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Abstract

STANDING ON THE SIDELINES WATCHING: WOMEN AND ZAMBIA'S CONSTITUTIONAL PROCESSES

Zambia is one of the few countries in the world that can boast four Constitutional reform processes (with a 5th just concluded) in a period of only 49 years since it gained independence. These processes have been highly contested and have resulted in three Constitutions that were not very favourable towards particular women's rights. This paper examines women's participation and representation in the Constitutional processes. It briefly traces their role in Constitution making in Zambia and explores whether the increase in women's participation and representation has resulted in the advancement of their rights. This is because previous Constitutions have ignored certain rights that women have advocated for and Women's movements have felt that the Constitutional processes have been driven by patriarchal attitudes that aim to maintain male domination. Four particular rights have been selected for discussion in this paper and it is argued that the failure to include these amongst rights has resulted in procedures that fail to accommodate the needs of more than half of the population. The first draft Constitution currently under consideration incorporates most of women's concerns but could be derailed if the other interests are placed ahead of women's rights. Therefore, this paper proposes possible measures which that would ensure that more women are incorporated in the constitutional process.

Introduction

Zambia is a landlocked country of an estimated 13.5 million people. It has been relatively peaceful since gaining independence from the British in 1964, so it is somewhat ironic that at present, Zambia's is undergoing its fifth constitutional process. Zambia has had three Constitutions with 2 major amendments in 1969 and

1996.¹ An emphasis in every Constitutional process has been the need to have a constitution that stands the test of time or as a former Vice President put it, to have 'a constitution that is more suited to our own candidates which is pertinent to the aspirations of our people.'² Such a constitution's content is largely determined by the process of drafting, consideration and adoption. In other words, process largely determines and/or protects the content hence these two aspects cannot be discussed in isolation.³ This process requires effective participation of both men and women and that, has been one of Zambia's biggest challenges.

The inclusion of women has been a challenge, despite a correct observation that:

'A constitution is not an ordinary piece of legislation. It is the person's sovereign and inalienable right to determine the form of governance for their country by giving to themselves a constitution of their own making.'⁴

Such a sovereign and inalienable right requires that all sectors of society are included in the process especially those that have previously been side-lined as has been the case with women. Zambia being deeply patriarchal and conservative has often sacrificed women's rights at the altar of national decisions.⁵ This paper focuses on two indicators of this sacrifice, namely the issues of citizens participation and representation, in a bid to illustrate how a constitutional process in a democratic state has side-lined an important part of its citizenry.

The paper will commence with a brief introduction of how Zambia's constitutional processes have been conducted from post-independence till present day. It will thereafter analyse representation and participation of women in these processes. Representation will be examined through an investigation of the number of women have been appointed as commissioners and who have also been part of national consultations processes. Citizen's participation will be studied by reviewing the

¹ Ndulo M and Beyani C *As Tedious as Twice-Told Tale: The Struggle for Legitimate and Democratic Constitution In Zambia* (unpublished paper,2011)3.

² Former Vice President Mainza Chona at the 2nd Reading of the Zambian Constitutional Bill 1973.

³ Mwale S, *Constitutional Review: The Zambian search for an Ideal Constitution* (a paper presented at the 10th African Forum for Catholic Social Teachings Working Group Meeting, on 2nd May 2006, Nairobi) 1, available at http://www.jctr.org.zm/index.php?option=com_content&view=article&id=76&Itemid=99 (accessed on 15th August 2013).

⁴ Mungomba Constitutional Commission Review Report (2005) 493.

⁵ While this is not peculiar to Zambia alone, it does inform the argument made in this paper.

number women that have made submissions before the previous four commissions and how wide the consultation process was. Subsequently, four identified women's concerns will be used to illustrate whether there have been any positive outcomes from the participation. A brief analysis of the draft Constitution will thereby follow to determine whether it provides any relief in respect of the concerns identified before concluding with recommendations regarding possible measures to ensure better inclusivity of women.

1. A history of Zambia's Constitutional processes

In order to trace the role of women in the constitutional making process, one needs to understand the format that Zambia's constitutional processes have taken. These have previously involved the appointment of a Constitutional Review Commission (herein referred to as CRC) by a sitting president. The power to appoint a CRC is vested in the Inquiries Act⁶ and it has been used on four separate occasions in order to appoint commission intended to canvass the country for people's views regarding what should be included the Constitution. The first was in 1972, when then President Kenneth Kaunda appointed a commission chaired by former vice president Mainza Chona and popularly known as the Chona commission.⁷ The views sought by the CRC were mainly those regarding changes in the constitution that would facilitate the practice and procedures of the ruling United National Independence Party (UNIP) and government necessary to bring about a One-party state.⁸ Hence the 1973 Constitution was adopted.⁹

The second instance arose in 1990 when years of discontent with the One-party state prompted call for changes. Kaunda appointed another CRC¹⁰ led by Professor Patrick Mvunga popularly known as the Mvunga commission. One of the commission's most important Terms of Reference (TOR's) was the examination and determination of a system of political pluralism¹¹ which would ensure a government strong enough to rule the Zambian nation and secure the personal liberties of the

⁶ Act 45 of 1967

⁷ National Commission on the Establishment of a One-Party-Participatory Democracy in Zambia gazetted under Statutory Instrument No. 46 of 1972.

⁸ Terms of Reference of the Chona Commission.

⁹ The Constitution of the Republic of Zambia, Cap 1 of 1973.

¹⁰ Gazetted under Statutory Instrument No 135 Of 1990.

