

A Legal Analysis of the Provincial Councils and Administration Amendment Bill



**Centre for Community Development in Zimbabwe
(CCDZ)**

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A LEGAL ANALYSIS OF THE PROVINCIAL COUNCILS AND ADMINISTRATION AMENDMENT BILL, H.B 5, 2021 SUMMARY

1.0 Introduction

The Centre for Community Development in Zimbabwe (CCDZ) is implementing the project: **“Strengthening Citizen Engagement in Local Government Reform”**. The objective of this project is to advocate for democratic local governance reforms and to promote citizen participation in local and national governance processes. As part of its work, CCDZ is lobbying government including Parliament to implement devolution in line with the Constitution and democratic standards. This *Legal Brief* looks at the Provincial Councils and Administration Amendment Bill, H.B5, 2021, which was gazetted by the government of Zimbabwe on the 31st March 2021. This Bill is set to significantly amend the existing Provincial Councils and Administration Act [Chapter 29:11] (‘PCA Act’) to align with the 2013 Constitution. The PCA Act’s foundational purpose is to establish a provincial system of governance superintended by provincial governors and provincial councils.

2.0 Major Features of the Provincial Councils Administration Act

The Act forwards three key institutions for the provincial tier of governance namely; the Minister; the provincial governor and the provincial councils. Further, the Minister for local government is the defined central authority, and provincial governors and provincial administrators are responsible for the political administration of a province.

It confers limited powers on provincial councils, gives the Minister extensive control powers over the affairs of provincial councils, and grants the Minister power to make regulations for the administration of the Act. In addition, the President can declare, alter, assign names and abolish provinces and provincial areas.

However, the Act also denies provincial council law-making powers, in contrast to local authorities that have such power, and, also provides the President with powers to alter assigned names or abolish provinces.

3.0 Unresolved Matters

Provincial Governors and Ministers of State

All provisions in the PCA Act concerning provincial governors must be repealed as the new Constitution does away with the office of provincial governors, specifically in the devolved system of government for provinces. Furthermore, it is submitted the Minister of State for Provincial Affairs, who exercises the function of provincial governors, be unambiguously removed from the devolved system as a) this office is also absent in the devolved governance under Chapter 14 of the Constitution and b) it is unlikely these Ministers will act in the interests of the provinces as their loyalty will lean towards the central government.

Provincial Councils

Under the PCA Act, the provincial council is composed of, among others, the provincial governor; mayor or chairperson of each municipal or town council or local board in the province; one appointed councillor from each municipal, or town council or local board in that province. However, the system of provincial governance created by the 2013 Constitution is markedly different and includes Members of Parliament. Their inclusion creates a constitutional problem as under section 129(1)(h) of the Constitution they cease their membership upon becoming members of ‘a statutory body, a government-controlled entity, a provincial or metropolitan council or a local authority’.

Ministerial Control Powers

The wide-ranging powers granted to the Minister of direct control of the affairs of provincial councils while possibly justified in a centralised system of government are unsuitable in a devolved system of government. They must be curtailed to lend a degree of autonomy to provincial governments.

4.0 Major Features of the PCA Amendment Bill

Preliminary Issues

The Amendment Bill is spread across 50 pages; this is odd considering the Bill intends to amend only 13 pages of the current Act. Additionally, there is no justification for creating a devolved system of government through an amendment to the current Act as the Bill attempts to graft a decentralised system of government onto a central government-oriented Act.

Competency of Councils to Receive Devolved Functions

While the Bill requires the Minister to prescribe the criteria for competence that Councils must meet before they can be granted governmental powers and responsibilities, there is no procedure for Councils to follow if they desire to claim and receive devolved powers. It is not clear whether Councils shall apply to the Minister when they are of the view that they deserve receiving central government powers and responsibilities. This failure gives the Minister excessive unilateral powers.

Minister of State to replace Governors

The Bill proposes to substitute governors with central government appointees to be called Ministers of State and Devolution, appointed by the President. Their functions include coordinating, monitoring government programmes in the province and reporting to the President. The latter being indicative of an intent to retain central government appointees in provincial government whose accountability lies, not with local citizens but with the President.

Also proposed is the Provincial and Metropolitan Development Committee whose core function is to provide technical assistance to the office of the Minister of State and Devolution and Provincial and Metropolitan Councils with members reporting to their parent Ministries.

