

INCREASING CITIZEN PARTICIPATION IN GOVERNANCE
SYSTEMS: AN ANALYSIS OF THE CONSTITUTION OF
ZAMBIA (AMENDMENT) ACT NO. 2 OF 2016
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INTRODUCTION

Since the time of the Greek Republic, the participation of citizens in the governance of their states has gone through various stages from direct democracy to representative democracy and is progressively heading towards increased citizen representation. The need for citizen participation in the affairs of the state is one of the basic tenets of the rule of law in a Democracy.¹ This discussion seeks to give an overview of the provisions of the constitution of Zambia that have been amended and which have resulted in the enhancement of citizen participation in Zambia's governance. The discussion will also examine areas of shortcoming in relation to citizens' participation and propose areas of possible improvement.

CITIZEN PARTICIPATION AND THE RULE OF LAW

The participation of citizens in the public affairs of the state has been acknowledged to be one of the key features of a vibrant democracy. This is because the ability of citizens to participate in the governance of their nations ensures greater transparency in the governance system as well as greater accountability of the leadership in their conduct of governance. The extent of the participation of citizens in national matters differs from jurisdiction to jurisdiction. There are however a number of key characteristics of citizen participation that should exist in a jurisdiction in order to help it increase the tenets of democracy. These include the ability of citizens to propose legislation, challenge proposed legislation and recall members of Parliament who do not perform to the expectation of their constituents.

¹ Nancy C. Roberts, "Public Deliberation in an Age of Direct Citizen Participation." *American Review of Public Administration*, 2004, 34(4):315-353.

The underlying principles regarding citizen participation in Zambia are summarised in the preamble to the Constitution. The preamble to the Constitution as amended provides, among other things that the people of Zambia, uphold the human rights and fundamental freedoms of every person, commit themselves to upholding the principles of democracy and good governance, resolve to ensure that their values relating to family, morality, patriotism and justice are maintained and all functions of the State are performed in their common interest and direct that all State organs and State institutions abide by and respect the people's sovereign will.

From the provisions of the preamble to the constitution, two major issues relating to citizen participation are become apparent and are worth noting. Firstly, the people of Zambia through the Constitution pledge to uphold the principles of democracy and good governance and secondly direct State organs and institutions to abide by and respect the people's sovereign will. Citizen participation is therefore based on the rights that people enjoy as enumerated in the Bill of Rights and which are enjoyed directly by citizens as well as through their State offices and State institutions, which are obliged to abide by and respect the people's sovereign will. The constitutional arrangements for governance are therefore such that citizen participation can occur directly as well as through institutions and officers carrying out the will of the citizenry, as will be observed in greater detail.

A HISTORICAL OVERVIEW OF CITIZEN PARTICIPATION UNDER ZAMBIA'S CONSTITUTIONAL FRAMEWORK

The participation of Zambia's citizens in the governance of the nation can be traced back to the Independence Constitution of 1964, which was part of the legal framework facilitating Zambia's Independence pursuant to the Zambia Independence Act and the Zambia Independence Order-in-Council, 1964.² Under the Independence constitution, provision was made for the participation of citizens through the process of referenda, within the general environment of a multi-party system.

In 1967, a referendum was held with the objective of transforming Zambia from a multi-party state into a single party state in order, it was argued, to unite the country and promote socio economic development. The referendum resulted in the subsequent amendment of the Constitution for the introduction of a single party state. In 1991, the country witnessed further constitutional changes with the re-introduction of the multi-party politics. The provisions of the constitution relating to citizen participation in public affairs through referenda remained substantially unchanged and there were no additional avenues through which citizens could take part in the governance of the country.

