

ZIMBABWE ELECTION SUPPORT NETWORK



*PROMOTING DEMOCRATIC
ELECTIONS IN ZIMBABWE*

AN ANALYSIS OF THE ELECTORAL AMENDMENT BILL, 2017, GAZZETTED 18 SEPTEMBER 2017

Introduction

A Bill proposing to amend the Electoral Act [Chapter 2:3] was gazetted on 18 September 2017. Titled, the Electoral Amendment Bill, 2017, the Bill seeks to introduce amendments that specifically deal with the voter registration process. The proposed amendments largely cater for the introduction of the Biometric Voter Registration (BVR) system. In this position paper, ZESN discusses the proposed amendments considering the Constitutional principles that set out the minimum thresholds of free, fair, peaceful and credible elections.

Executive Summary

A closer scrutiny of this Bill shows that it largely mirrors a law passed a week earlier, through the gazetting of Statutory Instrument (SI) 117/2017, on the 15th of September 2017, through the Presidential Powers (Temporary Measures) Act. The Bill is meant to eventually

substitute the SI given that laws promulgated via the use of presidential powers do not have shelf life beyond six months.¹ The president has, in the past utilised the presidential powers to effect amendments to the Electoral Act.² It must be pointed out that it is undesirable to use the presidential powers to amend laws of this nature as this seems contrary to the urgent measures that are contemplated by Section 2 of the Presidential Powers (Temporary Measures) Act that provides for the very limited circumstances under which a President may usurp the primary law-making function of parliament. Parliament had all the time since the promulgation of the new Constitution in 2013, to bring the laws within the ambit of the Constitution, including the provisions for voter registration, in preparation of the 2018 election which was always foreseen. The use of the presidential powers seems unjustified.

Secondly and more fundamentally the use of presidential powers, to effect changes to Electoral Act, followed by the subsequent passage of the Bill to ratify the president's actions appears to violate the principles of separation of powers and is against the letter and spirit of the Constitution. Section 134 of the Constitution now restricts the promulgation of legislation via delegated legislation as was done by the President. The Presidential Powers Act precedes the Constitution. The wording of the Constitution seems to limit the use of presidential powers even further. It clearly stipulates that the primary law-making power of parliament may not be delegated.³ The wording of the Presidential Powers (Temporary Measures) Act as read with the presidential powers regulations promulgated seem to conflict with the clear constitutional provisions as they purport to delegate primary law-making power to the President without specifying the nature and scope of the regulations as required by the law.⁴

ZESN has previously pointed out that the electoral framework of Zimbabwe requires comprehensive and holistic amendments to ensure it is in conformity with the Constitution and regional guidelines on good governance and elections. So far, the piecemeal approach adopted in the amendments represents the objectionable approaches that have been previously adopted in the past, of amending parts of the sum to the Electoral Act. These proposed amendments represent the continuing piecemeal approach to amending the Electoral Act. This is the third time the Act is being amended in just less than four years since the promulgation of the Constitution in 2013. ZESN observes that some of the proposed amendments deal with issues that could have been addressed by previous amendments if the process had been done meticulously. Of greater concern is that the current amendment bill only focusses on a narrow, specific issue related to voter

¹ Section 6(1) of the Presidential powers (Temporary Measures) Act

² See for example, Statutory Instrument (SI) 85 of 2013.

³ See section 134(a) of the Constitution

⁴ See section 134(d) of the Constitution

registration. The bill once again fails to address all key provisions of concern that still fall foul of the Constitution and have been raised by ZESN in previous papers. The passage into law or otherwise of this Bill will not resolve the broader problem of incomplete and piecemeal amendments to the electoral law. Despite the latest proposed amendments, it is submitted that several legal provisions in the Electoral Act still require revision, to bring them in line with the Constitution. The existence of potentially unconstitutional provisions within the Electoral Act and other relevant legislative pieces has a bearing on the holding of a free, fair, peaceful and credible election as envisaged by the Constitution and the SADC principles and guidelines governing the conduct of democratic elections.

