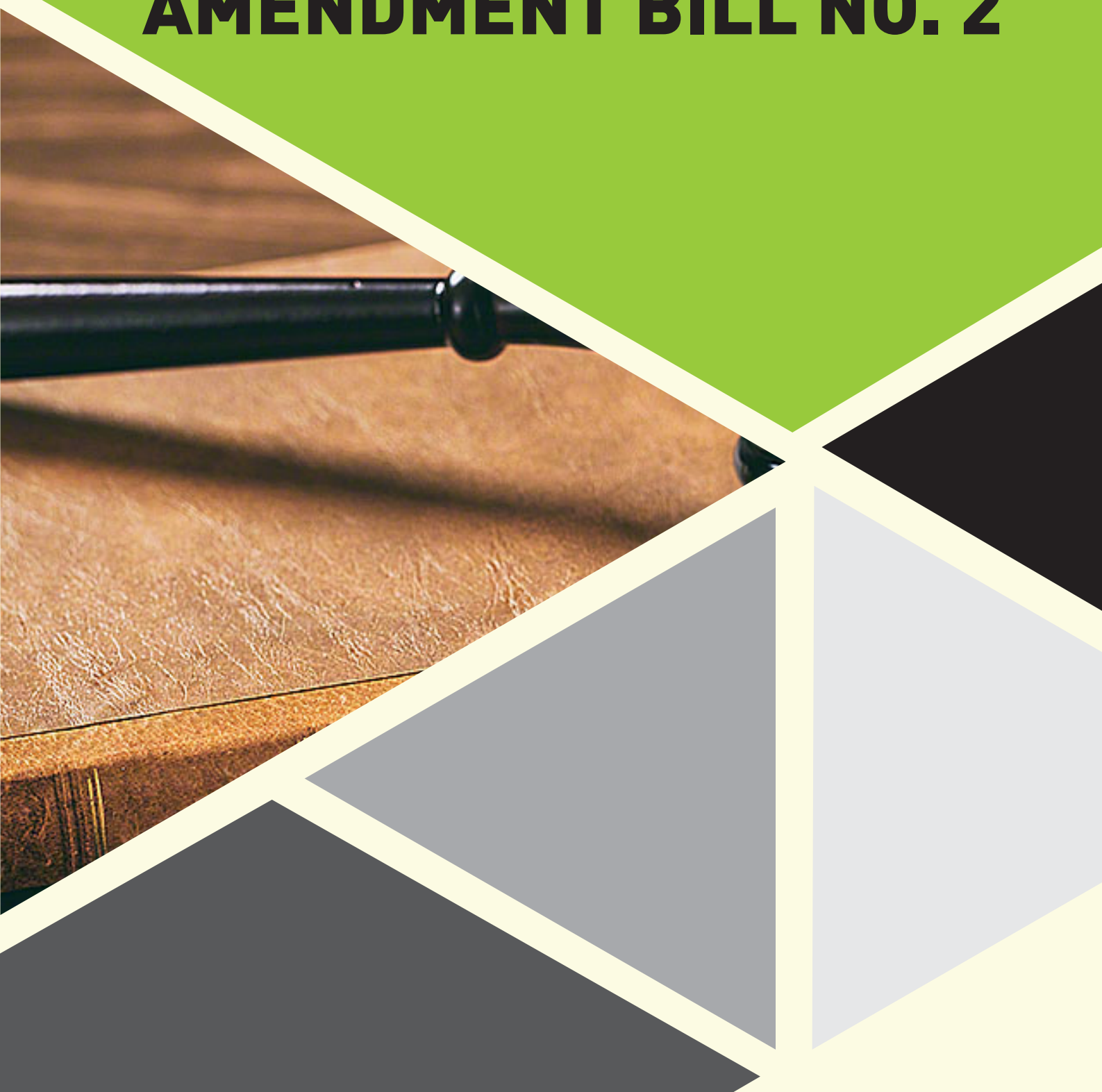




ZESN ON CONSTITUTIONAL AMENDMENT BILL NO. 2



ZESN ON CONSTITUTIONAL AMENDMENT NO. 2

1

On 31 December 2019, the Government of Zimbabwe (GoZ) published the Constitution of Zimbabwe Amendment (No. 2) Bill (hereafter the Constitutional Bill) in the Extraordinary Government Gazette. This formally commenced the special procedure to amend the Constitution of Zimbabwe.

2

The process stalled following the emergence of the COVID19 pandemic and public health regulations under which a national lockdown was imposed. Parliament has announced that public consultations are resuming. This document summarises ZESN's position on the set of changes proposed by the Constitutional Bill.

3

The Constitutional Bill includes proposals that affect the conduct of elections in Zimbabwe. The following proposed changes impact elections both directly and indirectly:

- *the delimitation of electoral boundaries*
- *the election of Vice Presidents*
- *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*

4

Delimitation of electoral boundaries

4.1

The Constitutional Bill proposes to delink the delimitation exercise from the population census. This means electoral boundaries will be marked without the requirement to base them on population census data as has traditionally been the case. This carries the risk of affecting democratic representation as it opens avenues for gerrymandering. Population census has always been used as a scientific source of data to mark electoral boundaries. The amendment sets no replacement for the use of population census data, which leaves an unfilled gap that is prone to abuse. The proposal to delink the delimitation exercise from the population census will have profound impact on the integrity of the electoral process.