THE BILL OF RIGHTS AND CITIZEN PARTICIPATION

The participation of citizens in public affairs in Zambia arises out of the constituent power of the citizens exercisable through the civil and political rights enumerated in Part III of the Constitution, the Bill of Rights. The various rights under Part III that have the most direct impact in citizen participation in the governance of the nation are summarised in Article 11 of the Constitution, which provides inter alia that-

² Zambia Independence Act 1964, 13 and 14 Eliz. C65; Zambia Independence Order-In-Council.

every person in Zambia has been and shall continue to be entitled to the fundamental rights and freedoms of the individual, that is to say, the right, whatever his race, place of origin, political opinions, colour, creed, sex or marital status, but subject to the limitations contained in this Part, to each and all of the following, namely:

- (a) life, liberty, security of the person and the protection of the law;*
- (b) freedom of conscience, expression, assembly, movement and association;*
- (c) protection of young persons from exploitation;*
- (d) protection for the privacy of his home and other property and from deprivation of property without compensation;*

The rights enumerated in Article 11 of the Constitution are enjoyed by citizens through direct participation as well as through what shall be termed as segmented citizen participation, where citizens who choose to serve their fellow citizens through public office assume the obligation to be their “brother’s keeper”. Citizen participation in its fullest sense includes the right of citizens to legitimately complain and peacefully protest against the Government, where necessary. This is in keeping with Article 11, which further states that the Bill of Rights has effect for the purpose of affording protection to the rights and freedoms specified in the Constitution, subject to such limitations of that protection, being limitations designed to ensure that the enjoyment of the rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest. Since the primary duty of regulating public relationships among citizens rests with the state, this duty is executed through public officers. The role performed by public officers does not arise out of any rights conferred on citizens by the state but as a result of rights that inherently vest in citizens and which the state is obliged to protect.³

CITIZEN PARTICIPATION UNDER ZAMBIA’S AMENDED CONSTITUTION

Zambia in continuing its process of constitutional review further amended the constitution the Constitution in 2016 through Act No. 2 of 2016. The aim of the amendments was to further amend the constitution as a result of the work undertaken by the Technical Committee on the drafting of the Zambian constitution, which was appointed to review the constitution and make proposals for amendment based on the report of the Mung’omba constitutional reform commission.

One of the results of the constitutional review process has been the revision of the constitutional provisions in order to enhance the participation of citizens in Zambia’s governance process. The amendments to the constitution as far as they relate to the participation of citizens will now be analysed in detail in order to determine the nature and extent of participation of citizens in the governance of the Zambia.

The participation in the public affairs by a citizen is predicated on the responsibility that the citizen has under the Constitution. In particular, Article 43 of the amended Constitution provides the obligations of a citizen and states as follows:

³ See Ronald Dworkin, Taking Rights Seriously 16th ed. Bloomsbury Academic, 2013.

43. (1) A citizen shall-

- (a) *be patriotic to Zambia and promote its development and good image;*
- (b) *pay taxes and duties lawfully due and owing to the State;*
- (c) *protect and conserve the environment and utilise natural resources in a sustainable manner;*
- (d) *maintain a clean and healthy environment;*
- (e) *provide national, defence and military service when called upon by the State; and*
- (f) *co-operate with law enforcement agencies for the maintenance and enforcement of law and order.*

(2) A citizen shall endeavour to-

- (a) *acquire basic understanding of this Constitution and promote its ideals and objectives;*
- (b) *register and vote, if eligible, in national and local government elections and referenda;*
- (c) *develop one's abilities to the greatest possible extent through acquisition of knowledge, continuous learning and the development of skills;*
- (d) *foster national unity and live in harmony with others; and*
- (e) *understand and enhance Zambia's place in the international community.*

Article 43(1) requires Zambian citizens to be patriotic and promote the development of the nation. This can be done through the payment by the citizen of appropriate taxes and duties that are lawfully due and owing to the state. An extensive discussion on the general legal obligation to settle tax liability is observable from the Supreme Court decision in Post Newspapers Limited v Zambia Revenue Authority.⁴

A further obligation of a citizen relates to the protection and conservation of the environment and the sustainable use of natural resources. The duty of citizens in relation to the protection of the environment was exercised and judicially tested in the case of Nyasulu and Others v Konkola Copper Mines Plc and Others. Although this case predates the amendment to the Constitution, it demonstrates the obligation that citizens have to be vigilant in the protection of the environment. The brief facts of the case are that 2000 plaintiffs, who were residents of a town called Chingola, whose source of water was a stream in which the first defendant was allegedly discharging the effluent from its mining operations, sued the first defendant, Konkola Copper Mines to compel the company to meet the required acceptable standards and ensure that no leakage or spillage occurred. At the conclusion of the trial, the court determined that the plaintiffs had proved their case against the first defendant in Common Law and Statutory Law and that the first defendant was reckless and had no regard for human, animal and plant life.⁵ The ability of citizens to litigate in matters concerning the protection of the environment is based on *locus standi*. The matter was discussed by the court in the matter of Lafarge Zambia Limited v Peter Sinkamba (Suing for and on behalf of Citizens for a Better

⁴ Appeal No. 07/2016

⁵ Ibid, p. J21.