¹¹ Multi-party elections were held under a new Constitution on 31st October 1991.

people.¹² This process bore the 1991 Constitution¹³ and with political pluralism came winds of change and the Movement for Multi-Party Democracy (MMD) governed henceforth.¹⁴ Fredrick Chiluba was appointed as President and he too in 1995 appointed a third CRC known as the Mwanakatwe Commission¹⁵. This was the first commission that specifically included the need to entrench and promote legal and institutional protection of fundamental human rights amongst other TOR's.¹⁶ The result of this process was the 1996 Amendment to the 1991 Constitution.¹⁷

Seven years later, Chiluba's predecessor President Patrick Levy Mwanawasa appointed another CRC in 2003 known as the Mungomba commission¹⁸ with a view to garner opinions on a constitution that would exalt, effectively entrench and promote legal and institutional protection of fundamental human rights and most importantly, stand the test of time.¹⁹ A novel inclusion in the TOR's was the requirement for the CRC to investigate the extent to which gender equality should be addressed in the Zambian Constitution.²⁰ The constitutional changes were never implemented as they failed to meet parliamentary approval. In November 2011, the newly elected President, Michael Sata announced that unlike previous instances, he was appointing a Technical Drafting Committee²¹. He stated that the Technical Committee was appointed to draft a constitution²² that would provide structures necessary to ensure constitutional democracy²³ and for the development of a constitutional culture to underpin Zambia's political system. One of the Technical Committee's various terms have been to draft a constitution that establishes a democratic system of government guaranteeing gender equality, gender equity and

¹² Report of the Constitution Commission (1991), pg 4. Electronic copy available at <http://www.unza.zm/zamlii/const/1991/act91.htm> (accessed on 5th August 2013).

¹³ The Constitution of Zambia, Act no 1 of 1991.

¹⁴ G Gesiler attributes women's need for greater political representation to these winds of change.

¹⁵ Chaired by John Mwanakatwe Esq, gazetted under Statutory Instrument No. 151 of 1993 as amended by Statutory Instrument No. 173 of 1993.

¹⁶ Report of the Mwanakatwe Constitution Commission, Inquiries Act, Cap 181 at pg 4.

¹⁷ The Constitution of Zambia, Act no 1 of 1991.

¹⁸ Chaired by Willie Mungomba Esq, under Statutory Instrument No. 40 of 2003,

¹⁹ As stated in the introductory part of the Mungomba Commission Report of 2005.

²⁰ Pg xxvi.

²¹ This committee was appointed on 16th November 2011 but was beset with controversies when various outstanding Zambians declined to be part of it.

²² The appointment of the Committee has in itself been highly contested as critics argue that there is no legal basis for its appointment and thus the process is disingenuous.

²³ This is despite renowned academics like Dr Chaloka Beyani and Dr Muna Ndulo declining a role on the committee stating there should be no more review commissions to collect views of the public. Stating that he views of Zambians on the future constitution for Zambia had been adequately canvassed through several previous commissions.

affirmative action.²⁴ Having said this, the history of the women's engagement with these processes tells a different story.

2. Constitutional Review bodies; representing whom?

Representation often entails being a symbol for or an illustration of a particular theme or group. While, it is conceded that representation is only the first necessary but by no means sufficient condition for effective participation²⁵, such a step greatly influences effective participation. The CRC's were appointed to facilitate public involvement in the constitutional processes and effective participation has always been touted as an important objective of this.²⁶ Yet the first CRC, the Chona commission²⁷ of a twenty person delegation, only had one female.²⁸ The Mvunga commission²⁹ was nineteen person strong³⁰ and boasted just three women³¹ despite the fact that Zambia had ratified the Convention on the Elimination of Discrimination Against Women (CEDAW) in 1985³². In the introduction of the CEDAW, it states that 'state parties to the convention are convinced that the full and complete development of a country, the welfare of the world and the cause of peace require the maximum participation of women on equal terms with men in all fields'.³³

Thus, such an important aspect for a countries development should have embraced more women in keeping with the obligations contained in the CEDAW. The subsequent Mwanakatwe commission³⁴ though bigger in size with 21 members only had four women³⁵ with the Mungomba Commission³⁶ thereafter, containing

²⁴ Item (c) ii of the TOR's available at <http://zambianconstiution.org/terms-of-reference-.html> (accessed 10th July 2013).

²⁵ Jayal NG, *From Representation to Participation: Women in Local Government* (paper presented at the Expert Group Meeting on Equal participation of women and men indecision-making processes, with particular emphasis on political participation and leadership, October 2005)3.

²⁶ Present in all CRC reports.

²⁷ Of 1972

²⁸ Mrs Lily Monze, editor the parliamentary debates

²⁹ Of 1991

³⁰ Excluding two secretaries who were both male

³¹ Ms Celestina L Kabalu, Ms Bernadette Sikanyika and Ms Any Kabwe.

³² Adopted by Resolution 34/180 of the General Assembly in 1979.

³³ Text of CEDAW, available at <http://www.un.org/womenwatch/daw/cedaw/text/econvention.htm> (accessed on 12 July 2013).

³⁴ Of 1993

³⁵ Namely Chieftainess Chiyaba, Ms. Beatrice Chileshe, Mrs Hilary Mulenga Fyfe and Mrs. Lucy Banda Sichone.

