FOUNDATION FOR DEMOCRATIC PROCESS

SUBMISSION TO THE TECHNICAL COMMITTEE ON DRAFTING THE NEW ZAMBIAN CONSTITUTION (TCDZC)

TO BE SUBMITTED ON JULY 27, 2012

THEME: “Defining a Vision for the Future Zambia”

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PREAMBLE

The question whether the Constitution of the Republic of Zambia will “stand the test of time” and whether Zambians will get the constitution they want emerges each time the country undertakes a constitutional process, be it a review or an amendment. Also very central has been the concern on how to ensure that the Constitution truly reflects the real interests of the majority of Zambians. The newly constituted Technical Committee on Drafting the New Zambian Constitution has not been an exception to these concerns. The process itself has been characterised with several controversies ranging from lack of mass participation, partisan influence, poor planning i.e. Lack of proper road map and defined budget, and allegation of lack of transparency and accountability to limited circulation of the Draft Constitution and delay in producing the copies in vernacular and Braille! With regard to the contents of the Draft Constitution, an emerging query seems to beg the question: Whose interest is this Constitution intended to serve?

It is against the foregoing that FODEP’s submissions to the Committee on the Draft Constitution are guided by the question: Can Zambia produce a Constitution that can “stand the test of time and that reflect the will of the majority Zambians?” The FODEP’s submissions on the draft Constitution document focus on four key areas, namely Human Rights, Elections, Local Government and the Executive. These four issues constitute the Organisation’s core mandate of contributing to the consolidation of the democratic process and effective governance in Zambia.

As FODEP makes these submissions, it also calls upon all Zambians to courageously submit their wishes and their reservations on the Draft Constitution document to the Committee using every available resources and platforms. FODEP also strongly believe that the entire constitution making process and its ultimate product-the Constitution-can only gain legitimacy if there is effective participation of the people.
INTRODUCTION

FODEP’s vision is to see the attainment of “A democratic Zambia where government is accountable to its citizens and in which all citizens freely and willingly participate in the social, political and economic affairs of the country.” And thus remains dedicated to the promotion and consolidation of democratic governance through the organization’s thematic areas being: elections and the electoral process, local governance and development and human rights. Though the review of the Draft Constitution was done simultaneously with the final report of the NCC to provide accurate and unbiased review, it was done with the organization’s vision, mandate and with the following objectives in mind:

- To work towards strengthening and consolidating instruments, institutions and operations of democracy in Zambia.
- To consolidate the respect and observance of human rights, tenets of good governance and development in Zambia.

The submissions contained in this document are premised on FODEP’s motto: **Power in the Service of the People and thus remains accountable to the people of Zambia.**

PREMISE OF SUBMISSIONS: MODE OF ADOPTING THE REPUBLICAN CONSTITUTION

According to Part V Article 79 (3) of Current Constitution, a national Referendum is required to alter and or amend this part. This article guides the Committee and the Zambian people on a unique way of adopting the National Constitution. As we have always stressed, for any Constitution to enjoy widespread legitimacy, it needs to be recognised and adopted by a representative constituency of citizens. The worthiness of any Constitutions highly hinges on popular acceptance and broad-based national recognition. Undebatably, with regard to the most important part, namely, the endorsement stage, it is very essential to subject the Constitution to a referendum at least on issues not agreed to by the masses. This will ensure that the process of adoption is participatory, transparent and inclusive.

## SUBMISSIONS

### PART I: SUPREMACY AND DEFENCE OF CONSTITUTION

1. **Article 1 (3) and (5):** The two clauses require harmonisation as they seem to be contradictory. Clause 3 seems to mean that the Constitution’s validity and legality cannot be questioned by any court and yet clause 5 seem to imply that the Constitution Court shall have jurisdiction over any matter arising from the Constitution. Is this not challenging the Constitution and its legality?