Environment).⁶ In that cases the court determined that the respondent had no *locus standi* to commence the action in the lower court in the manner that the respondent had done since the nature of the action commenced was the preserve of the government.

A citizen has a further duty to register and vote in elections and referenda where the citizen is eligible to do so. Further the citizen has an obligation to develop the citizen's individual abilities to the greatest possible extent and to foster national unity and live in harmony with others. These obligations, by their very nature require the observance of law and order and the participation in the various public affairs of the state in order to ensure that the various institutions of governance are transparent and accountable to the people.

Part V of the amended constitution deals with representation of the people and more specifically relates to electoral systems and process. Article 45 of the constitution enjoins citizens to freely exercise their political rights by seeking public office if they are eligible and minded to do so. Article 46 of the Constitution allows a citizen who has attained the age of eighteen years is entitled to be registered as a voter and vote in an election by secret ballot. It is notable that although this constitutional provision exists, the design of the ballot papers used in the last general elections of 2016 were capable of being used to identify individual voters in order to determine how they voted. The practical challenge that arises with the provision in relation to citizen participation in elections relates to the need to strike a balance between secrecy of the ballot and prevention of fraud. It has been noted that in a secret ballot the voter is entitled to cast a vote independently in a way that ensures the vote remains unknown as to the identity of which voter has supported a particular candidate. It has been further observed that fair elections and integrity also imply that each eligible voter has the opportunity to cast one vote privately. The secrecy of the vote is acknowledged as being especially important in political contexts where citizens have a reason to be afraid of political oppression and therefore vote for some other candidate than they personally would support.⁷

Citizen participation under the amended constitution is further provided for under Article 88 of the Constitution, which deals with the right of citizens to petition and make comments. Article 88 provides as follows:

88. (1) *A citizen may petition the National Assembly to initiate the enactment, amendment or repeal of legislation.*
- (2) *A citizen may comment on a deliberation, statement or decision of the National Assembly.*
- (3) *The manner of petitioning and commenting referred to in this Article shall be prescribed.*

⁶ SCZ Appeal No.169/2009.

⁷ The Electoral Knowledge Network "Serial numbers on ballots" <http://aceproject.org/electoral-advice/archive/questions/replies/912993749> as available on 29th April, 2017.

Unlike the previous constitutional provisions that existed prior to the amendment of the constitution in 2016, the constitution now provides for enhanced participation by citizens through the ability of citizens to petition the National Assembly to initiate the enactment, amendment or repeal of legislation. Prior to the amendment of the constitution in 2016, an individual citizen was not legally permitted to initiate the enactment or amendment of legislation unless that citizens attempted to do so through their elected representative in Parliament, who was empowered by virtue of being a Member of Parliament to initiate legislation through a private member's Bill. For example, two Bills that were initiated as private members Bills in the National Assembly of Zambia were the Zambia National Broadcasting (Amendment) Bill, 2002⁸, and the Independent Broadcasting Authority Bill, 2002.⁹

An additional right that the amended constitution of Zambia has now conferred on a citizen relates to the ability to comment on a deliberation, statement or decision of the National Assembly. A citizen is now free to make comments on the deliberations and decisions of parliament without fear of reprisal or the risk of being cited for contempt of Parliament as long as the comments do not undermine the dignity of the National Assembly. This position is a considerable change from the previous position which limited the making of comments related to the deliberations of the National Assembly. Article 88 further provides for the enactment of legislation in order to give effect to the provisions of Article 88(1), on how to make comments on the deliberations and decisions of Parliament.

