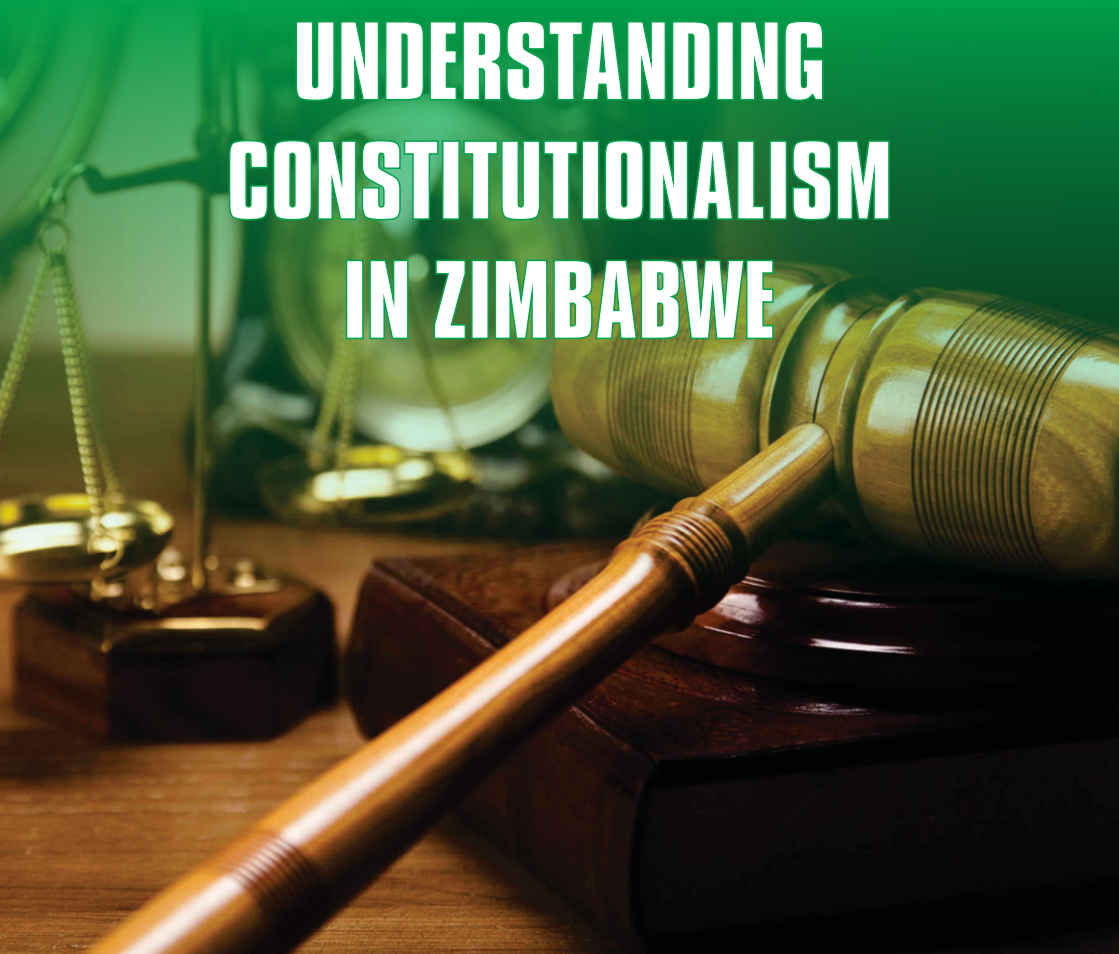




W/O 3/93
Campaigners for Human Rights

A CITIZEN GUIDE TO UNDERSTANDING CONSTITUTIONALISM IN ZIMBABWE





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Campaigners for Human Rights

A CITIZEN GUIDE TO UNDERSTANDING CONSTITUTIONALISM IN ZIMBABWE

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EXECUTIVE SUMMARY

This Guide is designed to help communities appreciate the value and concept of Constitutionalism in Zimbabwe and capacitate them to take action in promoting Constitutionalism and defending the Constitution. This Guide provides communities with advocacy strategies to help and support communities in taking collective action in defending the Constitution, deepening the culture of constitutionalism and respect for constitutional values.

- In the first section the Guide defines the Constitution and the key concepts relating to Constitutions.
- In section two, the Guide distinguishes between the Constitution and other legislative enactments.
- In section three, the Guide explains the hierarchy of laws.
- In Section four, the Guide introduces the concept of Constitutionalism and its key pillars.
- In section five, the Guide explains the different types of Constitutionalism and the key concepts.
- In section six, the Guide includes the principles guiding the concepts of Constitutionalism.
- In section seven the Guide explains how human rights and the Constitution relate with each other.
- In section eight the Guide discusses the Declaration of Rights as enshrined in chapter 4 of the Constitution.
- In section nine the Guide explains the need and importance of educating citizens about Constitutionalism.

- In section ten, the Guide discusses the role of the Judiciary in protecting the Constitutionalism.
- In section eleven, the Guide discusses the role of citizens in promoting Constitutionalism.
- In section twelve, the Guide discusses the possible threats against Constitutionalism and how they can be countered.
- In section thirteen the Guide explore other ways in which constitutional literacy can be promoted and compares with other countries.
- In section fourteen, the Guide explores the relationship amongst the Constitution, regional and international law
- In section fifteen, the Guide explore practical activities and strategies that be best implored by all persons to promote Constitutionalism.
- In section sixteen, the Guide answers the question whether or not a Constitution can be amended and the circumstances under which such amendments can be effected.
- The Guide concludes by discussing ZimRights' position on the Constitution Amendment Bill No 2 of 2020



**IF YOU KNOW YOUR
CONSTITUTION, YOU KNOW
YOUR RIGHTS**

1. WHAT IS A CONSTITUTION?

A Constitution is the supreme law of a country. It binds every person, governmental body and private entity, including companies and other private institutions. It must be obeyed as the highest law of the land.

The Constitution creates the foundation for governmental rule. It constitutes the State by creating:

- the courts,
- the presidency,
- parliament and
- all other State bodies.

