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UNDERSTANDING THE DRAFT CONSTITUTION

*A series of leaflets to inform you of the contents of the
Final Draft Constitution*

No. 4

The Three Arms of Government — Executive, Legislature and Judiciary

Introduction

The three branches of Government are the Executive (President and Cabinet), the Legislature (Parliament) and the Judiciary (Courts). These three branches are the ones that either govern us or determine how we are governed.

Zimbabwe is a democratic State. For democracy to exist the powers of these three branches of Government (Executive, Legislature and Judiciary) must be kept separate; that is they should be independent of each other and must be held by different people. Then they can control or check each other to make sure that all of them work for the benefit of the people and do not abuse their powers.

This leaflet outlines what the Draft Constitution provides for in this regard and, where possible, comparing it with the current Constitution, with a view to identify the changes that have been effected by the Draft Constitution.

The Executive (Chapter 5)

- In the Draft Constitution the President has executive authority which he/she exercises, subject to the Constitution and through Cabinet. Currently, to accommodate the GPA, executive authority vests in the President, Cabinet and the Prime Minister. The Draft Constitution does not provide for the office of the Prime Minister.
- As per the current Constitution, the term of office for the President and Vice-President is 5 years and shall run at the same time as the period of office of Parliament. The Draft Constitution thus retains harmonised elections.
- But while the President and Cabinet have executive authority, according to the Draft Constitution such authority derives from the people and is exercised in terms of the Constitution. With the current Constitution, the President takes precedent over all persons in Zimbabwe.
- The Draft Constitution sets out the duty of the President to uphold the Constitution, rule of law, protection of fundamental rights and promotion of unity, peace, diversity and well-being of all Zimbabweans. This is not stipulated in the current Constitution.
- Among the qualifications for election as President and Vice-President is that one should not have already held office for two terms, whether continuous or not. Thus, the Draft Constitution, unlike the current one, limits the terms of office for the President and Vice-Presidents to two terms (i.e. maximum of 10 years).
- The Draft Constitution provides for up to two Vice-Presidents. It provides for Presidential running mates, whereby a Presidential candidate nominates in advance two candidates to stand with him as running mates or next-in-line to the President. These automatically become Vice-Presidents if the candidate wins. This way, the President and Vice-Presidents are elected as a unit by the voters and as such Vice-Presidents cease to be mere appointees of the President. However, this section on running mates shall not apply in the transition period (that is the period within ten years after the first election under the new Constitution). During this transition period, the current system continues, whereby upon winning an election, the President appoints not more than two Vice Presidents who hold office at his/her pleasure.
- The Draft Constitution has provision to oblige political parties to set clear lines of succession. If a President dies, resigns or is removed

etc. In the Draft Constitution however there are provisions that a judge may be appointed for a fixed term and the office of a judge must not to be abolished during his term or tenure of office

Conclusion

In conclusion the following are some highlights regarding what is provided for in the Draft Constitution concerning the three branches of Government:

Executive Maximum of 2 terms for President and Vice Presidents; Presidential running mates; Presidential election result can be challenged in the Constitutional Court, with time frames stipulated for the hearing of election challenges; Accountability clauses; Appointment of some ministers/deputy ministers on the basis of professional skills and competence; Removal of President or Vice President; Checks and balances in the exercise of some Presidential powers; Attorney General without prosecuting powers.

Legislature Bicameral Parliament will continue to burden the fiscus; All Government and State institutions accountable to Parliament; Proportional representation in the election of Senators Affirmative action will boost women's representation in the House of Assembly; Sensitivity to representation for people with disabilities; Public access and involvement; Referendums for some constitutional amendments.

Judiciary Creation of the Constitutional Court; Guarantees on independence of the judiciary and principles to govern members; Reduces role of the President in the appointment of Judges and increases openness and transparency in the appointment process.

Supreme Court.

- Any person can bring a matter directly to the Constitutional Court or a court may make an order of constitutional invalidity which will only be of force if confirmed by the Constitutional Court
- The Labour Court and Administrative Courts and customary courts are specifically mentioned in the Draft Constitution.
- Both the current Constitution and the Draft Constitution have clauses on the independence of the Judiciary but in the Draft Constitution the clause is more elaborate i.e. the Judiciary is subject only to the Constitution and the law and the principles that are to govern them are provided e.g. impartiality, justice, fairness, rule of law. Members of the judiciary must not be partisan and should not accept gifts or bequests that influence their decisions. The State is to obey court decisions and not to interfere.
- In the Draft Constitution the required years of professional experience for Constitutional Court judges is 12, 10 for Supreme Court Judges and 7 for High Court, Labour and Administrative Courts judges. In the current Constitution Supreme and High Court Judges should have 7 years of professional experience.
- In the Draft Constitution, the appointment of judges is still done by the President but after the Judicial Service Commission has advertised the vacancies and invited applications. Then the list of the nominees is submitted to the President for appointment, after public interviews are held. The public and the President are also invited to make nominations. The appointments are to be published in the *Government Gazette*. With the current Constitution Judges are appointed by the President in consultation with the Judicial Service Commission.
- In the Draft Constitution there are the following additions to the composition of the Judicial Service Commission: Chief Magistrate, Public Accountant and a person with human resources management, both of 7 years experience. For the Draft Constitution, Magistrates are to be appointed by the Judicial Service Commission in a transparent manner. Gender diversity is to reflect in the appointments.
- In the Draft Constitution, Constitutional Court judges have a 15 year term or retire earlier if they reach 70 years. Supreme Court and High Court Judges have a fixed term and must retire at 70 years of age.
- For both, Judges may be removed from office for gross incompetence, inability to perform due to mental/physical incapacity or misconduct

from office, the first Vice-President will take office and remain in power until the expiry of his/her predecessor's term, while the second Vice-President will become the first Vice-President. But during the transition period, in the event of death, resignation, or removal of the President, the first Vice President or the Vice President who was last nominated to act, becomes the Acting President. The vacancy must then be filled by a nominee of the political party which the departed President represented.

