

ZIMBABWE ELECTION SUPPORT NETWORK



POSITION PAPER ON CONSTITUTION OF ZIMBABWE AMENDMENT (NO. 2) BILL



May 2020

EXECUTIVE SUMMARY

The government is proposing to amend the Constitution and some of the proposed changes affect the conduct of elections. This is ZESN's position paper concerning the proposed changes. While ZESN acknowledges that the Constitution is not set in stone, it encourages caution and restraint before changing it, particularly so not long after its adoption and before some parts have been implemented. ZESN urges a **more consultative, cooperative and consensus-based approach** and discourages unilateralism based on numerical superiority in parliament.

ZESN is concerned by the **proposal to delink the delimitation** of electoral boundaries from the population census. This will affect democratic representation and may lead to gerrymandering. ZESN urges the government to move forward the **Population Census** as a better alternative to amending the Constitution.

ZESN believes there is no need to remove the **running-mate** provisions in presidential elections, especially when they have not even been tested. The proposal to remove these provisions is based on an irrational fear. The removal will disturb a more democratic succession system.

The proposed amendments to the **devolution provisions** demonstrate a need for a comprehensive re-think of the devolution model rather than doing piece-meal changes that will result in a patched-up and incoherent Constitution. There is no need to create two centers of power in the Metropolitan Provinces which will be the result of the proposed amendment.

While extending the women's quota in Parliament appears like a progressive idea, it perpetuates a façade of promoting **women's participation** in politics when the government should be implementing the principle of 50/50 (equal) representation as required by the Constitution. Another 10 years of the women's quota is not going to solve the problem of under-representation and authorities must take a bolder step if they are committed to gender equality. Likewise, **the new youth quota** of 10 youth members of parliament (MPs) is an act of political tokenism rather than a substantive step to promote youths' participation in parliament. The amendment must also be redesigned to ensure it promotes equal gender representation.

ZESN is concerned with proposals to change rules for appointing judges to the Supreme Court and the Constitutional Court and the retirement of judges. It is also concerned with changing procedures for appointing the Prosecutor General. These changes affect the independence of the judiciary and prosecution authority, which are important political referees in electoral disputes.

INTRODUCTION

On 31 December 2019, the Government of Zimbabwe (GoZ) published the Constitution of Zimbabwe Amendment (No. 2) Bill (Constitutional Bill) in the Extraordinary Government Gazette. This was the formal commencement of the special procedure to amend, for the second time in two years, the Constitution of Zimbabwe which was adopted following a popular referendum in 2013.

The Constitutional Bill includes proposals that affect the conduct of elections in Zimbabwe. Monitoring the conduct of elections and the rules that affect elections are important parts of the core business of the Zimbabwe Election Support Network (ZESN). It is important, therefore, to examine the Constitutional Bill and state our position on the proposed changes.

The purpose of this paper, therefore, is to set out the ZESN position concerning proposals in the Constitutional Bill that affect the conduct of elections. This will be done through an examination of the relevant proposals. *This position paper is structured as follows:*

- Following this introduction, the proposed amendments that affect the conduct of elections will be outlined.

- Thereafter, in order to provide the broad context, there will be an overview of arguments for and against amending the constitution.
- The fourth section contains a detailed examination of each of the proposed amendments.
- The fifth section will provide the conclusions and recommendations.

OUTLINE OF THE PROPOSED AMENDMENTS

The following proposed amendments will have a direct impact on elections:

- *the election of Vice Presidents*
- *the delimitation of electoral boundaries*
- *the composition of provincial and metropolitan councils*
- *the extension of the women's parliamentary quota*
- *the introduction of the youths' parliamentary quota*
- *the appointment of judges of Supreme Court and the Constitutional Court*
- *the appointment of the Prosecutor-General*

ZESN will examine the effect of each of these proposed amendments and provide an opinion and recommendations and, where applicable, alternative suggestions. However, before this examination, ZESN provides a general overview of its position regarding amending the Constitution.

GENERAL OVERVIEW CONCERNING CONSTITUTIONAL AMENDMENTS

ZESN accepts that the Constitution represents a social contract between the State and the citizens and, as such, it is subject to change over the course of time. However, ZESN believes that there are good reasons why the Constitution must be considered sacred and, therefore, ought to be protected from unwarranted changes. While as per constitutional procedure a party that has a special majority in Parliament can institute amendments to the Constitution, ZESN is of the view that such changes should strengthen rather than weaken democracy.

ZESN acknowledges that it may be necessary to amend the Constitution in order to make corrections to the original text. This may be because errors or gaps have been observed in attempts to implement the Constitution. The existence of the special procedure to amend the Constitution is a recognition of the need for a facility to amend the Constitution. The threshold for changing the Constitution is higher than for amendments to ordinary legislation which is a reaffirmation of the special status of the Constitution.

