

## **ANALYSIS OF THE CONSTITUTION AMENDMENT ACT NO.2 OF 2016**

Unlocking Zambia's Potential

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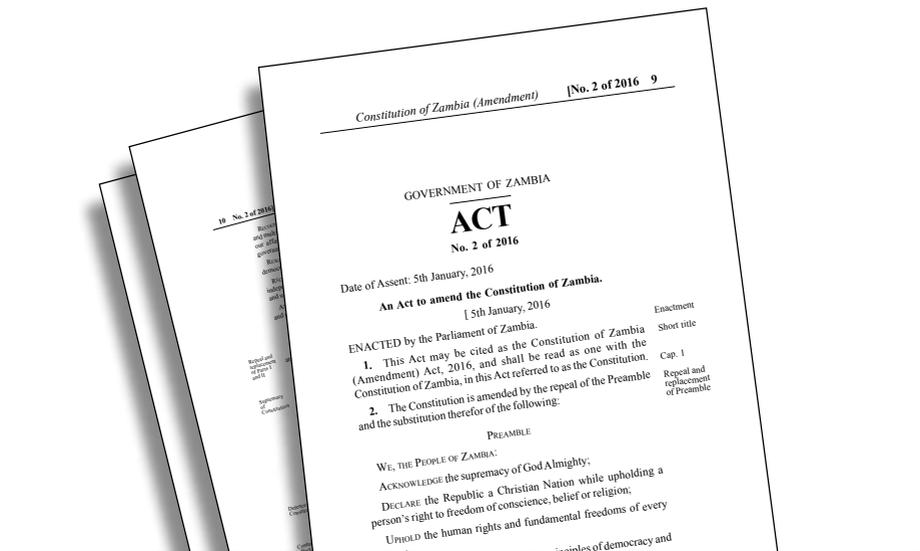
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## INTRODUCTION

The Constitution (Amendment) Act No. 2 of 2016 came into effect on Tuesday 5<sup>th</sup> January 2016, when President Edgar Lungu assented to it at the Heroes Stadium in Lusaka. The Constitution was signed into law with some amendments that largely border on the electoral process. Some of the new provisions in the amended Constitution include, **“Dual Citizenship”**, which allows Zambians who obtain citizenship in another country to maintain their Zambian citizenship. It also contains the **“50% + 1”** clause which requires that a presidential candidate win an election by 50% or more of the total votes cast. Further, the amended Constitution stipulates that

a presidential candidate must have a **“running mate”** in a presidential election, who will become the Vice President for the Republic. The provision is progressive as it guarantees that Zambia will not be subjected to Presidential by-elections in the event that the sitting president dies, as the vice president would immediately assume office. The Constitution has also made provision for the establishment of a **“Constitutional Court”** to preside over constitutional disputes. Under the amended Constitution, the minimum requirement for people who are contesting in elections is set at **“Grade 12 qualification”**.





## WHAT IS A NATIONAL CONSTITUTION?

The National constitution (**highest law of the nation**) is the set of fundamental rules (written or un-written) that control how a government can exercise public power and authority. The Constitution establishes the mandate of a government by defining the basic principles to which a society must conform; by describing the organization of the government and regulation, distribution, and limitations of the functions of different government departments; and by prescribing the extent and manner in which sovereign powers can be exercised.

### SUPREMACY OF THE ZAMBIAN CONSTITUTION (EXTRACT)

1. (1) This Constitution is the supreme law of the Republic of Zambia and any other written law, customary law and customary practice that is inconsistent with its provisions is void to the extent of the inconsistency.

### DEFENSE OF THE CONSTITUTION

Defence of Constitution 2. Every person has the right and duty to —  
a. Defend this Constitution; and  
b. Resist or prevent a person from overthrowing, suspending or illegally abrogating this Constitution

### NATIONAL VALUES AND PRINCIPLES

National values and principles 8. The national values and principles are —  
a. morality and ethics;  
b. patriotism and national unity;  
c. democracy and constitutionalism;  
d. human dignity, equity, social justice, equality and nondiscrimination;  
e. good governance and integrity; and  
f. sustainable development.

