Analysis of Constitutional Provisions*

Rational behavior tends to subject every purchase to cost-benefit analysis. At individual level, this is not always consciously done especially for small purchases but is always done most probably casually or subconsciously. In public expenditure management, it is always necessary to conduct a formal and credible cost-benefit analysis to ensure value for public expenditure. In the absence of systematic cost-benefit analysis; there may be a high risk of constitutional provisions that do not reflect best value for public expenditure. The challenge of costly constitutional provisions was aptly observed by Hon. Alexander Chikwanda, former Finance Minister (2011-2016) and the then Chairman of the Finance Committee of Patriotic Front (PF), the then ruling political party "There are no easy solutions- it is a legal requirement, the Government cannot circumvent that when a vacancy occurs at Parliamentary or Local Government seat, a by-election must be held within 90 days. The cost of by-elections is becoming increasingly unsustainable." (Chikwanda, 2018)

In the justification of constitutional costs, the first test is the comparison of benefits to be achieved with the opportunity cost. This may often entail comparing tangible with non-tangible attributes or things with different measurement units. The value placed on people's choice of their government leaders may be compared with tangible opportunity cost such as social infrastructure or some other intangible benefits. If people decide democracy requires an election every five years to facilitate people's choices on governance then the opportunity cost and, indeed, all the other alternatives sacrificed by the election cost every five-year cycle are considered inferior to the democratic dividend.

As the price for the basic choices of people, the cost for the general elections can be considered inevitable as it is essential to meet this democracy objective. This cost cannot be avoided. The only thing that can be done with this cost is to rationalize it so as to achieve the best value for the money spent. As part of this rationalization of inevitable costs, the Electoral Commission of Zambia (ECZ) has provided for a single general election every 5 years for voters to choose the President, Area Member of Parliament and Ward Councilor. This is not just cost effective, but is also conducive to effective planning and budgeting

The constitution also has some optional costs related to provisions that have options to meet the democracy objective. In the example of optional costs for filling a casual vacancy in an elective position, all options for achieving the democratic objective must be assessed on the basis of democratic dividends and opportunity costs.

In terms of the democratic objective of capturing the will of the people, the by election appears to be the best option as people are given chance to directly determine the outcome for a second time in the five-year cycle. If the cost of the by election is presumed to be same as that of the original general election, then the total opportunity cost of this democratic objective has doubled. Since the cost of the regular Presidential election is inevitable, and is not subject to further debate, the question, then, is whether the democratic objective of filling the casual presidential vacancy can justify this level of opportunity cost especially in the light of available options for replacing the President. Rational behavior will lead to systematic analysis of available options with particular emphasis on their capacity to deliver the people's will in a cost-effective way.

The general assumption is that all available options can be crafted into the constitution so as to promote people's choice. For instance, a Vice President elected by the people as running mate of the Presidential candidate is directly elected by the people during the election to fill a casual vacancy during that electoral cycle. The choice of Speaker of National Assembly or anybody elected by National Assembly would reflect people's indirect choice through their elected representatives.

When all options are ranked in terms of their capacity to deliver democratic objectives the next level of analysis is the economic bottom line or cost effectiveness of the options. Rational behavior will lead to choices of options with high capacity to deliver democratic objectives at low opportunity cost. The selection criteria will be a combination of both quality and cost considerations. In Zambia where social basic needs are perilously competing with democracy enhancing objectives for very limited national resources, there is need for careful and serious analysis of the opportunity costs when determining constitution provisions.

It is assumed that in crafting the options, every effort is made to promote the democratic objectives, and therefore every option has some scope for meeting the objective. There will be some differentials between the options in terms of quality. But these will be modest compared to differentials in the associated opportunity costs. Thus, under the "Quality and Cost" selection system, the determination of the best option will be heavily dependent on the opportunity costs of the available options. In the example of a casual vacancy in the Presidency, the option of a by election has the highest quality but is rejected by rational behavior on account of very high opportunity cost. The running mate option may be second ranked option in terms of quality but could be adopted because it has practically zero opportunity cost.

It is important that all constitutional provisions are subjected to some form of cost-benefit analysis. In reviewing our current constitution or examining new constitutional provisions, if all constitutional provisions are determined on a credible cost-benefit analysis the constitutional development will have met the economic bottom line which is important in ensuring that democratic dividends are in harmony with other diverse developmental objectives of the country.

### **3. Cost Analysis of Constitutional Provisions**

Below is a discussion of some of the major constitutional provisions that have been adopted or proposed for possible adoption. In light of extensive debate and wide support in 2015 for using a referendum to craft a new constitution from the proposals of a constitutional conference, the paper starts by looking at the cost-benefit analysis of using a referendum as the mode of adopting a constitution. It then looks at the cost implications of some constitutional provisions.

#### *3.1 Mode of Adopting a Constitution*

The mode for adopting a constitution or constitutional amendments should reflect the will of the people and should be practical and cost effective. In this section we look at the referendum and compare it with the parliamentary or other options of representative democracy.