The Constitution sets the boundaries of legitimate governmental power. It is only the power which is set out in the Constitution which can be legitimately exercised. Any power outside the Constitution is unlawful.

The Constitution ensures that no one individual or entity has unlimited powers, and creates a system of checks and balances, so that no one exercises powers beyond that which they have.

The Constitution also outlines fundamental freedoms. These are the rights bestowed on every individual. They represent the zones into which the government cannot interfere. This is an important limitation of governmental power and represents the last line of defence against abuse of power.



2. WHAT IS THE DIFFERENCE BETWEEN THE CONSTITUTION AND OTHER LEGISLATIVE ENACTMENTS?

There are other forms of law which govern human conduct. Those made by Parliament are called Acts of Parliament or statutes, and constitute what is referred to as primary legislation. Executive bodies and functionaries (including government ministers) enact statutory instruments. This is called subsidiary legislation and includes by-laws and regulations.

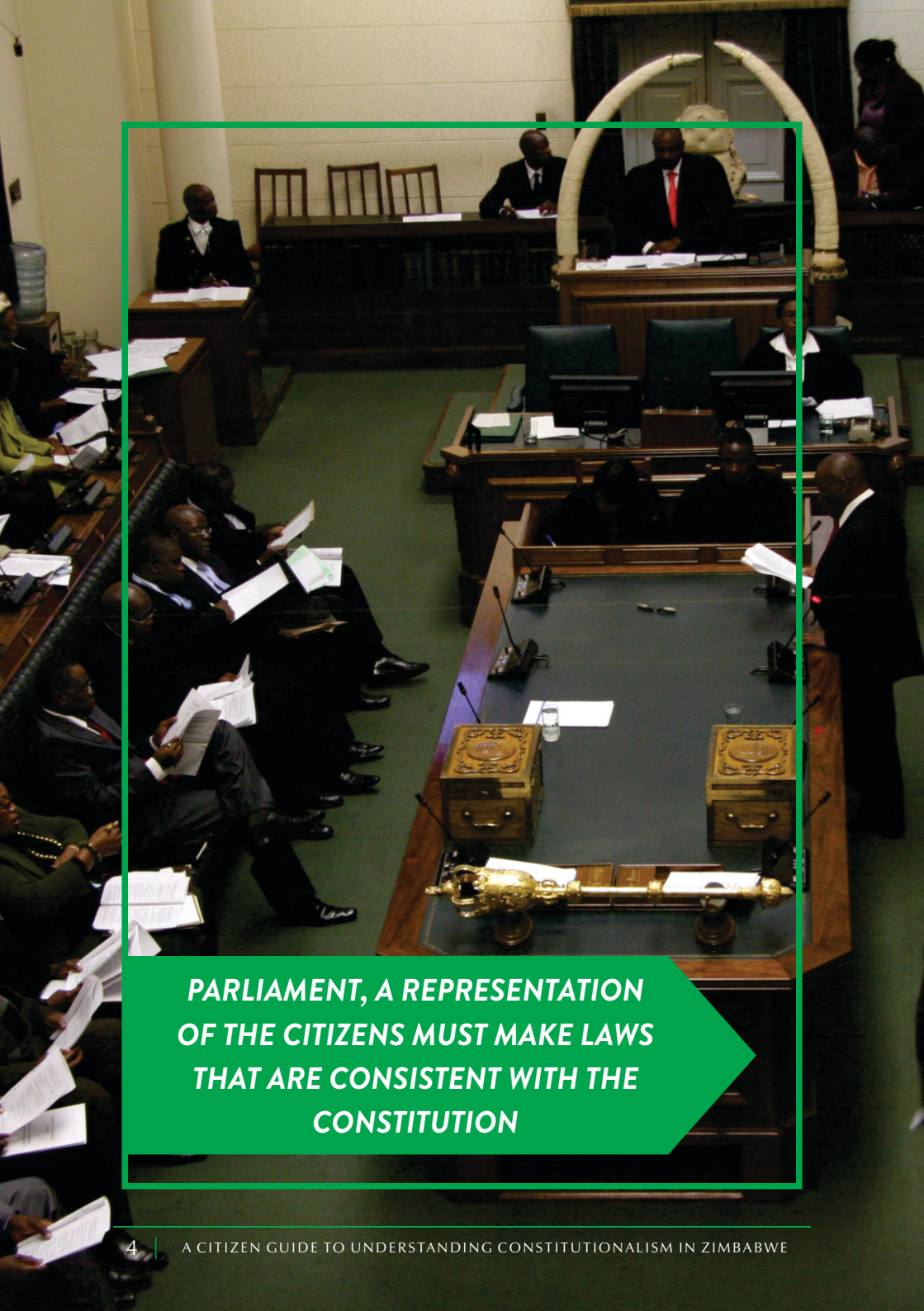
The law contained in the Constitution is different from other forms of law. This is because of constitutional supremacy.

a. Supremacy: The Constitution is the mother of all laws. It was not created by elected representatives, government ministers or local authorities but by the people themselves.

b. Origins: Unlike an ordinary Act of Parliament, the Constitution of Zimbabwe was adopted through a referendum, in which the people participated in deciding whether or not to adopt the Constitution.

c. Collective Identity: It represents the collective identity and foundational values of the nation. This gives it the highest legal status.

d. Social Contract: The Constitution is referred to as the “social contract”, meaning it is an embodiment of how people want to be governed, and a collection of the people wishes and aspirations.



**PARLIAMENT, A REPRESENTATION
OF THE CITIZENS MUST MAKE LAWS
THAT ARE CONSISTENT WITH THE
CONSTITUTION**

3. WHAT IS THE HIERARCHY OF LAWS?

The hierarchy of laws describes the structure and status of sources of law, and shows the importance of the sources.



a. The Constitution is at the top of this hierarchy as the highest legal instrument. Any law, custom or conduct which is contrary to the Constitution is null and void. It has no effect.

b. Acts of Parliament are below the Constitution but above statutory instruments. This means statutory instruments must be in conformity with the Acts of Parliament under which they are created. Acts of Parliament and statutory instruments must all conform with the Constitution.

c. Statutory Instruments, these are a form of legislation which allow the provisions of an Act of Parliament to be subsequently brought into force or altered without Parliament having to pass a new Act. They are also referred to as secondary, delegated or subordinate legislation.

d. By-laws, these are rules or laws established by an organization or government departments to regulate itself, as allowed or provided for by some higher authority. The higher authority, generally a legislature or some other government body, establishes the degree of control that the by-laws may exercise.