   **FODEP Position:** clause 3 should be deleted or rephrased and maintain clause 5.

### PART IV CITIZENSHIP

2. **Article 28 (3):** This article seems to be in variance with the Preamble that declares Zambia as a Christian Nation, Christian teachings of forgiveness and the past trend where respective Republican Presidents have refused to sign off any person on death roll and also realising...
that prisons are for rehabilitation and correctiveness, capital punishment seem to be misplaced. A number of countries are now abolishing capital punishment. As a Christian community, the Bible which Christianity is based on states that in Matt. 5: 20-22, 38-48 not to kill but to forgive. There is no way the supreme law of the land can permit killing in such a manner and in an event of blood-thirsty President being elected, this article can be maximally utilised to the detriment of society. The killing as a result of violence and suppressing riot as contained in Clause 6 is also unjustifiable and contracts the right to life, fair judicial hearing and trial of any concerned persons.

**FODEP’s Position:** While we accept the rights for individual Zambian citizens to take revenge against their adversaries, there is need to speak to the realities of life and political environment. It is retributive justice and a contradictory with the right to life. In addition past presidents have refused to sign a death roll for convicts sentenced to death, death penalty or capital punishment in the Constitution be deleted all together.

**PART VI: BILL OF RIGHTS (STATUS, APPLICATION AND INTERPRETATION)**

This section does not list any specific entitlements but has recognized them. The Bill of Rights does not clearly and specifically mention or mirror international human rights standards or in other words consistent with the Universal Declaration of Human Rights and all and any other international human rights instruments deriving there from. The Chapter on the bill of rights is not clear and specific in terms of repealing and amending the Bill of Rights. There are however, two mechanisms that look at the implementation phase. It is stated that the Constitutional Court will oversee the legal enforcement of the Bill of Rights and it calls for the establishment of a Human Rights and Gender Equality Commission to deal with the administrative enforcement. There is need to identify one Commission that will ensure there is no duplication of work and promote specialization.

**FODEP Position:** In as much as we agree to the expansion of the rights in the Bill of Rights, there is need for the provision of specific entitlements.

3. **Article 24 (1):** It is stated that: The Bill of Rights is fundamental to Zambia’s democracy and constitutionalism and shall be Zambia’s basis for the adoption of social, political, economic and cultural policies.

4. **Article 24(2):** It is stated that: The purpose of the Bill of Rights is to preserve the dignity of individuals and communities promoting social justice and realising the potential of all human beings.

5. **Article 25 (1):** It is stated that the State shall respect, protect, promote and fulfil the Bill of Rights

**FODEP’s Position:** The key issue is enforceability: Government must assume the core responsibility of ensuring that its citizens enjoy their basic rights such as adequate nutrition and food, health, education and social protection. Furthermore, with regard to the application and enforcement of the Bill of Rights, the Constitution should:

- Allow for a person to approach a court if she or he feels these rights have been violated by his/her government.
- Courts must be able to consider international law and foreign law as long as they promote and consolidate the Bill of Rights

**CIVIL AND POLITICAL RIGHTS**
6. **Article 27 (1) & 45**: suggests Equality regardless of colour sex, creed etc. Every person is equal before the law and has the right to equal protection and benefit of the law. It is further stated that Equality includes the full and equal enjoyment of all rights and freedoms

**FODEP’s position:** In order to ensure that the people of Zambia effectively benefit from this provision and maximise the enjoyment of their rights, the following demands must take place:

- Repeal of the Inquiry Act. This must be replaced by the Constituent Act.
- Reduction in the excessive powers of the Executive which have given the Executive an overbearing position in relation to the other two wings of the state, namely Judiciary and Legislature. This will enhance checks and balances among the three organs of the State
- Clear and effective provisions to curtail the abuse of power and corruption
- Clear provisions on effecting transparency and accountability

7. **Article 36 (1): Freedom of Expression**: It is stated that a person has the right to freedom of expression. While we welcome this provision there is need to address some of laws that impact negatively to the enjoyment of this freedom.