##### **3.1.1 Limitations of Referendum for Adopting A Constitution**

Following the constitutional proposals of 2015 there was so much talk about the constitution being adopted through a referendum. It would appear that most of the passion for the referendum as the mode of adopting the constitutional amendments reflected the general disappointment with past methods of dealing with constitutional amendments and the historical failure to implement repeated recommendations of constitutional commissions. This passion for referendum does not appear to be based on tested capabilities of referendum as a mode for adopting a complex multidimensional document like a whole constitution.

The advantage of a referendum is that people are given direct say in the issues to be decided. Referendum has proven to be very useful in deciding single issues. For instance, UK used a referendum to decide whether to leave EU, and Greece recently used a referendum to decide whether to accept or reject conditions of EU and other lenders to deal with the national debt crisis. This was clearly the best reflection of the will of the Greek people.

However, there are serious practical challenges in using a referendum to determine a multidimensional issue like a constitution with several provisions. The proposed Zambian constitution had 322 articles or specific issues to be determined. Will the voter get the opportunity to vote on each individual issue? If this were possible it would reflect the will of the people on all the issues. Even with the available IT facilities, for each voter to vote on all the issues will create serious logistical problems starting with ballot papers which will have to be voluminous documents listing all issues. Even without mentioning the problem of high illiteracy rate, the documentation and voting can be quite challenging.

To avoid this daunting challenge, it may be tempting to vote YES/NO on the constitutional proposals as a whole document. But will this lead to the optimal outcomes? Can this reflect the will of the people on all issues of concern? Can you assume a realistic homogenous single

answer to all questions/issues of the constitution for any individual? While the proposed constitution is a very good document with very good proposals, it would be unrealistic to assume that the typical voter will give a single YES or NO to everything in the document. Most people will find areas they agree with and areas they disagree with. Does one reject (vote NO) the entire constitution because you are very unhappy with a few provisions, while happy with others. For instance, most chiefs were passionately opposed to proposals on the land administration. Do they vote against the whole document just because of their passionate objection to this article even though there may be other provisions with which they are happy? If they reject the constitution as a whole, is that the best outcome for them or the country? Will such a vote reflect the will of the chiefs on all articles of the constitution?

Indeed, with regard to achieving the best outcomes, it should be noted that some proposed articles may not be adopted or rejected as presented but could be amended to get the optimal outcome. A referendum would rob the electorate of the opportunity for optimal outcomes that could come with prudent amendments of the proposed articles.

To subject a multidimensional document to a single vote clearly does not lead to the best outcomes and cannot be said to reflect the will of the people on the constitution. On the other hand, to implement a referendum in which each voter is able to vote on each article of the constitution is clearly not practical. Under these circumstances spending money on a referendum to adopt the constitution would be a waste of money as this will not bring out the will of the people on the constitution.

As provided for in the current constitution, the referendum can be used for single contentious issues like the Bill of Rights. Even here there will be need to be cost conscious, practical and realistic. For instance, there is no debate about human rights to clean water. But will it make sense to spend millions on a referendum on rights to clean water when we have no resources to implement those rights. The money on such a referendum could as well be spent directly on some water projects which may not solve the entire water problem but can have some impact on the problem.

### 3.1.2 Inevitability of Representative Democracy

Throughout the history of democracy, constitution developments have mainly been done through representative democracy where an elected group or some form of representative organ expresses the will of the people. It was representative conferences of liberation movements and others that formulated constitutions of new nations that got independence from colonial masters e.g. India, Zambia and other colonies and post-apartheid South Africa. It is representative organs such as Zambia's Parliament that have powers to amend constitutions in all democracies with the provision that single issue items such as bill of rights can be taken to the direct democratic process of a referendum.

Representative democracy may not be the perfect system, but we have to accept that it is the most practical and cost-effective democratic dispensation available to society. Hence, its universal dominance of the democratic practices around the world. The real challenge we face in Zambia is for the elected representatives of Parliament and political parties to show the true spirit

of representative democracy as carrying the will and best interests of the people rather than to champion narrow partisan interests based on interests of the political elite.

### *3.2 Presidential By Election*

Under the constitution that reinstated plural politics in Zambia in 1991, the State President was to be elected every 5 years directly by the people. In case of death or any incapacity of the incumbent President, a by election was to be conducted within 90 days to elect a President for the remainder of the five-year electoral cycle. Even if a general election was due in 6 months, and the incumbent President dies, the country will have to hold this by-election and then a general election after 3 months. Within the first five 5-year electoral cycles of presidential elections (1991-2016), Zambia had two presidential by elections for the President. Considering the high cost of national elections, this is a lot of expenditure for a country striving not only for democracy, but also for other urgent needs of human development. As observed by the Nobel Prize laureate, Wangari Maathai many Africans like to equate the quantum of elections with the quantum or depth of democracy (Maathai, 2009). There is need to be more analytical about the quantum of national elections that can deliver the democratic objectives in a cost effective and sustainable way.

