



CONSTITUTION OF ZIMBABWE AMENDMENT (NO. 17) BILL, 2005

**SUBMISSIONS TO THE PORTFOLIO COMMITTEE
ON JUSTICE, LEGAL AND PARLIAMENTARY
AFFAIRSⁱ**

INTRODUCTION

The Constitution of Zimbabwe Amendment (No. 17) Bill, 2005 ("the Amendment Bill") was gazetted on 15 July 2005 and is intended to amend the Constitution of Zimbabwe in several respects. It is the view of Zimbabwe Lawyers for Human Rights (ZLHR) that the Bill raises serious concerns, and the Portfolio Committee on Justice, Legal and Parliamentary Affairs ("the Committee") should be encouraged to present an adverse report to Parliament, based on the analysis, conclusions and recommendations that appear below.

THE PRINCIPLE OF CONSTITUTIONALISM¹

In the most minimal terms a "constitution" consists of a set of rules or norms creating, structuring and defining the limits of, government power or authority. This requires not only that there are rules creating legislative, executive and judicial powers, but that these rules impose limits on those powers. The only time-tested manner of ensuring such limits is through a constitutional structure which ensures separation of powers, checks and balances, independent constitutional review by an independent Judiciary, and protection of individual rights. This, in essence, is the principle of constitutionalism.

Constitutionalism is a necessary foundation for the rule of law. Laws must exist to place meaningful constraints on government behaviour, and must allow for established procedures to be available, consistently implemented and enforced in order to prevent arbitrary action, which leads to a loss of authority in the eyes of the people who the government seeks to serve.

Constitutionalism does not weaken the government; to the contrary, it allows the government to be stronger and more stable, as it is seen as more responsible, more consistent, more predictable, more just, and more respected.

In turn, constitutionalism cannot exist without the rule of law. If laws are exclusively the results of the "sheer will" of the legislators, there can be no constitutionalism. For a constitutional structure of separation of powers, checks and balances and rights protection to exist, there must be some limits on what the legislators can do. This limit is imposed by the rule of law and implemented through an independent judiciary, the process of judicial review, and the notion that law is, at least in part, the product of independent legal reasoning by judges.

¹ The arguments put forward in this section draw upon comments to be found in the *Stanford Encyclopedia of Philosophy* and Li, B. *Constitutionalism and the Rule of Law Perspectives*, Volume 2, No. 1

A further important feature of constitutionalism is that the rules imposing limits upon government power must be in some way be *entrenched*, either by law or by way of "constitutional convention". Those whose powers are constitutionally limited — i.e., the organs of government — must not be legally entitled to change or expunge those limits at their pleasure. Were a government entitled, at its pleasure, to change the very terms of its constitutional limitations, it is questionable whether there would, in reality, be any such limitations.

What is clear from the contents, intent and purposes of the Amendment Bill is that there has been a general failure to subscribe to this fundamental principle.

The Amendment Bill seeks to effectively remove the fundamental rights to property [section 16], secure protection of the law [section 18(1) and (9)] and freedom of movement [section 23] from the people of Zimbabwe who rely on the Constitution for protection against unchecked State action. As an organisation whose primary objective is to foster a culture of human rights in Zimbabwe and promote and protect human rights as enshrined in the Constitution of Zimbabwe and international and regional human rights instruments to which Zimbabwe is a State Party, ZLHR finds these implications in particular to be of great concern.