The courts are entrusted with maintaining this hierarchy. They can strike down any laws which are contrary to the Constitution.

The courts can also strike down statutory instruments which are outside the powers of the Acts of Parliament under which they are enacted.



4. WHAT IS CONSTITUTIONALISM?

Constitutionalism is the limitation of governmental power by fundamental law. Constitutions define governmental powers. Anything contrary to the constitution is unlawful.

The limitation of governmental power by constitutional enumeration lies at the heart of constitutionalism. Governments can only exercise power provided for and in the manner prescribed by the Constitution.

All other power is retained by the people. Constitutionalism is the conduct which is consistent with the constitutional limitation of power.

Constitutionalism also refers to those provisions which specifically limit the powers of government. These include but not limited to the following:

- human rights provisions,
- term-limited presidency and
- independence of the judiciary.

These provisions are not meant to demarcate powers of the state, but define the zones in which such powers cannot be exercised. The Constitution contains a number of checks and balances that ensure that powers are being exercised lawfully and appropriately.



5. WHAT ARE THE DIFFERENT FORMS OF CONSTITUTIONALISM?

Constitutionalism has two forms; a thin or descriptive form and a thick or prescriptive form.

a. Descriptive Form

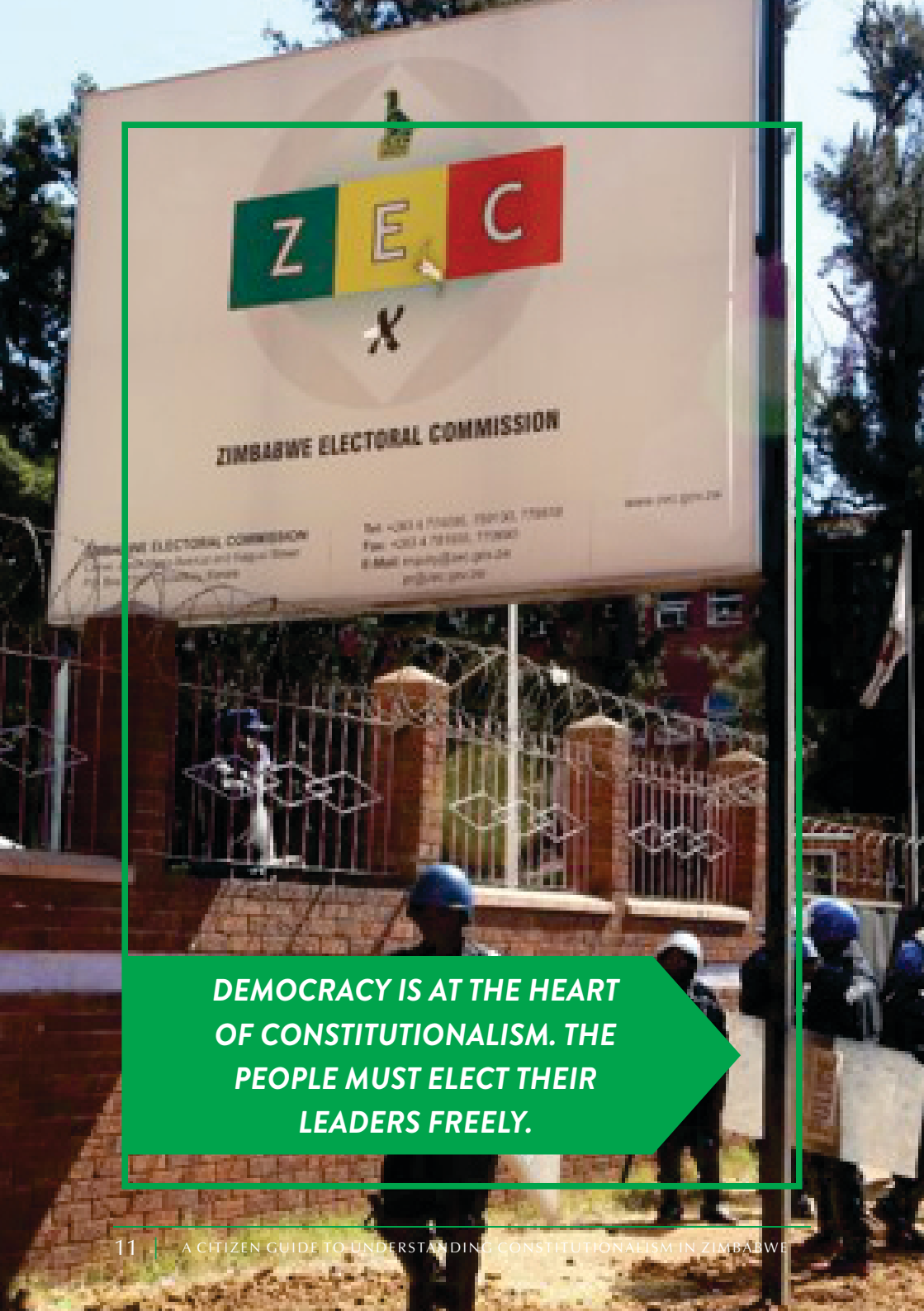
Constitutionalism describes the relationship between the constitution and the government. It defines constitutionalism as government in terms of fundamental law. In terms of the thin version of constitutionalism, a government which is unhappy with a constitutional provision can simply change it and act in accordance with the new provision it prefers.

b. Prescriptive Form

This version of constitutionalism requires certain minimum provisions to be included in the constitution for it to truly live up to the idea of limiting governmental power. These may include:

- presidential term limits,
- protection of minorities,
- fundamental rights and
- provisions which secure access to courts.

This is why it is called a '*prescriptive*' form of constitutionalism. It goes beyond following any constitutional provision, but asks whether the constitution truly limits the powers of government.



