**CONSTITUTION WATCH 3/2020**

**[28th January 2020]**

**Amending the Constitution [PART 3]**

**Introduction**

**In Part 1** of this series *[*[*link*](http://www.veritaszim.net/node/3900)*]* we analysed the Constitution of Zimbabwe Amendment (No. 2) Bill and dealt with the provisions which:

* seek to reduce Parliament’s oversight of foreign agreements,
* give the President power to appoint and dismiss Vice-Presidents.

**In Part 2** *[*[*link*](http://www.veritaszim.net/node/3906)*]*we analysedclauses 13 and 14 amending provisions for the appointment of judges and their tenure in office.

**In this Part 3** we will add an addendum to Part 2 and then continue our analysis of the Bill, looking at the provisions which:

* will de-link delimitation of electoral boundaries from censuses,
* allow the President to appoint two more non-parliamentary Ministers,

**Addendum to Part 2**

In Part 2 of this series, we analysed clauses 13 and 14 of the Bill, which seek to amend the Constitution’s provisions for the appointment, promotion and retirement of judges. Two of these proposed amendments require further comment. They are:

* The amendment that will empower the President, on the recommendation of the JSC and without the need for public interviews to select suitable candidates, to appoint or promote a judge of the Supreme Court or the High Court to fill a vacancy in a higher court. *[In Part 2 of the series we erroneously suggested that this would allow the President to promote judges of the Administrative Court or the Labour Court; in fact it will only allow judges of the Supreme Court or the High Court to be promoted without being interviewed]*.
* The amendment that will allow judges of the Constitutional Court and the Supreme Court to continue in office after they reach the current retirement age of 70 years; their tenure will be extended for one year at a time so long as the President, after consultation with the JSC, is satisfied that they are fit to continue.

**Further Comments**

**1. Promotion of judges without interviews**

At present Supreme Court judges double up as judges of the Constitutional Court. No judges have yet been appointed solely as Constitutional Court judges. This is a temporary arrangement under para 18(2) of the Sixth Schedule to the Constitution, which will come to an end on 22nd May this year. After that date the Supreme Court judges will cease to be Constitutional Court judges and the Constitutional Court will stand as an independent court consisting of the Chief Justice, the Deputy Chief Justice and five other judges *[see section 166(1) of the Constitution]*. The Chief Justice and Deputy Chief Justice are already in office but those five other judges will have to be appointed.

If the proposed amendment is passed by Parliament, the President will be able to fill all five vacancies in the Constitutional Court with judges from the Supreme Court and the High Court without the need for public interviews, so long as he can induce the JSC to recommend their appointment.

This has the potential to mar the credibility and independence of the Constitutional Court, which is our apex court. As the Constitution is the supreme law of the land, it needs to be upheld by judges who meet the highest standards of ability, integrity and impartiality and who are manifestly seen to meet those standards. Public interviews are necessary and pivotal to the appointment of Constitutional Court judges as they assure citizens that their Constitution will be guarded by people who have been thoroughly vetted and are well suited to the position. As mentioned in Part 2, the amendment may invite unwarranted political interference in the judicial sphere, compromising separation of powers, openness and the independence of the judiciary.

**2. Security of tenure of judges**

The proposed amendment which will allow senior judges who have reached the age of 70 to continue in office for one year at a time, subject to the President being satisfied as to their fitness, also compromises judicial independence because judges who continue in office will have no security of tenure. A judge should be able to uphold the law and the Constitution without fear, favour or prejudice. One of the ways to ensure this is through security of tenure. The reason for giving judges long and fixed terms of office is to offer them the assurance that so long as they are upright and uphold the law impartially they cannot be dismissed however unpopular their decisions may be. By allowing judges who are past retirement to renew their terms annually, subject to Presidential approval, judicial independence will be weakened because they will have no guarantee that their contracts will be renewed when their annual terms come to an end. Put briefly, judges in that position may be more pliant.

**Delimitation of Electoral Boundaries**

Under section 161 of the Constitution the Zimbabwe Electoral Commission must fix a date every 10 years for a delimitation of constituencies, wards and other electoral boundaries; the date must fall “as soon as possible after a population census”. Clause 12 of the Bill proposes to amend section 161 so as to remove the linkage between delimitation and population censuses.

**Comment**

There is no logical reason for a delimitation to be preceded by a population census. A census tells the authorities how many people ‒ adults, children, citizens and aliens ‒ are living in a particular area. It will be only a rough guide, however, to the number of registered voters who are living in the area. If voters are registered continuously, as ZEC is enjoined to do by section 17A of the Electoral Act, then ZEC’s own records will tell it where the voters are living and it will not have to look at census figures.

The probable reason for the amendment is that the next census is due to be held in 2022, which will not give enough time for a delimitation of electoral boundaries before the 2023 general election. Removing the link between delimitations and censuses will allow ZEC to set about delimiting constituencies and wards soon enough for the work to be done properly *[Note: A thorough delimitation has not been conducted since the 1985 general election.]*

Nonetheless the same result could be achieved without a Constitutional amendment: by amending section 12 of the Census and Statistics Act to require a census to be held this year or next year, thus giving ZEC two years to delimit constituencies and wards.

To sum up, therefore, the amendment is desirable but not strictly necessary. The question must be asked: Is it worth amending the Constitution when the same objective can be achieved by amending an Act?

**Appointment of Additional Non-Parliamentary Ministers**

Section 104(3) of the Constitution allows the President to appoint up to five Ministers and Deputy Ministers from outside Parliament; all the rest must be Senators or Members of the National Assembly. The Amendment Bill will allow the President to appoint up to seven non-parliamentary Ministers.

**Comment**

Our Constitution is based on the British model under which Ministers are drawn from Parliament, principally the House of Commons. It is a democratic model to follow as Ministers who are members of Parliament are more likely to respect Parliament as an institution and to accept that they are accountable to Parliament.

However it is not essential for the proper working of government that all Ministers should be members of Parliament. Other countries permit Ministers to be appointed from outside Parliament. In South Africa, for example, the President can appoint up to two Ministers from outside the National Assembly, in Botswana the President can appoint four, and in Malawi all of them can be so appointed. In the United States of America, which admittedly does not have a Westminster-type constitution, Ministers are not members of Congress at all (though the Vice President presides over the Senate).

That said, there seems to be no compelling reason for us to increase the number of non-parliamentary Ministers. Five of them should be enough to provide Cabinet with knowledge, expertise and skills that cannot be found among members of Parliament. If five are not enough to do this, perhaps the remedy lies in improving the calibre of people elected to Parliament rather than increasing the number of non-parliamentary Ministers.

The Cabinet at the moment is undesirably large (27 members altogether, including the Attorney-General) and there may be a temptation to add the non-parliamentary Ministers to an already overstuffed cabinet rather than replacing dead-weights.

One further compelling reason why we need to preserve the link between Ministers and Parliament is that there have been constant complaints of Ministers not turning up to answer questions in Parliament. This is likely to be made worse if more Ministers have no ties to Parliament.

*[Analysis of the Constitution Amendment Bill will be continued in PART 4]*

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