The democratic objective of people's choice is adequately delivered through the national presidential election every 5 years. Hence, the cost of a regular Presidential election is considered inevitable. However, the cost of a by election cannot be inevitable as there are other options for meeting the democratic objective of replacing a dead President. All options have to be analyzed on two fronts: a) capacity to deliver the democratic objective of reflecting the will of the people, and b) the cost effectiveness of the option.

Before discussing the cost implications of the presidential by elections, it may be opportune to reflect on the lessons of the two presidential by elections with regard to people's choice. In Zambia, the Presidential and Parliamentary elections are primarily choices for the political party rather than the individual candidates. The two presidential by elections did not result in change of the ruling party. The by elections only confirmed that as far as the electorate was concerned the 5-year mandate given to the ruling party was not to be changed midway. It is also significant to observe that after the 5-year mandate of the Movement for Multi-Party Democracy (MMD) under President Mwanawasa was completed under the same party (MMD) by President Banda in 2011 the electorate gave the next 5- year mandate to PF under President Sata and this was reconfirmed as PF mandate during the 2015 Presidential by election.

The two presidential by elections may be too few for generalized conclusive lessons, but in the brief history of the emerging democratic practices in Zambia, they show that so far the people are comfortable with the 5-year cycle of presidential choices. This underscores the legitimacy of inevitable cost for Presidential elections every 5 years as the only way for regular choices of the people.

However, there are a number of ways for filling a casual presidential vacancy. In terms of quality, the presidential by election is clearly the best in delivering people's will. Unfortunately, this option has the highest opportunity cost as the overall direct cost is practically the same as that of the regular Presidential election. The cost for the 2015 Presidential by elections was K



371 million. If the money had been spent on education infrastructure, we could have had 10 boarding schools (complete with 25 teacher houses each) or 20-day secondary schools (with 20 teacher houses each). For one Presidential by election the country sacrificed one boarding secondary school or two-day schools per province. For the two Presidential by-elections the country sacrificed 20 boarding schools or 40-day secondary schools. (See appendix3 for infrastructure cost estimates)

If the money spent on the two Presidential by elections had been spent on health services we could have built 15 district hospitals (complete with 10 staff houses each) or 297 health centers (with 12 bed capacity and 5 staff houses each) or 1,484 health posts (with one staff house each). It is clear that if the Presidential by elections had been avoided the financial savings, if directed on health services, could have dramatically improved the health services.

In the light of available options, the high opportunity cost of a presidential by election will disqualify this option. In terms of quality, the next option to be considered is the Running Mate system. Under this system, with its long history in USA, a Presidential candidate is voted jointly with a Vice President as running mate during the presidential election with clear mandate for the Vice President to automatically take over from the elected President in case of death or incapacity for the remainder of the 5-year mandate. This system allows for direct expression of people's choice in a forward looking way and comes with practically zero opportunity cost.

After experiencing two expensive presidential by elections, Zambia has adopted the running mate system as the mode for filling casual vacancy, and this was first implemented in the 2016 general election. This is a significant cost driven constitutional development with positive implications for other development objectives of the country.

### *3.3 Parliamentary and Ward by Elections*

A Parliamentary constituency and ward can be declared vacant in case of death of the incumbent; change of political party affiliation by the incumbent; resignation from office or expulsion or resignation of incumbent from the party which won the election. A vacancy can also arise through nullification of an election by a court. Under the current constitution, any vacancy should be filled through a by election within 90 days of that vacancy occurring.

When you look at the cost of constituency/ ward by-elections, you want to be sure you can justify the cost in terms of the democratic dividends to be achieved. During the 2006- 2011 election cycle, there were 19 parliamentary and 136 ward by elections. In the 2011-2016 cycle the figures rose. (See appendix 1 and 2). The total opportunity cost for the parliamentary and ward by elections for the 2011-2016 election cycle is estimated in terms of education facilities at 4 boarding schools or 9 day secondary schools. In the health sector the opportunity cost was 3 district hospitals or 62 health centres or 310 health posts.

Like the Presidential election, an election every 5 years can be deemed as adequate provision for people's choice of their representatives at parliamentary and ward levels. The costs for these regular elections are considered inevitable for democracy to prosper. Using the same quality and cost system of comparative analysis of options used for filling casual Presidential vacancies, the high opportunity cost of by elections will rule out this option of filling casual vacancy at

constituency and ward levels. Below are options with zero opportunity cost and adequate quality in terms of respect for, and reflection of people's choice made during the regular election time.

A general assumption on Parliamentary/ ward vacancies is that although the attributes of individual candidates are significant in parliamentary/ward elections, the candidates are mainly voted for as parties rather than as individuals. This paper is not debating whether people vote for the party or the individual, but merely recognizes the rationale behind current laws that governs resignations and expulsions of elected representatives from their party of election. General observations since independence would support that in Zambia, indeed the majority of voters vote for the party rather than the individual.