ZESN also acknowledges that amending the Constitution may be justified on the grounds that it is consistent with democracy since it is done through democratically elected representatives. It also enables society to adapt to changing circumstances and avoids rigidity which might tie society to unworkable systems. However, the special amendment procedure must strike a balance between preserving the Constitution from unwarranted changes and freeing society from restrictive rigidities of a Constitution.

The above points notwithstanding, ZESN believes that because of its status as the supreme law of the country, the integrity of the Constitution deserves special protection. The Constitution is the cornerstone of the country, the very foundation of the nation, and unnecessary tempering with it structurally weakens it.

The Constitution contains the founding values and principles of the nation and anything that threatens them must be avoided, regardless of procedural legality of that process. There is also a need to prevent potential floodgates of amendments which would result from changes being made unnecessarily.

Proposed constitutional amendments may also be objectionable on the basis of unconstitutionality. This may be because they do not meet procedural requirements or on the basis that the substantive content violates existing parts of the Constitution. ZESN takes note of the judgment of the Constitutional Court in the case of **Gonese and Another**

v Parliament of Zimbabwe and Others delivered on 31 March 2020 which confirmed the legal point that a constitutional amendment can be unconstitutional if it does not meet procedural requirements.

Overall, it is ZESN's view that while there is no bar against constitutional amendments, great care, caution and restraint must be the hallmarks of the approach towards the nation's most important law and amendments must only be made as a matter of necessity and because they are unavoidable.

ZESN does not believe that a persuasive case has been made for the latest set of proposed changes, especially as they come so soon after the current Constitution was adopted and some of the provisions have not even been implemented. ZESN is also concerned by the unilateralism that characterizes the approach to changing the Constitution when the making of the current Constitution had marked an important step in promoting cooperation and consensus as a norm of constitutional making.

- **DELIMITATION: MARKING ELECTORAL BOUNDARIES**

A key proposed change is that the marking of electoral boundaries will no longer be linked to the population census as has been the case all along in terms of section 161 of the Constitution. This provision requires delimitation to be done *"as soon as possible after a population census"*. Clause 12 of the Constitutional Bill *"de-couples ZEC's delimitation function from the population census"*.

No specific or convincing reason has been given for de-linking the marking of electoral boundaries from the census. The last census was in 2012 and the next is due in 2022, a year before the elections in 2023. However, ZEC has signalled its intentions to carry out delimitation earlier than 2022. There has been no delimitation since 2008. Census data from 2012 is likely to be outdated and ZEC does not want to wait for the next census in 2022. This could explain why the amendment seeks to de-link delimitation from the population census. If this is the sole reason it is a quick-fix to liberate ZEC from the constitutional obligation to use the latest census data so that it can go ahead before the next census.

While recognizing the need for a new delimitation exercise as current electoral boundaries are arguably no longer representative of the population, ZESN does not believe the solution lies in de-linking the exercise from the population census. The argument that ZEC can rely on the voters' roll to mark electoral boundaries is inadequate. A Member of Parliament or council is a representative of all people in a constituency, not just those that are registered on the voters' roll. Electoral boundaries affect other aspects, including the allocation of resources to constituencies or wards. The change will have a fundamental impact on democratic representation in the political community.

The government still has time to move the census forward from 2022, so that ZEC will have ample time to do the delimitation exercise using latest population data. The census is governed by legislation and it can be easily changed without affecting the constitutional fundamentals. If the census is going to be held in 2022, there is no reason why it can't be moved forward to 2020 or 2021 in which case ZEC will still be able to mark electoral boundaries well in time before the 2023 elections.

The issue of delimitation is of utmost importance in electoral politics because of the common problem of gerrymandering. This is a practice where electoral boundaries are manipulated in order to suit one political party's interests over its competitors' interests. There will be fears and suspicions that de-linking of the delimitation exercise from the population census is another way towards gerrymandering. There is need to exercise great caution before de-linking the marking of electoral boundaries from the population census data.

- **ELECTION OF VICE PRESIDENTS**

The proposals seek to change the way the Vice Presidents come into office. Currently, the provisions that are due to start operating at the 2023 elections require Vice Presidents to be elected alongside the President. These are often referred to as the "running mates' provisions". The proposals will change this so that the Vice Presidents will be appointed by the President.

The running mates' provisions were designed so that there would be a clear hierarchy in the presidency as there would be a first and a second Vice President. It would also ensure a smooth succession in the event of a vacancy in the Presidency as the First Vice President would automatically take over. It was also considered more democratic because the successor would be a popularly elected person, not an appointee of the president.

However, critics of the running mates' system argue that it creates multiple centres of power since the Vice Presidents can claim a popular mandate from the people as their source of authority. This is different from a situation where the President is the appointing authority. Critics fear that the President's authority might be challenged by the deputies. There is also concern that the system creates incentives for the Vice President to displace his boss since they will be automatically assured of taking over by virtue of the succession provisions.