Article 89 of the amended Constitution additionally provides for public access to and participation in the legislative process. The public participation takes various forms including attending Parliamentary committees and being able to make submissions to Parliamentary Committees that deal with various subjects of consideration that Parliament deals with. Article 89 of the Constitution provides as follows:

- 89. (1) The National Assembly shall facilitate public involvement in the legislative process.*
- (2) The National Assembly or a parliamentary committee shall not exclude the public or media from its sittings, unless there are justifiable reasons for the exclusion and the Speaker informs the public or media of the reasons.*

The Article allows for the participation of citizens in the legislative process. The provisions allow for the inclusion of members of the public and the media from the sittings of the National Assembly in the absence of justifiable reasons for the exclusion of the members of the public. The provision for inclusion of members of the public in parliament now means that there is increased access to parliamentary information and deliberations for the members of the public and greater transparency in the functioning of the National Assembly.

A further provision in the amended Constitution that relates to citizen participation in public affairs may be found in Article 240 of the constitution. This provision enables citizens to be appointed as members of commissions and to participate in the governance systems that fall within the jurisdiction of the of the various commissions. Article 240 states provides that-

⁸ National Assembly Bill No. 12 of 2002.

⁹ National Assembly Bill No. 13 of 2002.

240. A person qualifies to be appointed as a member of a commission if that person-
- (a) is a citizen;
 - (b) is permanently resident in Zambia;
 - (c) has not, in the immediate preceding five years, served a term of imprisonment of at least three years;
 - (d) declares that person's assets and liabilities, as prescribed;
 - (e) has paid that person's taxes or has made arrangements satisfactory to the appropriate tax authority for the payment of the taxes;
 - (f) does not have a mental or physical disability that would make the person incapable of performing the functions of office;
 - (g) is not serving a sentence of imprisonment for an offence under a law; and
 - (h) has other qualifications, as prescribed.

The amended Constitution also provides for the promotion of the economic empowerment of citizens in order to allow them to contribute to sustainable economic growth and social development. To this end, Article 10 of the constitution provides as follows:

10. (1) The Government shall create an economic environment which encourages individual initiative and self-reliance among the people, so as to promote investment, employment and wealth.

(2) The Government shall promote the economic empowerment of citizens so that they contribute to sustainable economic growth and social development.

(3) The Government shall promote local and foreign investment and protect and guarantee such investment through agreements with investors and other countries.

(4) The Government shall not compulsorily acquire an investment, except under customary international law and subject to Article 16 (1).

(5) Where the investment compulsorily acquired under clause (4) was made from the proceeds of crime no compensation shall be paid by the Government.

Although the provisions of the constitution now allow for further participation by citizens in the public affairs of the nation, there are still some areas where participation could still be further enhanced. For example, the constitution still does not provide the right of citizens to recall Members of Parliament and councillors that do not perform according to the expectations of citizens. In this regard it may be argued that the recommendations of the Mwanakatwe and Mung'omba and other constitutional review commissions were not adhered to as proposed.¹⁰

Although the participation of citizens has in elections has been taking place even before the amendment of the Constitution, the direct election of certain office bearers, specifically mayors and council

¹⁰ Government of the Republic of Zambia, "Final Report of the Constitution Review Commission": Government Printers, December, 2005. At p. 357 and p. 414.

chairpersons, was not provided. Under the Constitution as amended, provision has now been made for the elections of mayors and councillors by the electorate directly. To this end, Article 153 of the amended Constitution provides for the election of councillors by registered voters resident within the district in which the candidate is standing for election. Article 153 (1) specifically provides that-

153. (1) A councillor shall be elected in accordance with Article 47(3) by registered voters resident within the district.

(2) A council shall consist of the following councillors-

(a) persons elected in accordance with clause (1);

(b) a mayor or council chairperson elected in accordance with Article 154; and

(c) not more than three chiefs representing chiefs in the district, elected by the chiefs in the district.