³⁶ Of 2003.

eight women of the 42 commissioners.³⁷ Yet, one of the TOR's of the commission was to investigate the extent to which gender equality should be addressed in the constitution. Though, this was a novel inclusion for a CRC, its composition failed to buttress this vision. The Mungomba commission was unique because unlike other draft constitutions which were dependent on the government's response³⁸ this one initially held some hope of adoption by a Constituent Assembly.³⁹

However, in July 2007, following an inter-party dialogue⁴⁰, it was resolved that instead of a Constituent Assembly; a National Constitutional Conference (NCC) would adopt the constitution.⁴¹ It was tasked to be a forum for the examination, debate and adoption of proposals to alter the Constitution as contained in the draft Constitution submitted by Mungomba CRC.⁴² The NCC was comprised of 495 members from all sectors of Zambian society, ranging from women's organisations, to youth, to professional bodies and the judiciary.⁴³ Of the 495 strong members, only 131 were women equating to only 26% of the members of a conference that was not only a novel experience but held so much hope for citizens who had long awaited a people driven process.

The paucity of women on these bodies demonstrates not only that women were not well represented but that there lacked a concerted effort to ensure equal representation. While it is acknowledged that it may be difficult to prove the impact of more women on the CRC's, having fewer women could have affected the way in which the CRC conducted its business and fulfilled the TOR's especially as regards women's rights. More women on the CRC's would have been a symbolic assurance for other women participating in the process that the government was genuinely interested in ensuring equality and non-discrimination. It would also have added

³⁷ Chiefteness Nkoehsya Mukambo II, Ms Rosemerry Chimpape, Ms Rosemery C Banda, Ms Joyce Namonde, Ms Charity Mwanza, Mrs Nellie B.K. Mutti, Mrs Hilary M. Fyfe and Ms Lauren M. Sikanyeye.

³⁸ The Inquiries Act allows gives government the powers to reject or accept people's recommendations and make any modifications that government desires through a document called the government "White paper".

³⁹ This followed pressure from civil society groups under the broad umbrella of the Oasis Forum after a stalemate of two years.

⁴⁰ Mbao M, 'The Politics of Constitution-making in Zambia: Where does the Constituent power lie?' in Fombad C and Murray C (eds) *Fostering Constitutionalism in Africa* (2010) 87-117.

⁴¹ Established under the National Constitutional Conference (NCC) Act No. 19 of 2007

⁴² Part II clause 3 of the NCC Act.

⁴³ Composition of members available at <http://www.ncczambia.org/members.php> (accessed on the 11th of July 2013).

legitimacy to the process by demonstrating to all members of society, including women that this process needed to be owned by the people.⁴⁴

3. Citizen's Participation

People's participation in a constitution-making process from beginning to its completion is an inevitable prerequisite of any democratic institution, community or society.⁴⁵ Participation was so critical for Kenyan process that the Constitution of Kenyan Review Act was amended to reflect an agreement, which placed people's participation at the centre of the review process.⁴⁶ The Kenyan Constitution⁴⁷ is arguably one of the best constitutions in the world and the emphasis placed on participation played a large role in this. An inclusive participation agenda requires a deliberate effort to include previously disadvantaged groups such as women. In addition, information regarding a drafting process must be widely broadcast on TV, audio, with the use of pamphlets, fliers and any other means to reach both urban and rural areas.

Until recently, this is has not been part of the Zambian process as history has shown a continued lack of civil education regarding Constitutions.⁴⁸ Hence women's rights activists such Sara Longwe and women's organisations have taken it upon themselves to mobilise women in order to educate them and ensure that their views are heard.⁴⁹ It could be argued that the 1972 process was pretence because it was focused on entrenching a One-party rule- thus defying values of democracy. However the other processes should have been different. In 1991, a total of 576 petitioners from across the country made oral submissions before the Mvunga Commission and of this number only 35 were women, just 6.7%.

⁴⁴ It should be noted that the Technical Committee appointed in 2011 has sixteen members of which four are women excluding the secretary who is also female.

⁴⁵ Mwale, Simson 'Conflicting Interests in Constitution Process' (2005) 7 *The Challenge Magazine* 6 7.

⁴⁶ International IDEA Democracy-building & Conflict Management (DCM) *The Constitution of Kenya Review Commission, The Constitution Review Process in Kenya: Issues and Questions for Public Hearings*, (March 2002) 8.

⁴⁷ The Constitution of Kenya Rev 2010.

⁴⁸ The current process has distributed the draft Constitution in all major languages and has had wide media coverage to facilitate the process.

⁴⁹ Sara Longwe was first contracted by a donor agency to do so in 2007 and organisations such as WILDAF, NGOCC and ZARD have also been involved.

The Mwanakatwe commission⁵⁰ received 969 oral submissions of which 108 were from women⁵¹ amounting to 10.84%, a small improvement from before but, this could also be due to the fact that more cities were canvassed by this Commission than the previous one. While the Mungomba Report did not segregate petitioners by gender, it did hold public sittings in all 150 constituencies with a total of 12 647 petitioners making submissions.⁵² With only a 26% of representation at the NCC that followed the Mungomba Commission process, women were outnumbered even before the adoption process begun. Of the ten committees formed, women were only the majority in the Disciplinary committee and the General Purposes committee.⁵³ There were fewer women in the more dominant committees such as the Human Rights, Democratic Governance and Public Finance committees which indicate an attitude to exempt them from making the most important decisions.

Simutyani believes that the legacy of previous constitutions undermined vertical accountability by limiting public participation in the design and approval of the Constitution.⁵⁴ Such an observation is especially poignant for women because a limitation of their participation further consolidated existing attitudes that disadvantaged women. Dr Musumba also noted in a debate on the current constitution process that personal attitudes and traditional practices have always disadvantaged women and girls.⁵⁵ Such a disadvantage was experienced by a member of a leading women's organisation who described receiving hostile treatment⁵⁶ at a district convention in Lusaka in September 2012. She stated that:

Whenever I spoke regarding the importance of ensuring that women were protected and recipients of equality, they would boo. They kept interrupting me and had to be cautioned by one of the chairpersons, who luckily is a well-known lawyer.⁵⁷

⁵⁰ Of 1993.