CLAUSES 2 AND 23 OF THE AMENDMENT BILL: THE PROPERTY CLAUSE²

In summary this intended section 16B seeks to do the following:

- 1.** Add a new provision which will confirm the acquisition by, and vesting of full title in, the State of agricultural land for resettlement purposes which took place pursuant to the Land Reform Programme beginning in 2000 without compensation (except for improvements effected prior to acquisition), and provide for the acquisition in the future of agricultural land for resettlement **and other** purposes (emphasis added).
- 2.** Allow for the retrospective operation of the law in relation to such acquisition and vesting of full title.
- 3.** Remove the jurisdiction of the Courts of Zimbabwe to determine the merits of any such acquisition or any other matter relating to that land as envisaged by section 18(9) of the Constitution.³

² **Article 14** of the **African Charter on Human and Peoples' Rights**, to which Zimbabwe is a State Party, states: *'The Right to Property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws'*. In terms of **Article 17(1)** of the **Universal Declaration of Human Rights (1948)** *'Everyone has the right to own property alone as well as in association with others'* and **Article 17(2)** states that *'No one shall be arbitrarily deprived of his property'*

³ Section 18(9) provides that *'Subject to the provisions of this Constitution, every person is entitled to be afforded a fair hearing within a reasonable time by an independent and impartial court or other adjudicating authority established by law in the determination of the existence or extent of his civil rights or obligations.'*

4. Allow for future acquisitions without notice to affected landowners or the possibility of challenged such acquisition through the Courts of Zimbabwe.
5. Allow such acquisitions to go unchallenged even if the land in question is incorrectly identified by the State, as long as it is purportedly carried out in terms of the new section 16B.

The implications of this intended amendment are far-reaching and of a magnitude too serious to imagine.

- A. An entire category of landowners will effectively have their constitutional right to protection from deprivation of property summarily removed, on the basis that they own agricultural land. The Constitution itself in its current form provides that all persons are entitled to the fundamental rights and freedoms contained in the Declaration of Rights⁴, that no law shall make any provision that is discriminatory either of itself or in its effect⁵, and that no person shall be treated in a discriminatory manner by any person acting by virtue of any written law or in the performance of the functions of any public office or authority⁶. The intention of the drafters is clear as to who is being targeted and it is submitted that they fall within the confines of the groups against which such discrimination cannot be allowed to occur⁷.
- B. The proposed provisions of section 16B(2)(a)(iii) are dangerously vague and ambiguous, and allow for unacceptable discretion on the part of the acquiring authorities. In future, all targeted agricultural land can be acquired "*for whatever purpose*" and includes certain purposes, which, again, are left undefined in the Bill, are subject to various unintended interpretations and thus open to abuse.
- C. Of most serious concern is the contemplated ouster of the jurisdiction of the Courts of Zimbabwe, which will prevent the Judiciary from considering whether the actions of the other arms of government are within the confines of the Constitution and other relevant laws of the land. This contravenes fundamental international human rights instruments which Zimbabwe has ratified and which protect the independence of the Judiciary⁸. This clearly stated intention to remove the fundamental

⁴ Section 11 of the Constitution

⁵ Section 23(1)(a) of the Constitution

⁶ Section 23(1)(b) *ibid*

⁷ Section 23(2) *ibid*

⁸ Various international human rights instruments, to which Zimbabwe is a State Party, provide for secure protection of the law. These include the **Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the African Charter of Human and Peoples' Rights, and the International Covenant on Economic, Social and Cultural Rights**. For example in terms of **Article 16**

protection of section 18(9) of the Constitution also defies the principle of constitutionalism as traversed above, and is clearly bad law. It cannot be allowed to pass.

- D. There are other more practical issues that have not been addressed, but which will definitely prove problematic if such a provision passes:
1. There are a plethora of land cases already before the Administrative Courts, the High Courts, and the Supreme Court of Zimbabwe, which will be affected by this provision. They will be prematurely terminated should this provision pass, notwithstanding the individual merits and circumstances of each case. Amongst other considerations, who will compensate litigants for their wasted costs? Were such people consulted before such a drastic step was taken? Was the Judiciary itself consulted on its approval of such a blatant withdrawal of its constitutional mandate? The State is opening itself up to a multitude of lawsuits should this Amendment be passed.
 2. Even MPs sympathetic to the Government that drafted this Amendment ought to be cautious in voting for it because, by showing approval for such conduct, which is contemptuous of the fundamental principle of separation of powers, the Legislature will be condoning potential future ousters of the functions of the Judiciary by the Executive in other areas, which could eventually lead to a complete removal of the Courts of this land, causing a complete breakdown of the rule of law and no legal protection for any person living in Zimbabwe.
 3. The Courts of the land are being reduced to legal advisors of Government as and when it pleases because it can now simply legislate that it merely wants their opinion on certain issues, which it can disregard at its pleasure, (for example around the issue of quantum of compensation) but it is not willing to allow the courts to decide on the lawfulness of its conduct. Now the Courts cannot review patently unlawful and or unconstitutional laws and or constitutional amendments. This function will be left to the Executive and its majority in Parliament.