**DEMOCRACY IS AT THE HEART
OF CONSTITUTIONALISM. THE
PEOPLE MUST ELECT THEIR
LEADERS FREELY.**

6. WHAT ARE THE GUIDING PRINCIPLES OF CONSTITUTIONALISM?

Constitutionalism is built on three pillars which are Limited government, Constitutional supremacy, and Rule of Law.



We have already looked at the **first pillar**: limited government. Governmental powers are defined by the constitution. Boundless power lead to abuse and arbitrary action. Constitutionalism requires that the contours for public power are defined so the people know how to order their lives.

The **second principle of constitutionalism** is constitutional supremacy. This is related to the hierarchy of laws. As the fundamental law, the Constitution is above all other rules, norms, customs and conduct. Thus, all laws and conducts which do not conform with the Constitution are null and void.

The **third principle is the rule of law**. The rule of law is closely related to constitutionalism. It is the limitation of government by law. This is based on the general idea that governmental power or *rule* must be in terms of a publicized norm or *law*. In other words, constitutionalism is a version of the rule of law, but constitutes rule of the *highest law*. It includes many aspects including the fact that law must be publicly accessible, pre-existing and impersonal.



**THE CONSTITUTION
ENSURES EQUAL PROTECTION
OF ALL PERSONS**

7. HOW DOES THE CONSTITUTION RELATE WITH HUMAN RIGHTS?

The Constitution contains rights which enjoy constitutional supremacy. They are called constitutional rights.

Any law or conduct which is contrary to constitutional rights is invalid. Constitutional rights demarcate the individual space into which the state or anybody else cannot intrude. Any law or conduct which violates constitutional rights can be challenged in the courts.

Human rights are protections which accrue to every individual by the fact of being human. Every human being is born with the entitlement to be treated with dignity and respect. Human rights are rules of conduct which ensure respect for human life and other fundamental freedoms. They operate as a buffer between the individual and the exercise of public and private power.

The law which protects human rights is called human rights law. It is contained in the following legal documents:



Some rights have also been developed by the courts and are called common law rights. These are all important tools for enforcing human rights law. Some rights are also contained in international law, but need to be domesticated by an Act of Parliament to have the force of law in Zimbabwe.



**THE CONSTITUTION
PROTECTS ALL PERSONS FROM
ABUSES AND VIOLATIONS**

8. WHAT DOES THE CONSTITUTION SAY ABOUT HUMAN RIGHTS?

Chapter 4 of the Constitution contains the Declaration of Rights. The rights in that chapter are binding on the State and every other person including legal persons such as associations and companies.

The rights fall into the categories of

- Civil and Political rights,
- Economic Social and Cultural Rights and
- Group Rights.

8.1 Civil and Political Rights

Civil and political rights are also called *first generation rights*. These are the freedoms which enable people to participate in the civic and political spheres.

These rights do not usually have a direct financial implication. Thus, they are immediately realizable.

Some of the rights are substantive, in that they have a direct bearing on the enjoyment of the right. These include the rights to life, dignity and privacy.

Other rights are procedural, in that they provide formal steps to be taken to access a right. Those include the right to access information, the rights of accused persons and the right to administrative justice.



Citizens must freely exercise their political rights

The civil and political rights in the Constitution are as follows:

- Right to life (s.48);
- Right to personal liberty (s.49);
- Rights of arrested and detained persons (s.50);
- Right to human dignity (s.51);
- Right to personal security (s.52);
- Freedom from torture or cruel, inhuman or degrading treatment or punishment (s.53);
- Freedom from slavery or servitude (s.54);
- Freedom from forced or compulsory labour (s.55);
- Equality and non-discrimination (s.56);
- Right to privacy (s.57);
- Freedom of assembly and association (s.58);
- Freedom to demonstrate and petition (s.59);
- Freedom of conscience (s.60);
- Freedom of expression and freedom of the media (s.61);
- Access to information (s.62);
- Freedom of movement and residence (s.63);
- Political rights (s.67);

- Right to administrative justice (s.68);
- Right to a fair hearing (s.69);
- Rights of accused persons (s.70);
- Freedom from arbitrary eviction (s.74);

8.2 Economic, Social and Cultural Rights

Economic, social and cultural rights are also referred to as *second generation rights*. These rights require State action so that people can participate in economic, social and cultural spheres of life. These rights tend to have financial implications, and for that reason their implementation is subject to availability of resources.

However, the State is still required to undertake basic minimum actions to establish conditions for progressive realization of the rights. This incremental approach, subject to availability of resources, is what is normally referred to by the *phrase progressive realization of rights*. Additionally, the State may not do anything that subtracts from the standard already enjoyed.



Citizens have the right to clean and safe water

The economic, social and cultural rights in the Constitution are as follows:

- Language and culture (s.63);
- Freedom of profession, trade or occupation (s.64);
- Labour rights (s.65);
- Property rights (s.71);
- Rights to agricultural land (s.72);
- Right to education (s.75);
- Right to health care (s.76);
- Right to food and water (s.77);
- Marriage rights (s.78);

8.3 Group Rights

Group rights are also known as *third generation rights*. These are the rights which are held and enjoyed collectively by a community of persons.



Citizens and environmental rights



Rights which are held and enjoyed collectively by a community of persons.

The group rights in the Constitution are as follows;

- Environmental rights (s.73);
- Rights of women (s.80);
- Rights of children (s.81);
- Rights of the elderly (s.82);
- Rights of persons with disabilities (s.83);
- Rights of veterans of the liberation struggle (s.84).

Some constitutional rights have internal limitations. For instance, the right to life is subject to the death penalty. The right to liberty can also be limited on reasonable suspicion of the commission of an offence. The other rights are subject to a general limitation clause. This means the State can limit any right if it is reasonably justifiable in a democratic society. Any such limitation must be through a law of general application.

Some rights are given special status under the Constitution. These cannot be limited under any circumstances whatsoever, even under a law of general application. These are:

- The right to life save as provided in the Constitution;
- The right to dignity;
- Freedom from slavery and servitude;
- The right to habeas corpus;
- Freedom from torture or cruel and inhuman or degrading treatment or punishment; and
- The right to a fair trial.

All other rights can be limited by the State through a law of general application which is reasonably justifiable in a democratic society.



