

**PORTFOLIO COMMITTEE ON JUSTICE, LEGAL AND PARLIAMENTARY AFFAIRS**

**REPORT OF THE PUBLIC HEARINGS ON THE CONSTITUTION OF ZIMBABWE AMENDMENT NO.2 BILL**

**H.B.23, 2019**

# INTRODUCTION

* 1. The Constitution of Zimbabwe Amendment (No. 2) Bill [H.B. 23, 2019] was gazetted on the 17th January 20201. Section 328 of the Constitution of Zimbabwe provides that: *“(3) A Constitutional Bill may not be presented in the Senate or National Assembly in terms of section 131 unless the Speaker has given at least ninety days’ notice in the Gazette of the precise terms of the Bill. (4) Immediately after the Speaker has given notice of a Constitutional Bill in terms of subsection (3), Parliament must invite members of the public to express their views on the proposed Bill in public meetings and through written submissions, and must convene meetings and provide facilities to enable the public to do so.”* In compliance with this constitutional provision, and as part of public consultations meant to enhance participatory democracy, the Portfolio Committee on Justice, Legal and Parliamentary Affairs conducted nationwide public hearings on the *Bill*. The consultations were held from 14 – 19 June, 2020.

**2.0 METHODOLOGY**

In order to gather views from the public, the Committee conducted physical public hearings in all the ten provinces, virtual public hearings using the Zoom platform and Live Radio programmes.

# SPECIFIC SUBMISSIONS ON THE PROPOSED AMENDMENTS

* 1. **Clauses 2 – 8**
     1. The proposed amendments seek to remove the running-mate concept of the Vice-Presidency. Instead, the two Vice-Presidents will be appointed by the President and serve at the President’s pleasure. In terms of the current constitutional framework, with effect from 2023, every candidate who seeks to be elected as President must nominate two persons to stand for an election jointly with him or her and designate one of those persons as his or her candidate for first Vice-President and the other as his or her second Vice-President. In this way, the President and his or her Vice-Presidents will be jointly elected.

## The majority of the submissions received pointed towards a desire to maintain the system of running mates. People were of the firm and considered view that that the running mates system that the proposed amendments seek to avoid creates certainty in presidential succession and is desirable to avoid the possibility of a power vacuum or instances of political instability in circumstances where the President leaves office before expiry of his/her term. Other submissions opined that, it promotes democracy as a succeeding president will be deriving their authority from the electorate.

* + 1. ***Yet other sentiments, in the minority, noted that the running mates’ system has a danger of creating 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. It was submitted that the President’s authority might be challenged by the deputies. They voiced their concern that the system creates incentives for the Vice President(s) to displace the President since they will be automatically assured of taking over by virtue of the succession provisions.***
  1. **Clause 9**
     1. This clause adopts the transitional provisions of succession to the office of the President and seeks to make them permanent. These are provided in terms of paragraph 14 of the Sixth Schedule to the Constitution (given that the proposed amendment seeks to dispense with the position whereby Vice-Presidents are elected at the same time with the President).

## While some of the public welcomed the amendment, some were of the view that the adoption of paragraph 14 of the Sixth Schedule of the Constitution creates uncertainty in succession to the office of the President. They submitted that there is no need to change the current constitutional framework which provides for certainty to a higher degree.

* 1. **Clause 10**
  2. This clause seeks to give the President power to appoint up to 7 (instead of the current

5) additional Ministers from outside Parliament. The current constitutional framework provides that Ministers and Deputy Ministers are appointed from the legislative arm, with an exception of a maximum of five that may be chosen for their professional skills and competence and thus chosen from outside Parliament.

## Some were of the view that the status quo is adequate as far as the appointment of Ministers and Deputy Ministers is concerned. They opined that increase of the number of Ministers from five to seven appears to be only cosmetic and not driven by an inclination towards improving governance in Zimbabwe.

* 1. ***Other contrary sentiments noted that this would be a welcome development; some duties and functions require expertise which may not be in Parliament. An isolated submission pointed out that the overlapping nature of Cabinet and Parliament should be severed to an extent that no Member of Parliament must be appointed as Minister. Appointing Ministers from Parliament is likely to inhibit the impartial oversight function of Parliament.***
  2. **Clause 11**
     1. This clause seeks to extend the provision for the party-list women members of the National Assembly by another two extra Parliaments (from 2 to 4 Parliaments) and makes provision for the addition of a party-list representation of ten youths in the National Assembly.

## The majority of members of the public felt that there is need to implement Sections 17, 56 and 80 of the Constitution of Zimbabwe2. It was further argued that the proportional representation system had served to disadvantage women; the women have no constituencies. Other submissions noted that there should be 105 constituencies reserved for women where they compete against themselves.