ZESN has previously raised concerns on several issues that have a bearing on the holding of a free, fair and credible election and still require revisiting including the following issues:

- Addressing the residence requirement to bring it in line with the political rights in terms of Section 67 of the Constitution
- Addressing the question of the right to vote of categories of voters that include the prisoners, the infirm and the people in the diaspora, in accordance with Section 67 of the Constitution
- Ensuring the Accreditation Committee of ZEC constitutes members who are ZEC Commissioners in line with Section 239 of the Constitution
- Specifically providing for the Biometric Voter Registration(BVR) system in the Electoral Act by promulgating adequate legal provisions that address administrative and implementation issues of the BVR system
- Revisiting voter registration issues such as the, maintenance of the voters’ roll and provisions on voter education in line with the letter and spirit of the Constitution

Having said that, the summary below specifically discusses the proposed amendment Bill:

Clause to the Electoral Amendment Bill	Summary of amendment to the Electoral Act	Commentary and analysis of the amendment
Clause 1	The Clause provides the short title of the act, namely The Electoral Amendment Act,	No substantive comment

<p>Clause 2</p>	<p>The second clause proposes to repeal and substitute section 24(1) of the Electoral Act. The new section removes the provision that requires the voter registration officer to fill the claimant's form for voter registration on behalf of a potential voter.</p>	<p>The proposed amendment must be considered progressive as it now provides for an efficient, expedited and simpler process for voter registration compared to the current provision of the Electoral Act.</p> <p>The current provision in the Act places an obligation on the voter registration officer to complete the prescribed form on behalf of any person wishing to be registered as a voter. Such a process results in bureaucratic processes causing unnecessary delays and bottlenecks to the voter registration processes. A further concern previously raised has been that the formulation of Section 24(1) is deliberate to serve profiling and intimidatory purposes.</p> <p>The amendment in the bill would serve to address the twin concerns outlined above.</p> <p>The new provision is consistent with Section 155(2) (b) of the Constitution that places an obligation on the State to take appropriate legislative measures to ensure that all eligible voters are registered as voters. It also resonates with the spirit of the SADC Principles and Guidelines Governing the Conduct of Democratic Elections.</p> <p>Recommendation</p> <p>For the avoidance of doubt, it may be necessary to include a specific provision in the Act or in subsidiary regulations that sets out the process of accessing and the submission of the registration form by a claimant. The provisions can, for example, set out where the registration forms may be accessed either through physical or online means.</p>
<p>Clause 3</p>	<p>Clause 3 introduces a new procedure to be followed by a claim for transfer by a voter from one constituency to another</p>	<p>Clause 3 amends section 25 of the Electoral Act to make it consistent with the proposed amendment to Section 24 of the Principal Act as explained above and brings uniformity to the provisions related to the process of voter registration set out in the two sections.</p> <p>Clause 3 also amends Section 24(5) by the deletion of "the Registrar-General of Voters" and</p>

		<p>the substitution of, "the Commission." Question marks have previously been raised on the role of the Registrar General in election related processes. His credibility and neutrality has largely been tainted by his alleged bias to one party. The failure to furnish the voters' roll in 2013 despite a court order directing him to do so, only served to confirm the suspicions on the role he played in elections.</p> <p>By deleting any reference to his office and substituting it with the word, 'Commission' the act brings the provision into conformity with the Constitution which gives the Zimbabwe Electoral Commission the sole mandate to run elections, which is progressive.</p>
<p>Clause 4</p>	<p>The clause seeks to repeal subsection 3,4 and 5 of Section 36B of the electoral Act by requiring every eligible voter to register to vote.</p>	<p>This amendment seeks to align the electoral provisions with the new voter registration system-the Biometric Voter Registration (BVR) system. The clause introduces the requirement that every eligible voter (new and old) must register/re-register as a voter, using the new biometric-based system. This is a departure from the previous provisions where those already on the voters' roll did not need to re-register. Every eligible must register whether as new voters or returning voters to enable ZEC to produce an entirely new voters' roll based on the biometric voter registration system.</p> <p>This is progressive given the multiple problems and inaccuracies of the old voters' roll. ZESN has previously highlighted the benefits of the BVR system based on comparative experiences gleaned from other jurisdictions where the system has been used. If deployed properly the BVR system can address some common problems from previous election processes such as the duplication of names and errors to the voters' rolls as well as elimination of the phenomenon of double voting and ghost voting cases.</p> <p>The amendment made by clause 4 is deemed to have taken effect on the 14th of September 2017. This has been done to retrospectively legalise the voter registration that started on</p>

