



**THE LAW SOCIETY
OF ZIMBABWE**

AN ANALYSIS OF THE ELECTORAL AMENDMENT BILL, 2017

18 SEPTEMBER 2017

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Introduction

The Electoral Amendment Bill, 2017, gazetted on 18 September 2017, introduces proposed amendments to the Electoral Act [Chapter 2:3], otherwise referred to as 'The Act'. The proposed amendments to the Electoral Act seek to amend certain sections that provide for the voter registration processes. The Bill introduces provisions that cater for the envisaged new voter registration system, otherwise referred to as the Biometric Voters Registration(BVR) system. The amendments also seek to bring the relevant provisions of the Act in line with the letter and spirit of the electoral principles enunciated in the Constitution of Zimbabwe. This analysis considers the proposed amendments in line with the requirements enshrined in the constitution and regional and international standards on electoral processes viz holding free, fair, peaceful and credible elections.

Executive Summary

This Amendment Bill was preceded by the gazetting, on 15th September 2017, of Statutory Instrument(SI) 117/2017, through the Presidential Powers (Temporary Measures) Act. The Statutory instrument amends provisions of the Electoral Act. Thus this amendment Bill largely mirrors the provisions of SI 117 of 2017. It is therefore 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 use of presidential powers is not a new phenomenon and the president has previously utilised these powers to effect amendments to the Electoral Act.² Firstly, it seems debatable that the amendments of this kind could be said to be the urgent measures that could have been 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. As things stand the rushed process seems self-recreated and will likely result in confusion with a nation election looming in under a year.

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

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

Secondly and more fundamentally the use of presidential powers, in particular to effect changes to Electoral Act, followed by the subsequent passage of a Bill to ratify the president's actions patently violates the principles of separation of powers and seems to go against the letter and spirit of the current Constitution. This is so because of the provisions of Section 134 of the Constitution that now severely restricts the legislation via delegated legislation. The Presidential Powers Act precedes the current Constitution. The wording of the new 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 Whilst the thrust of this analysis is on the electoral amendment bill, it is critical to put in context the role the use of the presidential powers has played in giving birth to the current process and to point out the flaws, in the context of the constitutional realm of Zimbabwe. The practice of preceding amendments to law through the presidential powers, as in the present case, appears unconstitutional considering Section 134 of the Constitution.

The electoral framework of Zimbabwe requires comprehensive amendments to bring them into 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 total to the Electoral Act. Unfortunately, the proposed amendments mark a continuing trend by legislature of embarking on unending and piecemeal amendments to the Electoral Act in the past two decades. More worryingly this will be at least the third time that the Electoral Act is being amended in just under four years since the promulgation of the new Constitution is reflective of the piecemeal, rushed and not well thought out process of amending of the law. Unsparingly, some of the amendments deal with issues that could have been addressed earlier on if attention had been paid to the process of amending the law considering the constitution. More worryingly whilst the current amendment Bill focusses on

³ See section 134(a) of the Constitution

⁴ See section 134(d) of the Constitution

specific provisions dealing with voter registration, it is suggested that the Bill does not, at a broader level, address all key provisions of concern that are still fall foul of the Constitution. Resultantly the passage into law or otherwise of this current Electoral Amendment Bill will not resolve the broader problem of the existence of the potentially unconstitutional provisions within the Electoral Act and other relevant legislative pieces that have a bearing on the holding of a free, fair, peaceful and credible election as envisaged by the Constitution of Zimbabwe and The SADC principles and guidelines governing democratic elections.

As pointed out above the Electoral Act still contains several provisions that do not give effect to the Constitution and the provisions are not within the contemplation of the current amendment Bill. Some of the issues of concern that have a bearing on the holding of a free, fair and credible election and still require revisiting with a view to bring them in line with the Constitution 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 a category of voters that include the prisoners, the infirm and the diasporas considering 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 and promulgating adequate that adequately address administrative and implementation issues of the BVR system
- Revisiting the areas around voter registration, maintenance of voters roll and provisions on voter education with a view to bring them in line with the Constitutional threshold