## BASIS OF ECONOMIC POLICIES

National values and principles

- 10.** 1. The Government shall create an economic environment, which encourages individual initiative and self-reliance among the people, so as to promote investment, employment and wealth.
2. The Government shall promote the economic empowerment of citizens so that they contribute to sustainable economic growth and social development.
3. The Government shall promote local and foreign investment and protect and guarantee such investment through agreements with investors and other countries.
4. The Government shall not compulsorily acquire an investment, except under customary international law and subject to Article 16 (1).
5. Where the investment compulsorily acquired under clause (4) was made from the proceeds of crime no compensation shall be paid by the Government

## RESPONSIBILITIES OF A CITIZEN

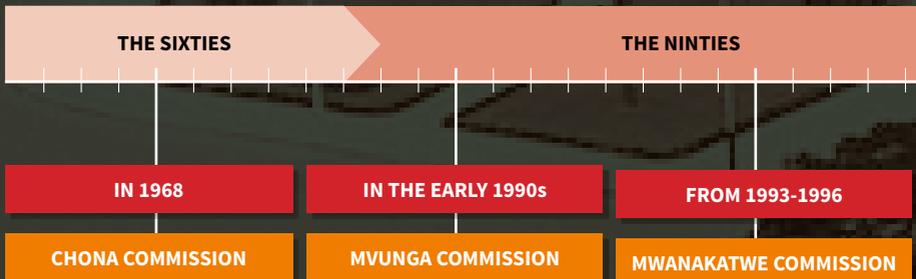
Renunciation and deprivation of citizenship

- 40.** (1) A citizen—
- (a) may renounce citizenship as prescribed; or
  - (b) shall be deprived of citizenship if that citizenship was acquired by means of fraud, false representation or concealment of a material fact.
- (2) The process and procedures to be followed by the Citizenship Board of Zambia when granting or depriving a person of citizenship shall be prescribed.

# BACKGROUND TO THE CONSTITUTION MAKING PROCESS IN ZAMBIA

## Timeline

### DRAWING FROM PAST CONSTITUTIONAL COMMISSIONS



A referendum was organised and four years after, a Constitutional Review Commission (CRC), headed by Vice President Mainza Chona was established in a move that opened the window for the institutionalization of one party rule.

A new CRC headed by Prof Mphanza Patrick Mvunga was appointed by Kaunda to draft a new constitution that would restore multiparty democracy. This was the Constitution Act that was promulgated on August 31<sup>st</sup>, 1991.

A new commission, chaired by John Mwanakatwe, was appointed in 1993 to draft a Constitution. Unfortunately, the process failed to win popular support and a resulting constitutional amendment in 1996 was considered to lack legitimacy, as the government ultimately rejected most of the commissions recommendations presented in 1995.

## POST 2000

**ON 17<sup>TH</sup> APRIL, 2003**

### **MUNG' OMBA COMMISSION**

By Statutory Instrument No. 40 of 2003, His Excellency the President, Mr. Levy Patrick Mwanawasa, SC, in exercise of the powers under the Inquiries Act, Cap. 41, appointed a Commission, chaired by Mr. Wila D. Mung'omba, to review the Constitution of Zambia.

**ON 16<sup>TH</sup> NOVEMBER 2011**

### **SILUNGWE COMMISSION**

The President of the Republic of Zambia, Mr. Michael Chilufya Sata, using his executive powers vested in him by the current Republican Constitution, appointed a technical committee led by Justice Annel Silungwe to draft the Zambian Constitution.

# UNDERSTANDING KEY CLAUSES IN THE CONSTITUTION AMENDMENT ACT NO.2 OF 2016

(Focusing on the 2016 General elections)

## ELECTION DATE



### EXTRACT 56.

- (1) A general election shall be held, every five years after the last general election, on the second Thursday of August.*
- (2) The day on which a general election is held shall be a public holiday*

The new constitution has removed the uncertainty associated with the date of elections. It provides that the general elections shall be held on the second Thursday of August in an election year. In the same vein, Zambians will know in advance who the successor would be, should the office of the Republican President fall vacant for one reason or another. The introduction of this clause brings an end to uncertainties that have existed in the past concerning the election date. This clause has leveled the political playing field as all parties will now be aware of the election date in advance.

