



Towards a Democratic and Inclusive Constitution for Zimbabwe

The Scope for Addressing Gender Equality

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1 INTRODUCTION

Gender discrimination is the unequal treatment of a person because of their sex and the roles that society gives to that particular sex. Ensuring non-discrimination on the basis of gender is one of the key steps towards achieving a democratic and egalitarian society. It is also a sound basis for a country to make full use of its human resources. It also helps a country to understand issues from the perspective of both men and women. Often, gender equality and gender justice have not been achieved because of continued discrimination against women. In order to achieve gender equality and gender justice, it is necessary to examine all issues, in this case the Constitution, from the perspective of the lives of both men and women. This is because special steps may need to be taken in favour of women in order to achieve gender equality as it is usually women whom society discriminates against.

One of the key challenges facing campaigners of gender equality is the reality that discrimination is so inbuilt in the social mindset it is almost invisible to many people. As such, for some, in crafting a new

Constitution, the expectation will be that it is enough to treat all citizens the same, without making any room for special treatment for disadvantaged groups such as women. It is such misunderstandings that are important to address as part of the discussion on the Constitution-making process.

While there are instances where all citizens can and ought to be treated the same, there are equally instances where, in order to level the playing field, those who have been marginalised need to be treated differently. An overall 'gender neutral' approach to constitutional law-making or equal treatment of persons in unequal situations would result in continuing rather than removing injustices.

2 THE SIGNIFICANCE OF HUMAN RIGHTS STANDARDS FOR CONSTITUTIONAL REFORM

It is also a fact that the modern world has taken measures to rectify the reality of discrimination against women. This is clear from the existence of major international and regional instruments that promote women's rights. Human rights instruments

in particular set the standard in terms of what can be expected of a state that is party to an instrument.

Zimbabwe is no exception to the ratification of key international and regional instruments. These include the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) at international level and the ratification of the Optional Protocol to the African Charter on the Rights of Women at regional level. The signing by Zimbabwe of the SADC Protocol on Gender and Development is also an important indicator of the seriousness of women's struggles. At national level, the existence of the National Gender Policy, as well as the strategies for its implementation (between 2008 and 2012), would greatly benefit from a positive constitutional framework that addresses prevailing gender inequality.

Indeed, one of the major expectations of state parties to CEDAW, for example, is that the Constitution should be in tune with international human rights standards. The Constitution, as the highest law of the land, must be the torch-bearer for all laws.

As described above, gender equality can only be achieved if gender-based discrimination is actively eliminated. In Zimbabwe, as in the rest of the world, gender-based discrimination mainly affects women. This has to be addressed in a new Constitution. The major aim of this paper is to critically analyse fundamental areas that are of concern to women from a constitutional perspective. It uses the current Constitution as the backdrop for discussion of the key areas and issues for attention.

3 WHAT ARE THE MAJOR ISSUES THAT NEED TO BE ADDRESSED IN ORDER TO ACHIEVE GENDER EQUALITY?

3.1 The process

Constitution-making is an ongoing process. Ideally, both genders would need to be included equally at all stages for reasons of legitimacy and democracy. This is particularly true for the writing stage in order to ensure that all needs are addressed in the Constitution. It would also increase the Constitution's chances of acceptance if marginalised groups such as women know that they have been part of the process.

3.2 Non-discrimination and equality

Although s23 of the Constitution clearly states that no law shall make any provision that is discriminatory, it is important to note that the current Constitution does not contain a clause that specifically outlines the principle of equality between men and women. Article

2 (a) of the Convention on All Forms of Discrimination Against Women (CEDAW) requires states to embody the principle of equality of men and women in their national Constitutions or other appropriate legislation and to ensure its effective application. Article 2(1) (a) of the Protocol to the African Charter on the Rights of Women requires the same of member states. A modern Constitution should leave no room for doubt about the equality of men and women.

It is also important to realise that the discrimination generally experienced by women is both direct and indirect. For example, there may be instances where the discrimination suffered is from the content of law, in which case the discrimination is direct in nature. In other cases, the law will be adequate but discrimination may emanate from the way that the law is applied or from cultural and societal attitudes and beliefs on a specific issue. Ideally, therefore, in the spirit of promoting real and substantive equality between men and women, constitutional principles would need to clearly spell out that the discrimination being prohibited is both direct and indirect in nature.