8. **Article 36 clause 1 (c)**: There is need to clarify as to how to define artistic creativity. We need to avoid situations such as the one currently faced by South Africa, where an artist and a gallery is being sued by the ANC for a piece of artwork that shows President Jacob Zuma private parts. There is need to clearly define how the draft constitution will draw a thin line between artistic creativity and the right to dignity. Some may argue that pornography is artistic creativity thus there will be need for pornography laws to be reviewed and harmonized to suit Article 36 clause 1 sect (c).

**FODEP’s Position:** There is need to remove all derogations that will allow for broad interpretation that can ultimately restrict civil and political rights. The term “freedom of expression” should be clearly defined by the Constitution and should include explicit provisions on the freedom of the media as well as the freedom to receive and impart information or ideas. More importantly, in order to guarantee the people of Zambia genuine enjoyment of this freedom, the following must be undertaken:

- Repeal or commitment to reform the Defamation and State Security Acts.
- Development and implementation of laws and policies that promote public access to information in a timely manner
- Full implementation of the Independent Broadcasting Authority (IBA) and ZNBC Act

9. **Article 37 (1): Access to Information**: It is stated that: a citizen has the right of access to the information held by the state and that held by another person.

**FODEP’s position:** It is commonly acknowledged that in order for democracy to flourish, it is important to ensure that the citizens enjoy unimpeded access to public information. Unlimited and timely access to public information is vital in empowering people to meaningfully participate in the governance of their country.

The following measures are crucial in promoting public access to information:
• Enactment of laws or Acts that would compel media to broadcast programmes such as those related to government’s policies, development agenda of opposition party policies etc

• Clear definition of what constitutes classified and confidential information in relation to matters of public interest and national security

• Enactment and operationalisation of the FOI Bill

• repeal laws that impede access to information and Media and Freedom of Expression like

• some sections of the Penal Code such as section 53, 54 and 55, 57, 60 and 69, 177 and 191 to 198

• The Anti-Terrorism Act No. 21 of 2007

• National Assembly (Powers and Privileges) Act, Cap. 12

• These pieces of legislation defeat the whole purpose of Access to information, freedom of the media and freedom of expression.

10. Article 38 (1): Freedom of Media: It is stated that: (1) Freedom and independence of the electronic, print and other types of media is guaranteed.

FODEP’s position: While acknowledging the importance of safeguarding information related to national security, it still remains imperative to ensure that the people of Zambia are guaranteed unlimited access to unbiased information regarding public affairs of the nation. Therefore, it is important to establish an Independent Broadcasting Authority (IBA), Implementation of the ZNBC Act and enactment of the FOI Bill into law. The main responsibilities of IBA would include the regulation of broadcasting activities as well as the promotion access to information. Refer also our position on Article 37 (1) above.

11. Article 41: Right to Assembly, demonstrate, picket, lock out and petition: It is stated that: (1) A person has the right, peacefully and unarmed, to assemble, demonstrate, picket or lock out and present petitions to public authorities

FODEP’s Position: First and foremost, it is important to recognise that the right to assembly and association are closely linked with freedom of speech. Therefore, recommend the

• Total rejection of the NGO Act No. 16 of 2009 on the Existence and Operations of NGOs in Zambia because it contains irrelevant barriers to both the entry and operations of civil society. In addition, it gives both an unreasonable and unnecessary strong control of civil society by the State. In short, this Act is not conducive and supportive to the growth of a vibrant civil society as well as the consolidation of democracy in Zambia.

• Review of Registrar of Societies Act with the view of strengthening it so as to make it appropriately enforceable

• Review the Public Order Act which empowers to the police to reject notices from the public to stage peaceful demonstrations.

12. Article 60: Minority and marginalised Groups: This article requires more clarity because the category of these minority and marginalised groups is not defined. Undefined in the sense that all Groups we may call marginalised and minority have been covered such as women, youths, children, elderly, persons with disabilities, refugees,etc. It is therefore, mind puzzling to think of other minority and marginalised groups that have not been covered by this constitution. This only leaves people to speculate that the minority and marginalised groups not covered are the homosexuals (gays and lesbians).
**FODEP position:** It will not support any practices that contravene Zambia’s culture norms and values. Therefore proposes the deletion of this article or alternative define the catchment population under the categories of marginalised and minority.

