



BILL OF RIGHTS ANALYSIS

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INTRODUCTION

On the 23rd May 2016, Government gazette N.A.B 37, 2016 An “Act to amend the Constitution Zambia” was released. The objective of this Bill is to revise the Bill of Rights to include Civil, Political, Cultural, and further and special rights. It has further been revised to entrench the supremacy of the constitution. Furthermore, revisions have been made to the provisions relating to the declaration of war, state of emergency and national disasters. The Bill additionally provides for the revision of the provisions on the amendment of the Constitution.

This PMRC analysis highlights selected articles contained in the Bill of rights focusing on the different and new articles not previously contained in the 1996 Amended Constitution of Zambia. This analysis is PMRC’s contribution towards the promotion of good governance by sensitizing the general public on the articles contained within the Bill of Rights in preparation for the August 11th Referendum, that will be held simultaneously with the General Elections. This analysis provides explanations of key articles and the subsequent clauses.



Article 11 clause 2 (below) of the Bill of Rights sets the tone for the Bill of Rights highlighting what is provided for within the Bill. It provides for the coverage of the rights as well as the limitations of these rights, which are provided for in detail in Articles 53, 54 and 55. Article 11 clause 2 further provides guidelines that these rights are prescribed on the foundation of the morals and values of the Zambian people.

Article 11 (2).

The rights and freedoms set out in this Bill of rights-

- a) Are inherent in each individual;
- b) Protect the dignity of the person;
- c) Include rights and freedoms which are consistent with this constitution but not expressly provided for, except those that are repugnant to the morals and values of the people of Zambia; and
- d) Are subject to the limitations, derogations and restrictions provided for in Article 53, 54 and 55.



Article 12 formally recognizes the important role that the Civil Society plays in the promotion and the protection of the Bill of Rights. This article is important as it provides political space for the Civil Society to be equal partners in the social economic development of the country. Furthermore, the Civil Society can actively engage Government in the promotion and protection of the Bill of Rights.

Article 12.

The State shall recognize the role of civil society in the promotion and protection of the Bill of Rights.



Article 13 provides for the Development of Jurisprudence; this particular article gives powers to the Constitutional Court to provide guidance in circumstances where legislation doesn't give effect to a particular right or freedom. Clause 2 further provides for the court, Human Rights Commission, to provide interpretation of a right or a freedom that is consistent with the application of the Bill of Rights.

Article 13.

(1) Where legislation does not give effect to a right or freedom, the Constitutional Court shall develop human rights Jurisprudence.
 (2) A court, the Human Rights Commission, a State Institution, a person or body shall interpret a right or freedom in a manner consistent with Articles 11, 266, 267 and 272.

The second section of the of the Bill of Rights provides for Civil and Political Rights. The analysis discusses selected articles from this section that recognize and provide for the civil and political rights of citizens.



¹Offensive
²Means the right not to be returned to the country of origin or a third country if the person has a well founded fear of prosecution.



Article 15 clause 1 provides for the right to life and additionally clause 2 defines that the life of a person begins at conception.

Article 15.

- (1) A person has the right to life.
- (2) The life of a person begins at conception.
- (3) A person shall not be deprived of life intentionally, except for a capital offence the sentence of which is death, subject to limitations, defenses and extent prescribed.



This particular article refers to the **importance of life** and further brings an end to the debate over abortions. **Clause 2** implies that by law abortion remains illegal and life shall be protected from conception.

Article 12 formally recognizes the important role that the Civil Society plays in the promotion and the protection of the Bill of Rights. This article is important as it provides political space for the Civil Society to be equal partners in the social economic development of the country. Furthermore, the Civil Society can actively engage Government in the promotion and protection of the Bill of Rights.

Article 12.

The State shall recognize the role of civil society in the promotion and protection of the Bill of Rights.



Article 20 provides the freedom of conscience, belief and religion, **Clause 2**, includes the observance of the day of worship. This particular clause implies that an individual now has the rights to observe the day of worship.

Article 20.

- (1) A person has the right individually or in community with others, publicly or privately, to manifest any religion or belief through worship, observance, practice, or teaching including the observance of a day of worship.





Article 22 allows for individuals to access information on another person, which is lawfully required for the exercise or protection of a right or a freedom. Individuals can now cite **article 22 Clause 1**, in the acquisition of any kind of information as the law permits deemed necessary in the exercise or protection of a freedom or a right. Clause 3, states that the Government proactively publicize information that is in public interest. This clause allows for further transparency in governance and enables the general citizenry to hold government accountable, and improves general access to information.

Article 22 Clause 1.

- 1) A person has the right of access to information held by the State or another person which is lawfully required for the exercise or protection of a right or freedom.
- 2) The State shall proactively publicize information that is in the public interest or affects the welfare of the Nation.



Article 38 promotes the equality of both gender, that is **men and women**. Both have equal rights with regards to treatment and opportunities. However, Article 14 provide for affirmative action, that is preferential treatment to groups that may have been marginalized in the past. Women fall under this category and despite the equality right, will still receive preferential treatment in certain circumstances.

Article 38.