⁵¹ The largest number being from the town of Zambezi which has 33 submissions from women.

⁵² Matibini P 'Constitution Making Process: The Case of Zambia' (2008) Special Edition *Zambian Law Journal* 1 17.

⁵³ There were 6 women in the Disciplinary Committee and 5 of them and in the General purposes Committee, which both had 13 members.

⁵⁴ Simutyani N, 'The politics of constitutional reform in Zambia: From executive dominance to public participation?' in Chirwa D and Nizjink L (eds) *Accountable Government in Africa Perspectives from public law and political studies* (2012) 33.

⁵⁵ Dr Charity Musumba, gender activist speaking on the TV show 'Know your Constitution' discussing women and the draft Constitution on 23rd September 2012.

⁵⁶ This included booing and noisemaking whenever she tried to speak.

⁵⁷ Anonymous interview on 25th October in Lusaka, Zambia with a member of NGOCC.

She believes that this treatment was allowed, because the facilitators, chairpersons and other important organisers were men. As a women's rights activist, she is well accustomed to dealing with chauvinism but was still appalled at the backlash she received and expressed concern for women who are not activists and who may have a desire to have their voices heard. Such an environment provided a further impediment to women because participation has an additional role in empowering them vis-à-vis their subordination in the larger social framework of patriarchal gender relations.⁵⁸ Jayal notes further that effective participation cannot be legislated. It involves the creation of a political, social and cultural environment in which women acquire the awareness, information base and confidence to articulate their concerns, and an institutional environment that is receptive and responsive to such articulations.⁵⁹ Such a response has been lacking in the Zambian constitutional process as will be evidenced by the four identified themes below.

4. Concerns raised and the Outcomes

4.1 Discrimination

The prohibition on discrimination has always been couched narrowly in Zambia's Constitutions. The 1973 Constitution in article 25 (1) stated that 'subject to provision in clauses (4),(5) and 7 no law shall make any provision that is discriminatory either of itself or in its effect.' Article 25(3) described discriminatory treatment as affording different treatment to people mainly due to descriptions of amongst others, race, tribe and creed but made no mention of sex or gender. Sarah Longwe when recounting her first involvement with making constitutional submissions, states that:

the realisation of the gaps in the Constitution happened in the 1980's where it was noticed that the prohibition on discrimination in the 1973 Constitution did not include, gender or marital status.⁶⁰

Having suffered discrimination herself based on gender, she successfully sued Intercontinental Hotel for barring her from entering the premises unaccompanied because she was a woman.⁶¹

⁵⁸ Jayal NG (2005) 3.

⁵⁹ Jayal NG (2005) 10.

⁶⁰ Audio interview with Sara Longwe, recorded on 23rd September 2013.

Before the Mvunga commission, a number of petitioners forcefully expressed the views that the 1973 Constitution did not provide against discrimination on the grounds of sex or marital status.⁶² Despite the fact that only 6.7% of the petitioners to the Mvunga commission were women, the commission adopted these concerns and included gender and marital status in the draft constitution. However, the final 1991 Constitution contained exemptions under the discrimination clause which included marriage. Article 23(1)⁶³ of the 1991 Constitution contained the same exemption clause as article 25(1) of the 1973 Constitution. 'Article 23(4) (c) then went on to state that:

Clause (1) shall not apply to any law so far as that law makes provision: ...(c) with respect to adoption, marriage, divorce, burial, devolution of property on death or other matters of personal law,⁶⁴

This was a major setback for women, yet when there was a review process in 1996, they felt confident, despite the previous experience, that this time would be different.⁶⁵ With an increase in submissions from women⁶⁶, the Mwanakatwe commission made substantive and progressive recommendations which included amongst others widening the scope of the Bill of Rights to include women's rights.⁶⁷ Unfortunately the government was more concerned with entrenching Executive Power than it was about an expanded Bill of rights and so the White Paper⁶⁸ noted the criticism of the existing Bill of rights but rejected most of the recommendations. The 1996 process merely provided an amendment to the 1991 Constitution and key changes were as regards the preamble, qualifications for presidential candidates and a limit on term of presidential office.⁶⁹

⁶¹ See *Sara Longwe v International Hotels* 1992/HP/765; [1993] 4 LRC 221.

⁶² Mvunga Commission Report, pg 60.

⁶³ Of the Zambia Constitutional Act of 1991.

⁶⁴ Same as article 25(4) (c) of the 1973 Constitution.

⁶⁵ Views expressed by Sara Longwe.

⁶⁶ 10.4% of oral submissions were from women and there were at least ten associations affiliated specifically to women who made written submissions.

⁶⁷ Petitioners felt that amongst others, anti-discrimination clauses were not sufficiently addressed and that women and children's rights had not been given sufficient emphasis.

⁶⁸ The *White Paper: Government Reaction to the Mwanakatwe Commission* (Government Paper no 1 of 1995).

⁶⁹ Amongst other rejected recommendations was the adoption of the Constitution by a Constituent Assembly and National Referendum.

In 2005, the Mungomba report specifically highlighted article 23 (4) (c) of the 1991 Constitution as a major limitation in the Bill of rights⁷⁰. Despite this, when the NCC produced their draft after considering the Mungomba recommendations, it still included article 23 (4) (c). The resolution from the NCCC was that the discrimination clause needed to state grounds where discrimination could be included. They sought the inclusion of positive discrimination without requesting that certain types of discrimination be declared unfair until proven otherwise. This type of declaration can be found in article 9 (5) of the South African Constitution⁷¹ which contains listed grounds including marital status that are unfair until established to be fair. Such a clause ensures that any discrimination on such vital grounds meets very high criteria and it is this clause that has been lacking in the Zambian discrimination provisions.