**ECONOMIC, SOCIAL AND CULTURAL RIGHTS**

The provisions include protection of life; liberty; respect for human dignity; abolition of slavery or forced labour; equality and freedom from discrimination, arbitrary arrest and detention; access to a fair trial, rights to privacy and respect for the rights of the child, and so forth.

13. **Article 61: Progressive realisation of economic, social and cultural rights:** It is stated that: (1) Parliament shall enact legislation which provides measures which are reasonable in order to achieve the progressive realisation of the economic, social and cultural rights under this Bill of Rights...

(3) Where a claim is made, by the State, that the State does not have the resources to implement a particular right or freedom –

(a) It is the responsibility of the State to show that the resources are not available; and

(b) the constitutional court shall not interfere with a decision by a State or State institution concerning the allocation of available resources solely on the basis that the court, tribunal or Human Rights Commission would have reached a different conclusion

**FODEP’s position:** The State must domesticate all international and regional instruments on the progressive realisation of Economic, Social and Cultural Rights. More importantly, application of these rights should be binding of the three arms of Government and all organs of the state. Furthermore, with regard to the application and enforcement of these rights, the Constitution should:

- Allow for a person to approach a court if she or he feels these rights have been violated.
- Courts must be able to consider international law and foreign law as long as they promote and consolidate the Bill of Rights

14. **Article 62 (f): Education:** It is stated that: (1) Every person has the right to...

**FODEP’s position:** While the Draft Constitution stipulates progressive ideas of the State’s commitments to promoting the Zambians right to education, this only can be effectively realised and enjoyed when there is an effective provision on the enforcement of the Higher Education Act to ensure regulation of the development and operations of institutions of higher education.

**Part VIII: REPRESENTATION OF PEOPLE: THE ELECTORAL SYSTEM AND PRINCIPLES**

The following adopted articles contained in the Draft Constitution reflect FODEP’s long standing issues of interest. We can only stress our sincere hope that these issues will be retained in the final report:

15. **Article 18: Dual Citizenship.** Dual citizenship will broaden Zambia’s economic base by promoting and providing trade and investment between the dual respective countries. In addition, it will allow for the reversal of the brain drain phenomena that has gripped Africa as a whole and Zambia in particular over the past decades.
16. **Article 75 (1): the 50% + 1 as the Electoral System (majoritarian system for election of President)**. This will help address the issues of legitimacy of the president-elect; regional and tribal voting; interparty dialogue and coexistence and assist realise the One Zambia, One Nation Motto.

17. **Article 75 (2): Mixed Member Proportional Representation (MMPR) Electoral System** to take care of the interest groups. However, FODEP is against the proposed Open List Proportional Representation (PR). Proposed system does ensure loyalty of the MPs to the party and its leadership and not to the electorate. This may be recipe for poor service delivery to communities. It is for this reason that FODEP stands for the Mixed Member Proportional Representation (MMPR) for both parliamentary and Local Government elections as proposed by the Mung'omba Article 95 and NCC draft constitutions.

18. **Article 82 (1): Enshrining of the Date of elections in the Constitution**. However, we are against the holding of any of the elections separately as suggested by clause (2) of Article 82. FODEP’s position on this matter is that the current practice of tripartite elections be upheld.

19. **Voting in Diaspora**: Zambia should adopt a system that would allow people in Diaspora to cast their vote during a General election. FODEP would want to adopt the recommendation in the Mung’omba Draft Constitution Article 102 (h).

20. **Article 100 (4) & 102**: Swearing in and handover period: We welcome the proposed period of handover and formalities herein.

21. **Article 107: Running Mate Clause**: this clause will among others help address having a vice-president who is a “Chola man/boy” to one with specific powers outlined in the law. It will also address the issue of presidential by-election in an event of death of the sitting president.

22. **Article 120 &121: Appointment of Ministers Outside Parliament**: This will create independence of the legislature and strengthen representative democracy as members of parliament will be accountable more to their constituents and not jostle for ministerial positions.

