

Policy Brief

April 2020

## Implications of Zimbabwe's Constitutional Amendment (no. 2) Bill on Fiscal Governance and Public Finance Management

### Executive Summary

The policy brief addresses key questions on the implications of Clauses 10, 17, 18 and 23 of Constitution of Zimbabwe Amendment (No.2) Bill on public finance management in Zimbabwe. The analytic study sought to provide a thorough insight and assessment on the repercussions of removing the power of Parliament in approving agreements with foreign organisations and entities. Particular attention was paid on the impact on debt management, transparency and accountability. The brief, *inter-alia*, also looked at the effect of creating the office of the Public Protector on public finance management. Based on the systematic review of the proposed amendments, the policy brief recommended that there is need for Parliament to retain its power and authority to approve all agreements which impose fiscal obligations on the State. Clause 23 which alienates the powers of Parliament in approving agreements with foreign organisations and entities must be severed from the Bill as it will undermine the role of Parliament in fiscal governance. This will undoubtedly undermine Parliament's oversight and representative functions which are the hallmarks of effective governance. In addition, and for purposes of clarity and certainty, the Constitution must provide a definition of what is a 'foreign organisation and entity'. Currently, such definition is not provided. The brief supports Clauses 17 and 18 which seek to introduce the Office of Public Protector. This office, given adequate resourcing and independence, may promote fiscal discipline, particularly in the public sector where successive

Auditor General's Reports have revealed recurring financial malpractices and general non-compliance with public finance management statutes.

### 1.0 Introduction and Background

This policy brief is based on a comprehensive analysis of relevant clauses of the Constitution of Zimbabwe Amendment (No.2) Bill and their implications on Public Finance Management (PFM) in Zimbabwe. Comparative studies aimed at deepening the understanding of PFM were conducted. The selected countries were Mozambique and Zambia. PFM in Zimbabwe is anchored on various provisions of the Constitution, particularly the principles encapsulated in section 298 of the Constitution which provide that public funds must be expended transparently, prudently, economically and effectively. The Constitution states that financial management must be responsible, and fiscal reporting must be clear; and public borrowing and all transactions involving the national debt must be carried out transparently and in the best interests of Zimbabwe.<sup>1</sup> These principles, coupled with other constitutional provisions are important in that the Constitution is the supreme law of the land and any other law, custom, conduct and practice inconsistent with it is invalid to the extent of the inconsistency.<sup>2</sup>

From the onset, it is critically important to note that the landmark 2013 Constitution of the Zimbabwe, adopted through a widely consultative and participatory approach is yet to be fully implemented,

<sup>1</sup>Section 298 of the Constitution of Zimbabwe, 2013

<sup>2</sup>Section 2 of the Constitution of Zimbabwe, 2013

with certain provisions yet to be given practical meaning. As such, any attempt to amend the progressive Constitution must be thoroughly interrogated pursuant to the need to enhance good governance. Constitution of Zimbabwe Amendment (No.2) Bill is coming soon after Constitution of Zimbabwe Amendment (No.1) Act whose main effect 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 are now made by the President after consultation with the Judicial Service Commission. Constitution of Zimbabwe Amendment (No.2) Bill has far reaching implications on PFM in Zimbabwe as it has clauses aimed at diluting the powers in Parliament in debt management. In this context, this policy brief seeks to analyse Clauses 17, 18 and 23 of the Constitution of Zimbabwe Amendment (No.2) Bill and their implications on PFM. The brief will cite relevant examples from other jurisdictions and how these can inform PFM in Zimbabwe. The policy brief will also examine the desirability of the policy reforms, particularly at a time when Zimbabwe is in debt distress. The policy brief will conclude by proffering recommendations on measures to enhance PFM and fiscal governance in Zimbabwe.