4.2 Marriage and Citizenship

Citizenship has been so contentious in Zambian history, that years after the MMD government came into power it changed the law to preclude former president Kenneth Kaunda from ever contesting presidential elections. Article 8 (1) of the 1973 Constitution stated that 'The following persons shall be entitled to apply to the Citizenship Board...

(b) any woman who has is or has been married to a citizen of Zambia and has been ordinarily resident in Zambia for a continuous period...

(c) any person who-

(i) has attained the age of twenty-one years or is a woman who is or has been married...'

This article specifically excluded men who were married to Zambian women from attaining citizenship thus prejudicing foreign nationals marrying Zambian women but not foreign nationals marrying Zambian men. Article 8(1) (b) resulted in Zambian women married to foreign men suffering the consequence of not having their foreign spouse claim citizenship.

⁷⁰ Mungomba Commission report, pg 11.

⁷¹ Constitution of the Republic of South Africa 1996.

The effect of such discrimination was canvassed in the case of *Attorney General v Unity Dow*⁷² where the Botswana court held that sections 4 and 5 of the Citizenship Act⁷³ discriminated against the applicant. They held that the sections denied her children the right to be citizens because she had married a foreigner. This was judged as unconstitutional as it punished a female citizen for marrying a foreigner and interfered with her dignity. In *Mauritian Women v Mauritius*⁷⁴, the Human Rights Committee noted that a law removing the permanent residency of foreign husbands married to Mauritian wives but not foreign wives married to Mauritian husbands was discriminatory.⁷⁵ It stated that the authors were suffering from the status of their consequences only because they were women. Before the Mvunga commission in 1991, petitioners expressed concerns regarding article 8(1) (b) stating that it was discriminatory not to give men who married Zambian women the choice to take up their wife's citizenship.⁷⁶

When the 1991 Constitution was promulgated, it thereafter stated in article 6 that citizenship could be attained by:

1) Any person who --

(a) has attained the age of twenty-one years or is or has been married to a citizen of Zambia; and

(b) has been ordinarily resident in Zambia for a continuous period of not less than ten years immediately preceding that person's application for registration; [or]

(c) is a woman who has been married to a citizen of Zambia for a period of more than three years preceding 24th July, 1988...

The discriminatory clause had been removed thus allowing foreign men the option to take up their wife's citizenship if they met the requirements but foreign women were still provided an additional advantage by article 6 (1) (c). Unsurprisingly, during the 1995 Constitutional review process, petitioners expressed their unhappiness at the continued discrimination in article 6(1)(c) and thereafter the Mwanakatwe commission recommended that marriage should be

⁷² (2001) AHRLR 99 (BwCA 1992).

⁷³ Of 1994

⁷⁴ UN Human Rights Committee, Communication No. 35/1978, 9 April 1981

⁷⁵ Para 9 2(b) %-7

⁷⁶ Note 63 above at 22.

removed as a grounds entitling a person to apply for citizenship.⁷⁷ This was after the Commission observed that citizenship was an extremely sensitive subject and mischief was only caused when marriage was made a condition for citizenship.⁷⁸ The efforts from women paid off and were visible in the 1996 Constitutional Amendment when article 6 (1) (c) of the 1991 Constitution was removed thus eliminating a clause that benefitted Zambian men married to foreign spouses but not Zambian women.

4.3. Customary Law

Regarded as a system of law practised in the community, that has its own values and norms, customary law is practised from generation to generation, evolving and developing to meet the changing needs of the community.⁷⁹ In various tribes in Zambia, it has been responsible for customary divorce and inheritance practices, bride wealth, widow inheritance (levirate), dehumanizing rituals pertaining to widows, early childhood marriage and polygamy.⁸⁰ These practices have continued to subordinate women primarily because, as noted by Fareda Banda, in Africa, women are largely left out of this norm making, leading to the charge that customary law is gendered and excludes the female voice.⁸¹ The prohibition of discrimination in the 1973 Constitution also provided exemptions as regards customary law. It stated that the prohibition on discrimination would not apply:

(d)for the application in the case of members of a particular race or tribe of customary law...

Petitioners making submissions to the Mvunga commission in 1991 expressed the need to re-enforce of the law of inheritance to protect the surviving spouse and a child after a husband was deceased.⁸² This is because the death of a husband often meant what is colloquially known as 'property grabbing' where the relatives of the

⁷⁷ Note 73 at 41-42.

⁷⁸ As above.

⁷⁹ *Modjadji Florah Mayelane vs Mphephu Maria Ngwenyama and another* (2013) ZACC 14 ,2013 (4) SA 415 (CC).

⁸⁰ Trip A M 'Women's Movements, Customary law, and Land Rights in Africa: The Case of Uganda' (2004) 7 *African Studies Quarterly* 1 3.

⁸¹ Banda F 'Women, Law and Human Rights in Southern Africa (2006) 32 *Journal of Southern African Studies* 13 14.