These arguments are based on an irrational fear of a so-called powerful Vice Presidency. They ignore the fact that the President would normally be deputized by a person that she/he would have chosen and is therefore more likely to be an ally than a competitor. Furthermore, they overlook the fact that the Vice President has no incentive to overtake his boss because doing so results in a moral hazard. The moral hazard is that if he/she could displace his/her boss, his/her deputy would also have the same power to displace him/her. It is not in deputy leaders' interests to fight and displace their bosses.

The proposed amendment will take the country back to the old constitutional dispensation where Vice Presidents were appointed by the president. Succession in the event of a vacancy in the presidency would be settled by the incumbent party and therefore the person would not have a popular mandate.

- **CHANGES TO METROPOLITAN COUNCILS**

The Constitutional Bill seeks to make changes to the devolution model by merging provisions applying to provincial and metropolitan councils, the latter two being Harare and Bulawayo. The amendment will ensure that chairpersons of the metropolitan provinces will be elected just like chairpersons of provincial councils are elected by their fellow councilors. At present, the mayors of the cities of Harare and Bulawayo automatically become chairpersons of the metropolitan provinces.

On the face of it, the change will enhance democracy in the metropolitan councils. However, the reason why designers of the Constitution created different leadership models for metropolitan councils and provincial councils is the two types of administrations are different. Metropolitan provinces cover the two large urban areas which are already governed by Mayors and city councils. Having an elected mayor and a provincial chairperson only creates two rivals running the same area. This results in duplication of roles and potential conflicts if held by two different persons. This is likely to cause problems.

One alternative, if there are to be any changes at all, is to re-think the whole idea of having devolved metropolitan councils led by a provincial chairperson in addition to urban councils presided over by a mayor in Harare and Bulawayo. Devolution would apply to all other provinces not to the two major cities which will simply be run by urban councils. There is no practical purpose to be served by having an urban council and a provincial council covering the same geographical area.

- **REMOVING MPS FROM PROVINCIAL AND METROPOLITAN COUNCILS**

Another proposed change to the devolution model is to remove Members of Parliament from membership of provincial councils. Currently, MPs from each province also sit as members of provincial and metropolitan councils. The main rationale for this model was that it would save costs rather than have a new set of councilors. However, it diluted the concept of devolution.

The proposal will mean there will be 10 provincial council members elected separately based on proportional representation. This will make the devolved councils more exclusive and it will also increase spaces of

representation for politicians. If they are not elected for national Parliament, they can always try the provincial councils.

If used well, provincial councils can be good spaces for grooming future MPs. It might be a good opportunity to have preferential seats for women and youths and the disabled at this level.

What is evident from this discussion is that there are still unresolved issues concerning devolution, which seven years after the Constitution was adopted, has not yet been implemented. This amendment process is a good opportunity to re-visit the devolution model as a whole rather than engage in these piecemeal amendments which will leave the Constitution patched-up and untidy. ZESN would recommend a proper study of the current model and a comprehensive solution that can be worked out through co-operation, consultation and consensus.

- **EXTENDING THE WOMEN'S PARLIAMENTARY QUOTA**

The proposed amendment seeks to extend the provision for a maximum quota of sixty (60) proportional representation seats for women in the National Assembly for a further two Parliaments. The current provisions provide for the women's quota for a maximum of two Parliaments, due to expire in 2023.

This might be presented as a correction of the Constitution, having identified that the period given in the original document is insufficient. Such an extension is presented as a positive step to promote women's representation in Parliament. Nevertheless, there is some criticism for this amendment for being inadequate, misleading and perpetuating inequality while being presented as progressive.

Critics argue that there must be equal representation of women as required by the values, principles and provisions of the Constitution and that this quota system detracts from the demand for equality. The women's quota was presented as a measure to promote the representation of women in parliament but it was a compromise and a climb-down from the requirement for gender equality. Male MPs were not prepared to give up their seats in favour of women, hence the creation of 60 additional PR seats.

This achieved two things: parliament got bigger with 60 additional seats without necessarily promoting gender equality. In a political system in which political representation is largely constituency-based, proportional representation MPs have little clout and visibility. Therefore, PR MPs are given derisive names on the grounds that they are beneficiaries of a system rather than worthy candidates compared to constituency-based MPs.

The proposed extension of the women's quota is an acknowledgement that it has not worked. However, no investigation has been done to examine why it has not worked. Extending the women's quota for another two terms does not fix the problem. The proposed extension might be well meant but not enough thought has gone into it. The government should consult more and consider a system which guarantees 50/50 representation in Parliament.