## Constitution and the Socio-Political Context

The Constitution of a country moderates political power (deals with the exercise of political power and its limits) and establishes the basis of economic and social life.<sup>3</sup> Other political players participate in the political process on the basis that everyone respects the highest law of the land. The constitution represents the views and aspirations of majority of Zimbabweans (94.49% voted in favour of the 2013 Constitution). The proposed Constitution amendment number 2 has been widely criticised by citizens. It is democratic for a country to ensure that the governing law adopts to changing circumstances since people are the legitimate

source of constitutional authority. For example German constitution has been amended 68 times since its adoption in 1948 while the US constitution has only 27 amendments in 200 years. What matters most is not the frequency of the amendment but the quality, content and effect of the amendment in upholding the tenets of constitutionalism. Generally, constitutions are amended to correct defects which are identified through application and practice i.e. making the necessary corrections, filling gaps and removing contradictions. But at the same time amendments should not undermine the basic features of the constitution, cause tensions or contradict other parts of the constitution, undermine public confidence and trust in the constitution, affect coherence and stability of the constitution and should not advance short term political interests.

The amendments are proposed in an environment where the main opposition party (MDC Alliance) questions the legitimacy of the president following the disputed 2018 harmonised elections. Historically the Government of Zimbabwe has been amending the Constitution without due regard to the views of general citizens. It should be noted that the first attempt to overhaul the 1980 constitution failed when citizens rejected the proposed constitution in February 2000 in a referendum. The 2013 Constitution of Zimbabwe was crafted under a Government of National Unity where ZANU PF and MDC negotiated provisions. The 1980 Constitution was amended 19 times and most of the amendments were addressing racial imbalances and consolidating the power of the president. There has been lack of constitutionalism<sup>4</sup> in Zimbabwe which creates a mistrust between the state and citizens since the state failed to guarantee the liberty and rights of individuals which is the backbone of a free society. When a country is not adhering to principles of constitutionalism the end result is poor management of public resources, rampant corruption by government officials and lack of concern over citizen's welfare.<sup>5</sup> Absence of constitutionalism also provides room for

<sup>3</sup> De Smith and Rodney Brazier. Constitutional and Administrative Law. London and New York: Penguin Book. 1998. p. 6–7.

<sup>4</sup> Constitutionalism is concerned with political power of those who rule to ensure respect of liberty and rights of individuals and preventing tyranny (Reynolds NB. The Ethical Foundations of Constitutional Order: A Conventionalist Perspective. Const Pol Econ. 1993)

<sup>5</sup> Olasunkanmi A. Constitution without constitutionalism: interrogating the Africa experience. Art Human Open Acc J. 2018;2(5):272–276. DOI:

<sup>6</sup> 10.15406/ahoj.2018.02.00069

<sup>6</sup> Federalist Papers no. 51, available at <http://avalon.law.yale.edu/medieval/magframe.asp>

resistance to transparency, accountability and political representations by the ruling elites which threatens good public finance management. James Madison once remarked that: *'If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary'*<sup>16</sup>. In real life however, men govern over men, this necessitate the need to create controls on the power of those who govern while at the same time ensuring that government is not rendered impotent. Constitutionalism ensures a balance such that the government does not become tyrannical and that it is not pushed to paralysis.

## 2.0 Structure of the Policy Brief

To put the discussion into a proper context, the policy brief will first and foremost define Public Finance Management. This will be followed by a discussion of each of the proposed amendments on PFM in Zimbabwe. The brief will then touch on the pros and cons of the proposed amendments. Ultimately, the policy brief will propose some recommendations.

## 3.0 Definition of Public Finance Management

Lawson (2015) defines public financial management as a set of laws, rules, systems and processes used by governments to mobilise revenue, allocate public funds, and undertake public spending, account for funds and audit results. It encompasses a broader set of functions than ordinary financial management and is commonly structured as a cycle of six phases, including 1. Policy formulation. 2. Budget formulation. 3. Budget approval. 4. Budget execution. 5. Accounting. 6. External audit and evaluation. PFM, as practiced by

most governments, is anchored on legal and institutional frameworks that provide the platform for supervising all phases of the budget cycle, including formulation and preparation of the budget, budget execution and expenditure management, internal controls and audit, procurement, monitoring and reporting arrangements, and external oversight and audit. In this regard, therefore, PFM serves to promote socio-economic development and good governance. This becomes instructive on account of the fact that financial resources are finite and ought to be used optimally and in line with best practices. Against this backdrop, the question that may arise is to what extent does what does Constitution of Zimbabwe Amendment (No.2) Bill enhance PFM in Zimbabwe.