3.3 Expanding the grounds for non-discrimination

The grounds for non-discrimination that are spelt out in s23 (2) of the present Constitution include race, tribe, place of origin, political opinions, colour, creed, sex, gender, marital status, and physical disability. While sex, gender, and marital status are particularly relevant for women, these grounds are not exhaustive. Women also experience discrimination because of pregnancy, age, culture, and religion. For example, an employer may fail to hire a woman because she is pregnant, or women may tend to be marginalised because of their reproductive role in society. When it comes to age, both men and women may suffer discrimination, but the problem is likely to be more so for women due to perceptions of where they belong in society and notions of what roles they should adhere to.

Including culture and religion as grounds for non-discrimination would not mean that people would be denied culture and religion as constitutional rights. It would mean that the exercise of one's culture and religion must be in line with the tenets and spirit of any Bill of Rights as laid out in the new Constitution. There are young girls, for example, who do not go to school because they belong to religious sects that do not consider their education important. It is therefore vital for a Constitution to firmly recognise that religion should not be used as a shield for violating rights.

3.4 The issue of customary law

The current Constitution states that the grounds for non-discrimination do not apply to matters of personal law.

Before being reduced to 'matters of personal law' through an amendment to the Constitution, s23(3) (a) used to spell out these as including the following matters: adoption, marriage, divorce, burial, devolution of property on death, or other matters of personal law. Whilst personal law continues and will no doubt continue to play a significant role in the personal lives of many Zimbabweans, its fluidity and dynamism needs to be acknowledged. It is vital to recognise that women in Zimbabwe have, throughout the decades, been challenging personal laws that no longer speak to the realities on the ground. Examples include cases brought before the courts seeking equality in the distribution of property or where women have sought to be recognised as guardians and as administrators of estates, despite contrary customary law positions on all these issues.

Learning from others on the African continent who are also having to reconcile such issues of legal pluralism is one way of gaining support for how to handle difficult issue such as this. The South African Constitution, for example, makes it very clear under s30 that everyone is entitled to participate in the cultural life of their choice, but that no one exercising these rights may do so in a manner inconsistent with any provisions of the Bill of Rights.

There is no reason whatsoever why a new Constitution as the highest law of the land should not embrace the same approach of customary law being subjected to the Bill of Rights. Subjecting culture and customary practices to the Bill of Rights will not result in their death, but will instead with infuse them with a dynamism that speaks to the inevitability of change as opposed to protectionism.

Article 17 of the Protocol of the African Charter on the Rights of Women talks of the right to a positive cultural context, i.e., their right to live in a positive cultural context and to participate at all levels in the determination of cultural policies.

Currently, the question how land is handled customarily in the communal areas is not subject to anti-discriminatory provisions. Again, this is problematic for women as by and large they are the ones who are mostly responsible for production and survival. It is essential to understand the ways in which the current Constitution, in protecting personal laws from non-discrimination, contributes substantially towards the creation of women as an underclass that is disadvantaged as compared to others and the ways

in which it helps to keep women as a group in that subordinate position.

3.5 The approach to affirmative action

Affirmative action consists of the provision of special advantages through laws and policies to address discrimination suffered by disadvantaged groups, in this case, women. It is done with the aim of creating a more equal society.

The current Constitution excludes affirmative action programmes from being regarded as discriminatory. Whilst this is a positive standpoint, it must nonetheless be recognised that affirmative action is not made mandatory. It is merely stated that it shall not be regarded as discriminatory in instances where it is effected. There is clearly room for taking a more proactive approach to affirmative action which would ensure that the State takes appropriate measures to introduce affirmative action in areas where it is needed. As stated earlier, addressing past injustices may be necessary in order to create equality. Positive discrimination in favour of women generally has its roots in women's weaker position, and this is what one attempts to rectify through affirmative action.

3.6 Women's participation in politics and decision-making

Article 9 of the Protocol of the African Charter to which Zimbabwe is a party clearly states, for example, that states are to adopt affirmative action, enabling legislation, and other measures to ensure that women:

- participate without discrimination in all elections
- are represented equally at all levels with men in all electoral processes
- are equal partners with men at all levels of development and implementation of state policies and development programmes.

The participation of women in politics and decision-making at all levels is clearly one area that could benefit from affirmative action. Women's participation in politics is important for democracy, legitimacy, addressing the special concerns of women, and for making efficient use of the nation's human resources. Quotas, for example, are one form of affirmative action that could be introduced to increase women's participation not just in politics but in other areas where they have also been disadvantaged.