### 3.3.1 Vacancy by Death of Incumbent

If the party rather than the individual is assumed to have been given a mandate to represent a constituency/ward for 5 years, that party should be competent to appoint another member to replace the elected member in case of death. Such appointment will continue to reflect the will of the people as expressed during the general election, and the democratic dividend is achieved at zero opportunity cost.

If an independent MP dies, the guiding rationale is that the electorate rejected all participating parties. If there was a losing independent candidate with at least 5% of the total vote, he /she should be appointed as replacement without by-elections. If there was no losing independent candidate with at least 5%, we can still avoid the cost of a by-election by transferring the mandate to the party with the highest votes and the individual that stood on that ticket. For independents, a minimum vote is required to eliminate frivolous candidates. The exact practical minimum can be determined by Parliament.

### 3.3.2 Vacancy Created by Resignation of Incumbent

If an MP switches to another party or resigns from the party on which he/she was elected, that MP cannot have moral authority to continue representing the constituency because the electorate gave its mandate for 5 years to the party which he/she has left. The party which was given a mandate for 5 years should morally be competent to appoint a replacement MP for the remainder of the 5-year period.

Such appointment conforms to the will of the people. In U.S.A when President Obama assumed the Presidency and created a senate vacancy in Illinois State, there was no senate by-elections, the casual vacancy was filled by an appointment of a new Senator by the State Governor. In Zambia when President Lungu assumed the Presidency, the resultant Chawama Parliamentary constituency vacuum was filled through a by-election with substantial costs. In this particular case the electorate retained the same political party confirming the rationale that for the remainder of this 5-year period the original choice of party should continue.

Of course, it does not always come out like that in parliamentary by-elections. In some cases, especially where an opposition MP crosses to the ruling party, the superior campaign resources of the party in Government can and has often made it possible for the by election to be won by a party which was not given the mandate at the general election. Mainly because of this possibility

of restructuring voting power in the National Assembly, this law has led to many parliamentary by-elections involving MPs who have crossed to other political parties.

This is a very ironic development in that when this law was established the objective was to curtail political prostitution of people who would seek the mandate of a popular political party, just to cross over to one that was not so popular. Indeed, this law was initially very effective in eliminating casual crossing of party lines. It is noted that the original law was enacted by United National Independence Party (UNIP) in Government to protect the party from people who would seek to ride on its popularity to get elected just to ditch the party after elections. Since 1991, MPs have now been mainly crossing from opposition parties to the ruling party, and the cost of by elections has been phenomenal.

### 3.3.3. Expulsion of MP by the Party

If an MP is expelled from the party on whose ticket, he/she won the seat it may be tempting to argue that they cease to be MP for the constituency. This is a tricky situation which brings out the possible conflict between normal ethical responsibilities of an MP towards the people they represent and party guidelines. There are many reasons why a Party may seek to expel their MP from the party, and this paper cannot explore all these. Nor can we attempt a series of remedies for particular cases. What should be avoided is a situation where an elected MP is held to ransom by their political party with threats of expulsion which can undermine the legitimate role and responsibilities of an MP.

It is noted that the original thrust of this law was to maintain stability among and within political parties during the mandate period. MPs were not expected to casually move from their parties, and parties were not expected to casually expel their MPs during their period of tenure. If an MP is found with some shortcomings, the party's sanctions should be limited to warning them that they will not be fielded in the next election.

The proposals here are premised on respecting the social contract between the electorate and the political parties and the individuals nominated to represent the parties. A political party offers the electorate its manifesto and an agent to serve the people, and the people accept this package for the mandate period. If the elected individual abrogates the contract by moving away from the winning party, that individual should lose the seat, but not the party. If the winning party abrogates the contract by withdrawing (expelling) the agent who was part of the social contract, the party loses its contractual right to represent the electorate, and the elected MP should continue to serve as MP with personal mandate. The essence of this social contract and pertinent sanctions is to discourage any mischief among elected MPs and political parties and to stabilize mandates given by the electorates during the mandate period.

### 3.3.4 Nullification of Election Results

Nullification of election results is premised on maintaining certain standards in election practices. The electoral code of conduct tries to prevent distortion of people's choice notably by violence or material or financial inducement of voters. Violation of the electoral code of conduct can lead to nullification of the election. This appears to be a peculiar phenomenon of young

democracies rather than universal feature of mature democracies where it is not common to hear of elections being nullified.

In some cases like the 2011 Chipata central by-election which arose from election nullification, the original winner retained the seat after the by-election. This confirmed that the nullification was a waste of time and other resources as the original verdict was confirmed by the by-election as reflecting the will of the people. This may also reflect the difficulties faced by the judicial process in dealing with the subjective nature of the evidence of lack of conformity to election code of conduct.