* + 1. ***A suggestion was proffered for ZEC, through subsidiary legislation, to introduce provisions to compel political parties to ensure that women be given equal opportunities to participate in electoral processes. It was also noted that the disability quota should be included in this legislation.***

2 Section 17 – The State must promote the full participation of women in all spheres of the Zimbabwean society on the basis of equality with men.

Section 56 (2) – Women and men have the right to equal treatment including the right to equal opportunities in political, economic, cultural and social spheres.

Section 80 – Every woman has full and equal dignity of the person with men and this includes equal opportunities in political, economic and social activities.

## Some members of the public viewed this as a correction of the Constitution, having identified that the period given in the original document is insufficient. Such an extension was presented as a positive step to promote women’s representation in Parliament.

* + 1. ***Some proponents for the youth quota submitted that, while it was a welcome development, the number of youths should be increased to an average of 8 youths per province. This submission was informed by the fact that the majority of people are youths. Those against the youth quota noted that this system disempowers the youth; the youth should be voted for into Parliament.***
    2. ***It was also submitted that other alternatives to facilitate youth participation in politics can be done by ensuring that party lists on a national level include a significant number of youths. Therefore, the inclusion of youths could easily be achieved by requiring political parties to reserve a certain number of seats for youths.***
    3. ***Some respondents submitted that war veterans should also be given a quota. A related submission also called for a quota for war collaborators.***
  1. **Clause 12**
     1. This clause de-couples ZEC’s delimitation function from the population census held every 10 years. The current constitutional framework provides for delimitation of electoral boundaries once every ten years on a date or within a period that falls soon after population census. The proposed amendment seeks to delink the delimitation of electoral boundaries from the population census process.

## Some members of the public recognised the need for a new delimitation exercise as current electoral boundaries are arguably no longer representative of the population. However, to some, the solution does not lie in de-linking the exercise from the population census. They were of the view that the process of ensuring that the timing of the census is conducted in good time for the information and data to be used for delimitation purposes can be achieved through other legislative reforms i.e. amending section 12 of the Census and Statistics Act [Chapter 10:29] to align it with section 161 of the Constitution.

* + 1. ***The Chief’s Council submitted that as custodians of traditional boundaries, they must be part of the delimitation exercise.***
  1. **Clause 13**
     1. This clause will allow the President, acting on the recommendation of the Judicial Service Commission, to appoint sitting judges of the High Court and the Supreme Court to vacancies in the higher courts, without subjecting them to the public interview procedure.

## Some members of the public were of the opinion that the manner of appointment of Judges is central to the values of democracy, the idea of separation of powers, checks and balances in a democracy and an efficient and independent judiciary to sustain the separation of powers. They submitted that the proposed amendment to promote Judges of the High court and the Supreme Court to a higher court by the President without subjecting them to public interviews as provided by the current constitutional framework could undermine the independence of the judiciary. It was submitted that promotion of the Judges of the High Court and the Supreme Court in procedures not open to public scrutiny could reverse the gains that were made by the current constitutional framework.

* + 1. ***Some argued that movement of Judges from one court to the other through appointment allows for expert Judges to be appointed. These Judges are already in office and are assessed by the Head of Court, the Chief Justice and the Judicial Service Commission who already know the best performers who are excelling and deserving of promotion. There is a pool of very good Judges but because they do not want to undergo public interviews they opt to remain in their Courts thus this provision was a welcome development as it caters for that crop of Judges.***
  1. **Clause 14**
     1. This clause seeks to allow judges of the Constitutional Court and Supreme Court to extend their tenure after reaching the age of seventy annually for up to five years, subject to a favourable medical report as to the mental and physical fitness of the judge so to continue in office. In addition, the extension of such tenure is on a yearly basis, and subject to acceptance by the President.

## Some members of the public welcomed the proposed amendment on the basis that having the terms of office set in the Constitution or other legislation creates security of tenure for the judiciary. It was submitted that it lessens the risks to judicial officers when holding influential individuals and government bodies to account and insulates Judges from external pressure. Members of the JSC were of the view that instead of reviewing annually, the renewal should be a one off five years.

* + 1. ***Some were of the view that the proposed amendment should be rejected on the basis that, although the President extends the term of office after consultation with the JSC, the President does not appear to be bound by the recommendations of the JSC and this may lead to the corrosion of judicial independence. It was also submitted that Zimbabwe has a large and vibrant legal profession, with many young Lawyers who are fit and willing to serve as judges. Increasing the age of retirement, on a yearly basis from seventy to seventy-five, would deny young lawyers the opportunity to serve as judges. One participant stated that the fact that the judges are to be subjected to a rigorous medical examination, when they seek an extension, after every year shows that there is no longer trust in the physical and mental capacity of the judge in question so why not allow the judge to rest after all. It was further noted that there is no need to further increase the age of retirement bearing in mind that the general age of retirement is 65.***
  1. **Clause 15**
     1. This clause seeks to change the title “Civil Service” to “Public Service” and provides that the new “Public Service” is to implement the policies of the Executive and deliver public services.

