



AN ANALYSIS OF ZIMBABWE'S PROPOSED CONSTITUTIONAL AMENDMENTS RELATING TO THE LEGISLATIVE AND EXECUTIVE ARMS OF GOVERNMENT

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Overview

A Constitution of any State is a body of fundamental principles which the State is acknowledged to be governed by; it is the supreme law of the land. The procedure for amending a Constitution differs from State to State; however, it is always more difficult to amend a Constitution than it is to pass or amend ordinary laws. The Constitution of Zimbabwe Amendment (No. 2) Bill, 2019 ('the Amendment Bill') was published in Zimbabwe's Government Gazette on 31 December 2019. The Bill seeks to make changes to the current Constitution of Zimbabwe ('the 2013 Constitution'), establishing the rules and principles by which the polity of Zimbabwe is governed. In total, there are 27 proposed amendments. This policy brief considers the proposed amendments as they relate to the Executive arms of government.

Changes to the Office of the Vice Presidency

The Amendment Bill seeks to fundamentally alter the legal framework that structures the office of the Vice-President of Zimbabwe. The Vice-President is the second-highest-ranking political official in the country, who performs the duties of the President when he or she is absent or otherwise unable to exercise their duties, and succeeds the President if he or she dies or is removed from office. The election of the Vice-President is constitutionally mandated in several countries in Africa.

Sections 91 to 101 of the Constitution of Zimbabwe, among other things, outlines the qualifications to become the Vice-President, how the election of the Vice-President is conducted, the way in which the Vice-President assumes office, the term of the Vice-President, the resignation and removal of the Vice-President and lastly, the method of succession of the President or Vice-President. The content of the 2013 Constitution relating to the office of the Vice-President promotes values of accountability, transparency and democracy.

Section 92 of the 2013 Constitution allows for the direct election of two Vice-Presidents. They are nominated by a presidential candidate, under a "running mate" system. This system provides the voters with a crucial choice as to which set of Presidential and Vice-Presidential candidates best aligns with their political views. In other words, section 92 enables Zimbabweans to research, vet, know about, and as part of a more extensive decision, select the Vice-Presidents of Zimbabwe. The "running mate" concept is also entrenched, in section 110(3) of the Constitution of Zambia, section 80(4) of the Constitution of Malawi, section 148(3) of the Constitution of Kenya and section 142(1) of the Constitution of Nigeria. Other countries, however, opt for a different mechanism whereby the Vice-President is appointed by the President. This process is followed in countries such as South Africa (section 91(2) of the Constitution), Namibia (section 28(1)A of the Constitution) and Angola (section 119(a) of the Constitution).

Section 94(2)(a) of the proposed Amendment Bill authorises the President to appoint two Vice-Presidents. This amendment would deprive the voters of the power to elect the two Vice-Presidents. The Bill also amends sections 95 and 97, transferring to the President exclusive authority to remove Vice-Presidents from office. Thus, the Amendment Bill seeks to further consolidate and concentrate governmental authority in the hands of the President, who is already the most influential figure in

Zimbabwe. The Amendment Bill would furnish the President with higher authority to appoint and remove, and quite possibly control, Vice-Presidents. These proposed changes increase the likelihood that Vice-Presidents will be chosen based on their loyalty to the President, and that Vice-Presidents will act deferentially towards the President, out of fear of being removed from office. The lack of a clear succession policy also impacts on national stability. These issues were very much apparent during Robert Mugabe's tenure as President. They would also contribute to the erosion of democracy in Zimbabwe, by depriving citizens of having their say on which candidates should become Vice-President. Transferring the power of removing the Vice-President from the National Assembly to the President, could ultimately lead to abuses of power or process.

These proposed amendments are contrary to the African Charter for Democracy, Elections and Good Governance, in particular article 3, which states that State Parties to the Charter should ensure access to and exercise of State power in accordance with the Constitution of the State Party and the rule of law.

Increasing the Number of Unelected Ministers

The Amendment Bill proposes to amend section 104(3) of the 2013 Constitution by increasing the number of Ministers and Deputy Ministers that the President can select from outside Parliament from five to seven.

On face value, this proposed amendment might not appear alarming. However, on closer inspection, this change could provide the President with greater powers, as it widens the scope of choice the President has in appointing Ministers outside of Parliament. Consequently, it increases the number of unelected officials in the Executive. It is not inconceivable that this could lead to unelected Ministers putting extraneous interests, such as those of the President, before the Zimbabwean people. However, if done appropriately, it could result in more suitable persons assuming Ministerial office, as the President could nominate individuals with the professional expertise in matters relating to the specific portfolio to which he or she is appointed.