Membership of Councils

The Bill provides for provincial and metropolitan councils to comprise members of parliament, chiefs, senators, elected councillors and mayors and chairpersons of councils. However, the Constitution prohibits members of parliament to also be members of councils.

Excessive Powers of the Minister

The Bill makes no serious effort to curtail the extensive powers of the Minister, instead, they are given wide discretion and additional powers. These include:

- i) prescribing through Regulations or Statutory Instruments the criteria for competence that must be met by councils before governmental powers and responsibilities can be devolved to them;
- ii) under Clause 31 powers of suspension over mayors, chairpersons or councillors before they can be brought before a Tribunal;
- iii) power to appoint members of the Independent Tribunal whose secretariat will be the central government;
- iv) power to cause investigation and inquiries into the financial and other affairs of Councils and issue criminal sanctions for non-compliance or other misbehaviour.

Extremely Limited Sources of Revenue

The Bill fails to create any adequate or comprehensive sources of revenue. Devolution requires sustainable sources of revenue to succeed in the short, medium and long term. And thus the implication is that government will have to commit massive financial hand-holding of council

Legislative Competence

The Bill grants Councils limited power to make legislation. However, the Constitution does not appear to envisage granting legislative competence to any other arm of the state to make any primary legislation, apart from by-laws and other subsidiary legislation. It is instead recommended that the Bill be revised such that the law that councils can only promulgate be called ordinances.

Oversight Mechanisms

While the Bill grants Councils powers of oversight and the Constitution provides that members of Council are accountable collectively or individually to their province and the national government, it does not create mechanisms and procedures for this.

Public Participation and Engagement

The Bill makes provision for engagement and consultative processes in the interests of public participation (clause 7, 39, 57, and 74). However, because consultations are not binding on the consulting person it is submitted the Bill have more sections where the Minister acts on recommendations of certain key institutions, and not only consult them.

Institutional Overlaps and Duplication of Roles

Chapter 14 of the Constitution makes it clear that Councils are the mainstay as far as devolution is concerned yet the Bill contradicts this clear trajectory in creating the roles of the Minister of State and Devolution and the Provincial Development Coordinators a role. The roles of the Council and the Minister of State are similar, suggesting that the Minister of State is not necessary for the implementation of devolution. It is submitted the Minister of State and Devolution is an appointee whose loyalties lie with the President, not the province. He or she is therefore unnecessary.

5.0 Recommendations to Policy-Makers

The Centre for Community Development in Zimbabwe (CCDZ) recommends the following:

- ❖ The withdrawal of the Amendment Bill and promulgation of a new Act altogether, to be called the 'Provincial and Metropolitan Councils Bill'.
- ❖ The powers of the central government must be curtailed. In particular, the powers of the Minister are simply excessive.
- ❖ The criteria that councils must meet to receive central governmental powers and responsibilities must be set out in the Bill and not left to the prescriptions of the Minister for local government.
- ❖ To avoid the constitutional conflict raised by the inclusion of members of Parliament in provincial councils either members of Parliament must be removed from councils or a constitutional amendment is undertaken.
- ❖ It is submitted several proposed amendments now await and be guided by changes in the proposed Constitutional Amendment (Number 2) Bill since the current provisions are unconstitutional.
- ❖ The Bill must make further provision for the Participation for Youths, Women and Persons with Disabilities in provincial affairs.
- ❖ The Bill must recognise associations of residents in the province for purposes of consultations and access to information, in addition to other platforms of citizen participation.

- ❖ The Bill must provide for the vesting of the executive authority of a council in the chairperson together with other members of the executive council appointed by the chairperson from among members of the council.
- ❖ The Bill must abandon its proposed position on the law-making powers of Councils and simply provide that Councils can make ordinances. Promulgating ordinances would thus be an exercise of councils' legislative function stated in section 270 of the Constitution.
- ❖ The members of the Tribunal must be appointed by the President but these members must not all be nominated by the Civil Service Commission, which is a central government institution.

Conclusion

Generally, the Bill is flawed. As stated, it requires extensive and fundamental changes that a new Act altogether would be more appropriate. Importantly, it defectively attempts to institute a provincial governance system under an Act underpinned by centralized government objectives.

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****Submit your feedback or comments to:**

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