In some cases of nullification, the by-election leads to a change whereby the original winning party loses the subsequent by-election to another party. This is more common in situations where the by-election gives opportunity for the seat shifting to the ruling party from the opposition. Indeed, many election petitions have been driven by the hope of shifting political power in the National Assembly. Such changes in winning parties of by elections do not necessarily confirm malpractices in the general election, rather they point out the political ingenuity of the desire to take advantage of this clause in order to change the fortunes usually of the ruling party.

The importance of a conducive environment for free and fair election cannot be over emphasized. However, in a young democracy such as ours, the conducive environment may not be as idealistic as that in an old democracy such as USA or UK. The story is told of a respected Indian member of the Commonwealth Observer Mission at Zimbabwe general election. An official from old democracies wanted to suggest that because somebody had been killed during election campaigns, the election should be declared not free and fair. The Indian representative observed “India is today the biggest respected democracy in the world. Yet at each election there are several people who die from election induced violence, but nobody declares these democratic elections as not free and fair or not reflecting the will of the Indian people”. The point here is that while every effort should be made to improve the operational environment of the elections, we should recognize that ours is a young democracy, and we should be able to accept some short comings in our operational environment without resorting to drastic measures such as election nullifications and the resultant by elections that divert substantial resources from development

In Zambia we have sometimes witnessed high levels of violence during pre-elections campaign periods which could hamper full expression of the will of people in elections. We have also experienced massive flows of material goods and money intended to persuade voters. But it is generally accepted that voters are too wise to sell their vote for a beer or chitenge (wrapper material usually printed with party slogans). Indeed, what is now generally preached and practiced is that some voters get material and monetary gifts from all or any political party but vote for the party of their choice. Indeed, there is substantial casual evidence that material gifts do not change the voting pattern. In 1991, MMD swept the elections against the ruling UNIP which had superior campaign resources, and in 2011 MMD’s superior material and other resources were generously splashed around the electorate but failed to turn the tide against PF with its weaker resource base.

Really, the only objective ground on which an election can legitimately be judged not to reflect the will of the people has got to do with physical barrier to voting such as violence that creates risks of bodily injuries to prospective voters. Otherwise, if people are actually able to vote, there

is no legitimate basis for not respecting their vote. Thus, if the police and other security wings provide an environment in which people can vote, there is no basis for disregarding their choice.

In the event of massive violence or other barriers to voting, the ECZ is competent to postpone voting. Otherwise, once the ECZ allows voting, and declares a winner that should reflect the will of the people. The constitution should not make unnecessary provisions for nullification of elections which has been duly conducted under the auspices of the ECZ. Otherwise, the ECZ should have powers to determine if conditions are appropriate for credible elections, and to postpone the elections if conditions are not conducive.

Issues of human error leading to recounting of votes for instance can be addressed without by elections. If a recount is conducted and correct figures are established, the winner should be recognized and declared on the basis of corrected figures without necessarily going for a by election. Indeed, it should be within the constitutional powers of ECZ to rectify such mistakes without going to court, let alone a by-election. Where the ECZ decision needs to be challenged in court, we can still avoid a by election by the court establishing a winner based on the numbers adjudicated by the court. The court should be competent to nullify an election vote count in case of human error such as vote recounts, and establish the correct figures to guide ECZ, but the court should not have power to nullify an election. If people have voted the will of the people should be respected by the court and everybody. The role of the court should be to protect the integrity of the system by establishing correct figures in case of disputed figures. The ECZ should be competent to declare a winner based on court findings. The appropriate constitutional provision should provide for ECZ to change election verdict on the basis of corrected figures, but not to invalidate the election. The point is that the people's will as expressed through their vote should be held supreme. Not even the court should have powers to override the people's will. In terms of democratic dividends, the court's role should be to protect and reinforce the people's will, and if necessary, help establish correct figures, but nullification of the election is unduly overriding the people's will.

### *3.4 50%+1 Run Off Election*

Under the current constitution, a presidential candidate needs to get at least 50% +1 vote to be declared winner of the Presidential election. Failure by the best performing candidate to achieve this threshold will lead to a runoff election between the top two performers within 90 days of the general election. This constitutional provision may be justified on giving the electorate the satisfaction that the elected President enjoys the support of the majority of those that cared to vote. However, when this entails a run-off Presidential election there is need to carefully compare the costs of a run-off election with the anticipated democratic dividends.

In the light of the 2015 Presidential by election conducted 3 years after the general election, the level of apathy attributed to voter fatigue is a factor worth considering. This problem can be expected to be very pronounced in the case of run-off Presidential election that comes 90 days after the general election.

Here is a theoretical example of the distortion of people's will by voter apathy. A candidate wins 48% of general election vote with a voter turnout of 60% and you go to a run-off election where somebody wins 52% with a turnout of 15% voters because of voter fatigue. If the same person

wins both rounds you can talk of the will of the people, but at what cost? If somebody who got 40% in the general election is the one who wins 52% in the run-off can you seriously talk of the will of the Zambian people? It may be more appropriate to call that “the tyranny of the vigilant minority” that can undermine the best ideals of democratic dispensation. This scenario is shown in table 1 below.