Quotas are about equality of results as opposed to equal opportunities. They compensate for structural barriers that women encounter. In the political context, quotas are a mechanism to help women

achieve gender balance in political institutions. They can result in a dramatic increase in the number of women in politics. There are many different types of quota systems, and an issue for discussion should be the kind of quota systems we would like to see in the Constitution and in what areas.

3.7 The electoral system

Zimbabwe's current electoral procedure is based on the first-past-the-post system (FTPT). This means that the person with the most votes in a constituency wins the seat. Proportional representation, on the other hand, is often regarded as the better electoral option for achieving democracy as well as gender balance. Under this system, the percentage of votes that a party gets determines the number of seats it wins. It is generally seen as a more democratic system of governance as a cross-section of parties is more likely to be represented. The reason why more women tend to be elected under this system is because parties make a special effort to nominate women in order to receive votes. In today's world, where gender equality matters, voters may sideline a party if they see it as being gender-insensitive. This forces parties to field more women candidates. For the above reasons, it is worth considering this option in the new Constitution.

3.8 Civil and political rights: the right to life, liberty and freedom from inhuman treatment

While the Constitution addresses key civil and political rights such as the right to life, the right to personal liberty, freedom from slavery and forced labour, and protection from inhuman treatment, the major limitation is that these issues are not addressed in a way which also speaks to the reality of women's lives and how they might experience each of these differently. The biggest concern is with the deprivation and violation of these rights through public actions. The gendered construct of civil rights and liberties ignores the fact that the majority of women live their lives firmly removed from public domain. For example, the way the right to life is captured does not include how being a woman is life-threatening and the special ways in which women need protection in order to enjoy the right to life. Threats to women's right to life include widespread violence against women and control over their bodies. Violations in private spheres are generally excluded.

The central perception of torture is that it takes place in the public sphere and that it must be inflicted at the instigation of public official. Although women

may also experience this kind of torture, for most, the greatest type of torture occurs in the private sphere through endemic forms of violence against women and children.

The right to personal liberty in s13 also offers little freedom and protection to women as it is again largely couched in terms of direct action by the state. It does not address the fear of sexual violence or lack of freedom to control one's own body, which is a defining feature of women's lives.

To be gender-sensitive and gender-inclusive, personal freedom and security would need to include the right to be free from violence from public and private sources. Freedom from torture would also need to include torture arising from gender-based violence. Further, a gender-sensitive approach would entail that the right to bodily integrity also includes the right to make decisions concerning reproduction, security and control over one's body, as well as the right not to be subjected to medical and scientific experimentation.

Again, from a gender-sensitive and gender-inclusive perspective, the right to privacy would need to be protected in manner which does not exclude from scrutiny the major sites for the oppression of women that is the home and the family. Similarly, freedom of expression – a vital right – should not be a tool to initiate hatred based on grounds such as race, sex, gender and so on. From a women's perspective, a major concern with freedom of expression is the way in which it has been used for pornography and degrading women's bodies.

Given the turmoil that the country has gone through, and in particular the misuse of women's bodies as tools of conflict, there is a need to create dialogue on peace and how the Constitution ought to approach this. The Protocol of the African Charter is very clear, for instance, that women have a right to equal representation and participation in key decision-making positions in conflict resolution and peace-building processes. A gender-inclusive approach to constitution-making would include this important value and principle in the Constitution.

3.8.1 Social and economic rights

Apart from property rights, especially as relates to the land, the Constitution does not contain any substantive provisions that deal with social and economic rights such as access to health care services, the right to food, or the right to housing. Clearly, dialogue needs to take place on how best these issues should be incorporated in the Constitution in a manner that ensures that the experiences of both men *and* women

are captured. Lack of access to social and economic rights affects men and women, but as with everything else, the experiences of deprivation are gendered, as is illustrated below.

3.8.2 Land and its link to the right to food

The current Constitution does contain detailed provisions relating to the right to land. In implementing land reform programmes, s23 (3) (3a) states that the government shall treat men and women on an *equal* basis, which implies a 50-50 approach. This is a positive aspect of the current Constitution. However, it has already pointed out that in the communal areas customary law applying to land matters is exempted from the scrutiny of discriminatory lenses. Yet the reality is that most women in Zimbabwe still live in the communal areas. Lack of control of land by women can have and often does have devastating consequences, especially where the assumed support is simply not forthcoming when the husband dies. Land has a fundamental bearing on the right to food. Furthermore, the right to an adequate standard of living (including food) requires effective entitlements such as land; women often find themselves short-changed in this regard. As such, as a constitutional principle, equal access to land in the communal areas as the means of procuring food and food security is vital.