## 4.0 Unpacking relevant sections of Constitution of Zimbabwe Amendment (No.2) Bill

In line with section 328(3) of the Constitution of Zimbabwe, the Speaker of the National Assembly, on the 17<sup>th</sup> of January 2020, published in the Gazette, Constitution of Zimbabwe Amendment (No.2) Bill [herein after referred to as the Amendment Bill]. Clause 10 proposes to amend section 104(3) of the Constitution by increasing the number of Ministers appointed by the President from outside Parliament from the current five to seven. Clauses 17 and 18 of the Bill seeks to create the office of the Public Protector. The Public Protector shall have the power to investigate the exercise of public power by public office bearers pursuant to the need to ensure effective and smooth administration. The role of the Public Protector will be to inquire into matters of maladministration in the public service and provide appropriate remedial measures. Clause 23, *inter-alia*, seeks to amend section 327(3) of the Constitution of Zimbabwe by removing Parliament's power to approve an agreement which is not an international treaty but

concluded or executed by the President or under the authority of the President. What this means is that if the proposed amendments are enacted into law, Parliament will no longer be required to approve agreements entered into between the State and “**foreign organisations and entities**”.

## 5.0 Current legal position in relation to approval of agreements between the State and foreign organisations and entities

Currently configured, Section 327(3) of the Constitution provides that:-

*“An agreement which is not an international treaty but which—  
(a) has been concluded or executed by the President or under the President's authority with one or more **foreign organisations or entities**; and  
(b) imposes fiscal obligations on Zimbabwe; **does not bind Zimbabwe** until it has been approved by Parliament”. [Emphasis added]*

A literal interpretation of this important constitutional provision reveals that Parliament must approve all agreements between the State and foreign organisations or entities. More importantly, all agreements that impose fiscal obligations on Zimbabwe do not impose binding obligations on Zimbabwe until they have been approved by Parliament. The power to approve also include the power to disapprove any agreement that Parliament may consider to be detrimental to Zimbabwe or any agreement that may have been poorly negotiated. In this regard, Parliament is the custodian of national interest. Therefore, any Act that seeks to amend this critical provision must do so purely on good grounds.

Clause 23 of the Amendment Bill aims to amend section 327(3) by the deletion of “**foreign organisations and entities**” and its substitution with “**international organisations**”. If this Amendment sails through, parliamentary approval will no longer be required in the approval of agreements with foreign organisations and entities, even when these impose fiscal obligations on Zimbabwe. The questions that may arise are: Is this a desirable amendment or policy reform; what are the implications on PFM in Zimbabwe; and what will be the impact on parliament's role in fiscal governance?

## 6.0 Motivation for the Proposed Amendments

Clause 23 appears to have been motivated by the need to enhance the expeditious conclusion of agreements between the government and “foreign organisations or entities”. The policy reform seems to have been necessitated by the concern that involving Parliament in the approval of agreements with foreign organisations and entities lengthened the administrative procedures of concluding the agreements. In certain instances, it may be necessary to speedily conclude agreements that will ensure the financing of certain urgent commitments. However, it is perceived that this process may be potentially retarded or slowed down by the internal parliamentary processes which may take time to complete and satisfy in line with the constitutional principle compelling Parliament to involve the public in all its processes. In more specific terms, section 141 of the Constitution of Zimbabwe peremptorily provides that Parliament must facilitate public involvement in its legislative and other processes and in the processes of its committees.<sup>7</sup> This may be perceived by some as delaying the conclusion of agreements, particularly where there is an urgent need. In addition, an agreement must be approved by both Houses of