Table 1: Example of Voting Pattern under the Tyranny of Vigilant Minority

	General Election	Run-off Election
Voter turnout	60%	15%
Total Votes cast	2,400,000	600,000
Winner’s votes	1,152,000 (48%)	312,000 (52%)
Total registered voters	4,000,000	4,000,000

*Source: Author’s example*

In the case of the loser of the general election winning the run-off it is very misleading to interpret that the winner enjoys the support of the majority of the electorate. Mathematically, a runoff election can only be given that interpretation of majority support under conditions of a fixed number of voters participating in both rounds of election. This has been achieved in relatively small settings involving a fixed electoral body for all rounds. Otherwise in national elections where various factors can significantly distort the voters’ participation levels, the legitimacy of runoff elections can be elusive.

In Zambia, the most significant source of distortion of voters’ participation in runoff elections is voter apathy and fatigue which can lead to the tyranny of the vigilant minority. In the example given above, the will of the people expressed by 60% of voters is overridden by the will of 15% of the electorate under the “tyranny of the vigilant minority”. This is not a positive achievement for democracy. Of course, it is also possible to have higher number of voters at the runoff than at the general election. But this scenario is most unlikely in Zambia, and its possibility would be highly speculative.

Based on recent experiences, the voter fatigue is likely to be a serious problem for the run-off elections, and the huge expenditure on run-off elections is not easy to justify on expected outcomes. During the election cycles of 2011-2016 and 2006 -2011, the 50% +1, if in place, would have led to four additional Presidential elections in this short space of time. The absence of this clause from the then existing constitution saved the country in opportunity costs the equivalent of 4 boarding secondary schools per province (with 25 teacher houses each) or 8-day secondary schools per province (with 20 teacher houses each). For the health sector, the national savings were equivalent to 30 district hospitals (with 10 staff houses each); or 594 health centres (with 12 bed capacity and 5 staff houses each); or 2,968 health posts (with one staff house each). Thus, the introduction of the 50% + 1 threshold in the current constitution has imposed the risk of high opportunity cost of runoff elections without assured democratic dividends.

Apart from the risk of harvesting the tyranny of the vigilant minority, and the high opportunity cost, the runoff election raises a fundamental question about the essence of elections as a tool for determining the collective will of people. Each election result expresses the democratic choices of the people, and the practical challenge of society is to correctly interpret and respect that. If somebody wins a general election with say 49%, the fair interpretation of that is “Your election platform is the best, but many people also appreciate the positions of other parties, and as the winner you should take account of other platforms” It is not “the winner takes all” mandate. A 70% win would convey a different message of the electorate like “Many voters feel comfortable with your election platform, and you should implement it without much reference to the opposing positions.”

With these two variants of the people’s choice, the constitution allows one to be respected, while it provides for the disrespect of the other. Is it proper for the constitution to set conditions on which people’s will should be accepted? Is it not a fundamental position of democracy that the people’s will should be respected unconditionally? In any case, a runoff election is unlikely to change the people’s general stance because there will be no landslide victory. A runoff result will most likely be in the order of 52% victory which should have same message as the general election result. If the original winner also wins the runoff election, nothing really has changed. If the second highest performer in the general election wins, the people’s message remains the same, but the mandate shifts to one who was not originally qualified for the mandate.

The fundamental question for democratic practices is the respect of the will of the people as expressed in the general election. Rejection of the general election results that fail to give an outright winner goes contrary to the fundamental democratic principles of respecting the people’s will. With correct interpretation of election results, the will of the people can be seen and respected on the basis of the general election results. Since the will of the people can be safely delivered through the simple majority, Zambia can save costs by eliminating the 50%+1 clause without compromising her core democratic objectives.

### *3.5 Dissolution of Parliament*

Under this article the President can dissolve Parliament “if the Executive cannot effectively govern the Republic due to the failure of the National Assembly to objectively and reasonably carry out its legislative function”. Where Parliament is dissolved a general election shall take place within 90 days. If the dissolution article is invoked once in a 5-year electoral cycle it will imply at least two Parliamentary elections in a regular 5- year cycle. This will mean almost doubling the election costs during that electoral cycle.

The dissolution of Parliament is practiced in UK under the parliamentary system of government but is rare in USA where there is complete separation of power between the Executive, Legislature and Judiciary. Since our proposed system is now moving towards complete separation of power, our analysis can benefit from the USA practices and experiences.

