

Should the new Constitution deal with citizenship?

Citizens form the basis of every independent State because a State is an abstract concept comprising the people who live within a defined area. Of the people who constitute a State it is the citizens who have a right to determine who will govern them and, sometimes, to decide the form which their government should take.

Every State must specify who its citizens are and the extent of their rights and duties in relation to the government. This should be done in the constitution because if it is left to ordinary legislation the government may be tempted to deprive citizens of their citizenship, and hence of their vote, if it thinks they will vote for the opposition. Citizenship, in other words, is too important and fundamental to be left to ordinary legislation: the rules by which people acquire and lose citizenship should be set out clearly and comprehensively in the constitution itself.

History of Citizenship in Zimbabwe

Zimbabwe's history will almost certainly affect the way in which the new constitution deals with citizenship. Between 1891 and 1948 everyone in this country was a British subject, and after 1948 they were citizens of the self-governing colony of Southern Rhodesia. There was no such thing then as equal citizenship: Black citizens were not given the vote until 1961, and then only partially, and other restrictions imposed on Black citizens were so onerous that their citizenship meant very little. At Independence full citizenship was given to:

- everyone born in Zimbabwe, whether before independence or after independence, other than children of foreign diplomats, enemy aliens, illegal immigrants, or foreign residents;
- everyone born outside Zimbabwe, if his or her guardian parent was a citizen (but not if the guardian parent was a citizen by descent) or an non-citizen resident of Zimbabwe;
- everyone who acquired citizenship by registration (i.e. became a naturalised Zimbabwean).

Dual or multiple citizenship was specifically allowed — i.e., people could be citizens of Zimbabwe as well as of a foreign country. This was generally regarded as a sop to Whites, most of whom were citizens of Britain or South Africa, but as events showed it applied also to Zimbabweans of Mozambican, Zambian and Malawian origin.

The right to dual citizenship was removed from the Constitution in 1983 and Zimbabweans if dual citizens were required to renounce their foreign citizenship if they wanted to remain citizens of Zimbabwe. This proved difficult for the many Zimbabweans who were descendants of Mozambican, Zambian and Malawian migrant workers, so from 1990 to 2005 they were given a special dispensation so that they could vote even though they had lost their citizenship. They were later deprived of this right. Since then the Citizenship of Zimbabwe Act has been amended to allow them to “confirm” their citizenship and regain the right to vote. One thing this history makes clear is that citizenship should not be politicized to be granted, taken away and restored at a political whim. It must be protected by the Constitution itself.

Nature and Responsibilities of Citizenship

Citizenship is a bundle of rights and duties reflecting the relationship between an individual and a State. The nature and extent of these rights and duties vary from country to country. Because of Zimbabwe's history, as outlined above, citizenship issues are likely to be contentious when the new constitution is prepared, particularly the issue of dual citizenship. To enable informed decisions to be made on these issues, it may be helpful to examine the rights and duties attaching to citizenship, and to see how far they extend to non-citizens. The following are the main ones:

Right to Protection from the State: Citizens are entitled to protection from their State when they are within its borders and when they travel outside it. The State protects them by maintaining public order and ensuring that its laws are properly enforced. In a country like Zimbabwe where fundamental human rights are guaranteed by the Constitution, the State must ensure that those rights are respected. When its citizens are in foreign countries, the State must do what it can to uphold their rights in those countries. The State's duty to protect its people extends to non-citizens within its borders. The police, for example, have just as much a duty to investigate or prevent a crime committed against a Zambian or a South African as they have in regard to a crime committed against a Zimbabwean. The citizenship of the victim is immaterial. And the Constitution confers on citizens and non-citizens alike the fundamental rights to life, liberty, property and the protection of law.

Right to vote: Most modern States give their citizens the franchise, although not all citizens are allowed to vote: children and lunatics cannot do so, and some countries deprive long-term prisoners of the right to vote. Some countries impose residence qualifications on the right to vote so that citizens living outside the country usually cannot vote in elections. It should also be noted that while the right to vote in national elections is usually reserved to citizens, some countries allow non-citizens to vote in local authority elections. Zimbabwe used to, but does not now.

Duty of Allegiance or Loyalty to the State: As a corollary to the State's duty to protect its citizens, citizens owe a general duty of allegiance to their State..If citizens break their allegiance they may be guilty of treason or an equivalent statutory crime. This applies not only to citizens, however: States often expect all residents to be loyal whether they are citizens or not. Hence in Zimbabwe treason can be committed by citizens and by non-citizens ordinarily resident in the country.

The Obligation to Perform Military Service when Required: Arising out of their duty to be loyal to their State, citizens are expected to perform military service in defence of the State when called upon to do so. Again, this duty extends beyond citizens. In Zimbabwe, although in practice there is no national service in the form of military conscription, the National Service Act remains in force and it imposes obligations on all residents, whether citizens or not.

