

Constitutionalism in Zimbabwe

GREG LININGTON

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- ▶ Constitutionalism is concerned with the concept of limited government. It postulates that the powers of a government ought to be limited by law. Constitutionalism is closely associated with the Rule of Law, which will prevail if the laws uphold values like the separation of powers, equality before the law and certain basic human rights.

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▶ **The Constitutional Amendment Crisis of 2021.**

- ▶ In 2021 a number of constitutional amendments were enacted, most of which impacted adversely on the quality and integrity of the Constitution as an instrument of governance. Of equal concern is the fact that the proper procedure for amending the Constitution was not followed. According to section 328(3) of the Constitution the precise terms of a constitutional amendment Bill must be published in the Government Gazette at least 90 days before being introduced into Parliament. This is in order to give the public a chance to debate the Bill before its passage through Parliament.
- ▶ The Bill was only introduced after the expiry of the 90-day period. However, the Minister of Justice – the minister in charge of the Bill – then introduced amendments at the Committee stage of the Bill and these were passed by the National Assembly on the same day!
- ▶ If substantial changes before its are made to a Constitutional Amendment Bill after it's introduction into the House this would seem to flout the 90-day requirement and must surely be unconstitutional. All that is permissible are minor changes and corrections. Many of the changes were substantial and affected the Judiciary, Vice Presidents and the structure of Parliament.

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▶ **The Judiciary.**

- ▶ Under section 180 of the Constitution prospective judges have to undergo a selection process involving an interview. However, the amendment enables the President to dispense with the selection process and appoint sitting Supreme Court, High Court, Labour Court or Administrative Court judges to the next higher court.
- ▶ This undermines the quality and independence of the Judiciary because an interview-based selection process is likely to lead to the appointment of better judges. (Originally the Judicial Service Commission had to compile a list containing three names at the end of the selection process and the President's discretion was limited to choosing a judge from that list).
- ▶ The tenure of office of judges was also affected by the recent amendment. They had to retire on reaching the age of 70. Now however, the President can enable Constitutional and Supreme Court judges to remain in office until reaching the 75. But section 328(7) of the Constitution stipulates that extensions to term limits provisions cannot apply to incumbents unless the extension has been approved in a referendum. But no such referendum took place. Thus it would appear that Chief Justice Malaba, who recently turned 70, is no longer Chief Justice. This was the view of the High Court in *Musa Kiki v Minister of Justice*, a decision handed down on 15 May 2021 (now on appeal).

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▶ **Election of Vice Presidents.**

- ▶ Section 92 of the Constitution provided for the election of Vice Presidents but this was suspended for 10 years after 2013 by paragraph 14 of the sixth schedule of the Constitution. But now the recent Constitutional Amendment has made the suspension permanent. This will strengthen the position of the President as an appointed Vice President can be dismissed at any time unlike an elected one. Also an appointed VP lacks legitimacy.

▶ **Representation in Parliament.**

- ▶ One of the amendments proposed and passed on day of the Committee stage stipulates that 10 of the 60 women members elected under the party list system of proportional representation must be under the age of 35. This was poorly thought out. Parties cannot know which women candidates will be elected. So it will be impossible to ensure that 10 young women will end up in the House. Also what will happen to a woman who turns 36 during the life of Parliament? Will she lose her seat?

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▶ **The President's Unilateral Law-Making Powers.**

- ▶ The Presidential Powers Temporary Measures Act, enacted in 1986, gives the President the power to create primary legislation. This is clearly unconstitutional because since 2013 section 134 of the Constitution stipulates that Parliament may not delegate primary law making powers. Vesting primary law making powers in the President clearly violates the separation of powers doctrine.

▶ **Alignment of Freedom of Information Act with the Constitution.**

- ▶ This Act repealed AIPPA. However section 41 of the new Act maintains in force all subordinate legislation enacted under the old Act. These include regulations requiring journalists to pay fees in order to be accredited even though the new Act does not require this. The inconsistency with section 61 of the Constitution, the Freedom of Expression and Media provision, is obvious. The latter does not require accreditation.

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- ▶ **Alignment of the Electoral Act with the Constitution.**

- ▶ According to section 67(3) of the Constitution all citizens are entitled to vote in elections. But the Electoral Act denies voting rights to persons in the diaspora, hospital patients and prisoners. This is clearly unconstitutional. Zimbabwean democracy would be enhanced if all citizens could vote.