In our legislative fundamental guiding principles, there should be clear recognition of the supremacy of the general citizenry, and the supremacy of the will of the people. The general election reflects the will of the people. If the electorate gives the ruling party 76% of the MPs, the electorate is saying to the ruling party and the opposition “If the ruling party needs to change

the constitution that requires 75% votes, they can go ahead without the necessity of consensus” If the electorate gives the ruling party 52% of MPs the will of the people can be seen as “We have confidence in you to guide the affairs of the country, but we want you to carry the views of the others especially on critical issues like constitution amendments”

If a party in government is given a modest or bare majority and cannot carry along the opposition and fails to steam roll its legislative agenda, the guiding principle of supremacy of the will of the people requires the ruling party to negotiate its legislative agenda with the opposition to reach some workable compromise. What you achieve under these circumstances may not be the best of your political agenda, but a compromise solution is the best the people expect from the ruling party under the mandate given. Otherwise, to seek to dissolve Parliament in the hope of getting a bigger majority that can facilitate easier passage of the Executive’s agenda is a serious disrespect of the will of the people as reflected in the partisan composition of the legislature. As discussed under 3.4 (Runoff elections), in a democracy the constitution should never be used as a tool for disrespecting the will of the people.

The USA Congress (Legislature) is not known for easy support to the President in the legislative activities. Even the vote of the ruling party legislators cannot be taken for granted by the President, let alone the opposition votes. At least twice in recent history the Executive has been denied budgetary resources by a hostile Congress. It is not uncommon for the USA Congress to have majority members from one party while the President is from another party. Under such circumstances, legislative tangles can be, and are indeed common in USA.

In spite of these challenges to the smooth passage of the President’s agenda through Congress, the President and Congress are all committed to achieve their political objectives within the political perimeters established by the people through their original vote. Is it too much for our elected leaders to play within the perimeters established by the people at the scheduled general election? There are no assured benefits of dissolution of Parliament to justify the high opportunity cost of the resultant election. Apart from the cost considerations, the most serious argument against the dissolution of Parliament is that in a democracy a constitution is the primary tool for protecting and facilitating public respect for people’s will and should never be used to violate the will of the people. If the supremacy of the will of the people is accepted and adopted in the constitution, then no constitution provision should violate it, and any provision that runs contrary to the core principles must be considered not tenable. If we embed in the constitution any facility to violate this principle in the name of empowering the Executive to perform better, we may be opening a Pandora box for many abuses and violations of the will of the people and the ultimate supremacy of the general citizenry.

### *3.6 Political-Administration Industry*

Good governance is premised on effective and efficient public administration structures and systems. In his famous book “False Start in Africa” the French agronomist, Rene Dumont drew Africa’s attention to the risks of unsustainable political-administrative structures. He observed the trend in the newly independent African countries of expansionist public administrative structures that drained and diverted public resources from development projects which had more impact on human development (Dumont and Ott, 1969.) In recognition of this problem, the



standard approach to public administration today for most African countries including Zambia is a **lean and efficient public administration structure**. We look at the 2015 constitutional proposals for the National Assembly and Provincial Assembly as examples of the challenges faced in the area of administration industry.

### 3.6.1 National Assembly Structure

The 2015 constitutional proposals sought to increase constituency-based members from 150 to 156 and to add 94 members to be appointed by political parties based on proportions of votes received in the general election. The marginal increase in constituency-based members can be justified as normal growth in the size of the National Assembly. What needs to be justified is the proposed 63% increase in the size and cost implications of the National Assembly arising from proportional representation.

The constituency-based representation is adequate to carry the will of the people, and there are no democratic dividends to warrant the additional costs of additional proportional representation. An internationally respected constitutional law expert has observed that the Proportional Representation system is only practical in countries emerging from serious conflicts like South Africa. Otherwise, the constituency-based representative system is well tested in many mature democracies. Since Parliament makes the laws, once we have a blotted National Assembly the natural survival instincts of future MPs will tend to perpetuate a blotted structure of the National Assembly even when the majority of future generations may see the structure as highly questionable.

### 3.6.2 Proposed Provincial Assemblies

The 2015 constitutional proposals for the creation of Provincial Assemblies could, if adopted, have led to unmitigated personnel costs for the offices of Speakers, Deputy Speakers, Clerks and staff of the Provincial Assemblies. There is adequate representation of people through National Assembly and local authority structures. Zambia is a small country, and should avoid any temptation to create sub national administrative structures such as regional assemblies of large federal systems like Nigeria and South Africa. What is needed at provincial level is not additional representation, but development planning and coordination which are currently the responsibilities of Provincial Administration. Focus should therefore be on how to improve effectiveness of provincial development administration.

Two important reforms are needed. The first is to ensure effective devolution of power and resources to the local authorities. With Zambia's centralized fiscal regime, there is need for constitutional formula for the distribution of public revenue between the central Government and local government structures.

The second is that provincial administration should have a developmental rather than political focus, and should be superintended by a technocrat rather than a politician. To ensure focus on development, the head of provincial administration should be Provincial Development Commissioner (PDC), a technocrat appointed by, and as personal representative of the President to coordinate development efforts in the province. The PDC will be supported at district level by

District Development Commissioner (DDC), also a technocrat appointed as personal representative of the President to coordinate development at district level.