ZLHR concludes that such an amendment would be unacceptable and therefore should not be approved by the Committee or Parliament in general.

of the **International Covenant on Civil and Political Rights (1976)** ‘*Everyone shall have the right to recognition as a person before the law*’ (the proposed S.16B effectively denies land owners this status and strips them of their humanity), and **Article 26** provides that, ‘*All persons are equal before the law and are entitled without any discrimination to the equal protection of the law.*’

CLAUSE 3 OF THE AMENDMENT BILL: FREEDOM OF MOVEMENT⁹

The existing provision is similar in its form and content to many provisions of international human rights law, and provides in section 22(1) that "*No person shall be deprived of his freedom of movement*". Embodied in such protection are: (i) the right to move freely throughout Zimbabwe; (ii) the right to reside in any part of Zimbabwe; (iii) the right to enter and leave Zimbabwe; and (v) immunity from expulsion from Zimbabwe.

Subsection (4), as read with subsection (3)(a), provides that, although in the interests of defence, public safety, public order, public morality or public health, it is lawful to restrict the freedom of movement of persons, such right is not to be construed as authorizing a law preventing a citizen from leaving Zimbabwe or excluding or expelling him from the country. Verbatim it reads: "(4) *The provisions of subsection (3)(a) shall not be construed as authorizing a law to make provision for preventing any person from leaving Zimbabwe or excluding or expelling from Zimbabwe any person who is a citizen of Zimbabwe*" (emphasis added).

The Amendment Bill, in its Clause 3(b), seeks to remove the above-emphasized portion of S.22 (4), which disallows the making of laws that make provision for 'preventing any person from leaving Zimbabwe'.

In the case of *Chirwa v Registrar General*¹⁰, it was held that the onus is on the State '...seeking to limit the [applicant's] right to enter and leave Zimbabwe guaranteed under S.22, [to] also show that the objective which the limitation intended to achieve was of sufficient importance to overcome the protected constitutional right. Further, the Respondent must demonstrate that the means adopted to achieve this are proportional or appropriate to the ends'¹¹.

The Memorandum to the Amendment Bill seeks to justify the reversal of the ruling of a duly-constituted Court in Zimbabwe (thus again usurping the function of the Judiciary) by removing that portion of the judgment and provides the following explanation: '*An example of the type of mischief that may justify the imposition of the restrictions on the freedom of movement contemplated by this clause is where, for instance, it is discovered that a person intends to depart Zimbabwe for purpose of engaging in terrorist training abroad.*'

⁹ The right to freedom of movement is recognized under international human rights instruments to which Zimbabwe is a State Party. For example, in terms of **Article 12(2)** of the **African Charter on Human and Peoples' Rights**, '*Every individual shall have the right to leave any country including his own, and to return to his country. This right may only be subject to restriction provided for by law for the protection of national security, law and order, public health or morality*'. **Article 12(2)** of the **International Covenant on Civil and Political Rights** states that, '*Everyone shall be free to leave any country, including his own*'

¹⁰ 1993 (1) ZLR 1 (H)

¹¹ Per Adam J at p.20 C-D

With all due respect, this is an unjustified limitation. Sections 22(2) and (3)(a)-(f) already cater for this unfounded alarm. There is further an array of security and anti-terrorist laws already on our statute books¹² and in the common law to adequately protect against suspected terrorist activity. It is submitted that it is not reasonably justifiable in a democratic society to remove such a critical protection from the Bill of Rights for a purpose already achievable through other laws that the state has zealously enforced in the past.