23. **Article 162: Establishment of the Constitutional Courts**. FODEP’s observation is that while the Draft Constitution establishes the Constitutional Court for among other things address issues to do with the election of the presidency and vice-presidency, it is silent on parliamentary and local government perhaps because of the electoral system being proposed. It is important that parliamentary election petitions be referred to the **Electoral tribunals**. It also does not answer the concerns of majority Zambians of easing pressure on the few judges in Judiciary and its independence on such matters such as presidential petition especially that President of the Constitutional Court will be appointed by the
Republican President. Zambia must take leaf from the Ivorian situation on the Constitution to avoid its repeat in Zambia.

**FODEP’s position**: Electoral tribunals to deal with both parliamentary election petitions should be established as well. This will reduce pressure on the already overburdened High Courts.


25. Article 97(1): Qualification to stand as president vis-a-vis Parentage Clause-We welcome the clause and support it fully.

26. Articles 97, 135, and 214 (3): Qualification to stand as President, Member of Parliament and Councillor: The Draft Constitution still maintains EDUCATION qualification for presidency, parliamentary and local government positions. Though it is feasible to have grade 12s at parliamentary and presidency level, it will be difficult to get the same at local government level in rural areas as many of them leave these areas for towns to seek employment leaving behind grade nines and sevens.

**FODEP Position**: The obligation to be in possession of a Grade 12 as one of the qualifications for President, Member of Parliament and councillor should be deleted in the new Constitution because it will disenfranchise and discriminate many potential leaders a chance to lead this nation. Explicitly, education qualifications of the President, Members of Parliament and Councillor should be removed and replaced by the following clause: *Every citizen of Zambia by birth who qualifies to vote is eligible for the election as President, MP and Councillor provided he or she is between the ages of thirty five years for president, 21 years for both MP and councillor and is conversant with the official language.* Alternatively, Since Zambia has so many basic schools dotted around the country, a minimum qualification for councillors be either grade 7 and/or Grade 9 and maintain Grade 12 for the rest.

27. Article 228 (2) Chief’s participation: This article is welcome. In addition, FODEP holds the following perspectives in regard to these issues below: Participation of Chiefs in politics: This should include other types of traditional leaders (headpersons & Ngambelas) should be allowed to actively participate in politics (candidature) as long as they resign from their traditional role as chiefs. This will help them enjoy their civil and political rights. Therefore, Article 228 should be amended to provide sanctions or penalties against any traditional leader who participate in partisan politics without publicly resigning the traditional role.

28. **FODEP proposes the introduction of the Recall Vote** for non-performing elected members of parliament and councillors. The recall vote/vote of no confidence should be backed by an effective and efficient system of reviewing the basis of that recall. The article should read as follows:

**Clause 1**: A member of parliament and/or councillor who hold a constituency and/or ward-based seat may be recalled by the electorate in that constituency or ward as follows:
A recall shall only be initiated where a member of parliament and/or councillor has persistently neglected to perform his/her duties and responsibilities in the constituency and/or ward as may be required of the member of parliament and/or councillor by law,
A recall shall be initiated by a petition signed by at least fifty (50) percent of the registered voters in the constituency and/or ward,
The petition shall be presented to the Chairperson of the Electoral Commission, who shall constitute a tribunal to inquire into the matter and report back within thirty (30) days with its recommendation,
Clause 2: A Member of Parliament and/or councillor who is the subject of an inquiry under clause (1) shall have the right to be heard, be present and have representation before the tribunal constituted under clause (1).

Clause 3: The Chairperson of the Electoral Commission shall within fourteen days of the receipt of the tribunals’ recommendations, act in accordance with the recommendations of the tribunal.