In Zambia, under section 116 of the Constitution, it is required that the President only appoints Ministers from within Parliament, while section 42(3)(i) of the Constitution of Botswana, permits the President to select up to four persons as Ministers who are not members of Parliament. Article 27 of the African Charter on Democracy, Elections and Governance emphasises that in order to advance political, economic and social governance, State Parties shall commit themselves to strengthening the capacity of parliaments and legally recognised political parties to perform their core functions.

The Creation of a Public Protector

The importance of an oversight body such as a Public Protector is intended to improve the performance of governance structures and strengthen accountability. Article 15 of the African Charter on Democracy, Elections and Governance states that State Parties shall establish public institutions that promote and support democracy and constitutional order and that State Parties shall ensure that the independence or autonomy of these institutions is guaranteed by the Constitution. The Amendment Bill proposes to establish an entirely new executive office, the Public Protector.

The Bill equips the Public Protector with several powers including:

- To undertake investigations into administrative actions taken by officers, persons, or authorities who are part of any Ministry or department;
- To investigate where it is alleged that a person has suffered an injustice, and it is unlikely that judicial remedies will be available to that person. This function was previously assigned to the Zimbabwe Human Rights Commission (ZHRC) by section 243(1)(e) of the Constitution; and
- To investigate cases where a person, authority, offender, or officer is acting on behalf of the State or a public institution.

The Bill further gives Parliament latitude to pass laws furnishing the Public Protector with other duties. The Amendment Bill also empowers the ZHRC to take over and continue any investigation instigated by the Public Protector where the investigation concerns human rights, as well as to refer matters to the Public Protector that it believes fall within the Public Protector's scope of authority.

Under section 244A(2) of the Bill, the Public Protector and the Deputy Public Protector are appointed by the President, following consultation with the Judicial Service Council (JSC), and the Committee on Standing Rules and Order (CSRO). If the President elects to go against the recommendations of the JSC and the CSRO, he or she needs to merely inform the Senate of this as soon as possible. Conversely, more stringent rules apply to section of members of the Human Rights Commission, who "must be chosen for their integrity and their knowledge and understanding of, and experience in, the promotion of human rights". Also, the Chairperson of the Human Rights Commission "must be a person who has been qualified for at least seven years to practice as a legal practitioner".

It is of concern that the President has such extraordinary, and rather untrammled, powers of appointment in relation to the Public Protector and the Deputy Public Protector. In practice, this enables the President to select appointees based on self-interest or political motivations. This problem is amplified by the fact that there is no constitutional requirement that holders of the office of the Public Protector possess experience, qualities, or aptitudes required for that office.

The Human Rights Commission is empowered to take over matters being investigated by the Public Protector, on condition that the "dominant question" involves human rights violations by the government. These overlapping mandates may well give rise to ambiguity and misunderstanding. In addition, there does not seem to be any justification capacity-wise for the creation of another oversight body as government appears to be struggling to financially capacitate the existing oversight bodies.

Decreasing Parliament's Role in Concluding Agreements

The Amendment Bill proposes to change the words "foreign organisations or entities" to "international organisations" by amending section 327(3)(b) of the Constitution. Foreign organisations or entities refers to any institution that operates or is based outside of Zimbabwe, such as foreign international banks and financial institutions. While international organisations themselves are established by treaties or other international instruments, including the World Health Organisation and the African Union, this change would confer on the President the power to conclude agreements that bind Zimbabwe with foreign organisations and entities without the approval of Parliament. According to the 2017 Global Parliamentary Report, parliamentary oversight is one of the three core functions of Parliament. It is how Parliament holds 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 can wield absolute power in a democracy.

The amendment would allow the President to enter into agreements with foreign organisations, where previously the President could only enter into agreements with international organisations. Foreign organisations encompass a more considerable breadth of organisations, and the proposed amendment poses a risk that agreements against the national interest would bind the State, including possibly burdening Zimbabwe with further economic debt. It could also increase the opportunities for corruption and render the process of entering into such agreements decidedly less democratic. Currently, the provision ensures that Parliament is able to query the Executive before entering the country into binding agreements. It is further unclear how this proposed amendment will coexist with section 300 of the current Constitution which empowers parliamentary oversight over public debt.