It is therefore respectfully submitted that one of the real objectives of the amendment is to reverse the progressive reasoning of Justice Adam in the above-cited case. It has the unfortunate retrogressive effect of further diminishing the protection of human rights in Zimbabwe. It is an unfortunate example of the Executive manipulating the Legislature into undoing judicial decisions with which they disagree, or which they do not wish to enforce, and this is an unjustifiable affront to the time-honoured doctrine of separation of powers and the rule of law. It is submitted that it is reasonable and acceptable in a democratic society to let the legislature legislate on anti-terrorism measures and then allow the Courts to decide on the effect of the legislation on fundamental rights and freedoms. However with this Amendment Bill, legislation could now be promulgated to prevent a person from leaving Zimbabwe or to deny citizens passports. This new provision will make it possible for the State to pass laws which cancel travel documents of residents, withdraw passports or just declare them invalid and thus make it impossible for people to move out of Zimbabwe. In the view of ZLHR this is clear executive manipulation of the Legislature for unsustainable reasons.

The Memorandum is also highly misleading, as it directs attention away from other possible dangerous purposes for which the removal of protection can be enforced. The Amendment Bill seeks in clause 3(a) to increase the grounds open to the authorities to justify impositions of restrictions on freedom of movement. Added to the traditional grounds of interests of defence, public safety, public order, public morality or public health, have been added "the national interest", "the public interest or the economic interests of the State".

¹² In this regard refer to TITLE 11(DEFENCE, SECURITY AND PUBLIC ORDER) of The Statute Law of Zimbabwe (1996 Revised Edition). It contains *inter alia* the Commonwealth Forces (Jurisdiction) Act [Chapter 11:01]; Defence Act [Chapter 11:02]; Defence Procurement Act [Chapter 11:03]; Emergency Powers Act [Chapter 11:04]; Foreign Subversive Organizations Act [Chapter 11:05]; Geneva Conventions Act [Chapter 11:06]; Law and Order (Maintenance) Act [Chapter 11:07]; National Service Act [Chapter 11:08]; Official Secrets Act [chapter 11:09]; Police Act [Chapter 11:10]; Preservation of Constitutional Government Act [Chapter 11:11]; Protected Places and Areas Act [Chapter 11:12]; Unlawful Organizations Act [Chapter 11:13]; Public Order and Security Act [Chapter 11:17]; Chemical Weapons (Prohibition) Act [Chapter 11:18]; Anti-Personnel Mines (Prohibition) Act [Chapter 11:19]

The problem with such grounds is immediately apparent. Who defines such interest/s? They remain undefined in the Bill and therefore if passed would allow the authorities unfettered discretion to clamp down on any person they would not wish to travel out of the country for any purposes whatsoever. Examples that spring to mind are MPs critical of a government policy that are invited to address international forums. Another example could be activists who wish to travel to address regional or international meetings or conferences. A further example could be a labour representative traveling to participate at an ILO conference. The list is endless and it is clear what the intention of the drafters is. It should also be borne in mind that, with the clamping down on the freedom of movement, several other fundamental human rights will naturally be affected, including freedom of expression and freedom of assembly and association.

ZLHR again concludes that this provision is unacceptable and the intended amendments should be wholeheartedly rejected.

CLAUSE 4: PROTECTION FROM DISCRIMINATION

ZLHR welcomes the inclusion of “physical disability” to the list of grounds on which discrimination is prohibited as long overdue. As for the intended addition of *paragraph (g)*, it is submitted that the clause remains vague and undefined and needs to be tightened in order to prevent its abuse for unintended purposes.