## PRESIDENTIAL RUNNING MATE



### EXTRACT 110.

- (1) There shall be a Vice-President for the Republic who shall be the running mate to a presidential candidate in a presidential election.*
- (2) The qualifications and disqualifications applying to a presidential candidate apply to the person selected by the presidential candidate to be the running mate*

In this clause, the Presidential candidate is required to appoint a “**running mate**” who will also be elected together with a presidential candidate by the electorate. This means that the ballot paper for an aspiring presidential candidate will also bear the face of the running mate. This further means that once elected, the presidential candidate becomes

republican president whilst the running mate becomes the vice president of the republic. It further ensures that the country avoids an unexpected and costly by-election, in an event that a sitting president dies. This is similar to the United States of America, Malawi and Kenya among others. This approach has so far worked well in Kenya but caused a hitch in Malawi the later. The clause is also expected to add a new dimension to politics, as candidates will now have to rely not only their strengths but also on the strengths of their running mates

## THE “50+1” CLAUSE



### EXTRACT 47

*(1) Elections to the office of President shall be conducted directly, under a majoritarian electoral system, where the winning candidate must receive more than fifty percent of the valid votes cast, and in accordance with Article 101*

Zambia has been using the **First-Past-The-Post (FPTP)** or winner takes all systems to elect a Republican president. This “**plurality system**” simply awards the presidency to the individual candidate who receives the most votes in an election. The 50+1 is about majority. “**Majority**” is normally defined as 50 per cent plus one vote. This clause simply means that the candidate must win the elections by more than half of the number of votes cast in a particular election. Majority electoral systems attempt to provide for a greater degree of representativeness by requiring that candidates achieve a majority of votes in order to win. If no candidate gets a majority of votes, then a second round of voting will be held among the top leading candidates. It is hoped that the newly adopted **50% plus one** vote will assist to minimize presidential petitions, which have been a thorny issue in some of the past elections held in Zambia. Other African countries which require a presidential candidate to amass 50 per cent plus one to be voted to the presidency include Malawi, Nigeria, Central African Republic (CAR), Ethiopia, Senegal, Ghana and Ivory Coast to mention but few.

## THE GRADE 12 QUALIFICATION

According to Article 70 (1) (d), a person is eligible to be elected as Member of Parliament, if that person:



### EXTRACT 70.

*(b) has obtained, as a minimum academic qualification, a grade twelve certificate or its equivalent; and*

In the constitution, aspiring candidates are required by law to possess a Grade 12 qualification or equivalent (*Articles 70 and 100*). This clause has been subject to debate and stakeholders have demanded for the Constitutional court as well as the Electoral Commission of Zambia (ECZ) to clearly specify further on this requirement. A noted challenge is that some aspiring candidates may have obtained similar qualifications from out of the country and such cases need to be clearly interpreted as well.

## DUAL NATIONALITY



### EXTRACT 39.

*(1) A citizen shall not lose citizenship by acquiring the citizenship of another country.*

*(2) A citizen who ceased to be a citizen, before the commencement of this Constitution as a result of acquiring the citizenship of another country, shall be entitled to apply, as prescribed, to the Citizenship Board of Zambia, for citizenship and the Citizenship Board of Zambia shall bestow citizenship on that person.*

This clause allows Zambians who obtain citizenship in another country to still hold their Zambian citizenship. This is timely given that Zambia is currently formulating the Diaspora policy. Lessons from Kenya, Nigeria and Ghana indicate that once a diaspora policy is on place, it spurs engagements as well as remittances from a countries citizens in the Diaspora. This policy decision will also allow for Zambians abroad who have acquired citizenship of another country not to lose their Zambian citizenship. To this effect, the Government is currently compiling guidelines that will guide how the processes of dual citizenship will be affected. This decision has also been well received by the Zambians in the diaspora and it is purported to promote investments. *Further, a citizen is also disqualified to stand as president if they have dual citizenship (Article 100). For traditional rulers (Chiefs), they are not qualified to stand as president or MP unless they abdicate the throne but they qualify to stand as councilors in a local authority (Article 168).*

## ELECTORAL CODE

The amended Constitution further provides a new electoral code that stipulates that in order for a person-contesting for presidency to qualify for a presidential nomination, the person must have **1000 registered supporters**. It also provides guidelines on the issues of crossing of the floor in Parliament and by-elections among other things.