⁸² Note 63 at 7.

deceased would take everything leaving the wife and children with nothing. Mwenda *et al* have argued that because formal wills do not exist in African customary law, claims of intestate succession are often open to manipulation and abuse by members of the deceased's family.⁸³ This is not uncommon in Zambia and hence during the Mwanakatwe process⁸⁴, petitioners expressed their desire for a cultural policy that promoted best values in people's traditional heritage as well as the adoption of positive measures on customs and practices deemed harmful to women.⁸⁵

Ironically, in 2002, The Marriages Act⁸⁶ recognised the harm that widow inheritance (levirate) was causing, stating that a sibling wishing to marry or 'inherit' his brother's widow cannot elect a valid statutory marriage if he is already married. This however is not applicable if the man's first marriage is under African customary law and he intends to marry his brother's widow under customary law as well.⁸⁷ Thus providing no respite for women who are married under African customary law resulting in the continued oppression of women pricy to a different type of marital system. The Mungomba commission report noted that one of the major limitations of the Bill of Rights in the Constitution was that the anti-discrimination clause sanctioned discrimination in matters of personal law article 23 (4) (c).⁸⁸ It drafted a constitution that eliminated all the anti-discrimination exclusions previously found in article 23. Article 40 of the Mungomba draft stated that:

'Every person has the right not to be discriminated against, directly or indirectly, on any grounds including race, sex, pregnancy, health, marital, ethnic, tribal, social or economic status, origin, colour, age, disability, religion, conscience, belief, culture, language or birth.'⁸⁹

This anti-discrimination clause was a novel inclusion because it contained no exemptions. In addition, the inclusion of ethnicity and culture as grounds of

83 Mwenda M, Mumba F, Mvula-Mwenda J 'Property-grabbing under African Customary Law: Repugnant to Natural Justice, Equity, and Good Conscience, yet a Troubling reality' (2005) *George Washington International Law Review* 949 950.

84 1995.

85 Mwanakatwe Commission Report, pg 39.

86 The Marriages Act 34 of 2002

87 Note 85 above at 953.

⁸⁸ Report of the Constitution Review Commission, 2005, 112.

⁸⁹ Pg 71.

discrimination was recognition that women and children bore the brunt of ethnic or cultural practises that were a violation of their rights.⁹⁰ However, at the NCC, it was decided that the words 'on any grounds including' made the provision too open to various interpretations⁹¹ and it was necessary to provide grounds for positive discrimination. It recommended the inclusion of article 23 (3) and (4) of the 1996 constitution thus reverting to the previous position. Articles 23 (3) and (4) were always highlighted as obstacles to the full enjoyment of women's rights hence their inclusion could not have been supported by the women at the NCC. However, with a 26% minority, women were outnumbered and out voted on a critical aspect of women's struggles over the years.

4.4 Reproductive Health Rights

Bodily integrity includes women's intrinsic right to have control and autonomy over their bodies and it includes amongst others the right to make choices as regards sexual and reproductive health.⁹² A women's livelihood and status has long been tied to her ability reproduce and perhaps a notion that a woman's body is not just her own because she procreates. In a patriarchal and conservative country like Zambia a woman's body or what she does with it has been the site of various contestations.⁹³ Reproductive health rights were absent in the 1973 Constitution, with the nearest referral to bodily integrity being article 13(a)⁹⁴ that states that every person in Zambia subject to limitations has the right to security of person.⁹⁵

In 1991, when the Mvunga Commission sat, petitioners raised rights that were not on the agenda such as the rights of the unborn child, the rights of parents to decide freely the number of children they should have and the right of information on family planning methods.⁹⁶ The commission recommended that the right of parents to

⁹⁰ Virginity testing and initiation into womanhood is also practised.

⁹¹ Initial Report of the National Constitutional Conference, 2010,pg 197.

⁹² Mathur K 'Body as Site, Body as Space Bodily Integrity and Women's Empowerment in India', Working paper of r the Institute of Development Studies, (June 2007) available at http://www.idsj.org/Paper_148.pdf, accessed on 30th July 2013.

⁹³ Despite Zambia being signatory to numerous conventions including the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa.

⁹⁴ Under Fundamental Rights and Freedoms.

⁹⁵ Article 4 provided limitation.

⁹⁶ Religious groups argued that the rights of the unborn child should be enshrined and with no use of abortion as a means of family planning.

decide freely, the number of children they should have and the right to information on family planning methods should be recognised explicitly in the constitution.⁹⁷ In addition, it recommended that the constitution should explicitly provide for the recognition of the right to life of the unborn child from conception subject to medical consideration affecting both mother and child.⁹⁸

The government's response to this was to accept the rights regarding family planning and children on the condition that it was inserted in the preamble and not the main text.⁹⁹ The recommendation regarding the unborn child was accepted however with no conditions. The difference in the reactions to the two recommendations reveals that, the government did not want women deciding when and how to have children, hence the emphasis that it should be placed in the preamble. However, the notion of allowing a woman freedom in matters regarding termination of pregnancies was one aspect that needed to be controlled; therefore it was allowed into the full body of the Constitution. It was introduced by way of a new section under the Right to life¹⁰⁰ in the 1991 Constitution¹⁰¹. Article 12 (2) stated that:

No person shall deprive an unborn child of life by termination of pregnancy except in accordance with the conditions laid down by an Act of Parliament for that purpose.¹⁰²

The inclusion of this clause was akin to a double edged sword. On one end, it was a positive sign for the pro-life groups who had sought the protection of the unborn child. On the other hand, it was considered a setback for those women who had sought to fully protect a woman's decision to make choices about her body including having an elective abortion.¹⁰³ Nonetheless, there was no mention of reproductive rights and health outside the termination of life clause leaving women very disappointed. Years later, before the Mwanakwatwe commission¹⁰⁴, women repeated their desire to have access to information and education on family planning

⁹⁷ Note 65 at pg 12.

⁹⁸ Note 63 above at 18.

⁹⁹ The *White Paper: Government Reaction to the Mvunga Commission Report* (Government Paper no 2 of 1991).