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	This sets out the short title of the act, namely The Electoral Amendment Act,	
Clause 2	Clause 2 seeks to repeal and substitute subsection 1 of section 24 of the Act by removing the peremptory provision placed on the voter registration officer to fill a claimant's form on behalf of an eligible voter seeking to be registered on the voters' roll.	<p>The proposed amendment is progressive to the extent it provides for an efficient, expedited and simpler process for voter registration. The current provision of the Act requires a voter registration officer to complete the prescribed form on behalf of any person wishing to be registered as a voter. This process has proven to be unnecessarily slow, bureaucratic and tedious. Besides the delays occasioned by burdening a voter registration officer with filling a claimant's form, there have been concerns that this particular legal provision was so formulated or has subsequently been used as a method to profile and intimidate voters. The proposed amendment addresses the twin concerns that have been raised by stakeholders, as set 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 the spirit of the SADC Principles and Guidelines Governing Democratic Elections.</p> <p>Recommendations</p> <p>There may be need for specific provisions in the Act or in subsidiary regulations that specifically set out the process for a claimant to procure and subsequently submit his/her registration form. For example, these legal provisions should set out where the registration forms may be accessed physically and online.</p>
Clause 3	The clause sets out the new procedure to be followed by a	This amendment to section 25 of the principal Act resonates with the above-proposed amendment to Section 24 of the Principal Act and brings

	<p>claim for transfer by a voter from one constituency to another</p>	<p>uniformity to the provisions related to the process of voter registration enshrined in the two sections.</p> <p>A further amendment is also sought in Section 24(5)) by the deletion of "the Registrar-General of Voters" and the substitution of "the Commission." Previously, the role of the Registrar General in election processes, his credibility, neutrality, and independence has been questioned by political actors.</p> <p>The deletion of the term, "the Registrar-General of Votes and its substitution thereof by the word, Commission brings the provision into conformity with the Constitution which gives the Zimbabwe Electoral Commission the sole mandate to run elections and removes the role of the RGV in electoral processes.</p>
<p>Clause 4</p>	<p>The clause seeks to repeal subsection 3,4 and 5 of Section 36B of the electoral Act whose net effect to is to require every eligible voter to register to vote whether they have voted before or they are new voters</p>	<p>This amendment is primarily motivated by the introduction of a new registration system-The Biometric Voter Registration (BVR) system. Under this system every eligible voter (new and old) must register/re-register as there has never been a previous process of capturing biometric features in the compilation of a voters' roll. Previously those already on the voters' roll did not require to re-register by feeling claim forms anew. The new BVR system places everyone at par. Every eligible must register anew and ZEC is producing an entirely new voters roll.</p> <p>Given the new registration system, this amendment has merit. The BVR system has been lauded in other jurisdictions for its advantages that include the elimination of duplication of names and errors to the voters rolls as well as elimination of the phenomenon of double voting and ghost voters.</p> <p>Since the BVR system is in line with constitutional and international standards to the extent it leads to an electoral process that is transparent, simple and accurate</p> <p>Recommendations</p>

		<p>It is suggested that specific provisions that set out the BVR system and its operational framework should be introduced into the Electoral Act. The Electoral Act as presently framed 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 proviso to section 56(l)(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>One of the more contentious areas in the previous election was the use of the voter's slip by voters whose names failed to appear on the voters' roll on election day despite evidence that such persons had registered to votes. The acceptance of the voter's slip was an implicit acceptance by the electoral body that the voters roll was in shambles as a significant number of people who were registered voters found their names 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>Whilst this provision was initially commended as a way of ensuring voters were not necessarily disenfranchised by a reason not of their own making, the extremely high number of voters slips seen in the 2013 election raised controversy and suspicions that persons disentitled to vote were taking advantage of this loophole, thus affecting the credibility of the election.</p> <p>The proposed amendment must be considered positively. It resonates with the peremptory constitutional requirement 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 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>A clean, comprehensive voters' roll containing names of all registered voters will be an absolute must, upon which any credible election, envisaged under section 155 of the Constitution will be anchored on. It is critical that ZEC produces a voters' roll that is comprehensive and correctly captures details of all the registered voters to</p>

		<p>avert chaotic scenes on the voting day, a disputed election results and potential law suits from those whose political right to vote, enshrined in section 67 of the Constitution would have been violated.</p>
<p>Clause 6</p>	<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 manner in which 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 twice after the enactment of the 2013 Constitution. The reference to abolished posts should at least been easily addressed by now given the clear language of the Constitution on the Role of the Zimbabwe Electoral Commission to run elections.</p> <p>However, the amendments should be applauded to the extent they align with the Constitution.</p> <p>Recommendations.</p> <p>It remains a concern that, whilst these piecemeal amendments to the Electoral laws continue, there remains provisions that are inconsistent with the Constitution.</p> <p>The legislature 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.</p>