CLAUSES 5 – 8, 11 – 16 and 21, First Schedule

ZLHR notes that the Amendment Bill seeks to reconstitute the Parliament of Zimbabwe as a bi-cameral legislature consisting of a Senate and a House of Assembly. Further, certain representatives will be appointed in an undemocratic manner. Out of the intended 66 Senators, an unacceptable total of 16 will be people who have not been democratically elected by the people of Zimbabwe exercising their right to a secret ballot. In the House of Assembly, although the 10 chiefs will be removed through their “promotion” to the Senate, the other 20 non-constituency MPs remain, unelected and unacceptable in a democratic society.

This unfortunately undermines the principle that ***the authority to govern derives from the will of the people demonstrated through elections conducted on the basis of universal and equal suffrage exercised through a secret ballot***, and the principle that ***every citizen has the right to participate in government directly or through freely chosen representatives***, as enshrined in our very own Electoral Act [*Chapter 2:13*] and

in the SADC Principles and Guidelines Governing Democratic Elections, to which Zimbabwe has bound itself. For such reasons, ZLHR finds this re-constitution of the Senate unacceptable.

In addition, such intended re-constitution also imposes fiscal obligations on the State which, in the current economic climate, will be impossible to sustain and will endanger the lives and livelihoods of the people of Zimbabwe. It will have an adverse effect by drawing funding away from areas which critically require sustenance, and this will inevitably lead to further violations of the economic, social and cultural rights which, although not adequately protected in the Constitution of Zimbabwe, are protected in international human rights instruments to which Zimbabwe is a State Party.

It is the firm belief of ZLHR that the bi-cameral Parliament will offer no additional benefits to the people of this country, but only cater to the whims of a select and unrepresentative few. If the intention was to uplift the plight of the constituents they seek to represent, then the authorities would have sat down to seriously consider how economic, social and cultural rights could have been included for protection in the Constitution, and diverted financing intended for the overblown Parliament to those who truly need it most.

ZLHR therefore rejects the intended Amendments relating to such re-constitution of Parliament.

CLAUSE 17: THE ZIMBABWE ELECTORAL COMMISSION

ZLHR notes that the Zimbabwe Electoral Commission (ZEC) will, under the Amendment Bill, take over from the Electoral Supervisory Commission. Although this will remove the confusion that exists at present over which of the two bodies bears what responsibility, ZLHR is disappointed that the functions of other electoral bodies under the Constitution have not been addressed, and feels that the potential for confusion and abuse will still exist despite the intended amendments. ZLHR has previously made known its criticisms of the ZEC (which are available to the Committee upon request), and maintains that this Amendment Bill will not address our concerns.

CONCLUSION

In 1999 Zimbabweans were given an opportunity to be consulted about what they desired in a home-grown constitution, and to decide on whether what was produced was a true reflection of such desires. They did not believe that what was offered was acceptable.

The Government has a record of what the people said they wanted in a Constitution¹³. What the Amendment Bill proposes is not remotely close to this. If it is close, and this is not here conceded, then it falls far short insofar as it grants only that which at present seems convenient to the government and fails to address pertinent and key issues clamoured for by Zimbabweans in 1999, such as a wider Bill of Rights which embraces international human rights standards and norms and really makes a difference in their lives. Second and more importantly, it totally negates the principle of citizen participation in the constitution-making process and thereby ignores the input of the ordinary citizenry¹⁴.