<sup>7</sup>Section 141(a) of the Constitution of Zimbabwe, 2013  
<sup>8</sup>Section 118 of the Constitution of Zimbabwe, 2013

Parliament for it to be deemed to have been passed by Parliament. Section 116 of the Constitution prescribes that Parliament consists of the Senate and the National Assembly.<sup>8</sup>

The linear progression of an agreement from one House to the other could slow the process of concluding agreements. The Zimbabwean experience has seen the executive being exposed by parliament for borrowing without approval as stated in the constitution and this has also been humiliating the Ministers. This motivated the need to propose the removal the authority of Parliament in approving agreements with foreign organisations and entities. In addition, Clause 23 seeks to limit the class of agreements that Parliament can approve. If the amendments are enacted into law, Parliament's role will be limited to only approving international agreements as is the case in other jurisdictions. It will no longer exercise its powers to approve its traditional constitutional powers to approve agreements with foreign organisations and entities.

The proposed amendments are akin to similar moves in Zambia where the National Assembly seeks to repeal Article 63(2)(e) which currently gives the National Assembly oversight over approving international agreements and treaties before these are acceded to or ratified. Article 92(2)(c) of the Constitution of Zambia gives the President the power to negotiate and sign international agreements.

The proposed amendment removes the requirement that his power be subjected to approval by the National Assembly. In this regard, this brings to the fore the questions, what is an agreement with a foreign organisation or entity. How does this differ from an International treaty or agreement? Is there need to differentiate the two in so far as approval by Parliament is concerned.

## 7.0 Differentiating an international treaty from an agreement with a foreign organisation or entity.

An international treaty is constitutionally defined as a convention, treaty, protocol or agreement between one or more foreign States or governments or international organisations.<sup>9</sup> Article 2 of the Vienna Convention on the Law of Treaties defines a 'treaty' as an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.<sup>10</sup> An international treaty, therefore, defines relationships between and amongst sovereign states or between sovereign states and international organisations such as the United Nations or the Southern African Development Community (SADC). All international treaties or agreements between Zimbabwe and foreign states are not binding on Zimbabwe until and unless they have been approved by Parliament. In addition, agreements between Zimbabwe and International Organisations such as the World Bank, the African Development Bank or the International Monetary Fund are not binding on Zimbabwe until they have been approved by Parliament. The same applies with agreements which are concluded with "foreign organisations or entities" and impose fiscal obligations on Zimbabwe. The Constitution does not define a 'foreign organisation or entity'. However, this has been taken to mean organisations in which states are not the main actors. For instance, Zimbabwe has concluded agreements with foreign organisations such as African Export-Import Bank, Oil Producing and Exporting Countries (OPEC), Kuwait Fund and other foreign entities whose membership is not a foreign state. This class of agreements must be approved by Parliament because more often than not, they impose fiscal obligations on

<sup>9</sup> Section 327(1) of the Constitution of Zimbabwe, 2013

<sup>10</sup> Article 2 of the Vienna Convention on the Law of Treaties.

Zimbabwe. Clause 23 of the Amendment Bill seeks to insulate this class of agreements from approval by Parliament. This means if the Amendment is passed, Zimbabwe can enter into agreements with 'foreign organisations or entities' without seeking Parliament's approval. Parliament will no longer have the power to approve or disapprove such agreements. This will certainly diminish the power of Parliament on fiscal matters with serious consequences on PFM in general and debt management in particular.

## 8.0 Parliamentary Supremacy over Fiscal Matters

Parliaments the world over have powers to control public expenditure through approving national budgets, international treaties and other agreements that impose fiscal obligations on the State. This '**power of the purse**' or the allocative power of Parliament, may, in fact, be regarded as the most complete and effectual weapon with which any Constitution can arm the immediate representatives of the people. The sacrosanct approval authority of Parliament in resource allocation is regarded as the most definitive tool which Parliament can use to promote equitable socio-economic development and good governance.