**CITIZENS MUST BE CAPACITATED
TO TAKE ACTION IN DEFENSE OF
THE CONSTITUTION AND ITS
FOUNDING VALUES**

9. WHY MUST CITIZENS BE EDUCATED ABOUT THE CONSTITUTION?

The people are the ultimate custodians of the Constitution. They enforce constitutionalism by holding elected leaders accountable for their actions.

Mass protests, demonstrations and elections also constitute citizen action in defence of the Constitution. Several constitutional bodies exist which enable citizens to enforce constitutional rights.

These include the:

- Zimbabwe Human Rights Commission,
- Zimbabwe Media Commission
- Zimbabwe Gender Commission
- Zimbabwe Electoral Commission
- National Peace and Reconciliation Commission

This requires an informed citizenry which can engage in governance. People need to not only know of their rights, but also the mechanisms that assist with enforcement. This is why it is vitally important for people to be educated about the Constitution.

The role of the people in shaping constitutional meaning and monitoring its enforcement is directly correlated to their capacity to engage with the Constitution as rights bearing agents. They can only make informed choices if they are sufficiently conversant with the constitutional scheme of government. Even a top down form of constitutionalism by the political leaders is dependent on the choices made by ordinary people at the ballot box. For these reasons, it is critical that the citizenry is empowered to engage with the political system in order to narrow the gap between constitutional ideals and their daily realities.



10. WHAT IS ROLE OF THE JUDICIARY IN PROTECTING THE CONSTITUTION?

According to the Constitution, the courts are paramount in safeguarding human rights and the rule of law. They are the ultimate arbiters of constitutional meaning.

Thus, whenever there is a dispute over the meaning of the Constitution or any other law, the courts have the ultimate say. Their decisions are final and binding.

To enable courts to play this role, the Constitution demands that the courts must be independent, and must do their work based only on the law and the Constitution. Various mechanisms are in the Constitution to achieve this independence.

This include the appointment of judges through a public and transparent interview process, and protection of the tenure of judges.

This places the courts in a unique position. They are the authoritative guardians of the Constitution. There are different types of courts which offer various types of remedies.



a. Criminal Courts

Provide relief for violations against the criminal law. These include such violations such as taking someone's life, pledging of females into marriage or human trafficking.

These are reported to the police for investigation and the criminal courts are established for prosecution by the State. These courts remedy violations by securing conviction of the offender.

Criminal courts are also the first line of defence in protecting the rights of accused and detained persons. Any arrest or detention which is contrary to the Constitution is challenged in such courts.

These courts have a supervisory role over the conduct of the police and the National Prosecuting Authority which is responsible for prosecuting criminal cases on behalf of the State.

They offer such remedies as denying placement on remand, refusal of further remand or referring a case to the Constitutional Court to determine a constitutional question.



b. Civil Courts

Deal with non-criminal cases. One can secure a compensatory, prohibitory, mandatory or declaratory order from such courts.

- A compensatory order addresses a violation through a monetary award whilst a prohibitory order stops unlawful action like demolition of houses.
- A mandatory order requires action to be taken whilst a declaratory order indicates whether a breach of law has occurred.



c. Constitutional Court and High Court

Have power to invalidate any law or conduct which is contrary to the Constitution. They can also order a stay of prosecution, prohibition of unconstitutional conduct or provide an award of constitutional damages.

The Constitution gives these courts wide powers to grant appropriate relief whenever there is a violation of constitutional rights. Ordinary persons can challenge any law or conduct they believe is contrary to the Constitution. This would likely require the assistance of experienced legal practitioners.



*Constitutional Court and High Court
have power to invalidate any law or
conduct which is contrary to
the Constitution.*

A large, diverse crowd of people is gathered in a city square, filling the foreground and middle ground. In the background, several tall buildings are visible under a cloudy sky. A green arrow-shaped overlay points to the right, containing white text.

**CITIZENS ARE ULTIMATE CUSTODIANS
OF THE CONSTITUTION. THEIR ROLE IS
CENTRAL IN PROTECTING AND
PROMOTING THE CONSTITUTION
AND ITS CONSTITUTIONAL VALUES**

11. WHAT IS THE ROLE OF CITIZENS IN PROMOTING CONSTITUTIONALISM?

Every person has a duty to promote constitutionalism. Usually, political leaders only care about issues which the electorate holds dear. If the general public requires elected leaders to respect and uphold the Constitution, this will be central to their political agenda.

Democratic accountability is the process by which ordinary people hold leaders accountable. This makes it crucially important for people to promote constitutionalism by demanding that local and national leaders uphold the constitution.

Constitutionalism must also be promoted by citizen conduct which is in accordance with the Constitution. Everyone is required to abide by the Constitution. Just like elected leaders, the general public is similarly required to respect and uphold the Constitution.

Ordinary people also have an enforcement role through litigation in the courts. Any person who believes that a right is being or is likely to be infringed is empowered to approach the High Court for relief, or even approach the Constitutional Court directly when it is in the interests of justice to do so.

The Constitution allows people to approach the courts when acting in their own interest; on behalf of those who cannot act for themselves; as a group, class of persons or association, and acting in the public interest. This means there is a broad responsibility on citizens, individually and in groups, to approach the courts and ensure

that their rights and the rights of others are respected.

The Constitution allows members of the public to engage in such actions as protests, demonstrations, and any peaceful public display of displeasure when their rights have been violated.

Communities can resort to such action to draw attention to issues that they care about. It is important for anyone intending to take part in public protests to become aware of the law governing protests and to do so within the confines of the law.



Democratic accountability is the process by which ordinary people hold leaders accountable.



12. WHAT ARE THE COMMON THREATS TO CONSTITUTIONALISM AND HOW CAN THESE BE COUNTERED?

The power of the executive is the most common threat to constitutionalism, this is why the judiciary is granted independence from the executive branch.

As the branch of government with law enforcement and the military, the executive has the capacity to ignore constitutional provisions, refuse to execute court rulings and use its power to violate fundamental freedoms. The executive can also initiate changes to the Constitution which entrench their power or extend the life of the presidency.

Another common threat to constitutionalism is populism. This is when popular sentiment is harnessed to justify violating the Constitution. This might involve vilification of minorities or removal of constitutional safeguards. Constitutionalism is also under threat when judges cannot exercise their institutional independence.