## Members of the public who made submissions on this clause argued that apart from changing of words, the proposed amendment adds nothing new. This is because, under the current constitutional framework, the Civil Service implements the policies of the Executive and is expected to deliver public services.

* + 1. ***Submissions received from the public were against the amendment of Section 199. The public noted that rather than changing the name, there is need to initiate and implement Civil Service reforms that will ameliorate the working conditions of the civil servants.***
  1. **Clause 16**
     1. This clause provides for the appointment and role of the Chief Secretary to the Office of the President and Cabinet (Chief Secretary) and his or her deputies. Permanent Secretaries of Ministries will report to the Chief Secretary on any matter affecting them as a class.

## Some members of the public were of the opinion that this clause may need further engagement. From an administrative perspective, its role in execution is not clear hence can be a source of conflict with the Chairman of the Public Service Commission.

* 1. **Clauses 17 and 18**
     1. These clauses create the Office of the Public Protector, who will take over certain functions concerning public maladministration. The Office of the Public Protector is not a new phenomenon in Zimbabwe. It was in existence prior to the 2013 Constitution as the Office of the Ombudsman and then it was renamed to Office of the Public Protector. Its mandate was derived from the Public Protector Act [Chapter 10:18] which was later repealed. During its existence, members of the public could approach the body with complaints of maladministration in public institutions for investigation.

## Some members of the public welcomed the creation of the Office of the Public Protector as it is important in dealing with issues of cases of administrative injustice. However, they were concerned with the limit in scope of issues the new office will investigate as it will be restricted to those concerned with any Ministry or department, or any member of such Ministry or department; and such other persons or authorities as may be prescribed by or under an Act of Parliament.

* + 1. ***Some were against the amendment as it allows the Public Protector to encroach on the competency of the Zimbabwe Human Rights Commission and amounts to a duplication of roles between the two independent institutions. Their recommendation was not to create the office at this juncture given limited resources but to strengthen the already existing Chapter 12 Independent Commissions.***
  1. **Clause 19**
     1. This clause seeks to provide for the appointment of the Prosecutor-General by the President on the advice of the Judicial Service Commission and it seeks to remove the requirement of a public interview procedure. It also makes provision for his or her removal, replacing the current framework where the removal of the Prosecutor- General from office is similar to that of the removal of a judge.

## Some members of the public welcomed the provision, however others were of the view that the current appointment process promotes accountability and transparency. The process ensures that there is scrutiny, and increases public confidence in the office of the Prosecutor-General who is appointed based on merit. Removal of the public process as contemplated by the amendment was viewed as a threat to Prosecutorial Independence.

* 1. **Clauses 20, 21, 22 and 25**
     1. These clauses seek to remove members of Parliament from the membership of provincial councils, merge the provisions relating to provincial and metropolitan councils by removing the special provisions relating to the metropolitan councils (they will no longer be chaired by mayors, but be elected in terms of section 272 like provincial councils), and provide for the election of 10 of the members of Metropolitan Councils by a system of party-list proportional representation.

## Some members of the public welcomed the provision as it appears to be positively bringing devolution into effect. It was submitted that if used well, provincial councils can be good space for grooming future MPs. It might be a good opportunity to have preferential seats for women, youths and the disabled at this level. The minority of the submissions held a contrary opinion, noting that the removal of Members of Parliament from the provincial council would divorce local development from national development. The MP is the conduit between the local and national development agenda.

* + 1. ***The Chief’s Council expressed concern over the removal of Chiefs (by virtue of being Members of Parliament) from Provincial Councils. They argued that Chiefs are an integral part of local development and hence should not be excluded from the Provincial Councils. They proposed that all Chiefs that are not Senators become members of Provincial Councils.***
  1. **Clause 23**
     1. This clause proposes to remove the term “foreign organisations or entities” and replace it with “international organisations” in section 327(3) (a). Currently, an agreement which is not a treaty but which has been concluded or executed by the President or under the President’s authority with one or more “foreign organisations or entities” and imposes fiscal obligations on Zimbabwe is not binding, until approved by Parliament. The proposed amendment seeks to limit the scope of the application of this provision to “international organisations” only.