The requirement for legislative approval of financial measures is a democratic foundation stone that is enshrined in the law to curb abuse of power. Overall, parliamentary approval is meant to enhance transparency, accountability and ensure that effective checks and balances are imposed on the exercise of power by the Executive. Fiscal prudence and sustainability hinges on the ability of the State to effectively manage its public debt. As such, it is critical that the law must provide for approval and oversight mechanisms meant to curtail capricious conduct by public office bearers. Against this background,

outlined below are the pros and cons of the proposed Amendments.

### 9.0 Does the Amendment of section 327(3) of the Constitution adversely affect the role of Parliament in fiscal governance?

#### 9.1 Unchecked expansion of the foreign debt

It may be argued that Clause 23 of the Amendment Bill may be used by the government to enter into agreements with many lenders outside the watchful eye of Parliament. This may create the possibility of concealment of certain debt or information on the beneficiaries of the loan from Parliament. There is no doubt this will undermine PFM and fiscal governance in Zimbabwe. From a historical perspective, such fears are not without merit. A number of loans contracted by the Government of Zimbabwe since 1980, some without parliamentary approval, raised the foreign and domestic debt to unsustainable levels. Thus, if Parliament is not involved at the approval stage of the loan agreements with foreign organisations and entities, subsequent oversight work amount to "*closing the stable gates when the horses have bolted*". As such, there is need for Parliament to be involved at the approval stages so that it's '*eagle eye*' can interrogate the terms and conditions of the agreements pursuant to the need to enhance transparency and accountability. Errors of judgement by the negotiators of the agreements can be rectified by Parliament at the approval stage. This is a best practice that ensures that national interest is embraced in the entire cycle of negotiating the agreements with foreign organisations and entities. Where Parliament is not involved, a lot of vices may proceed undetected and undebated to the detriment of PFM.

Mozambique provides a good example of what happens when the Executive assumes free reign in concluding agreements. The secret loans in

Mozambique amplified the debt challenge. The loans to Proindicus (US\$ 622 million), to Mozambique Asset Management (US\$ 535 million) and to the Ministry of the Interior, MINT, (US\$ 221 million), all on commercial terms, increased the total public debt stock to at least US\$ 11.6 billion, or 78% of GDP, the highest level since 2005. The commercial component of the total public debt increased to 49%;<sup>11</sup> 70% of which is foreign debt.<sup>12</sup> It is important to note that the Mozambique Constitutional Court on 8 May 2020 ruled the state guarantees given to certain entities are null and void because they were concluded secretly and did not benefit the majority of citizens as stated in the law. This means that the highest court in Mozambique ruled that the loans and the guarantees should be treated as if they never had existed. In its decision, the Constitutional Court cited the special parliamentary commission of inquiry which found that the loan guarantees given by the state had not been authorised by parliament, and thus violated the Constitution.<sup>13</sup> However, the indebtedness of the country is still very high.

The country is burdened with a huge debt which imposes onerous obligations on current and future generations. Debt sustainability in Zimbabwe is a matter that requires urgent intervention by Parliament as the supreme legislative, representative and oversight institution. The International Monetary Fund, as part of Article IV Consultations for 2020, observed that Zimbabwe remains in debt distress. It encouraged the government to give impetus to re-engagement efforts and “debt management and transparency”. The IMF cautioned against continued recourse to collateralized external borrowing on commercial terms as this may potentially complicate any future arrears clearance operation. As such, it has been argued that there is need for Parliament to be involved in the approval of agreements that have fiscal obligations on Zimbabwe. After all, debt unsustainability and a growing debt risk can be an obstacle to the attainment

of Sustainable Development Goals (SDGs) and successive National Development Plans as envisaged in Vision 2030. Flowing from the above, it can be said the amendment undermines parliament's role in debt management. This is contrary to the letter and spirit of section 298 of the Constitution which provides as a matter of principle that “public borrowing and all transactions involving the national debt must be carried out transparently”.<sup>13</sup>