## QUALIFICATIONS OF MEMBERS OF PARLIAMENT



*(1) Subject to clause (2), a person is eligible to be elected as a Member of Parliament, if that person—*

- (a) is a citizen;*
- (b) is at least twenty-one years old; (c) is a registered voter;*
- (d) has obtained, as a minimum academic qualification, a grade twelve certificate or its equivalent; and*
- (e) declares that person's assets and liabilities, as prescribed.*

## QUALIFICATIONS FOR NOMINATIONS AS PRESIDENTIAL CANDIDATE



*100. (1) A person qualifies to be nominated as a candidate for election as President if that person—*

- (a) is a citizen by birth or descent;*
- (b) has been ordinarily resident in Zambia;*
- (c) is at least thirty-five years old;*
- (d) is a registered voter;*
- (e) has obtained, as a minimum academic qualification, a grade twelve certificate or its equivalent;*
- (f) is fluent in the official language;*
- (g) has paid that person's taxes or has made arrangements, satisfactory to the appropriate tax authority, for the payment of the taxes;*
- (h) declares that person's assets and liabilities, as prescribed;*
- (i) pays the prescribed election fee on, or before, the date fixed for the delivery of nomination papers; and*
- (j) is supported by at least one hundred registered voters from each Province.*

## MEDIA ACCESS

**Article 50:** of the constitution states that a political party and a candidate contesting an election shall have access to the media, especially during election campaigns. (The case of the public order act and fair access to the media) – some people may challenge this especially fair and adequate coverage of the elections

## THE CONSTITUTIONAL COURT



127. There is established the Constitutional Court which consists of—  
(a) the President of the Constitutional Court;  
(b) the Deputy President of the Constitutional Court; and  
(c) eleven other judges or a higher number of judges, as prescribed.

128. (1) Subject to Article 28, the Constitutional Court has original and final jurisdiction to hear—  
(a) a matter relating to the interpretation of this Constitution; (b) a matter relating to a violation or contravention of this Constitution;  
(c) a matter relating to the President, Vice-President or an election of a President;  
(d) appeals relating to election of Members of Parliament and councillors; and  
(e) whether or not a matter falls within the jurisdiction of the Constitutional Court.

## THE BILL OF RIGHTS AND THE NATIONAL REFERENDUM

### THE CASE OF THE “BILL OF RIGHTS” AND THE REFERENDUM

The **Bill of Rights** is a formal list of the most important legal and civil rights of the citizens of a country. This piece of legislation sets out the fundamental individual rights, freedoms and entitlements of a citizen. The main purpose of Bill of Rights is to protect those rights against infringement from both public officials and private citizens. The national referendum for the adoption and enactment of the expanded Bill of Rights is

scheduled to be held simultaneously with the general elections on 11<sup>th</sup> August 2016. It is important to note that the government opted to use parliament for the adoption and enactment of the final draft constitution, with the exception of part 5 which is “the Bill of Rights” and Article 79 of the previous Constitution because they are protected and entrenched and cannot be amended without a holding a referendum.

There is urgent need for the ECZ to massively sensitize the public on the contents of the Bill of Rights as well as ensure that there is a massive turnout in order for the referendum to be a success.

We must also bear in mind that for the referendum, any Zambian citizen who is above 18 years old has the right to vote even though the individual may not have registered as a voter. There is also a governmental commission established to oversee the conducting of the referendum. There is need for the Referendum Commission to ensure that its efforts to sensitize the public on the referendum processes are enhanced. To this effect, the public needs to be fully aware on what the bill of rights is and also what they are voting for.

**As PMRC,** we strongly believe that good governance is an integral cornerstone in the foundation of a nation's development and economic growth. Therefore, the PMRC has committed itself to playing a key role in sensitization and awareness creation on the amended constitution as well

as the referendum for the Bill of Rights. PMRC expects to see increased levels of awareness among the citizens and their full understanding on key clauses in the constitution as well as the contents of the bill of rights. This work ultimately seeks to promote dialogue and constructive debate on good governance and the upcoming elections in general.

The importance of the rule of law, open and accountable institutions, strong civil society organisations, and protection of human rights for all citizens and all communities cannot be over emphasized. 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 make informed decisions and interact more meaningfully with their leaders at community, provincial and national levels. This will ultimately promote increased participation in the governance and electoral processes and ultimately play their right as citizens of the country.