(1) women and men have the right to equal treatment and opportunities

The second section of the Bill of Rights provides for Economic, Social, Cultural and Environmental Rights. In this section the analysis discusses selected articles from this section that recognize and provide for the Economic, Social, Cultural and Environmental Rights.



Article 39 provides for the protection and promotion of human dignity, this article provides for economic and social rights that ensure that all Zambians have a right to a decent living. Clause 2 ensures that a citizen who is in need of emergency medical treatment is not denied access.

Article 39.

- (1) A person has the right, as prescribed, to -
 - a) Health care services;
 - b) Decent housing;
 - c) Food or acceptable standard;
 - d) Clean and safe water;
 - e) Decent sanitation;
 - f) Social protection; and
 - g) Education.
- (2) A person shall not be denied emergency medical treatment.





Article 43 provides for rights with regards to language, culture and intellectual property. This article allows for individuals to use or belong to any cultural or linguistic community. Clause 3 recognizes the importance that culture and rituals play in society but also protects individuals from being forced into participating or observing cultural practices or rites.

Article 43.

- . (1) Subject to article 258, a person has the right to use a language of that person's choice.
- (2) A person who belongs to a cultural and linguistic community has the right, with other members of that community to –
 - (a) enjoy that person's culture; and
 - (b) form, join or maintain cultural and linguistic associations.
- (3) A person shall not be compelled to –
 - a) perform, observe or participate in cultural practices or rites; or
 - b) form, join, contribute, maintain or pay allegiance to a cultural or linguistic association.
- (4) The State shall –
 - a) recognize the role of science, technology and indigenous technology in the development of the Nation; and
 - b) support, promote and protect intellectual property rights.



The fourth Section focuses on Further and Special Rights. This is an extension of rights that are specific to vulnerable and marginalized sections of society, focusing on older members of society and children.

Article 47 provides for further protection of rights relating to marriage and family, in clause 1 the state recognizes the family as a natural and fundamental unit of society. Clause 2 changes the minimum age for marriage from 18 years to 19 years, this is in conformity with international conventions. According to the United Nations Convention on the Rights of the Child (UNCRC Part I Article 1)1989, a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier. Thus an individual who is 18 or in the 18th year of the life may still be considered a child.

Furthermore, an individual has the right to choose any spouse of the opposite sex. This clarifies on fears from the general public that the bill of rights contained articles that allowed for same-sex marriages. Therefore, Article 47 Clause 2 clearly states that same-sex marriages are not permitted.

Article 47.

- (1) The State shall recognize and protect the family as the natural and fundamental unit of society and the necessary basis of the social order.
- (2) A person who is nineteen years of age or order has the right to choose a spouse of the opposite sex and marry.
- (3) A pregnant or nursing woman has a right to a noncustodial sentence, except as a measure of last resort where she poses a danger to the community.





ARTICLES:

Article 48 provides for the rights of a child and the duties of the parents of that child. Clause 1 recognizes that a child is equal before the law, and clause 3 ensures that a child's mother and father, whether married or not, have an equal right to protect and provide for the child.

Article 48.

- (1) A child is equal before the law.
- (2) In all actions and decision concerning a child, the best interest of the child shall be the primary consideration.
- (3) A child's mother and father, whether married to each other or not, have an equal duty to protect and provide for the child



The fifth section of the Bill of Rights is titled Non Derogable Rights and Freedoms, Limitations and Derogations. This section protects all rights that an individual cannot be deprived of regardless of the circumstance; these are referred to as non-derogable rights and are enshrined in **Article 52**. Despite any other provision, a law shall not derogate from the following **rights and freedoms**;

Article 52.

- (a) security of a person and protection from inhuman treatment;
- (b) protection from slavery, servitude or forced labor;
- (c) freedom of conscience, belief and religion; (d) the right to a writ of habeas corpus;
- (e) non-refoulement as provided for in Article 28; and
- (f) a right to a fair trial.

Article 53 provides for conditions under which these rights and freedoms can be limited and provides justification for the limitation of these rights.

Article 53.

A right or freedom is limited by—

- (a) a limitation, restriction or qualification expressly set out in the Article or clause containing that right or freedom;
- (b) the limitations and restrictions specified in this article and article 54; and
- (c) the limitations and restrictions provided in a law of general application as provided in Article 54, which do not negate the core or the essential content of the right or freedom and is reasonable or justifiable in a democratic society, taking into account—
 - (i) The nature of the right
 - (ii) The purpose of the limitation or restriction
 - (iii) The extent of the limitation or restriction; and
 - (iv) Whether there are alternative means to achieve the required purpose

²Means the right not to be returned to the country of origin or a third country if the person has a well founded fear of prosecution in the country of origin or third country, which justifies that person's request for asylum or refuge.



Section six (6) of the Bill of Rights provides for the Enforcement of the Bill of Rights. **Article 57 clause (1)** allows for an individual that alleges that a provision of the Bill of Rights is being or has been contravened in relation to that person, is free to approach the Constitutional Court or a court that this individual has immediate access to. Furthermore, Clause (2) allows for a person to bring an action against the violation of another person's rights and freedoms.

