



An Analysis of Zambia's Proposed Constitutional Amendments Relating to National Assembly Oversight

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Proposed Amendments to National Assembly Oversight

National Assembly

The Zambian Constitutional Amendment Bill was released for public comment on 21 June 2019. Among the proposed amendments includes the repealing of Article 63(2)(d) & (e) of the Constitution which states:

“The National Assembly shall oversee the performance of executive functions by:

(d) Approving public debt before it is contracted; and

(e) Approving international agreements and treaties before these are acceded to or ratified.”

A further proposed amendment which relates to National Assembly oversight, is Article 149(1) which currently states that the President may, subject to the approval of the National Assembly, create or divide a province or merge two or more provinces, as prescribed. The proposed amendment removes the phrase *‘subject to the approval of the National Assembly’*.

This policy brief seeks to demonstrate what impact these proposed amendments to National Assembly oversight will have, whether or not they interfere with the doctrine of separation of powers, and how they compare to regional practices and international best practice.

Parliamentary Oversight over Public Debt

According to the 2017 Global Parliamentary Report, parliamentary oversight is one of the three core functions of parliaments. It is how parliaments hold government to account on behalf of the people. It is a vital part of the system of checks and balances that ensures that no-one is able to wield absolute power in a democracy. The Universal Declaration on Democracy states that democracy is founded on the right of everyone to take part in the management of public affairs; it therefore requires the existence of representative institutions at all levels and, in particular, a parliament in which all components of society are represented and which has the requisite powers and means to express the will of the people by legislating and overseeing government action. Article 27 of the African Charter on Democracy, Elections and Governance emphasizes that in order to advance political, economic and social governance, State Parties shall commit themselves to strengthening the capacity of parliaments and legally recognized political parties to perform their core functions; Article 33 further encourages State Parties to institutionalize good economic and corporate governance through, inter alia: effective and efficient public sector management and through the promotion of transparency in public finance management.

A critical aspect of any government’s financial stability and sustainable economy is the ability to effectively manage its public debt. Given the importance of this administrative task it is imperative for countries to have capable oversight mechanisms in order to ensure transparency and accountability. The Public Finance Management Act governs public debt in Zambia.

Section 26(2) of the Act states that: “A public body shall not borrow and lend monies except with the written authority of the Secretary to the Treasury.” This provision must be read with Articles 114 and 207 of the current Constitution.

Article 114 of the Constitution stipulates:

- 1) The functions of Cabinet are as follows:
 - e) Recommend, for approval of the National Assembly:
 - i. Loans to be contracted by the State; and
 - ii. Guarantees on loans contracted by State institutions or other institutions.

Article 207 of the Constitution stipulates:

- 1) The government may, as prescribed:
 - a) Raise a loan or grant on behalf of itself, a State organ, State institution or other institution;
 - b) Guarantee a loan on behalf of a State organ, State institution or other institution; or
 - c) Enter into an agreement to give a loan or grant out of the Consolidated Fund, other public fund or public account.
- 2) Legislation enacted under clause (1) shall provide:
 - a) For the category, nature and other terms and conditions of a loan, grant or guarantee, that will require the approval by the National Assembly before the loan, grant or guarantee is executed.

From the aforementioned legislation, we see that despite the proposed repeal of Articles 63(2)(d) and 114(1)(e) which require the National Assembly to approve public debt before it is contracted into by the executive, this oversight role has not been removed completely as it is still covered by Article 207 of the Constitution. Furthermore the Public Finance Management Act ensures that the Secretary to the Treasury is accountable for financial management. At a first glance one could argue that repealing Article 63(2) may not have a dire effect in terms of checks and balances on financial management, however unless the law makers are clear as to the intention behind the proposed repeal of this particular Article, effecting this repeal into legislation should be cautioned, given the dangers of a lack of operational parliamentary oversight.

In order to establish the potential impact of this particular legislation, if any, it is useful to look at similar legislation in the region.