### *3.7 Size and Catchment Area of Cabinet*

Currently the Cabinet is drawn from members of Parliament on the pattern of the British Parliamentary system. Proposals for a cabinet drawn from outside Parliament like the USA system have been made several times but rejected. A major democratic dividend of this system is to vest executive responsibility in the elected leaders. But this system has three serious weaknesses. The first is that the constituency whose MP becomes a Cabinet Minister cannot have the full attention of its MP who now has broader responsibilities for the country. At national level, the national responsibility of the Minister will be distracted by constituency responsibilities.

The second is that in the distribution of public resources the Minister may be biased in favor of his/her constituency at the expense of optimal allocation of public resources. The third is that by narrowing the catchment field to the Members of Parliament you are narrowing the scope for quality of Cabinet. Where the entire country is eligible for Cabinet appointments, there is greater scope for quality of Cabinet team.

Where a Cabinet is drawn from outside the legislature, there is complete separation of legislative function from the Executive. Where executive responsibility is vested in an elected President, the Cabinet is merely advisory, and the executive responsibility is fully in the hands of the elected President. Hence, the vesting of executive responsibility in the elected leadership is not the monopoly of the parliamentary system. Thus, on equal terms with regard to responsibility of elected leadership for executive functions, the system of selecting Cabinet members from outside Parliament has additional advantages. The first is the superior scope for high quality of Cabinet members. The second is the ability of Cabinet members to stay focused on their national portfolio without disturbances from constituency issues. The third is scope for optimal resource allocations without distortions from constituency biases.

Another issue of public concern with regard to the Cabinet in Zambia has been its size. Since independence, the Cabinet size has been subject to frequent changes, and remains rather large. Sometimes cabinet positions have been created without much public justification in terms of need let alone cost. For instance the Ministry of Religious Affairs and National Guidance was created in 2016 amid strong public opposition on account of cost and relevance. There is need for cost consciousness in the determination of Cabinet size.

## **4. Concluding Observations and Way Forward**

### *4.1 Conclusion*

This paper shares in the national enthusiasm for a good constitution, and its primary objective is to raise national sensitivity to the cost implications of the constitution development process and the specific provisions of the constitution. The economic bottom line for democracy is that it cannot be achieved at unlimited price. In the context of other demands of human development that have to be sacrificed in the attainment of democracy, the socially fair price (inclusive of opportunity cost) for people's choice is the cost of a general election every 5 years or any such

other term as may be fixed. Any additional costs arising from by elections within that 5- year cycle will distort the socially acceptable economic valuation of people’s choice in the human development calculus.

In all cases of casual vacancies at Presidential, constituency and ward levels, the high opportunity costs of by elections cannot be justified by democratic dividends. Moreover, in the cases of dissolution of the National Assembly and 50% + 1 runoff elections, the constitution appears to be used as tool for disrespecting the will of the people. This creates a fundamental contradiction in the role of the constitution as the primary tool for democracy to defend and facilitate the supremacy of the will of the people.

*4.2 Way Forward in Constitution Development*

The socially acceptable price for people’s choice of representatives is the cost of one election for each representative office in every 5-year electoral cycle. All casual vacancies should be filled by appointments based on the will of the people as expressed in the general elections. There are no democratic dividends in any by elections to warrant the high opportunity costs involved in Presidential, constituency and ward level by elections. The fundamental objectives of democracy can be fully achieved with one general election in the electoral cycle. The democratic ideals and overall human development objective will be better served by complete elimination of all by elections through appropriate constitutional provisions. This will also improve the planning, budgeting and administration of democracy-driven objectives and other development programs.

Although there are no major cost implications, overall executive function is better placed in a President with a Cabinet appointed from outside the confines of elected MPs. Provincial administration should not entail additional heavy administrative structures on the pattern of the (2015) proposed provincial assemblies with high cost inducing offices such as Speaker of Provincial Assembly.

***Appendix 1: By Elections for 2006-2011 Election Cycle***

	Parliamentary	Local Government
2007	2	21
2008	5	28
2009	3	31
2010	6	21
2011	3	35
<b>Total</b>	<b>19</b>	<b>136</b>

*Source: ECZ Annual Reports, 2007-2011.*

**Appendix 2: Costs of By Elections for 2011-2016 Election Cycle**

Year	Parliamentary	Local Government	Total Cost (k Million)
2012	5	36	21
2013	11	86	31

Source: ECZ Annual Reports, 2012, 2013.

**Appendix 3: Costs for Selected Social Service Infrastructure (2015 Costs)**

Type	Estimated Cost (Kmillions)
1. District Hospital (with 10 staff houses)	50
2. Health Centre (12 beds, with 5 houses)	2.5
3. Health Post (with one house)	0.5
4. Day Secondary School(with 20 teacher houses )	18
5. Boarding Secondary School (with 25 teacher houses)	40

Source: Author's tabulations of data from Ministry of Health and Ministry of Education.

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