In comparison, section 89 of the Constitution of [Malawi](#), gives the President 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. In contrast, section 238 of the Constitution of [Eswatini](#), provides that 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.

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, was unlawful and furthermore irrational.

The [Zambian Constitutional Amendment Bill](#) which was released for public comment on 21 June 2019 is yet to be passed into law. Among the proposed amendments includes repealing the section which provided that the National Assembly shall oversee the performance of Executive functions by approving international agreements and treaties before these are acceded to or ratified. 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 is likely to lead to an abuse of power within government. The increased attempts in the region to concentrate power in the Presidency should raise alarm.

Gender and Youth Quotas in the National Assembly

Section 124(1)(b) of the 2013 Constitution seeks to establish a mandatory policy of affirmative action in the National Assembly of Zimbabwe, to ensure that, at a minimum, 22 per cent of the National Assembly’s legislators are women. The words “for the life of the first two Parliaments” contemplates that this should be a temporary measure, to boost female representation in the National Assembly in the short-term, and to address long-standing gender discrimination and inequality in Zimbabwe. It appears relatively clear that the aim of section 124(1)(b) is to foster the social conditions in which high female representation in Parliament occurs naturally, without the implementation of gender-specific quotas. The Amendment Bill intends to extend this policy to the “first four Parliaments”. This proposed amendment is a progressive step as it secures, at the very least, a baseline of female participation in the National Assembly, and will prevent the regression of gender equality in Parliament. This provision is in line with article 3 of the provisions of the [African Charter on Democracy Elections and Governance](#) which calls for the promotion of gender equality in public and private institutions. This is also reiterated in the [Convention on the Elimination of All Forms of Discrimination against Women](#) which stipulates that States shall take all appropriate measures to ensure that women participate in decision-making.

In practice, extending the force of section 124(1)(b) to a further two parliamentary terms could constrain rather than encourage female participation in the National Assembly. This is a distinct possibility if society expects female candidates to only, or primarily, contest the added 60 seats reserved for them, rather than the other 210 seats reserved for all political candidates. Thus far, the quota has not resulted in increased female participation in politics but has rather discouraged it. The quota has enabled parties to ignore or discourage female candidates from participating in elections on the basis that they would be catered for by the quota. Rather than increasing the number of women in Parliament, it has contributed to keeping it at mostly the same level. In reality, the quota is deceptive as it saves the State from introducing actual gender parity provisions such as 50/50 representation including in political party selection. In comparison, Kenya adopted a more robust and progressive Constitution in 2010 that deliberately compels the State to take affirmative measures to address gender imbalances in institutional set up.

Another proposed amendment is in section 124(1)(c), which allocates seats in the National Assembly for ten youth members, that is, persons aged from twenty-one to thirty-five years of age, one from each province. It is not unprecedented across Africa for countries to enact constitutional provisions reserving and adding – or allowing the Parliament to pass laws in this vein – seats in their Parliaments for youth members. This has been the case in Kenya (sections 97(1)(c) and 98(1)(c) of the Constitution), Uganda (section 78(1)(c) of the Constitution) and Rwanda (section 75(3) of the Constitution). According to the 2003 [UN World Youth Report](#), an analysis of the global experience of children and young people over many years reveals the extent to which the absence of their perspectives in policy-making at all levels has consistently militated against their best interests.

Overall, the insertion of this requirement of guaranteed youth representation in the National Assembly of Zimbabwe – although only providing for 10 youth members – is a change that will increase the number of young people in the government, enhancing the democratic character of Zimbabwe’s politics. After all, young people do comprise **most** of the Zimbabwe’s population. It may even encourage young people to be more active in the national affairs of Zimbabwe. However, there is a risk that this policy could entrench low levels of youth representation in the National Assembly, as young people may be expected to only run for those ‘youth-only’ seats.

Conclusion

Overall, the Amendment Bill dilutes democracy, weakens the rule of law, and fails to take sufficient heed of human rights, particularly those of a civil and political character.

Portions of the Amendment Bill would be a backward step for democracy, accountability, the divisions of governmental power, representativeness, the rule of law, and human rights in Zimbabwe. It would further allocate power to the President while diluting or enfeebling mechanisms intended to hold the President to account for his or her actions, wrongdoing, and in some cases, illegal conduct. Thus far, several civil society and human rights organisations and activists have expressed their profound concern towards the contents of this Amendment Bill, including the Zimbabwe Human Rights NGO Forum, the Zimbabwe Environmental Law Association, Crisis in Zimbabwe Coalition, and Election Resource Centre.