- The Draft Constitution provides for an aggrieved candidate to challenge the validity of the Presidential election in the Constitutional Court within 7 days of the publication of results. The Constitutional Court must make a decision within 14 days and its decision is final. If the election of the President is set aside, automatically the election of the two Vice-Presidents is set aside also. However, any challenge to the validity of the first Presidential Election must be heard and determined by the Supreme Court constituted under the replaced Constitution.
- The Draft Constitution allows for appointment as Ministers and Deputy Ministers of up to seven people who are chosen for their professional skills and competence. In appointing Ministers and Deputy Ministers, the President must be guided by regional and gender balance.
- The Draft Constitution has a clause on accountability not there in the current Constitution – Vice Presidents, Ministers and Deputy Ministers are accountable to the President for the performance of their functions. They must also act in accordance with the Constitution and have the duty to attend Parliamentary Committees.
- The current Constitution provides for a vote of no confidence in Government, but the Draft Constitution provides for both a vote of no confidence in the Government and removal of the President or Vice-President from office. A resolution to investigate whether to remove the President or Vice-President is to be passed by not less than half of the Members of Parliament. A joint committee of 9 Parliamentarians is to be appointed to investigate the matter and resolution for removal has to be passed by two-thirds of the total membership of Parliament. A vote of no confidence as per the current Constitution should be passed by at least two thirds of the total membership. If the President does not act, i.e. dissolve Parliament, remove the ministers or resign within 14 days, Parliament will stand as dissolved.
- The Draft Constitution allows the President to exercise executive

functions of the Head of State such as assenting to and signing bills, calling elections in terms of the Constitution, deploying defence forces etc. However, in the Draft Constitution the power of the President in the exercise of some of his executive functions is checked. The President has the power to declare a public emergency, declare war or make peace but Parliament has to ratify. Extension of the public emergency beyond three months has to be approved by Parliament. Any interested person can challenge in the Constitutional Court the validity of legislation enacted, or other actions taken as a result of the declaration of public emergency. The President has the prerogative to grant mercy or pardon convicted offenders but only after consultation with Cabinet. The current Constitution has no such provision.

- The Attorney-General's office will now have two main offices led by the Attorney-General and Prosecutor General. The Attorney-General will be the legal advisor to Government. He will sit in Cabinet. The Prosecutor General will lead the National Prosecuting Authority.

The Legislature (Chapter 6)

- As per the current Constitution, legislative power vests in Parliament and the President, who are the elected representatives of the people. Parliament is still bicameral – Senate and House of Assembly – 5 year term.
- In the Draft Constitution the role of Parliament is elaborated, i.e. to protect democratic governance, the Constitution and rule of law, and all Government and State institutions are accountable to it.
- The Draft Constitution introduces proportional representation in the election of Senators. Out of the 80 Senators (small reduction from 93); 60 are elected from the provinces as a whole by a system of proportional representation under a party list based on the number of votes cast for candidates representing political parties in each province for National Assembly; 16 are chiefs; 2 are the President and Vice-President of the National Council of Chiefs, and 2 are elected to represent people with disabilities. The idea of Senators representing specific categories of people is a new development.
- The Draft Constitution has provision to cater for gender but this will potentially increase members in the National Assembly to 270 for the first two Parliaments. The National Assembly consists of 210 members, one from each of the 210 constituencies, elected by secret ballot. Then provision is made for the first two Parliaments under the new

Constitution to include an additional 60 women, 6 from each of the provinces of Zimbabwe. In addition, the Committee on Standing Rules and Orders must reflect as closely as possible, the political and gender composition of Parliament.

- According to the Draft Constitution, elections of the Speaker and Deputy Speaker of National Assembly and the President and Deputy President of Senate are to be by secret ballot and conducted by the Chairperson of Zimbabwe Electoral Commission.
- According to the Draft Constitution, the President must once in a year call for a joint sitting of Parliament for a State of the Nation address. The President may be called by Parliament to answer questions on any issues.
- The Draft Constitution provides for public access to and involvement in Parliament in legislative and other processes. Parliament should consult the public and conduct sittings in public in a transparent manner though measures may be put in place for safety and order. Citizens and permanent residents have the right to petition Parliament to consider any matter.
- According to the Draft Constitution, constitutional amendments for the Declaration of Rights (Chapter 4) and Agricultural Land (Chapter 16) are to be referred for referendum and must be approved by a majority of voters. Amendments to the Declaration of Rights and term limits cannot be done under one bill or by the same referendum.

The Judiciary (Chapter 8)

- A major change in the Draft Constitution is the creation of the Constitutional Court that deals with all Constitutional matters and its decisions binds all other courts. With the current Constitution, the Supreme Court is both the Appellate Court of the High Court and the Constitutional Court. Matters to be dealt with by the Constitutional Court are to include issues relating to violation of the Declaration of Rights and Presidential/Vice Presidential election challenges or their qualification disputes, disputes of Parliament, or the President/Vice President failing to fulfil their obligations in terms of the Constitution. The Chief Justice will be the head of both the Supreme Court and the Constitutional Court. However, for seven years after the new Constitution, the Constitutional Court will not operate as a separate court. For those seven years the Constitutional Court will consist of the Chief Justice, Deputy Chief Justice and seven other judges of the