Clause 4: An Act of parliament shall provide for –
- the grounds on which a councillor may be recalled
- the composition, powers, sittings and procedures of a tribunal constituted under this Article

29. Articles 83(4 & 6): Selection and appointment of members to Electoral Commission:
FODEP is distressed with the selection of the Electoral Commission which we feel compromises the independence of the Commission. Under this Article, the President is empowered throughout the selection and appointment process of the Electoral Commission. This compromises the independence of the Commission and makes it difficult for it to detach itself from the Executive’s influence in its affairs. The involvement of the President from the selection and appointment of the committee in the committee do not guarantee any real independence and autonomy of the Commission.

FODEP’s position: To overcome this limitation, the final report should reflect the following:

- An independent body to be constituted to provide the list of members to be appointed on the Commission and directly ratified by parliament and after the select committee of parliament is satisfied with the proposed names;
- The Chairperson should be appointed among prominent people who are conversant with electoral issues and not necessarily always be a Judge

30. Article 88: Political Parties Fund: In principle, FODEP welcomes the establishment of Fund for political parties and proposes the Establishment of Political Parties’ Commission.

FODEP’s position is that the initiative of setting up a fund for political parties is a good initiative. But Zambia’s socio-economic context would not favour nor sustain such expenditure. Such expenditure would only make sense under ideal conditions where the country records low poverty levels, good economic growth, high living standards for majority Zambians and good education and health facilities. Acknowledging that the development and sustenance of credible political parties is an important aspect of development, FODEP proposes that the State can only make available resources to such expenses only after meeting demands related to rights contained in the Bill of Rights. It is also our considered view that the Political Parties’ Commission be established to be led part-time members and be in-charge of registration and regulation of political parties. This will change the perception currently obtaining that political parties are political threat and risk to ruling party hence registering them through the Registrar of Societies under the Ministry of Home Affairs. Alternatively, let the Electoral Commission of Zambia be in charge of registration and regulation of political parties as contained in Mung’omba Draft Constitution Article 113.

31. PART IX: EXECUTIVE
The presidency has too much power as prescribed in the Draft constitution such as powers to appointing public and other government officials like: judges, permanent secretaries; parliamentary secretaries; dissolution of parliament; creation; altering, merging and dividing of provinces with consultation with stakeholders, appointment of ministers, Attorney General, DPP, Solicitor General, issuance of warrant authorising withdraw of monies from the
Consolidated Fund, cause to prepare estimates of revenue and Expenditures of the Government, alienate land through chiefs, local authorities and Lands Commission, commander in chief of Defence Forces, accredit and appoint Ambassadors, High Commissioners, plenipotentiaries, diplomatic representatives and consuls among other functions.

**FODEP Position:** It is dangerous to place such powers in one person. More importantly, the appointment of judges by the president compromises the independence of the Judiciary, making it difficult to realise separation of powers. *Judges should be appointed by the Judicial Service Commission subject to ratification by Parliament; otherwise the appointment of judges by the president weakens Article 164 of the Draft Constitution.*

- The Anti-corruption Commission, Zambia Police Service, Auditor General’s Office, Drug Enforcement Commission should be established by an act of parliament and Chairpersons/Commissioners be elected or appointed by relevant bodies subject to ratification by parliament. Appointing these Chairpersons/commissioners by the President result in lack of objectivity and independence when dealing with cases that relate to government officials.

32. **Article 96: Protection of President from Legal proceedings (Presidential Immunity):** While we recognise the need for the president to be protected, the past trend has shown that such provisions have been abused leading to lifting of immunity of the former head of state. We have also observed where the former head of states have been de-dignified after leaving office because of alleged maladministration while in office. We thought the draft constitution would effectively constrain the executive power and promote mechanism that ensure and act with utmost sense of accountability, transparency and responsibility of the head of state while in office. The provisions in the draft are still supporting and endorsing presidential absolutism, contrary to hallmarks of democracy.

**FODEP Position:** There is need to revisit this clause and be moderated to ensure that the sitting president is liable for his/her actions while in office than awaiting his exit. The draft must include provisions that remove the discretion powers of the President. The President must not be immune from impeachable offenses. There is need for the draft constitution to clearly stipulate, define and list impeachable offenses. The immunity of the President must be removed if she is impeached from office. The constitution must allow for civil and criminal proceedings to be instituted for acts or omissions committed during time of service and if there are any charges or allegations, they must be brought within three years after ceasing to be President. Any time after that the Statute of Limitations takes effect.