## 9.2 Dilution of the principle of checks and balances

It has also been argued by some analysts that the proposed amendment weakens the system of checks and balances between and amongst the various arms of the State. Alienating Parliament from the approval of agreements with foreign organisations and entities undermines the checks and balances that exists between Parliament and the Executive. Checks and balances are critical for good governance in general and PFM in particular. Transparency and accountability is enhanced where State institutions embrace openness and defer to each other for the review and analysis of certain decisions. Passing the amendment Bill as currently worded relegates Parliament's role to that of merely exercising oversight on agreements that the Executive will have been unilaterally concluded. This undermines both corporate governance and may not be a good practice in PFM. In fact, the move is a regression from the positive strides registered in 2013 when Parliament enacted a law that compels the Executive to seek Parliamentary approval for all agreements with foreign organisations and entities. The amendment will also erode principles of constitutionalism by concentrating authority in one arm of the state (the executive). Notwithstanding the above, however, the oversight role of Parliament is still maintained by requiring that all agreements be

<sup>11</sup> IESE - Instituto de Estudos Sociais e Económicos(2016)

<sup>12</sup> <http://www.cconstitucional.org.mz/content/download/1290/7782/file/Acordao%207.CC.2020.pdf>

<sup>13</sup> Section 298(1)(f) of the Constitution of Zimbabwe, 2013.

published in the Gazette together with the terms and conditions of the agreements. It is through such publication that Parliament conduct oversight thereby promoting transparency and accountability. It has also been stated that the Amendment enhances the principle of separation of powers through segregating the duties of Parliament from those of the Executive. After all, the process of initiating and negotiating agreements is normally reserved for the Executive through its policy formulation prerogative articulated in section 110(3)(d) of the Constitution.

### 9.3 Secrecy undermines Public confidence in governance bodies and institutions

Clause 23 may undermine public scrutiny of the agreements, particularly where the terms and conditions are injurious to the interests of Zimbabwe. Non-disclosure of agreements with foreign organisations and entities at the approval stage could compromise public confidence in the governance processes, thus defeating the goals of good financial management. Public disclosure and debate of all agreements before approval enhances transparency and ownership. It enhances probity of the same. Hence, once Parliament is eliminated from approving agreements with foreign organisations and entities, a lot of agreements with all sorts of lenders may be concluded thus undermining openness and transparency, the major hallmarks of accountability. This presence a sovereign risk to Zimbabwe and its future in so far as debt management is concerned. This challenge is further compounded by the fact that the Government lacks key negotiation competencies, particularly in negotiating complex commercial contracts, particularly in the mining sector. Such deficiencies can be countered by allowing Parliament to scrutinize the agreements. As such, approval of the agreements must be done by Parliament so that PFM is

enhanced for the betterment of good governance in Zimbabwe. Limiting the role of Parliament to merely approving international agreements only undermines the role of Parliament in the entire PFM cycle.

### 9.4 General arguments in support of the Amendments

It has been highlighted that Clause 23 does not completely eradicate the oversight role of Parliament in PFM. This submission is grounded in section 305(1) of the Constitution which provides that "*Every year, the Minister responsible for finance must present to the National Assembly a statement of the estimated revenues and expenditures of the Government in the next financial year*". The Budget Statement presented by the Minister for approval by Parliament is the most important fiscal policy document in any Fiscal Year. Embedded in the Budget Statement for approval by Parliament is a statement on the country debt status, both domestic and foreign. However, an analysis of the National Budget Statement shows the Treasury has not been complying with the provision to table in Parliament a comprehensive statement of the National Debt. Notwithstanding this, section 305, properly construed, requires the Minister responsible for finance to disclose to Parliament for consideration all debt contracted by the State. Furthermore, section 300 of the Constitution on "Limits of State borrowings, public debt and State guarantees" states in clear language that:

(3) Within sixty days after the Government has concluded a loan agreement or guarantee, the Minister responsible for finance must cause its terms to be published in the Gazette.