The failure to provide adequate resources for constitutional bodies is also a significant threat to constitutionalism, as is the general problem of absence of political will for constitutional implementation.

These threats can be countered through rigorous monitoring by a vigilant citizenry, astute civil society and dynamic opposition.

The general public need to be aware of and participate in their own governance. They need to hold their political leaders accountable and civil society should play the watchdog role whilst engaging in effective lobby, advocacy and litigation.

The opposition parties need to be effective in monitoring the government's adherence to the Constitution. Constitutional design is also used to limit the power of the executive by establishing term-limited presidency, enforceable human rights and constitutional separation of powers. These provisions are not self-enforcing and require collective citizen action to ensure constitutionalism is upheld.



As the branch of government with law enforcement and the military, the executive has the capacity to ignore constitutional provisions, refuse to execute court rulings and use its power to violate fundamental freedoms.



13. OTHER PROPOSALS ON CONSTITUTIONAL LITERACY

13.1 What must the government do to ensure citizens are educated about the constitution? What can be borrowed from other countries?

In other countries, civic education is either a part of the school curriculum or is actively pursued by civil society organizations with State support. The government must incorporate constitutional literacy into the school curriculum so that learners are acquainted with the Constitution.

Promotional activities are required by the Constitution and these can include:

- debates,
- discussions and
- mock court-room appearances.

The State should support activities by civil society in promoting constitutionalism. The Constitution must also be made available to every citizen in any of the official languages. All these are requirements contained in the Constitution of Zimbabwe.



*Schools and universities can introduce
Constitution Clubs as a way of promoting
knowledge and literacy about
the Constitution.*



14. HOW DOES THE CONSTITUTION RELATE WITH REGIONAL AND INTERNATIONAL LAW?

In some countries, international treaties are immediately binding once they are signed by the State party. The treaties do not need approval by parliament or any other body for implementation.

In other countries, approval by the legislative body is required before an international treaty can be implemented. This is the case in Zimbabwe. Even if an international or regional treaty is signed on behalf of Zimbabwe, Parliament needs to approve and enact it into law before it can have any effect in Zimbabwe.

It must be noted that Zimbabwe is still bound by its commitments under international law whether or not Parliament has approved the treaty. The interpretation of the Constitution and other laws has to take into account the international treaties which the States of Zimbabwe has signed. This means that international and regional laws play an important role in the interpretation and development of Zimbabwean law.



*The Constitution also requires the
State to domesticate all international
treaties to which it is a party.*

More importantly, Zimbabwe is a State party to major treaties such as the

- International Covenant on Civil and Political Rights,
- International Covenant on Economic, Social and Cultural Rights,
- Convention on the Elimination of All Forms of Discrimination Against Women,
- Convention on the Rights of the Child (CRC) and
- African Charter on Human and People's Rights.

The Constitution also recognizes a special kind international law called customary international law. These are rules of which so many countries have implemented that they are recognised as legally binding. These rules are part of Zimbabwean law unless they are inconsistent with an Act of Parliament or the Constitution.



CITIZENS TAKING COLLECTIVE ACTIONS

15. HOW BEST CAN ALL CITIZENS, JURISTIC OR OTHERWISE, CONTRIBUTE IN PROMOTING CONSTITUTIONALISM IN ZIMBABWE?

All persons must endeavour to know the Constitution and its requirements. This working knowledge will enable people to conduct themselves in accordance with the Constitution and to hold others, including political leaders, accountable.

It would enable promotion of constitutionalism and participation in constitutional enforcement.

This can take the form of:

Lobby

These are grassroots activities that are primarily focused at influencing decision-making processes. The activities or actions aim at influencing or being able to be meaningfully and reasonably be considered by the person who initiates them, as being likely to influence decisions. Such activities must result in modification or in rejection of a legislative or regulation proposal, a program or a plan of action. Such actions might include campaigns against repressive laws.

Advocacy

It is a group public support of a particular cause or policing. These include roundtable meetings which can be done by communities with their community leaders for example.

Demonstration

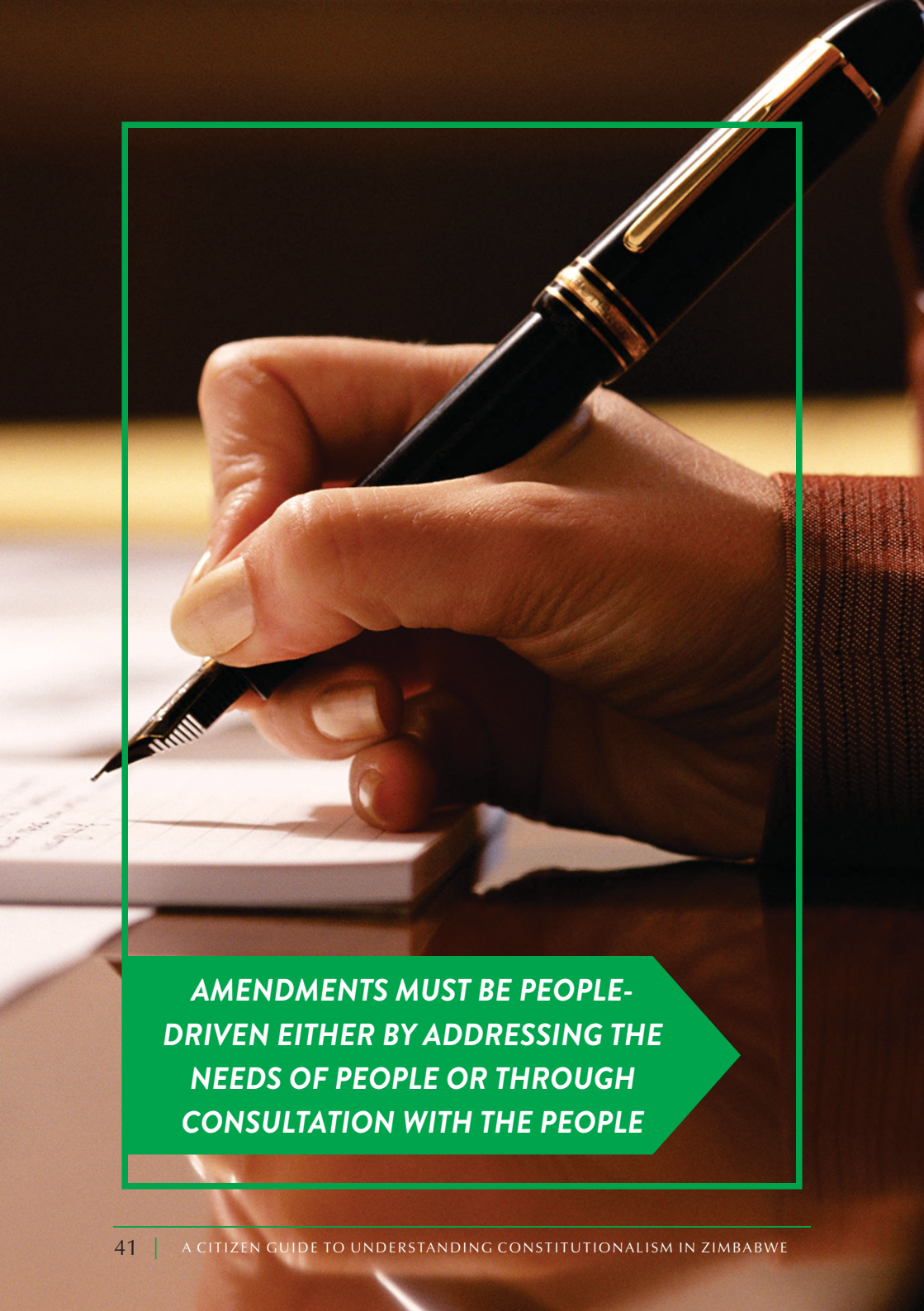
These are mass or collective actions by groups of people protesting against shared cause for concern for example women protesting against child marriages, communities against abuse of state funds