## Some members of the public submitted that the removal of the term ‘foreign organisations or entities’ from section 327 of the Constitution seeks to limit the types of agreements or treaties that must be approved by Parliament to become part of Zimbabwean law. The role of Parliament is to play an oversight role over executive functions and removing agreements with foreign organisations or entities beyond the scrutiny of Parliament, defeats the principle of separation of powers, public accountability and good governance.

* + 1. ***Those who were in support of the amendment argued that by voting the President into power, the public would have shown trust in him and hence should allow him/her to borrow whenever deemed necessary. They argued that in certain circumstances subjecting agreements to Parliament may cause unnecessary bureaucratic delays.***
  1. **COMMITTEE OBSERVATIONS AND RECOMMENDATIONS**
  2. The major issue that the public expressed was the need to urgently align laws and full implementation of the Constitution rather than rush to amend the constitution. **The Committee urges the Executive to prioritize the realignment of laws to the Constitution and its full implementation.**
  3. On the running mates debate, the Committee noted that the majority of the people were of the view that we should retain the running mate clause and do away with a system of appointment of Vice Presidents by the President. However, the Committee observed that there were members of Civic Society Organizations who were moving from venue to venue replaying the same points and advancing the same arguments, thereby making it difficult to conclude whether these were general views or influenced views. It was also apparent that the general public was not adequately conscientised on the contents of the Bill.
  4. There was a divided opinion on the proposed amendments on the devolution provisions. The Committee recommends that the Executive should be clear on the roles and functions of the Provincial Councils and the role of Councillors. This should enable the Committee to make an informed recommendation on the matter.
  5. While extending the women’s quota in Parliament is a progressive idea, it perpetuates a pretence 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. **The Committee recommends continuation with the quota system for another ten years. Meanwhile, Government must take robust measures to ensure that the Constitutional provisions of 50-50 are implemented. The party-list names for proportional representation must accommodate both young and old in a zebra system way.**
  6. Regarding the issue of appointment of Prosecutor General, **the Committee recommends that he/she should go through public interviews**.
  7. On the promotion of Judges by the President **the Committee recommends that their promotion may be done without public interviews but must be on the ADVICE of the JSC.**
  8. Section 186 of the current Constitution imposes a mandatory age of retirement for Constitutional Court and Supreme Court Judges at 70. In other jurisdictions, the retirement age of Constitutional Court Judges has also been set at 70 years. This is the case in South Africa, which also provides for the possible extension of the term of office based on an Act of Parliament. Having the terms of office set in the Constitution or other legislation creates security of tenure for the judiciary. It lessens the risks to judicial officers when holding influential individuals and government bodies to account and insulates Judges from external pressure.
  9. On the issue of de-linking census from delimitation exercise, **the Committee recommends withdrawal of the Clause since the issue has already been addressed by amendments to the Census Act.**
  10. The office of the Chief Secretary exists *de facto* and not *de jure*. Its role in execution is not clear hence can be a source of conflict with the Chairman of the Public Service Commission. From an administrative perspective, there is need to have clarity of roles. **This area may require further engagement.**
  11. The provision that creates the Office of the Public Protector also empowers the Public Protector to carry out certain functions currently carried out by the Zimbabwe Human Rights Commission (ZHRC), including investigating conduct relating to the violation of human rights and freedoms set out in the Constitution. **The Committee does not recommend the creation of the Office of the Public Protector but instead urges the State to strengthen the already existing Chapter 12 Independent Commissions.**
  12. On international conventions, treaties and agreements the current provisions require Parliament approval when the Executive concludes or execute agreements that imposes fiscal obligations on Zimbabwe before the agreement becomes law. Clause 23 of the proposed amendments appears to put beyond parliamentary scrutiny financing agreements or loans between Zimbabwe and foreign credit banks or other financial entities. The adverse effect of this move is that Zimbabwe would potentially be saddled by a foreign debt that would require repayment from the Consolidated Revenue Fund which payment would still require Parliament approval anyway. **The Committee recommends that there is need to maintain and strengthen the system of checks and balances and thus all agreements that impose fiscal obligations on the State must get Parliament approval as a way of enhancing accountability.**

# 5.0 CONCLUSION

The Committee noted with concern that the majority of the people who attended the public hearings, including those who contributed in writing, did not comprehend the jurisprudence behind the doctrine of separation of powers, independence of the judiciary and attendant issues. It is therefore the Committee’s submission that in order to enhance the quality of contributions, there must be a concerted effort by relevant stakeholders to sensitize the public on the content and import of Bills before embarking on public hearings. The public awareness is also likely to counter the manipulation of members of the public by sponsored groups who always rush ahead of the hearings. It is, however, the Committee’s general conclusion that, except for areas highlighted in the recommendations as requiring a re-look, the amendments be adopted as presented.