5

Running Mates provision

5.1

The Constitutional Bill also seeks to remove the provision for the election of Vice Presidents together with the President which was due to commence in 2023. This is commonly known as the running-mates provision, in that a presidential candidate is required to nominate two persons as first and second running mates. These two would automatically become the First and Second Vice Presidents. They provide clarity in the hierarchy of power and enable smooth processes of succession should the need arise. It is regrettable that this facility is being removed before it has even been tested. The proposal to remove the running mates provision is based on an irrational fear and should be avoided.

6

Devolution: Metropolitan Provinces

- 6.1** The proposal to amend the **devolution provisions** of the Constitution 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. The Constitutional Bill seeks to merge provisions applying to provincial and metropolitan councils so that chairpersons of Harare and Bulawayo provinces will be elected by their fellow councillors just like chairpersons of ordinary provincial councils. At present, the mayors of these two cities automatically become chairpersons of the metropolitan provinces.
- 6.2** While on the face of it, the change will enhance democracy in the metropolitan councils, it will also create two rival centres of power in these two metropolitan provinces, which already have mayors for the same area. Having an elected mayor and a provincial chairperson for the same area creates a duplication of roles and potential conflicts. This is why the original framers of the Constitution had a different governance system for metropolitan provinces. While the change may be well-intentioned, it is ill-conceived and problematic.

7

Removing MPs from Provincial Councils

- 7.1** The Constitutional Bill seeks to remove Members of Parliament from membership of devolved provincial councils. Under the current model, 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 completely new set of councillors. However, it diluted the concept of devolution. Under the proposed changes, provincial council members will be elected separately based on proportional representation. This separation between the national parliament and provincial councils is important for democracy and representation.
- 7.2** While this is a welcome change, it is only one of many changes that are required to make the devolution model work. It would be better if the government worked together with stakeholders to have a re-think of the devolution model as a whole as opposed to having piecemeal amendments. ZESN recommends a comprehensive solution through co-operation, consultation and consensus.

8

Representation of Women

- 8.1** The Constitutional Bill seeks to extend the duration of the provisions which provide for sixty seats for women in the National Assembly. This is commonly referred to as the Women's Quota, which was designed to promote women's representation in Parliament for the first two terms under the 2013 Constitution. This is due to expire in 2023 but under the amendment, it will be extended for another ten years.
- 8.2** While this extension of the Women's Quota appears like a progressive idea, the risk is that it is merely symbolic and remains a poor substitute for the government's obligation to ensure the implementation of the principle of equal representation as required by the Constitution. While the extension is an acknowledgement that the initial provision has failed, the government has not conducted any scientific study to understand the reasons for its failure. Adding another 10 years to the provision is not going to solve the problem of under-representation of women in parliament. The government ought to take bolder steps if it is truly committed to gender equality.

9 Representation of Youths

- 9.1** The Constitutional Bill proposes a new provision for the representation of youths in Parliament. Under the new provision, there will be 10 additional seats in Parliament, one for each province, also elected on the basis of proportional representation. While the object of promoting the representation of young people is commendable, this particular provision reads like an act of political tokenism which does little to achieve the goal apart from increasing the size of Parliament and the attendant costs. In addition, in its current form, where only one youth is elected per province, it is ill-designed to promote equal gender representation. ZESN believes that rather than increase the size of parliament with tokenism provisions, provision should be made within the current parliamentary composition to ensure that youth are more adequately represented.

10 Appointment of judges and the Prosecutor General

- 10.1** The Constitutional Bill seeks to change the procedure for the appointment of judges of the Supreme Court and the Constitutional Court and the Prosecutor General so that the President will have greater powers than he currently has. Under the present provisions, judges and the PG are appointed by the President upon the recommendation of the Judicial Services Commission after an open and transparent public nomination and interviewing process. The proposed change means the President will be able to appoint serving judges and the pg without following open and transparent procedure. This removes the checks and balances that were designed to prevent concentration of power in the President.
- 10.2** The change from an open and transparent process to a closed, opaque and unilateral process in the appointment of judges and the PG has important implications for elections because these are key institutions in the management of elections and the political process generally. Both judges and the PG are institutions that are traditionally classified as referees in the political community. They play key roles in the resolution of disputes and the application of the law. In particular, judges of the Constitutional Court have a constitutional mandate to resolve disputes regarding the presidential election. As such, they must be independent. The proposed amendments will remove these checks and balances and therefore affect the independence of the judiciary and the Prosecutor-General.

11 Retirement of judges

- 11.1** The Constitutional Bill proposes to change the retirement age of judges. Presently, the maximum age of retirement is 70 years for all judges. There is no allowance for extension. The amendment will allow judges to serve beyond the age of 70 years but on a “rolling contract” which is subject to approval by the President.
- 11.2** This change effectively hands greater powers to the President over judges. It impacts the tenure of judges, which is a core element in the independence of the judiciary. A judge's independence is eroded when his or her tenure is subject to control by the executive. The President, not age, will determine whether a judge stays or retires. This will make the judges more beholden to the President. A judge who wants to stay in office beyond the age of 70 must be compliant with the wishes of the President. It dilutes the idea of security of tenure which is part of the mechanisms to protect judicial independence. ZESN believes the age of retirement must remain at 70 and there should be no facility for extension, certainly not at the whim of the President.

While ZESN acknowledges that there may be sound reasons for changing the Constitution such as correcting errors or gap-filing, it does not believe the government has made a cogent and persuasive case for this Constitutional Bill. 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 concerned that the amendments lead to centralisation of power in the hands of the President, which is anathema to electoral democracy. ZESN is particularly concerned that the amendments affect the independence of electoral referees, which will tilt the electoral playing field. 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.