Petitions

They can be called complaint letters. These are formal and legal request for actions to public offices. These are instigated by communities asking government authorities to take action against a shared concern. Example can be community members of Chiredzi petitioning the Parliament to investigate into accusations against members of the parliament. ZimRights will assist to drafting the petitions.

Constitutional Litigation

It is strategic, public interest litigation whose primary beneficiaries are communities and the public. It primarily challenges repressive pieces of legislation and oppressive national or community practice that are inconsistent with the Constitution and infringes human rights. At its heart is the need to drive social change, address inequalities and injustices, and advocate for the enjoyment of human rights within communities and within a country. It's a type of advocacy which be done domestically, regionally and internationally. ZimRights will assist communities with lawyers that will help action court process.



**AMENDMENTS MUST BE PEOPLE-
DRIVEN EITHER BY ADDRESSING THE
NEEDS OF PEOPLE OR THROUGH
CONSULTATION WITH THE PEOPLE**

16. CAN THE CONSTITUTION BE AMENDED?

Following the independence of Zimbabwe in 1980, the first ever Constitution of Zimbabwe, the Lancaster House Constitution, was amended seventeen times.

The series of amendments began in 1987. The amendments included but not limited to the following:

- Abolishment of the Reserved Seats for Whites
- Black Advancement Affirmative Action
- Establishment of Supreme Court and High Court
- Introduction of Executive Presidency

Therefore, as with any other law, the Constitution can be amended. It is possible that some parts of the Constitution will no longer serve the country and its citizens well at some point, or that a need to add more features to the Constitution may arise. However, because the Constitution is the supreme law, it has its own special procedure of amendment which is stated in the Constitution.

For any part of the Constitution to be amended, it requires two thirds of members of both the House of Assembly and the Senate in Parliament to vote in support of the amendment.

The President must then sign the amendment into law. The exceptions are the Declaration of Rights (Chapter 4) and the parts on Agricultural Land (Chapter 16), which both require that the proposed amendments be presented for a referendum, in addition to two thirds vote in both houses of Parliament. These safety nets are included to ensure that the Constitution, especially the part protecting the human rights, is not easily amended by those in power.



17. WHAT PRINCIPLES MUST GUIDE ANY AMENDMENTS TO THE CONSTITUTION?

Constitutional amendments must be guided by the spirit of the Constitution itself. Constitutional amendments must arise out of a need either to correct a mischief, or to enhance the values and principles espoused in the Constitution.

The founding values and principles of the Constitution include the

- rule of law,
- fundamental freedoms,
- dignity,
- equality and
- the principles of a multi-party democracy.

These are the guide to any changes to the supreme law. Any constitutional amendment which enhances these principles is welcome and must be encouraged. However, amendments which undercut these principles and increase the power of the executive should be condemned as they tear the very fabric of the Constitution.



18. WHAT IS ZIMRIGHTS' POSITION ON THE CONSTITUTION OF ZIMBABWE AMENDMENT (NO.2) BILL OF 2020?

In 2017 the government proposed the Constitution Amendment Bill No.1 which subsequently came into effect. The main effect of the amendment was to change the procedure for the appointment of the Chief Justice, the Deputy Chief Justice and the Judge President of the High Court.

These appointments were to be made by the President after consultation with the Judicial Service Commission. This passage was challenged in court for being inconsistent with the Constitution.

On the 4th of April 2020, the Supreme Court declared the passage of the Constitution Amendment No. 1 a nullity. The Supreme Court in its Judgment held that because the affirmative votes did not reach the minimum threshold of two-thirds of the membership of the House, the amendment was invalid as it was inconsistent with the Constitution requirement of a two-thirds minimum threshold.

In December 2019, Amendment Bill No.2 was proposed, the Constitution of Zimbabwe Amendment (No. 2) is deeply problematic and ZimRights is against its passage except for the proposed amendment on devolution. The Bill undermines democratic accountability and unduly increases the size of government when the country is going through austerity and economic stagnation. This is done for no apparent articulated reason. Some examples of problems with the Bill are as follows.

Appointment of Judges and Prosecutor-General

The amendments enable the President to promote sitting judges of the High Court and Supreme Court without any public interview process. This will also remove the requirement for public interviews in the appointment of the Prosecutor-General.

