



27 March 2024

ERC COMMENTARY ON THE PROPOSED CONSTITUTIONAL AMENDMENTS

This is an opinion concerning the proposed constitutional amendments, which seeks to “...to transfer the responsibility to register voters from the Zimbabwe Electoral Commission (ZEC) to the Civil Registry Department...” while also “contemplating revoking delimitation responsibilities from ZEC.”

The proposed amendments were announced in a Sunday Mail story titled, “**Constitutional changes on cards**”¹ published on 24 March 2024, where the story cites the Minister of Justice, Honourable Ziyambi Ziyambi.

The Proposed Amendments

On 23 March 2024, the Government through a newspaper article published proposed constitutional amendments in relation to election administration that the Government seeks to implement. While the proposals are yet to be gazetted, the amendments seek to have two effects;

1. Amend constitutional provisions relating to the function of the Zimbabwe Electoral Commission, namely, duties to register voters as envisioned under section 239 (c) of the Constitution, by transferring the responsibilities to register voters from the Zimbabwe Electoral Commission to the Civil Registry Department.
2. Amend constitutional provisions relating to the function of the Zimbabwe Electoral Commission, namely, to delimit constituencies, wards and other electoral boundaries; as envisioned under sections 160, 161 and 239 (f) of the Constitution, by transferring the responsibilities to delimit from the Zimbabwe Electoral Commission to an independent commission.

In so doing, the proposed amendments purport to amend section 239 of the Constitution of Zimbabwe which sets out the functions of the Zimbabwe Electoral Commission. More specifically, sections 239 (c) and 239 (f) of the Constitution. The proposed amendments will come with subsequent amendments to subsidiary legislation including the Electoral Act.

Commentary

Independence of the Zimbabwe Electoral Commission

The law must safeguard the independence of independent commissions and section 235 creates an obligation on the State including when implementing legislation that;

¹ https://www.sundaymail.co.zw/constitutional-changes-on-cards#google_vignette

The State and all institutions and agencies of government at every level, through legislative and other measures, must assist the independent Commissions and must protect their independence, impartiality, integrity and effectiveness².

The proposed amendments do not assist, protect or further the independence of the Electoral Commission.

SADC Principles and Guidelines Governing Democratic Elections, namely principles for conducting democratic elections (provision 4.1.9), states that member states must; *Uphold and guarantee the impartiality and independence of the Judiciary, the Electoral Management Bodies (EMBs) and all other electoral institutions.* While the AU Declaration on the Principles Governing Democratic Elections in Africa of which Zimbabwe is a signatory imposes a duty on member states to; *Establish impartial, professional, independent, all inclusive, competent and accountable EMBs staffed by eminent, non-partisan and capable commissioners, and efficient and professional personnel.* However their applicability has been limited in the past, as States including Zimbabwe are not obliged to observe them, however they set out regional standards.

The International Convention on Civil and Political Rights in General Comment No. 25 to which Zimbabwe is a signatory, establishes a legally binding obligation for signatory member states to adhere to;

An independent electoral authority should be established to supervise the electoral process and to ensure that it is conducted fairly, impartially and in accordance with established laws which are compatible with the Covenant' (United Nations 1996: paragraph 20).

An independent electoral authority is not a requirement to establish a structurally independent EMB, rather a necessity. What is clear is that there is a duty on Government to ensure that it establishes, maintains and protects the independence of the Zimbabwe Electoral Commission. The government in its conduct and proposed amendments is meant to protect the functions of the Zimbabwe Electoral Commission and protect the professional independence of the Commission. The proposed amendments create an environment where the independence of the Electoral Commission is not fully realised, as they potentially make the Electoral Commission subservient to the Civil Registry Department and/or the proposed independent delimitation body.

The proposals reinforce retrogressive electoral measures to ensure independence of the Zimbabwe Electoral Commission, against recommendations made by domestic, regional and international (SADC, EU and Carter Centre) Election Observer Missions.

The Issue Had Lapsed

The Government alleges that the proposed amendments have been brought about by legislators' debates during the 9th Parliament (2018 - 2023). In terms of section 147 of the Constitution: ***“On the dissolution of Parliament, all proceedings pending at the time are terminated, and every Bill, motion, petition and other business lapses.”*** By virtue of section 143(1) of the Constitution, Parliament was dissolved at midnight on the day before polling (23

² Section 235 (2) of the Constitution

August 2023), i.e. at midnight on the 22nd August. Therefore by law any proposal to amend the law lapsed on such a date. A fundamental aspect of the rule of sovereignty that no Parliament can bind its successors. Parliament cannot bind its successors as to the form and content of subsequent legislation. Therefore, any proposal must be “new” following current submissions within the 10th Parliament of Zimbabwe session.