The Duty to Obey the Laws of the State: Citizens have a duty to obey the laws of their State but once again this duty is imposed equally on citizens and non-citizens. There is probably no law in Zimbabwe, apart from laws relating to elections, that apply only to citizens.

The Duty to Pay Taxes: Just as citizens and non-citizens must obey the laws of a State, so must they pay taxes to the State, because tax laws are not imposed on the basis of citizenship. Liability to tax usually depends on the taxpayer's residence or on the nature of the transaction that is being taxed. Sometimes, as in the case of VAT,

even temporary visitors are taxed.

The Duty to Respect the National Flag and the National Anthem: This duty is imposed on citizens by section 4(2)(b) of the Constitution. But non-citizens are expected to show similar respect.

When the rights and obligations that constitute citizenship are analysed, therefore, it can be seen that there is little difference between citizens and non-citizens except in regard to voting in national elections — and even there, not all citizens are allowed the vote and in the past even non-citizens have been allowed to vote. The issues of who should be given citizenship under the new constitution, and whether dual citizenship should be allowed, must be viewed in this light. We now turn to examine those issues, as well as the further issue of whether citizens should be allowed to hold dual citizenship.

Who Should be Given Citizenship Under the New Constitution?

Existing Citizens: Obviously, everyone who is a citizen of Zimbabwe before the new constitution comes into force must continue to be one afterwards. This is a point that was ignored when the citizenship provisions of the present Constitution were replaced by Amendment No. 19. Existing rights of citizenship were not preserved, thereby throwing into doubt the citizenship of all prior citizens from President Mugabe downwards. Such an absurd result cannot have been intended, but it shows how important it is for the new Constitution to preserve existing rights.

Citizens by birth: Everyone born in Zimbabwe should be a citizen by birth under the new constitution, irrespective of the nationality of his or her parents. The only restriction might be that at least one of the parents should be lawfully resident in the country. This would avoid the possibility of people coming here from another country to have a child, just so that the child can be a citizen of this country (which happens regularly in the United States). It is important to ensure that children born in this country are not stateless, because although Zimbabwe is not a party to the UN Convention on the Reduction of Statelessness, it is a party to the International Covenant on Civil and Political Rights, which states in article 24.3 that every child has a right to nationality. Moreover, the African Charter on the Rights and Welfare of the Child requires member states to ensure that their constitutional legislation provide for children to be accorded the nationality of the States in whose territory they are born if they have no other nationality (see article 6.4 of the Charter). Under our current law a child could be left stateless if neither of the child's parents is a citizen of Zimbabwe and the child does not acquire citizenship of another country through them (which could quite easily be the case — a citizen by descent usually cannot pass citizenship on to his children).

Citizens by descent: A person born outside Zimbabwe, either of whose parents is a citizen of Zimbabwe, should be a citizen by descent.

Citizens by registration: Citizenship by registration should be available to anyone who has lawfully resided in Zimbabwe for a minimum qualifying period. The qualifying period should not be excessive; five years is more than sufficient (this is the period currently laid down in the Citizenship of Zimbabwe Act).

Clearly there must be other qualifications, such as a clean criminal record, not being a burden on the State, and so on. Provided the candidate meets the requirements, he

or she should be entitled to citizenship, although there may need to be an overriding power granted to the executive to refuse citizenship on specified grounds. Any such refusal should be open to challenge in the courts.

Foreign spouses of Zimbabwean citizens: should be entitled to registration as citizens, perhaps after a reasonable qualifying period and provided that the State cannot show that the marriage is one of convenience. Under the present Constitution, foreigners who marry citizens can become citizens after five years' residence in Zimbabwe.

Foundlings: Children who are found abandoned in Zimbabwe and whose parents cannot be identified should be accorded Zimbabwean citizenship by birth because, as mentioned above, the African Charter on the Rights and Welfare of the Child requires our law to make provision for this.

Dual or multiple citizenship: The new constitution should not deprive Zimbabwean citizens of their citizenship solely on the ground that they are citizens of foreign countries. There are too many people born and bred in this country who through no choice of their own are citizens of neighbouring countries, for us to be exclusive in our citizenship. Some of the unforeseen problems that arise when dual citizenship is abolished have been mentioned earlier, and these problems will increase in future because the children of Zimbabweans living abroad will acquire the citizenship of their countries of birth as well as Zimbabwean citizenship by descent.

If we allow dual or multiple citizenship we shall be following the lead of some at least of our neighbours. South Africa has allowed multiple citizenship partially since 1995 and completely since 2004. Namibia allows dual or multiple citizenship for its citizens by birth. Zambia allows its citizens to hold foreign nationality until they reach the age of 22, when they must choose between their Zambian and their foreign citizenship.

Under our new constitution, therefore, a citizen by birth (or descent) should never lose his or her citizenship, except possibly if he or she formally renounces it and only then if he or she is not left stateless. A person who becomes a citizen by registration should not have to renounce any previous citizenship held, though it would be fair to provide that if such a person subsequently becomes a citizen of yet another country, he or she should lose his or her Zimbabwean citizenship.