This process does not allow open scrutiny of candidates' records and rigorous monitoring of whether the most suitable candidate is appointed. This is against the openness and transparency espoused by the Constitution, and has the potential to erode the independence of the judiciary and the Prosecutor-General through allowing for patronage appointments.

Extension of Tenure of Judges

The amendments will also extend the tenure of judges of the Constitutional and Supreme Courts beyond the retirement age of 70, subject to provision of medical certification, annually up to a period of five years.

This will likely make the judges more pliant to the executive, especially since the annual extensions would be subject to *acceptance* of the medical certificate by the President.

The amendment is silent on what is required for such certificate to be accepted, leaving such discretion entirely in the hands of the President.

Appointment of Vice Presidents and Ministers

The proposed amendments remove the running mate clause, meaning the President will continue to have the power to appoint Vice Presidents whom he can also fire at will.

The amendments will also increase the number of non-parliamentary ministers; the President will be able to appoint up to 7, from the current maximum of 5. This will increase the President's ability to

appoint people who are not accountable to the electorate.

De-linking Census and Constituency Delimitation

The amendments remove the requirement that the delimitation of voter constituencies is done as soon as possible after the population census. This exposes delimitation to gerrymandering, and would result in constituencies whose populations are not evenly distributed.

Parliamentary Oversight over Agreements

The amendment would reduce parliamentary oversight of agreements between Zimbabwe and international organisations, limiting such oversight to inter-governmental organisations. Agreements between the State and foreign entities would not require parliamentary approval before imposing financial obligations on Zimbabwe. This undermines representative democracy and checks and balances.

Appointment of Chief Secretary to the Office of the President and Cabinet

The amendment will make the office of the Chief Secretary to the Office of President and Cabinet a constitutional office without explaining why such office must be made a constitutional appointment.

The Chief Secretary is the most senior member of the Public Service, and Permanent Secretaries of Ministries will report to the Chief Secretary on any matter affecting them as a class. The President will fix the terms of office and conditions of service the Chief Secretary. This allows the President effective control (political and administrative) over the Public Service through the Chief Secretary.

Re-introducing Office of the Public Protector

The amendment re-introduces the office of the Public Protector, taking away the ombudsman role of the Zimbabwe Human Rights

Commission (ZHRC).

The President has exclusive powers to appoint the Public Protector and the Deputy, and there is no process nor qualifications stipulated. This amendment creates an “independent” institution taking over functions of the structurally and legally independent ZHRC, when such office is not at all independent from executive interference by virtue of the appointment mechanism. This is strategic weakening of the independent ZHRC and its mandate.

Parliamentary Quota System for Women and Youth

Some of the provisions of the Amendment Bill seem commendable on the surface, but have fundamental flaws that render them to amount to tokenism. The provision extending the life of the proportional representation seats reserved for women by another ten years masks the reality that of the current 22 cabinet ministers, for instance, only 5 are women, and many senior government positions are far from achieving gender parity.

This is in direct violation of the constitutional requirement that government appointments must reflect a 50/50 gender balance. What the quota system has done is to in fact side-line women in competitive political party contests for candidature.

Party candidates are dominated by men, hence in the current 9th Parliament the number of elected women dropped compared to the 8th Parliament. Real solutions would lie, for instance, in requiring political parties to have 50/50 gender parity in their candidates.

Similarly, the youth representation quotas proposed to be introduced mask the realities of exclusion of young people in mainstream governmental spaces, when in fact they constitute approximately 67% of the Zimbabwean population.

Devolution

Perhaps the one clause that makes sense in the way of separation of powers and cutting down unnecessary expenditure relates to the removal of members of Parliament from the composition of provincial and metropolitan councils.

These amendments further remove the requirement for mayors to be automatic chairpersons of the metropolitan councils, and provide for the election of 10 members of provincial and metropolitan councils by a system of party-list proportional representation.

Nonetheless, the creation of two centres of power in metropolitan provinces is a real threat occasioned by the removal of mayors from being automatic chairpersons of the councils. Fundamentally, the existing constitutional provisions on devolution are yet to be tested as devolution is yet to be implemented per the Constitution.

The Amendment Bill unduly increases presidential powers at the expense of openness, transparency, electoral integrity and democratic accountability. It undermines judicial independence, undercuts institutional independence of the Prosecutor General and reduces parliamentary oversight.

This poses a real and imminent threat to constitutionalism and for these reasons, the Amendment Bill should be withdrawn in its entirety. There is no motivated need for any of the proposed amendments at this time. Instead, government should implement the numerous constitutional provisions that are yet to be operationalised, seven (7) years after adoption of the Constitution.

19. FREQUENTLY ASKED QUESTIONS ON CONSTITUTIONALISM

? What is Constitutionalism?

Limitation of governmental power by adherence to fundamental law.

? What is the difference between Constitutionalism and the Constitution?

The Constitution is the supreme law. Constitutionalism is adherence to the supreme law.

? What is the difference between Constitutionalism and the Rule of Law?

The rule of law is governance in terms of preordained law. Constitutionalism is governance by preordained fundamental law.

? What is the link between Democracy and Constitutionalism?

Democracy is government by the people whilst constitutionalism is government limited by fundamental law.

? Is it against constitutionalism to change the Constitution?

This depends on the content on the constitutional amendment. An amendment which limits governmental power or adds fundamental freedoms enhances constitutionalism, but if it increases governmental power or limits freedoms it undercuts constitutionalism.



How is constitutionalism linked to free and fair elections?

Free and fair elections are required by the rule of law. When the Constitution contains requirements for free and fair elections, then such elections are demanded by constitutionalism.



Why does constitutionalism matter?

Constitutionalism ensures governmental power is not abused and people's fundamental freedoms are respected.



What is the link between constitutionalism and good governance?

Constitutionalism is part of and enhances good governance since it aids transparency, inclusivity, accountability and the rule of law.



Are rights protections part of constitutionalism?

Rights protections are part of constitutionalism because they limit governmental power by demarcating areas in which there can be no interference with individual action.



Is constitutionalism defined by the courts?

Constitutionalism is defined by members of the executive, legislature and ordinary persons. However, when there is a dispute over meaning, the courts have the final say.

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