The benefits of the constitutional consultative process were that people were able to put their views forward and be heard; it embraced the cardinal principle of government by the people and for the people. Zimbabwean citizens freely exercised their constitutionally protected right to participate in governance and in

¹³ On the Bill of Rights (including the right to property, protection of the law and freedom of movement) Zimbabweans said they wanted one which was *inter alia* wide & detailed, tied to international democratic practices and treaty standards such as the International Covenants on Civil & Political Rights, Economic, Social & Cultural Rights, The Universal Declaration of Human Rights and the African Charter on Human and Peoples' Rights. On the Legislature Zimbabweans are on record as saying they wanted it to be Bicameral and strong in that it be the sole legislative authority, the centre of Power made up of a Senate of 60, 10 provinces electing 5 representatives and 10 traditional leaders and a National Assembly of 60 constituency MPs (recallable) + 60 by Proportional Representation. On Electoral Institutions they wanted an independent body with wide powers, fixed terms & numbers. Members nominated, approval by 2/3rd vote in each house, appointed by the President, with a Code of Conduct and Protection from arbitrary removal. At no time did they state that they wished the powers and protection of the Judiciary to be removed.

¹⁴ The Universal Declaration of Human Rights (1948) in Article 21(1) provides that '*Everyone has the right to take part in the government of his country, directly or through freely chosen representatives...*' and Article 21(3) further adds that '*The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.*'. The SADC Principles and Guidelines Governing Democratic Elections (2004), though aspirational in nature provided for a similar principle. The Electoral Act [Chapter 2:13] incorporated similar principles in its S.3 which reads: '*Subject to the Constitution and this Act, every election shall be conducted in a way that is consistent with the following principles-*

- (a) *the authority to govern derives from the will of the people demonstrated through elections that are conducted efficiently, freely, fairly, transparently and properly on the basis of universal and equal suffrage exercised through a secret ballot; and*
- (b) *every citizen has the right-*
 - a. *to participate in government directly or through freely chosen representatives, and is entitled, without distinction...to stand for office and cast a vote freely;*
 - b. *...*
 - c. *to participate in peaceful political activity intended to influence the composition and policies of government;*
 - d. *to participate, through civic organizations, in peaceful activities to influence and challenge the policies of government*

the decision-making processes that would shape their lives. This success should not be overlooked, just as the importance of a truly consultative process should not be derided.

Surely what appears in the Amendment Bill is not a true reflection of the most pressing issues in Zimbabwe at present. Again Zimbabweans at no time ever intimated that they wanted the constitutional question to be addressed in such a piecemeal fashion. It is submitted that this approach is only delaying the constitutional question and it will resurface, with ordinary Zimbabweans clamouring to be included in the process as happened in 1999.

What is so important or unimportant about these provisions that government would leave it to a Parliament, divided upon party lines, to decide the right of Zimbabweans to seek and secure the protection of the law or be denied their right to freedom of movement by the passing of legislation that will withdraw, cancel or rescind passports or other travel documents? Further it must be pointed out that Zimbabweans in 1999 illustrated that they were unhappy with our present 'Lancaster House Constitution', and therefore it is peculiar to witness this concerted effort on the part of Government to consolidate and preserve the very values and protections of the 'Lancaster House Constitution' which we were told to reject in 1999.

The Amendment Bill, in the opinion of ZLHR, is an unjustifiable attempt to remove from the people of Zimbabwe fundamental human rights which, by virtue of being human beings with dignity, they are entitled to and which cannot be removed. The Bill goes against the very principle of constitutionalism, and is a bad law.

Our present Constitution has many shortcomings and falls far short of a document of which the Nation can be proud and willing to respect. It fails to protect fundamental economic, social and cultural rights and is far from being truly African in its intent and purposes, realizing the real challenges the country faces and seeking to uplift the lives of the people through a document which can be used for active progressive alleviation of bread-and-butter concerns and hardships. To continue to amend the Constitution to achieve limited and very selfish objectives should be unacceptable to the Committee and to all MPs who purport to represent the people who entrusted them with public office.

ZLHR therefore wholeheartedly recommends to the Committee and all Parliamentarians to reject the Bill and call for wholesale constitutional reform.

ⁱ This analysis was prepared by Irene Petras (Programmes Coordinator) and Tafadzwa Mugabe (Projects Lawyer) on behalf of Zimbabwe Lawyers for Human Rights. © reserved