Conflict with the Zimbabwe Electoral Commission

ZEC had long been making recommendations to strengthen the independence of the Commission including recommendations submitted by ZEC in 2019 which were ignored, reiterating this in the 2023 Election Observer briefing ahead of the 2023 Harmonised Election. At a time when efforts must be made to strengthen the capacity of the Electoral Commission following the 23/24 August Harmonised Elections, the proposed amendments seek to take away administrative duties of the Commission and infringe on the independence of the Zimbabwe Electoral Commission. Additionally, the proposed constitutional changes do not address the underlying issues our current election administration faces, namely the lack of a comprehensive voter registration process, which could be addressed by changes to practise instead of changes to law. The ERC notes the conflict brought about by the lack of independence of the Commission by law around delimitation in 2022/2023. On 3 February 2023, ZEC Chairperson, Justice Chigumba is on record having submitted a Final Delimitation Report to the President, who was then required by law to gazette it by midnight on 17 February 2023. However, the deadline passed without any word from the government, and ZEC was powerless to address the delays, plunging the 2023 Harmonised Election into a constitutional crisis. The crisis and conflict was brought about by the Electoral Commission’s subservience to the President for the finalisation of the delimitation report.

Historical Context

The proposed amendments call for a return to the old system of electoral administration where the registration of voters was conducted by the now repealed Registrar-General of Voters (repealed in General Laws Amendment Bill 2015) and delimitation conducted by the Delimitation Commission (repealed by section 11 of Act 11 of 2007 – Amendment No. 18). Electoral stakeholders including political parties and civil society organisations had long been critical of the Registrar-General of Voters office formerly held by Tobaiwa Mudede. Former Zimbabwe Electoral Commission Chairperson, Simpson Mtambanengwe, noted that Registrar-General Tobaiwa Mudede ought to operate under the supervision of the commission in conducting any election, however this was not practice. Noting the difficulty of separating duties and roles between the election management body and other state institutions. The ERC notes that historically, the Electoral Commission, where possible, wanted the Office of the Registrar-General to be reduced to a department operating under the supervision and control of the Commission³. Therefore, a return to the separation of duties between the Electoral Commission and the Civil Registry will be a return to the separation that burdened not only the Electoral Commission between 2005 and 2013 but burdened the credibility of elections and

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<https://www.voazimbabwe.com/a/zimbabwe-electoral-chief-urges-subordinate-role-for-registrar-general-137684173/1458003.html>

resulted in administrative conflict. In light of the criticism around the independence of electoral management bodies, SADC had since 2005 pushed for an independent election committee to be in charge of the elections in line with the SADC Principles and Guidelines Governing Democratic Elections.

Administration - Civil Registry Department

The ERC notes that according to the ZIMSTAT 2022 Population and Housing Census (PHC), approximately **15% do not have birth certificates** while **12% of people aged 16 years of age and above** do not have national identification documents, highlighting the administrative difficulties the Civil Registry Department already faces in the national registration of people. Therefore, how would further burdening the department with the administrative duties of registering voters improve the efficiency of election administration in general and voter registration in particular?

Piecemeal Approach to Amendments

The ERC believes that any amendments to electoral laws should be undertaken after wide-ranging consultations pertaining to all aspects of the election including addressing recommendations made by Election Observer Missions following the 2023 Harmonised Election. An electoral reforms dialogue ought to be the platform for such inclusive and broad based engagements on any proposed changes to practise, policy and/or law relating to the electoral framework.

What the government should do

If the government wants to change the practices concerning improving the registration of voters, it has the following options;

- Support collaboration between the Zimbabwe Electoral Commission and the Civil Registry Department through practice and/or policy changes that allow the Electoral Commission to coordinate voter registration with the Civil Registry without taking away the function from the Commission.
- Adequately fund the Electoral Commission to carry out periodic voter registration blitzes that support the continuous voter registration targeting areas with low rates of registration.
- The Government should call on the Commission to partner with civil society organisations in voter registration exercises noting that successes in the mass registration of voters in 2018 where ERC had partnered with the Electoral Commission.
- Any consultation regarding amendments to electoral laws should be wide-ranging and pertain to all aspects of the election including addressing recommendations made by electoral stakeholders.

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