		<p>that day in the absence of a legal instrument to support the process. If anything, this goes to show the haphazard nature in which the amendments to the Electoral Act have been effected in the past-a concern which has been previously raised by ZESN.</p> <p>Recommendation</p> <p>There seems to be a need for specific provisions in the Electoral Act that set out the legal parameters of BVR system. In its current formulation the Electoral Act does not envisage an entirely new form of registration system such as the BVR system.</p>
<p>Clause 5</p>	<p>This clause proposes to repeal the provision to section 56(1)(a) of the Electoral Act that entitles a person whose name does not appear on the voters' roll to vote upon production of a voter's registration certificate (voters slip)</p>	<p>This amendment deals with one of the most contentious issues raised in previous elections relating to the use of the voters' registration slips by voters whose names were not appearing on the voters' roll on election day despite having registered to vote. The acceptance of the voters' slip was an implicit acceptance by the electoral body that the voters' roll was not in order as many people who had registered were missing from the voters' roll and ended up voting using the voter's slip on election day, as evidenced by the 2013 national election.</p> <p>The extremely high number of voters' slips seen in the 2013 election raised controversy and suspicions that persons disentitled to vote took advantage and abused the facility to repeatedly vote thereby affecting the credibility of the election. ZESN has previously raised concerns on the use of registration slips especially in subsequent by-elections held after the 2013 elections.</p> <p>The proposed amendment is therefore welcome. It is consistent with constitutional provisions enshrined in section 155. However, the proposed amendment may still retain to haunt future processes, in the absence of a clean and comprehensive voters' roll that accurately captures names of all eligible voters. Every previous election has been</p>

		<p>characterised by an inaccurate/erroneous and incomplete voters' rolls that has affected the credibility of previous electoral processes and outcomes.</p> <p>Recommendation</p> <p>ZEC must produce a clean, comprehensive and accurate voters' roll containing names of all registered voters, in accordance with section 155 and section 67 of the Constitution that guarantee the right to vote for all citizens.</p>
Clause 6	<p>The clause seeks to effect some 'minor and consequential Amendments' to the Electoral Act, by removing references to abolished posts of "Registrar-General of Voters and "constituency registrars".</p>	<p>This amendment epitomises the rushed and often clumsy way amendments to the Electoral Act have been done along the years. This amendment should have been dealt with given that the Electoral Act has already been amended at least thrice after the enactment of the 2013 Constitution. The reference to abolished posts should at least have been easily addressed by now, given the clear language of the Constitution on the role of the Zimbabwe Electoral Commission to run elections. However, the amendments should be applauded to the extent they align the Electoral Act with the Constitution.</p> <p>Recommendations.</p> <p>The State should still consider a comprehensive, all-inclusive process of amending the Electoral Act to address all gaps and inconsistencies to the Constitution that still remain within the Electoral laws. ZESN has produced previous policy papers on areas of the Electoral Act requiring amendments. By focussing the latest amendments on the registration process only, another opportunity to align the Act with the Constitution has been missed and this may come back to haunt the national election expected in under a year from now</p>

Conclusion

ZESN has previously pointed out that electoral reforms were a key priority in promoting credible elections as Zimbabwe prepares for the 2018 harmonised elections. ZESN recommends and calls upon Parliament to commit towards a comprehensive process of aligning the Electoral Laws with the Constitution well in advance of the forthcoming election. ZESN considers the use of presidential powers to amend electoral laws, to be inconsistent with provisions of the Constitution. ZESN therefore calls upon parliament to take the lead in amending the electoral laws, considering submissions that have been made in previous ZESN position papers that enhance the freeness, fairness and credibility of the electoral process.