¹⁰⁰ Previously article 14 of the 1973 Constitution and now article 12 in the 1991 Constitution.

¹⁰¹ Constitution Act of Zambia, Act No 1 of 1991.

¹⁰² The Act referred to is the Termination of Pregnancy Act 13 of 1972 and amended in 1994.

¹⁰³ The Non-Governmental Organizations Coordinating Council (NGOCC) considered it a claw-back clause.

¹⁰⁴ 1995.

and to be consulted on issues that affected them.¹⁰⁵ The Commission recommended granting the rights of access to education and information on family planning to women so as to enhance their good health. The response from government was simply to reject the recommendation by stating that the necessary provisions were contained in the Marriages Act Cap 211 and article 11 of the 1991 Constitution.¹⁰⁶ Yet an introspection of both finds no mention of the right to access education and information on reproductive health rights. The Mungomba Commission nine years later made the same recommendations as regards reproductive health rights thus proving that they were not included in the Marriages Act and Constitution as government had stated.¹⁰⁷ The recommendations and the Mungomba Commission draft were later abandoned as stated earlier.

5. The Current Draft Constitution; what hope does it hold?

As previously stated the just ended process has involved more sensitization than previous processes. The first draft Constitution¹⁰⁸ has been translated into seven major languages¹⁰⁹ and also transcribed into Braille for the visually impaired.¹¹⁰ It was distributed around the country in both printed and audio format for comments before provincial and national conventions facilitated by the Technical Committee on Drafting the Zambian Constitution (herein the TCDZC).¹¹¹ While the Committee has not released official information regarding the total number of people who participated, reports from various people have been that women were outnumbered.¹¹² In addition, the TCDZC itself is dominated by men with only four women of the 16 members excluding the Secretary. For ease of reference, the

¹⁰⁵ Note 88 at 61.

¹⁰⁶ Government Paper No. 1 of 1995 'Summary of the Recommendations of the Mwanakatwe Constitutional Review Commission and Government Reaction to the Report' pg 36.

¹⁰⁷ Report of Constitutional Review Commission, pgs 142 available at http://www.ncczambia.org/media/final_report_of_the_constitution_review_commission.pdf (accessed on 26th August 2013).

¹⁰⁸ First Draft Report Of The Technical Committee On Drafting The Zambian Constitution available at <http://zambianconstitution.org/downloads/First%20Draft%20Constitution.pdf> (accessed on 15 September 2013).

¹⁰⁹ Bemba, Kaonde, Lozi, Lunda, Luvale, Nyanja and Tonga.

¹¹⁰ Technical Committee on Drafting the Zambian Constitution 'Update on the Constitution-making process' available at <http://zambianconstitution.org/component/content/article/35-press-release/85-update-on-the-constitution-making-process.html> (accessed 14 August 2013).

¹¹¹ Submissions from the diaspora were welcomed with the author making submissions in collaboration with various Zambians in Cape Town.

¹¹² Views from women groups that have been allowed to attend the conventions.

corresponding suggested articles that affect the four identified concerns of women are summarised in the table below.

Identified Concern	First draft Constitution	Resolutions from Conventions
1. Prohibition on Discrimination	<p>Article 51:</p> <p>(1) Women and men have the right to equal treatment, including the right to equal opportunities in cultural, political, economic and social activities.</p> <p>(2) Women and men are entitled to be accorded the same dignity and respect of the person.</p> <p>(3) Women and men have an equal right to inherit, have access to, own, use, administer and control land and other property.</p> <p>(4) Women and men have equal rights in the marriage, during the marriage and at the dissolution of the</p>	<p>At both provincial and national conventions this draft article was accepted with a particular rejection of the submission that the word 'same' in clause (2) above be replaced with 'similar'.¹¹³</p>

¹¹³ Report of The National Convention held at Mulungushi International Conference Centre Lusaka from 10th to 17th April 2013 , 'Consolidated National Convention Resolutions' available at <http://zambianconstitution.org/downloads/Consolidated%20%20Provincial%20and%20National%20Conventions%20Resolutions.pdf> (accessed on 14 August 2013).

	marriage.	
2. Marriage and Citizenship	<p>Article 16(3):</p> <p>Notwithstanding clause (1), a person who is, or was, married to a citizen for a period of not less than three years shall be entitled to apply to the Citizenship Board of Zambia, to be registered as a citizen, in such manner as may be prescribed by or under an Act of Parliament.¹¹⁴</p>	<p>The provincial resolutions wanted the period of marriage in article 16(3) to be increased to at least five to ten years to prevent marriages of convenience.</p> <p>The national convention resolved to not only increase the period of marriage to ten years but to remove the term 'who was married' making the clause inoperable for those foreigners no longer married to Zambians.</p>
3. Customary Law	<p>Article 51 (5) :</p> <p>Any law, culture, custom or tradition that undermines the dignity, welfare, interest or status of women or men is prohibited.¹¹⁵</p>	<p>The resolutions of both the provincial and national conventions included an acceptance of article 51(5) and a rejection of proposed amendments to delete the entire article.¹¹⁶</p>
4. Reproductive Health Rights	<p>Article 28;</p> <p>(1) A person has, subject to clauses (2) and (3), the</p>	<p>At the provincial and national conventions it was resolved that article 28(1) should be left</p>

¹¹⁴ Reference to requirements that must be made in clause (2) which states age and clause (4) regarding diplomats.

¹¹⁵ Note 118 above.

¹¹⁶ Note 118 above.