- **THE YOUTH QUOTA**

The proposed amendment seeks to reserve 10 proportional seats in the National Assembly for youths. This youth quota will work in the same way as the women's quota. While it looks positive, it is questionable whether it satisfactorily addresses the issue of underrepresentation of young people. It increases the size of Parliament without enhancing the role of young people in politics. Similar arguments advanced above apply with a similar effect to the youth quota.

The current proposal also suffers the weakness of failing to ensure gender equality. With only 10 vacancies, meaning one from each province, only the top candidate from the party that wins the province will be elected. The idea of the party-list is therefore redundant. A party-list can only be useful where there is more than one vacancy. The provision will have to be redrafted to ensure that it achieves the objective of promoting gender equality.

- **APPOINTMENT OF JUDGES AND THE PROSECUTOR-GENERAL**

Under proposed amendments, the President will have the power to appoint serving judges to the Supreme Court and the Constitutional Court without following the normal procedures which require public interviews and recommendations by the Judicial Service Commission (JSC). Currently, all judicial appointments are managed by the JSC in terms of a public process. This was designed to ensure that there would be transparency and checks and balances in the process of judicial appointments. The same process would also apply to the Prosecutor General. Now the Prosecutor General will be appointed by the President without the public process.

The change can be encapsulated as follows: the open, transparent process which had checks and balances has been replaced by a closed, opaque and unilateral process in which the power of the President to appoint is unchecked, as was the case with the Lancaster House Constitution. Why does this matter for elections, with which ZESN is primarily concerned?

Judges and the Prosecutor General are referees in the political community. They have an important role to play in resolving disputes in electoral processes, either as prosecutors of offences or as judges of disputes or criminal prosecutions. In particular, judges of the Constitutional Court have a constitutional mandate to resolve disputes regarding the presidential election. For that reason, their independence is fundamental and anything that detracts from it has to be watched carefully and avoided. The current appointment processes were designed to promote this independence and to prevent the President from having unchecked power in their appointment.

However, the proposed amendments will remove these checks and balances and therefore affect the independence of the judiciary and the Prosecutor-General. This is of particular significance in the case of the Constitutional Court in which case its judges are due for appointment in May this year. This is why the timing of the changes is viewed with suspicion by the political community. It suggests that there is an attempt to give the current President untrammelled powers to appoint his favourites without the scrutiny of the current judicial appointments process. The risk is that it will only add to long-standing concerns that the electoral field is unfair and skewed in favour of the incumbent and the ruling party.

It does not help that these proposed changes come so soon after the first amendment in 2017, which also changed the appointment procedures concerning the most senior judicial offices, namely, the Chief Justice, the Deputy Chief Justice and the Judge President of the High Court. The Constitutional Amendment (No. 1) Act removed the public process and gave all the power to the President.

- **RETIREMENT OF JUDGES**

Further proposed changes concerning judges will affect their retirement age. Presently, the maximum age of retirement is 70 years. If the amendment is passed into law, judges will be able to serve beyond the age of 70 years but on a “rolling contract” that is subject to approval by the President upon production of a medical certificate. These changes will have two important effects: they will effectively extend the judges’ retirement age and second, they will give greater power to the President who will determine whether the judge stays or leaves. This will make the judges more beholden to the President. It dilutes the idea of security of tenure which is part of the mechanisms to protect judicial independence.

The maximum age-limit was designed to ensure certainty and fairness in the retirement process. Every judge would be sure that they would retire upon reaching the age of 70. It also means judges’ tenure in office is not dependent on the discretion and benevolence of the President. The proposed changes to the retirement age will seriously impact judicial independence. A judge who is under 70 years will have to behave if he wishes to remain in office and a judge who has been allowed to stay beyond 70 will also have to behave as a show of gratitude and to guarantee renewal of the annual contract.

It goes without saying, therefore, that the changes are a fatal blow to judicial independence which affects the role of judges as political referees. ZESN recommends that the recruitment and maximum retirement age must be retained in its present form.

- **CONCLUSION**

Following the examination of the proposed changes, ZESN holds the view that the authorities have not presented a cogent and persuasive case for amending the Constitution at this stage. This is not because ZESN has a rigid view against constitutional amendments. On the contrary, ZESN acknowledges that there may be sound reasons for changing the Constitution such as correcting errors or gap-filing.

However, ZESN does not believe that in the current circumstances there is enough reason for changing the Constitution. Instead, ZESN urges the authorities to implement those parts of the Constitution that have not yet been fully implemented before taking steps to amend them.

ZESN is also concerned that some of the amendments point towards centralization of power in the hands of the President and therefore lead to an authoritarian style of government. Significantly, the changes to rules of appointing judges affect the independence of electoral referees and therefore tilt the electoral playing field in favour of the incumbent. This will lead to more concerns and charges that elections are not free and fair, which negatively impacts the legitimacy of elections.

ZESN does not believe that the proposed amendments are warranted and therefore urges the government to reconsider its position.