3.8.3 The right to health

The inspiration for core content on the right to health comes from the Health for All and Primary Health Care strategies of the World Health Organisation (WHO). This strategy stipulates that there is a health baseline below which no individual in any country should find him or herself. These include the provision of maternal and child healthcare, including family planning; immunisation against major infectious diseases; appropriate treatment of common diseases and injuries; and the provision of essential drugs. As regards underlying preconditions for health, these include education concerning prevailing health problems and the methods of their control and prevention; promotion of food supply and proper nutrition; adequate supply of safe water; and basic sanitation.

3.9 Education

Education plays a significant role in everyone's life. For women and girls it is also an essential key to unlocking their subordinate position. Enshrining in the Constitution the right to free and compulsory primary education would be a major step to addressing some of the gendered inequalities in this field.

3.10 The right to work

International instruments are very clear on the expected standards for men and women when it comes to work. These include, for instance, equal remuneration for work of equal value; freedom from harassment; equal opportunities for employment and promotion; and non-discrimination. Including these in any democratic Constitution is important. However, of significance from a gender perspective is recognising the fact that the vast majority of women are not in paid employment. It would be amiss to fail to appreciate this reality that affects the lives of the vast majority. The new Constitution would need to address ways of protecting the interests of women who are not in formal employment when it comes to social security. Most women in rural areas are not impacted upon by labour law legislation that applies in the formal sector and have virtually no benefits for their unpaid work.

3.11 Equality in marriage and family life

Equality in marriage and family life would be particularly important for women given some of the difficulties that occur in relation to issues in this context. Presently, guardianship in marriage rests with the father. Women have often encountered difficulties in obtaining travel documents for their children, even where the parties are no longer together, because of the unequal law on guardianship. Setting a minimum age for marriage would also be helpful, as the Customary Marriages Act does not currently set a specific age for marriage. Under general law, the marriageable age is also different for boys and girls: it is 18 for boys but 16 for girls. International instruments set the age of marriage for both sexes at 18. This may be the position that the Constitution could take in order to be in compliance with human rights standards.

Citizenship also presents problems for women as they do not have the right to pass on their citizenship if they are married to a foreigner. It is essential that both men and women have the same rights during marriage and at its dissolution.

4 ENFORCEMENT OF THE BILL OF RIGHTS

The Bill of Rights must be enforceable against both state and non-state actors as women's rights are not only violated by the state. It would also be useful to allow third parties to bring actions. Addressing the role of international instruments in national laws would also be useful, as this has often been a stumbling

block in building a culture of adherence to human rights standards.

5 CONCLUSION

While clearly not exhaustive of all matters, this paper has essentially outlined the major areas that are of significance to women from a constitutional perspective. It has sought to give some indications of what a democratic and gender-sensitive and gender-inclusive approach would entail for each of these issues. However, it in no way seeks to be prescriptive. The critical areas canvassed include laying the foundations for gender equality and non-discrimination; the role of state and non-state actors in dealing with discrimination; expanding the grounds for non-discrimination; the approach to affirmative action, politics and decision-making; and engendering civil and political rights as well as social and economic rights.

- Inclusion of the right to a positive cultural environment
- A proactive approach to affirmative action
- An electoral system that promotes a gender balance in politics and decision-making
- An approach to civil and political rights that takes into account a gender-sensitive approach to the rights to life, liberty, and freedom from inhuman and degrading treatment
- Equality in marriage and family life for both men and women
- The inclusion of social and economic rights in the Bill of Rights in a manner that is gender-sensitive.

6 SUMMARY – BASIC ELEMENTS OF A GENDER-SENSITIVE CONSTITUTION

- A constitution-making process that is inclusive of both men and women
- A preamble that acknowledges the role of both men and women in Zimbabwean society
- Non-discrimination and gender equality as foundational principles in the Constitution
- A Bill of Rights that applies to both state and non-state actors and that covers both the public and private sectors
- Comprehensive and gender-sensitive grounds for non-discrimination which should include, among others, sex, gender, marital status, age, culture, and religion

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