It must be noted that before the amendment to the Constitution, mayors and councillors were elected by councillors and not by the Citizens. This has provided further accountability and transparency of the civic officials as they now have to directly engage the public when they seek public office and they are directly accountable to the public for the execution of their duties in office. It is also worth noting that in terms of Article 153 (4) (d) a permanent resident of Zambia may also stand for election as a mayor or a councillor. As a result of this change, a non-citizen who is civic minded may choose to participate in the governance of the nation at the local level. The amendment to Article 153 now means that more possibilities for contributions to national development have been made available to the general citizenry.

The participation of citizens also occurs at the traditional level. Specifically, Article 165 (1) provides that the institution of chieftaincy and traditional institutions are guaranteed and shall exist in accordance with the culture, customs and traditions of the people to whom they apply. This means that in terms of traditional governance systems, citizens who are under traditional authority play a role in the selection of their chiefs in line with their respective traditional customs and practices. The participation of the citizens however is supposed to conform to three main principles namely compliance with the Bill of Rights, consistency with the other provisions of the Constitution or other written law and non-repugnance with justice and morality.

SEGMENTED CITIZEN PARTICIPATION

Apart from the direct mainstream participation in the governance of the nation that citizens exercise through participation in elections, referenda, public discussions and peaceful protest, there is participation that is not direct participation of citizens and it may be referred to as segmented participation. This involves the participation in the governance of the nation by various sections of society such as the civil service, the judicial service, the parliamentary service and the security forces, in the upholding of the constitution. Sectional participation can either enhance or undermine a constitutional order depending on how it is used. Examples include the regulation of public assemblies, making of independent judgements by judicial officers, public audit and accountability, legal advice

to government and legislative drafting, management of civil society participation in governance (eg. NGO and societies Act, LAZ) etc.

As far as segmented citizen participation is provided for under the amended Constitution, there are a number of provisions that are of particular interest that is worth noting. Firstly, Article 173 provides the values and principles for the public service. This Article states as follows:

173. (1) The guiding values and principles of the public service include the following-

- (a) maintenance and promotion of the highest standards of professional ethics and integrity;*
- (b) promotion of efficient, effective and economic use of national resources;*
- (c) effective, impartial, fair and equitable provision of public services;*
- (d) encouragement of people to participate in the process of policy making;*
- (e) prompt, efficient and timely response to people's needs;*
- (f) commitment to the implementation of public policy and programmes;*
- (g) accountability for administrative acts;*
- (h) proactively providing the public with timely, accessible and accurate information;*
- (i) merit as the basis of appointment and promotion;*
- (j) adequate and equal opportunities for appointments, training and advancement of members of both gender and members of all ethnic groups; and*
- (k) representation of persons with disabilities in the composition of the public service at all levels.*

(2) The values and principles specified in clause (1) apply to service-

- (a) at national, provincial and local government levels; and*
- (b) to all State organs and State institutions.*

(3) A public officer shall not be—

- (a) victimised or discriminated against for having performed functions in good faith in accordance with this Constitution or other law; or*
- (b) removed from office, reduced in rank or otherwise punished without just cause and due process.*

Article 173 in relation to segmented governance requires a public officer, who is defined as “a person holding or acting in a public office, but does not include a State officer, councillor, a Constitutional office holder, a judge and a judicial officer” to adhere to the guiding principles such as maintaining the highest standards of professional ethics and integrity, promotion of efficient, effective and economic use of natural resources and effective, impartial and equitable provision of public service. The Article also enjoins the public service to encourage people to participate in the process of policy making and requires the public service to respond promptly and efficiently to people's needs and exercise a commitment to the implementation of public policy and programmes. The principles also require accountability for administrative actions.

In their strictest application, the principles set out in Article 173 are principles of what is being referred to as “segmented governance” in circumstances where a person chooses to participate in governance through public service to others. The service of the public comes with various obligations, the most paramount of which is the exercise of public functions and delivery of public services in good faith. The exercise of public duties in good faith and the protection from sanction for the exercise of functions in good faith are essential for ensuring the accountability of the public service and the avoidance of arbitrary exercise of power and abuse of public office. The remedy available to a citizen aggrieved by administrative public action is generally an action for judicial review, depending on what the action complained of is, although this is not the only remedy available.