South Africa

Section 32 of Public Finance Management Act states the following:

- (2) A government may only through the following persons borrow money, or issue a guarantee, indemnity or security, or enter into any other transaction that binds or may bind a Revenue Fund to any future financial commitment:
 - (a) The National Revenue Fund: The Minister or, in the case of the issue of a guarantee, indemnity or security, the responsible Cabinet member acting with the concurrence of the Minister in terms of section 70.
 - (b) A Provincial Revenue Fund: The MEC for finance in the province, acting in accordance with the Borrowing Powers of Provincial Governments Act, 1996.

Chapter 4 of the South African Constitution states that the National Assembly is responsible for overseeing executive action.

Eswatini

Section 72(1) of the Eswatini Public Finance Management Act states that The Principal Secretary is responsible for finance and shall maintain a full record of accounts of the loans taken by government and

shall arrange timely repayment, furthermore, that the record of accounts of loans taken by the government includes information on the principal, terms of repayment, amounts drawn, interest and service charges accrued, principal and interest paid, and the balance outstanding and shall make the memorandum available in a timely way to Cabinet and parliament. Article 111 of the Eswatini Constitution requires the consent of cabinet for the settling of financial matters.

Zimbabwe

Section 11 of the Zimbabwe Public Debt Management Act states that the President may authorize the Minister to borrow a sum of money and the amounts that may be borrowed in any financial year by way of loans shall not exceed the limit fixed by National Assembly, which limit the Minister may propose to the National Assembly for approval by resolution or by means of a provision in a Finance Bill. Furthermore, Section 36 states that at least twice a year, the Minister shall furnish Parliament with a report on government debt management activities, guarantees and lending. The report shall be inclusive of the following:

- (a) Information on how the debt management strategy has been implemented over the course of the financial year;
- (b) Bi-annual reporting of debt management activities covering an evaluation of outcomes against the debt.

The Minister shall at the same time as the estimates of revenue and expenditure are laid before the National Assembly, table in parliament a comprehensive statement of the public debt.

Article 300 of the Constitution of Zimbabwe states that an Act of parliament must set limits on:

- a) Borrowings by the State;
- b) The public debt; and
- c) Debts and obligations whose payment or repayment is guaranteed by the State; and those limits must not be exceeded without the authority of the National Assembly.

An analysis of the aforementioned laws in the region provides for either the National Assembly; as is the case with South Africa and Zimbabwe or the Cabinet; as is the case with Eswatini, to have oversight over the management and administration of public debt and financial matters. However we see that this oversight function is stipulated in both the Constitution as well as in subordinate legislation, and thus the removal of National Assembly oversight in the Zambian Constitution is a clear deviation from regional practice.

International Agreements

International law comprises a body of rules which is concerned solely with the rights and obligations of sovereign States. Treaties and Conventions form part of international law and are written agreements that States willingly sign and ratify and as such are obliged to follow. For example, the United Nations Charter is a central instrument of public international law. Different States use different models for the adoption and enactment of international law into national legislation, and the organ responsible to oversee this enactment is usually stipulated within their respective constitutions. Below is a brief overview relating to parliamentary oversight of approval of international agreements in a few countries in the Southern Africa region.

South Africa

Article 231(1) of the South African Constitution states that an international agreement binds the Republic only after it has been approved by resolution in both the National Assembly and the National Council of

Provinces, unless it is an agreement of technical, administrative or executive nature, or an agreement which does not require either ratification or accession, entered into by the national executive; binds the Republic without approval by the National Assembly and the National Council of Provinces, but must be tabled in the Assembly and the Council within a reasonable time.

In the South African Constitutional Court Judgment on the invalidity of the disbandment of the SADC tribunal, the Court held that the President's participation in suspending the SADC Tribunal and subsequent signature of the 2014 Protocol on the SADC Tribunal, without referral to the National Assembly first, be declared unconstitutional. The Court stated the following: *'If it was the intention to withdraw from South Africa's obligations under both the Treaty and the Protocol, consent of Parliament had to be obtained first. Failure to do so, in the present context, is unlawful and furthermore irrational'*.