33. **Article 92 President’s Power to override the National Assembly:** We note with concern the powers the draft constitution gives to the President to override decision of the people’s representatives. The reason the three arms of government do exist is to provide effective checks and balances of each other. It will be dangerous and dictatorial for the Executive to override what the majority have rejected.

**FODEP’s Position:** There is need to respect the views of people’s representatives on such matters. More powers should be vested into the representative body rather an individual.

34. **Article 110: Declaration of War:** It is stated that (1):The President may, in consultation with Cabinet, subject to prior approval of National Assembly, declare war but Clause 2 of the same Article gives power to the President to Unilaterally declare war.

**FODEP’s Position:** This is extremely dangerous when you have blood thirsty president. There is great need to always seek National Assembly approval before war is declared by the
President as it affects all Zambians. Article 111 (2): The President may, in consultation with Cabinet, at any time, by Proclamation published in the Gazette, declare that a state of public emergency exists

35. **Article 112 & 113 (1):** Declaration of threatened state of public emergency: The President may, in consultation with Cabinet subject to approval by the National Assembly, by Proclamation published in the Gazette, declare that a situation exists which, if allowed to continue, may lead to a State of Public Emergency.

**FODEP’s Position:** In the aftermath of declaring state of emergency or war, an independent commission be constituted to establish the genuineness of decision undertaken if proven to the contrary, impeachment process against the President should immediately be instituted.

36. **Article 118 (5) Proceedings of Cabinet meetings:** state that the president may in consultation with the Cabinet Secretary, invite any persons whose presence is desirable to attend and participate in the deliberations of a meeting of Cabinet.

**FODEP Position:** This provision is misplaced in the sense that it would allow cadres to be invited as long as the President wants them to be in Cabinet meetings. The Cabinet Secretary may not have the guts to say no to the President’s proposal. It will also make Cabinet meetings porous and bona fide members of Cabinet may feel intimidated. There is no need for extra people for such meetings.

**PART XII: LOCAL GOVERNMENT**

37. **Article 224: Local Government Equalisation Fund and Funds for District Council:** It is stated that (1) there shall be established a Local Government Equalisation Fund

(2) Parliament shall, annually, appropriate a percentage of the total annual revenues of the Republic to the Local Government Equalisation Fund.

(4) The revenue referred to under clause (2) shall be in addition to revenues raised by a district council and retained by it

(5) The Government may provide additional funds and grants beyond what is provided under clause (2) to a district council, conditionally or unconditionally...

**FODEP Position:** these monies should be for the sustenance development and administration of the communities in a district. As result, all funds provided by the State to District Councils as well as those raised by District Councils themselves, should be subjected to annual audits. Annual auditing of District Councils must be made mandatory and a penalty attached for failure to do so.

38. **Article 221: Local Government Service Commission:** The existence of LGSC defeats the decentralisation policy which aims at giving power to the local people to decide their development programmes with minimal interference from the centre. The Commission also usurps the powers of the councillors to employ and disappoint staff. This scenario may lead to indiscipline work force who does not respect people’s representatives at local level as they are only accountable to the LGSC which is an arm of central government.

**FODEP’s Position:** The responsibilities and roles assigned to this Commission are a contradiction to the principles of decentralisation. The operations of this Commission automatically take-over the roles of councils under a decentralised system of governance.
39. **Remuneration for Councillors:** We propose that if the decentralisation is to take root with committed and quality players, the position of a councillor must be attractive by attaching remuneration to it. The current arrangement has resulted into quality personnel shunning this position because of its non-lucrative nature. Councillors being the drivers of development and policy makers at local level must be well remunerated.