## WHAT IS A REFERENDUM?

*It is important to note that the PF government, opted to use Parliament for the adoption and enactment of the Final Draft Constitution, with the exception of part 5 which is “the Bill of Rights” and Article 79 of the previous Constitution because they are protected and entrenched and cannot be amended without a holding a referendum. There is however need to build consensus around what amendments (if any) will have to be made to the Bill of Rights before proceeding with holding of the referendum.*

A referendum is when citizens are requested to vote in deciding whether to accept or reject a particular proposal or the constitution. It is a form of direct democracy. A referendum is a national ballot on a question to change a part of the Constitution. In a referendum the Parliament asks each citizen on the electoral roll to vote. If a majority of people across the nation as a whole votes yes (called a double majority), then the part of the Constitution in question is changed.



# THE REFERENDUM QUESTION

Do you agree to the amendment to the Constitution to enhance the Bill of Rights contained in Part 3 of the Constitution of Zambia and to repeal and replace Article 79 of the Constitution of Zambia?

YES  NO

## UNDERSTANDING ARTICLE 79

Article 79	Articles 301 - 303
Process of amending the Constitution and the Bill of Rights	Process of amending the Constitution and the Bill of Rights
Amendments requiring referendum <ul style="list-style-type: none"> <li>■ Bill of Rights</li> <li>■ Article 79</li> </ul>	Amendments requiring referendum <ul style="list-style-type: none"> <li>1 - Supremacy of the Constitution</li> <li>4 - Sovereign of the Republic</li> <li>5 - Sovereign authority of the people of Zambia</li> <li>47 - Electoral System for Presidential and Parliamentary</li> <li>10 6 - Tenure of office of the President and vacancy</li> <li>110 - Vice Presidency election to office and swearing in</li> <li>116 - Ministers (appointment, role and vacancy)</li> <li>117 - Provincial Ministers (appointment, role and vacancy part 3 - Bill of Rights Article 301 and 302</li> </ul>
Referendum threshold - 50% of eligible votes voting yes	303 - Referendum threshold - 50% of registered voters voting and more than 50% of the votes vote in favor
No Time frame	303 - Referendum to be held within 120 days after first reading of the bill
Requirement - Holder of green NRC and attained the age of 18	303 - Requirement - Registered voter

## VOTING IN THE 2016 AUGUST GENERAL ELECTIONS

### What citizens will be expected to vote for



- Presidential candidate + Running mate
- Executive Mayors
- Parliamentary (Member of Parliament)
- Referendum for the “Bill of Rights”
- Local Government (Councilors)

### SOME CLAUSES THAT WERE NOT CONSIDERED IN THE NEW CONSTITUTION

1. The establishment of Provincial Assemblies (which would have provided a platform to enhance citizens’ participation in the governance process at local level). It was rejected on the premise that it would be too costly a venture.
2. The Cabinet outside Parliament clause (which proposed the enhancement of checks and balances between the Executive and Parliament and encouraged separation of powers was equally left out of the Constitution).
3. Mixed Member Proportional Representation clause (aimed at enhancing representation of marginalized groups such as women, youth and persons living with disabilities in Parliament).

## CONCLUSION

### WHAT DOES A PEOPLE DRIVEN CONSTITUTION MEAN FOR ZAMBIA

- It ensures the separation of powers amongst the various State organs including the Executive, Legislature and Judiciary, so as to create checks and balances between them and to ensure accountability of the State and its officers to the people of Zambia.
- Democracy is essentially built on and sustained by a constitution representative of the desires of the people and not the desires of the ruling party and its government. This cements our democracy as a country.
- It guarantees peace, national unity and integrity of the nation in order to safeguard the well being of the people.
- It establishes a free and democratic system of Government that guarantees good governance, constitutionalism, and the rule of law, human rights, gender equity, gender equality and affirmative action.
- It ensures the provision of basic needs of all Zambians through the establishment of an equitable framework for economic growth and equitable access to national resources;
- Promotes national unity, whilst creating an enabling environment for free exchange of ideas and promotes an environment of free, fair and responsible media.

# ANALYSIS OF THE CONSTITUTION AMENDMENT ACT NO.2 OF 2016



## Unlocking Zambia's Potential

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