	<p>right to life, which begins at conception.¹¹⁷</p> <p>Article 52:</p> <p>Without limiting any right or freedom guaranteed under the Bill of Rights, women have the right to:</p> <p>(a) reproductive health, including family planning and access to related information and education.</p>	<p>unamended because it was felt that any danger to the health of the mother is catered for in clause (2) which authorises termination of life under any other law.¹¹⁸</p> <p>The provincial and national resolutions unanimously accepted the inclusion of article 52 (a) into the constitution thereby recognising the need to ensure women have power over their reproductive decisions.</p>
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These articles as they stand are very progressive and heartening. Although they only confirm what the Mungomba Commission had recommended, they highlight the importance of these issues for women eight years after the Mungomba Commission draft. The responses from the Provincial and National conventions are also commendable, although marriage and citizenship continues to be a sensitive topic. This is despite the TCDZC recommendation that marriage should be supported by the Constitution and it was the duty of the Citizenship Board to screen applicants for citizenship and determine genuine applicants without disadvantaging well-meaning persons.¹¹⁹ Of great importance is that the TDCZC highlighted an element of discrimination that is often ignored. It noted that the Constitution assumes equality of

¹¹⁷ Clauses (2) and (3) relate to deprivation of life as authorized by the Constitution and any other law which includes conviction on a capital offence.

¹¹⁸ Note 103 above.

¹¹⁹ Note 120 above at 19.

the sexes without regard to the reality of inequalities created by the socio-cultural and economic construct of the society.¹²⁰ The socio-cultural and economic constructs permeate so deeply into women's lives that the TDCZC were probably alluding to the need for substantive equality to effectively address discrimination.

The TCDZC also highlighted that any customary law that is not inconsistent with the Constitution shall form part of the laws of Zambia¹²¹ thus promoting the supremacy of the Constitutional all matters. This was also welcome relief for organisations such as Women for Change who believe that women have suffered indiscriminately because of the conflict arising because of the application of customary and statutory law in a dual legal system.¹²² Finally, the rationale for article 28 (1) was the view that the right to life is inherent in all human beings and nobody should be deprived of life arbitrarily. Article 52 was included simply because the TCDZC felt that the Constitution needed to provide additional measures that will uplift the status of women apart from those aimed at gender equality.¹²³ Surprisingly there was no added recognition of the fact that maternal mortality in Zambia is extremely high due to the lack effective reproductive health services.

6. Recommendations

In light of the fact that Zambia has endured many constitutional processes, it is hoped that in future there will be no need for another one. Failing this, it is recommended that future constitutional processes strive to have a more inclusive procedure of working. Firstly, any future commissions or committees need to broadly reflect the gender proportions of Zambia's population. There are a number of astute women in various fields and holding different positions that would enrich any constitutional commission and thus there is no reason to have less than 50% of females on future commissions or committees. Secondly, there needs to be a concerted effort to ensure that there is widespread education regarding the opportunities for marginalised groups including women to make submissions directly

¹²⁰ First draft Constitution report, pg 48.

¹²¹ Note 120 above, Article 7 (c) at 12.

¹²² First Draft Report of The Technical Committee On Drafting The Zambian Constitution available at <http://zambianconstitution.org/downloads/First%20Draft%20Constitution.pdf> (accessed on 15 September 2013).

¹²³ Note 126 above at 49.

to the commission.¹²⁴ The consultation or education of women in both rural and urban areas should not be left to Non- Profit Organisations (NPO's) but should be financed and administered by the government.

While the just ended process held district, provincial and national consultations, they were facilitated and chaired mostly by men.¹²⁵ It is suggested that there should be a quota for female participation at conventions and this should include ensuring that there is at least one female facilitator and chairperson at each convention. Such an intervention would provide a more welcoming environment and perhaps prevent situations such as that described earlier-where a female speaker was booed and interrupted. Lastly, the adoption of a constitution by a Constituent Assembly is key to not only ensuring vertical accountability¹²⁶ but to ensure that outcome of the constitutional process is inclusive of women's needs.

Conclusion

Currently, there is a wave of Constitutional reform sweeping over Africa, with an acknowledgement that the gathering of people to collectively debate and deliberate on issues of common concern only strengthens democracy. In Zambia, while this has been acknowledged on paper, the reality is that women and their concerns have not been the greatest priority. The processes in Zambian history, from the establishment of the Constitutional review Commissions to the responses from Government have lacked a concerted effort to genuinely engage with equality, inclusiveness and the needs of more than half of the population. What has occurred instead has been a top-down approach that selectively chooses what rights it considers as important for women and rejects those it has objections to. There is no doubt that women know what they need, they have expressed time and time again that discrimination, inequality, harmful practices and the absence of reproductive health knowledge have no place in the Zambia that they want to live and raise future

¹²⁴ While the just ended process was widely advertised, there was no concerted effort to encourage people to make submissions outside the conventions.

¹²⁵ Reports from attendees state that men controlled the processes and official pictures of the conventions confirm this complaint.

¹²⁶ Beyani and Ndulo argue that previous processes have been executive driven thus limiting Vertical Accountability.

generations in. The question that remains is whether this time, those needs will be met.

Despite the fact that women were probably outnumbered at the conventions, it is heartening that most of the resolutions from the conventions in response to the first draft Constitution have appreciated the massive challenges that women have previously faced. The effects of deep seated patriarchal practices have been critical to the lack of representativity on commissions, proportion of petitioners and involvement in the first ever participatory body-the NCC. As the country awaits the final Constitution emanating from the TCDCZ, it is hoped that this time, women's hopes will not be crushed from a Government White paper or by a parliamentary vote. It is also hoped that this will indeed be a Constitution that lasts the test of time and that ensures the absolute entrenchment of women's rights is not just a vision but a lived reality.

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