Article 58. 3 provides for the Repeal of **Article 79** of the 1996 Amended Constitution of Zambia. Article 79 refers to the Alteration of the Constitution. This proposes PART XIXA that provides new guidelines on the alteration of the constitution. PART XIXA will be discussed in further detail later in this analysis.

Article 58.

58. The President shall, each year, when addressing the National Assembly, report on measures taken by the State in the realization of the Bill of rights.
3. The Constitution is amended by the repeal of Article 79.
4. The Constitution is amended by the insertion immediately after PART XV, of the following new Part.

PART XVA

Part XVA provides the conditions and guidelines that must be adhered to in the event of Declaration of War, **State of Public Emergency**, threatened State of Public Emergency and National Disasters.

Article 198.

- (1) The President may, in consultation with Cabinet, Declare war between the Republic and another country.
- (2) A declaration made in accordance with clause (1) shall-
 - (a) as soon as is reasonably practicable, be published in Gazette; and
 - (b) continue in force until the cessation of hostilities.

Article 199.

- (1) The President may, in consultation with Cabinet, declare a state of public emergency when there is a state of war, disorder, an invasion, insurrection or other similar situation.
- (2) The President may, in consultation with Cabinet, where a situation exists which, if allowed to continue, may lead to a state of public emergency, declare that a threatened state of public emergency exists.
- (3) A declaration made in accordance with this Article shall-
 - (a) be effective prospectively;
 - (b) as soon as is reasonably practicable, be published in the Gazette; and
 - (c) continue in force-
 - (i) for a period not exceeding twenty-one days from the date of the declaration, unless the National Assembly resolves to extend the period of the state of public emergency or threaten state of public emergency in accordance with clause (4); or
 - (ii) until the president revokes the declaration of the state of public emergency or threatened state of public emergency.
- (4) The National Assembly may, by a resolution supported by the votes of not less than two thirds of the Members of Parliament, taken by secret ballot, extend the period of a state of public emergency or threatened state of public emergency for periods not exceeding three months.





Article 201 provides for individuals to contest the validity of the emergency resulting in the declaration. An individual has the right to apply to the Constitutional Court for a hearing.

Article 201.

A person may apply to the Constitutional Court for a hearing-

(a) on the validity of-

(i) a declaration of a state of public emergency or threatened state of public emergency; or

(ii) an extension of a declaration of a state of public emergency or threatened state of emergency; or

(b) whether any legislation relating to, action or measure taken during, a state of public emergency or threatened state of public emergency was reasonable.



PART XIXA

This part has been inserted to change the process of **amending the constitution**. This has been done in **articles 301 and 303**, this implies that particular clauses of the constitution can not be amended unless a referendum is held. This process entrenches the supremacy of the constitution. The following Articles will now require a Referendum to make amendments;

1 - Supremacy of the Constitution

4 - Sovereignty of the Republic

5 - Sovereign authority of the people of Zambia

47 - Electoral System for Presidential and Parliamentary

106 - Tenure of office of the President and vacancy

110 - Vice Presidency election to office and swearing in

116 - Ministers (appointment, role and vacancy)

117 - Provincial Ministers (appointment, role and vacancy part 3 - Bill of Rights Article 301 and 302)





Article 301.

- (1) A provision of this Constitution may be amended in accordance with this Article, Article 302 or 303.
- (2) A Bill to amend an Article shall have the sole purpose of amending that Article and shall not provide for any other matter.

Article 302.

- (1) A Bill to amend an Article or groups of Articles, except a Bill to amend the Bill of Rights and the Article specified in Article 303, shall be done in accordance with this Article.
- (2) A bill referred to in clause (1), shall be published in the Gazette and laid before the National Assembly, for first reading, after thirty days from the date of its publication.
- (3) A Bill referred to in clause (1) shall be passed by the National Assembly by the votes of at least two thirds of the Members of Parliament at the second and third reading stages of parliamentary process.

Article 303.

- (1) A Bill to amend the Bill of Rights, Article 1, Article 4, Article 5, Article 47 (1) and (2), Article 106, Article 110 (1), Article 116, Article 117, Article 301, Article 302 or this Article shall be by a referendum and in accordance with this Article.
- (2) A Bill referred to in clause (1) shall be published in this Gazette and laid before the National Assembly, for first reading, after thirty days from the date of its publication.
- (3) The Speaker shall, after the first reading, refer the Bill to the Electoral Commission for a referendum to be held on the Bill.
- (4) The Electoral Commission shall, within one hundred and twenty days of receipt of the Bill, referred to the Commission in accordance with clause (3), hold a referendum on the Bill, as prescribed.
- (5) If, in a referendum, at least fifty percent of the registered voters vote, and more than fifty percent vote in favor of the amendment, the National Assembly shall proceed to pass the Bill.





RECOMMENDATION:

The Policy Monitoring and Research Centre (PMRC) is hopeful that by understanding the key clauses and the Bill of Rights, citizens will be empowered with the right information that will enable them to understand their rights and apply them appropriately. This will further allow citizens to vote in the referendum with adequate information about the Bill of Rights, which will ultimately promote increased participation among the citizens in the governance and electoral processes.



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