**PART XIV: PUBLIC SERVICE AND COMMISSIONS**

40. **Article 235:** Office for Republic (1) (a): The power to constitute public offices for the Republic and power to abolish any of these offices vests in the President; and

(b) The power to appoint persons to hold or act in offices constituted for the Republic, to exercise disciplinary control over persons holding or acting in those offices and remove any of those persons from office vests in the President.

**FODEP’s Position:** The powers of the President in appointing persons to various public positions must be reduced. The President’s overbearing powers in these appointments will undermine the autonomy and independence of these offices. Instead, independent bodies consisting of government, civil society, churches and other prominent must be given mandate to select and submit directly to parliament for ratification.

41. In this Part “public officer” does not include people holding constitutional offices such as a judge, a member of any Commission established by this Constitution or an Act of Parliament, any officer serving the Parliamentary Service Commission, a Member of Parliament or a councillor,

42. **242 (1) Attorney General** – Appointed by the President, subject to ratification by the National Assembly

43. **243 (1) Solicitor-General** – as above

44. **244 (1) Director of Public Prosecutions and IG** – as above

45. **183 (1) The President shall, on the recommendation of the Judicial Service Commission, and subject to ratification by the National Assembly appoint:**

46. The Chief Justice

47. The Deputy Chief Justice

48. The president, deputy president and Judges of the Constitutional and Supreme Courts

49. The Judges of the High Court; and the Deputy Chairpersons of the Industrial Relations Court

50. **Article 249:** Gives limitless power to the President to appoint all Public officers compounded with article 240 which empowers the President to establish and abolish any public office without consultations. This is against the principles of democracy which require people’s input in the governance of the country.

51. **Contracting Debt:** FODEP’s position that Parliament should be consulted when Zambia is contracting foreign Debts. The current trend where Government contract debt without the input from Parliament defeats the principles of accountability and transparency.

52. **Public Officer:** FODEP’s position: There should also be clear definition of ‘public officer’ and ensure that the definition does not erode the responsibility of ‘public officers’ to account. The Judgement in Chiluba’s case should help in redefining a public officer. So any person appointed to serve on a commission that governs an institution that provides public services and goods should be a ‘public officer’ and this includes Members of Parliament and councillors. The relevance and survival of any Constitution largely depends on the distinction of separation of powers among the key arms of government.
The retention and prevalence of a pervasive system of Presidentialism crafted around an overly empowered Presidency will continue to undermine the prospects for effecting independence on one hand and a meaningful fusion among the three arms of government in Zambia. In our view, it is high time that the Zambian people ensured that the massive powers welded around the Presidency were reduced to realistic levels.

CONCLUSION:

UNAVIODABILITY OF A REFERENDUM FOR ZAMBIA

As Zambia heads towards enactment of a new constitution and concluding rather a long constitution making process, it should be very clear to us all that we should not once again, as a nation squander a golden opportunity of developing a Republican Constitution that can “stand the test of time” and Define the vision for the future of Zambia. The controversies, inefficiencies, anxieties and tensions that have characterised this process should always serve to remind us that the “people’s voice” is the most important element in any Constitution making process. It is now obvious that the silence by Government to on the need for the constitution of National Referendum Commission and lack of legal backing of the Technical Committee Drafting the new Zambia Constitution (TCDZC) in making our constitution may create serious doubts on Government’s commitment to deliver a people driven and popularly adopted constitution which may turn out to be more costly for all of us. Of utmost disappointment is the observation that while Government has been preaching transparency and accountability of all public resources, it failed to avail the public the budget of the TCDZC. It is our sincere hope that now both political and policy elites concede that indeed the Constitutional making processes are as important as the content of the Constitution itself. Otherwise, how will the people of Zambia relate to the Constitution preamble which reads, “We the people of Zambia...committed to upholding the values of democracy, transparency, accountability and good governance and resolved to exercise our inherent and inviolable right as a people to decide, appoint and proclaim the means and methods to govern ourselves.” It is on this basis that FODEP concludes its submissions to the Draft Constitution 2012 with the notion that a National Referendum is no longer an avoidable issue for Constitutional making processes in Zambia. This will ensure that the process of adoption is participatory, transparent and inclusive.