In the case of Derrick Chitala (Secretary of the Zambia Democratic Congress) v Attorney General (1995) S.C.Z. Judgement No. 14 of 1995 the Supreme Court elucidated the basic principles relating to judicial review as a means of challenging administrative action. The brief facts of the case are that the appellant appealed against a decision of a Judge in the High Court who had summarily refused to grant leave to bring judicial review proceedings. The appellant had sought to obtain an order of certiorari to remove into the High Court in order to quash the decision by the President and the Cabinet to have the next Constitution enacted by the National Assembly. The appellant also sought an order of mandamus directed to and compelling the President and the Cabinet to take measures necessary to ensure that the Constitution was debated by, finally determined and enacted by a Constituent Assembly and subjected to a referendum and ancillary relief. The appellant contended that the decision to have the Constitution enacted by the National Assembly had been taken in bad faith and was contrary to the recommendations of the Mwanakatwe Constitution Commission and contrary to the general objectives and purposes of the Inquiries Act. The Government had brought out a White Paper in response to the Commission's report in which it had rejected the recommendations of the Commission that the least favoured option was to have the Constitution enacted by the National Assembly. The Court relying on the case of Council of Civil Service Unions and Others v Minister for the Civil Service¹¹ held that-

1. there had been no arguable case of irregularity because the Executive had neither exceeded the statutory powers under the Inquiries Act nor sought to frustrate the object of the Act but had suggested to address the concerns of the applicants and many other citizens and there was accordingly nothing which had to be left to a full hearing;
2. a perusal of the document and consideration of the arguments did not support that there was an issue of irrationality fit to go to a full hearing;
3. neither was there any procedural impropriety.

The revised constitutional provisions relating to the public service should be read with Articles 90, 91(2) and 93, dealing with the Executive, the Presidency and vesting of Presidential powers. Article 90, in dealing with Executive power provides that “[t]he Executive authority derives from the people of Zambia and shall be exercised in a manner compatible with the principles of social justice and for the people’s well-being and benefit.”

¹¹ [1984] 3 All ER 935

Article 91(2) states that the executive authority of the State vests in the President and, subject to the Constitution, shall be exercised directly by the President or through public officers or other persons appointed by the President. It is this exercise of the executive functions of the State that obliges public officers to discharge their functions in good faith as the main actors in the segmented participation in the governance of Zambia. In order to ensure accountability of public officers and avoid abuse of executive power, Article 93 provides as follows:

93. (1) A decision or instruction of the President shall be in writing under the President's signature.

(2) The signature of the President on an instrument shall be under Public Seal.

Arguably the highest instance of segmented citizen participation in governance is the holding and execution of the functions of the office of President. In the execution of the office of President, the President shall be accountable for the President's actions and is liable under Article 108 for violation of a provision of the Constitution or other law, a crime under international law, or gross misconduct. Gross misconduct is defined under Article 266 of the Constitution as-

- (a) behaviour which brings a public office into disrepute, ridicule or contempt;*
- (b) behaviour that is prejudicial or inimical to the economy or the security of the State;*
- (c) an act of corruption; or*
- (d) using or lending the prestige of an office to advance the private interests of that person, members of that person's family or another person;*

The various aspects of segmented participation in governance cuts across all three organs of Government, namely the Executive, Legislature and Judiciary and all the organs all ultimately have accountability to the general citizenry. The participation of citizens in the governance of the country is therefore multidimensional.

CONCLUSION

Having examined the provisions of the amended Constitution it is apparent that there is still work that needs to be further undertaken in order for the Zambian constitution to be definitively considered to be a constitution that allows for effective participation of citizens in the governance of Zambia. Also, the need to ensure that the entire spectrum of citizen participation is clearly articulated to citizens in order for them to realise their obligations towards each other. Further, there is need to ensure that the citizens that participate in governance at a segmented level are aware of their accountability to their fellow citizens.

Citizen participation, when undertaken in the manner envisaged by the Constitution provides for mutual accountability on the part of the "governing" and the "governed". Based on the ideological principle upon which the Constitution is based, the concept of the governing and the governed does not exist since the citizens choose to govern themselves either through direct participation or through segmented participation using their elected representatives and public officers.