Eswatini

According to Article 238 of the Constitution, an international agreement executed by or under the authority of the government shall be subject to ratification and become binding on the government by an Act of parliament; or by a resolution of at least two-thirds of the members at a joint sitting of the two Chambers of parliament.

Malawi

In Article 89 of the Constitution, the President shall have the powers and duties to negotiate, sign, enter into and accede to international agreements or to delegate such power to ministers, ambassadors and high commissioners; and section 96 states that the members of the Cabinet shall have the function to assist the President in determining what international agreements are to be concluded or acceded to and to inform parliament thereon.

Zambia

The proposed constitutional amendments repeal Article 63(2)(e) which currently gives the National Assembly oversight over approving international agreements and treaties before these are acceded to or ratified. Similarly, Article 92(2)(c) explains that the President has the power to negotiate and sign international agreements, and the proposed amendment removes the requirement that his power be subject to approval by the National Assembly. A proposed amendment of Article 94 of the Constitution also reduces the power of the National Assembly to effectively veto appointments or measures taken by the President. The current Article 114 of the Zambian Constitution states that one of the functions of Cabinet is to recommend the accession and ratification of international agreements and treaties to the National Assembly. The proposed amendment to Article 114(1)(d), will allow the Cabinet to act without seeking approval from the National Assembly.

Currently, the constitutions of South Africa, Eswatini and Zambia have similar provisions relating to National Assembly or parliamentary oversight over international agreements. In Malawi, Cabinet is given the function of assisting the President in making this decision, this assistance may be interpreted as somewhat of an oversight function, moreover it is still a requirement that parliament is then informed of any decision made in this regard. In the case of Zambia, the proposed amendments seem to be a deliberate attempt to remove parliamentary oversight on this important area.

The Doctrine of Separation of Powers

A proposal has been made to amend Article 149(1) of the Zambian Constitution which removes the requirement for parliament to approve the President's decision to create or divide a province or merge two or more provinces. This particular amendment can be said to speak to the doctrine of separation of powers. The main objective of the doctrine is to prevent the abuse of power within different spheres of government and to make the branches of government accountable to each other. It is a separation of three main spheres of government, namely, Legislative, Executive and Judiciary. Some overlapping between powers is unavoidable since we talk here of spheres of what is in fact one government.

The proposed amendment has implications on a number of levels, including impacting on the resource allocations within government and to particular constituencies. The proposed amendment has the potential to influence power dynamics in the Cabinet itself, since the proposed amendment by Article 113(d) seeks to include provincial ministers in the Cabinet. In addition, the proposed amendment might impact on how electoral boundaries are delineated. One of the key recommendations from the 2011 Commonwealth Observer Group during the 2011 elections, was that; "to ensure equal suffrage is provided for, constituency boundaries for the National Assembly need to be reviewed in order to take account of the variation in population size." For the 2016 General Elections, the variation in population size across Zambia's districts and constituencies still remained an issue of concern. The Report of the Common Wealth Observer Group of 2016 illustrates the discrepancies in population size within constituencies; it was reported that in the Central Province for example, population ranges from 9,080 in the constituency of Lufubu, in the District of Ngabwe, to 103,986 in Kapiri Mposhi constituency, in the Kapiri Mposhi District. As the above example illustrates, the inconsistencies are extremely significant. It is evident that if this decision is left in the hands of the President alone, it could leave him with an inordinate amount of power over boundary demarcation which could ultimately result in the ability to manipulate in the outcome of the election process.

Conclusion

There has been opposition to the proposed amendments from not only the Zambian Law Society, but from opposition parties, civil society as well as the public at large. The removal of National Assembly oversight over executive functions not only undermines the doctrine of separation of powers, but also threatens the rule of law, and if the motive behind the amendments is not sought, it is likely to lead to an abuse of power within government.