(4) The Minister responsible for finance must—  
(a) at least twice a year, report to Parliament on the performance of—  
(i) loans raised by the State; and

(ii) loans guaranteed by the State;  
(b) at the same time as the estimates of revenue and expenditure are laid before the National Assembly in terms of section 305, table in Parliament a comprehensive statement of the public debt of Zimbabwe"(emphasis added).

These provisions peremptorily oblige the fiscal authorities to table in Parliament a comprehensive report of the national debt for debate in Parliament as part of accountability mechanisms. As such, Clause 23 does not completely terminate the role and authority of Parliament on the execution on any agreement which imposes fiscal obligations on Zimbabwe. Parliament, through its oversight functions, retains its authority over all agreements, irrespective of whether they are international treaties or agreements with foreign organisations or entities. The only challenge, as has been stated above, is that conducting oversight on agreements that are already being executed or being implemented may not assist much in terms of impact mitigation. Post implementation oversight paints a picture of Parliament merely being used as a 'rubber stamping' institution. This is not consistent with the expanded mandate of Parliament and the need for pro-activeness. This can only be achieved if Parliament is involved from the onset. It is important to note that as clearly encapsulated in section 300(3) of the Constitution, all loan agreements and their terms must be published in the Gazette. This affirms that the constitutional values of transparency and accountability may not be compromised by the proposed Amendments. What the proposed Amendment of section 327 simply does is to remove the role of Parliament in the approval process on non-international agreements where states or international organisation are not the key players. Further to this, it must be emphasised that the Minister responsible for finance is compelled by section 300 of the Constitution report to Parliament, at least twice a year, the performance of all loans raised by the State. National

interest may be at stake when the Executive is given a free reign to conclude agreements with many lenders without endorsement by Parliament.

While monitoring performance of the loans is good, there is a greater need for Parliament to have a say on how the debt will have been contracted because over the years, numerous loans were contracted without approval by Parliament. As at 30 September 2019,<sup>14</sup> Zimbabwe's external debt stood at US\$8 billion. This, coupled with the domestic debt, puts Zimbabwe in severe debt distress. Hence, Parliament must retain its power to approve all agreements with foreign organisations or entities. After all, Parliament is the ultimate custodian of the will of the people of Zimbabwe. Parliament, as prescribed in section 119 of the Constitution, must ensure that the provisions of the Constitution "are upheld and that the State and all institutions and agencies of government at every level act constitutionally and in the national interest".

All institutions and agencies of the State and government at every level are accountable to Parliament on all matters including but not limited to financial management. The Amendment seems to dilute the "power of the purse" of Parliament. Properly construed, and from a purposive interpretation perspective, the Amendment gives the Executive unrestricted powers to conclude agreements with foreign organisation and entities. An error of judgment at the negotiation stage may spell ruin for the country. As such, any agreement which imposes fiscal obligations on the State must have the blessings of Parliament as the supreme representative body and the apex oversight body. After all, section 299 of the Constitution of Zimbabwe provides compels Parliament to:

"...monitor and oversee expenditure by the State and all Commissions and institutions and agencies of government at every level, including statutory bodies,

<sup>14</sup>The 2020 National Budget Statement

government controlled entities....in order to ensure that-

- (a) All revenue is accounted for;
- (b) All expenditure has been properly incurred; and
- (c) Any limits and conditions on appropriations have been observed".

While the above section empowers Parliament to conduct oversight, it can be argued that it can be very challenging, if not unhelpful, to conduct oversight of a badly negotiated agreement. As such, maintaining the provision that Parliament must approve agreements with foreign organisations can be the best approach to PFM. In fact, section 327(3) will serve national interest better if it is left as currently configured.

### **9.5 Statutory Checks on Fiscal Management and Debt Management**

The Public Debt Management Act [Chapter 22:21] sets a ceiling on the total debt that can be contracted by the Government of Zimbabwe. The total debt in any given year must not exceed the limit set by the National Assembly. Section 11 of the Public Debt Management Act [Chapter 22:21] provides that public debt cannot exceed 70 % of GDP. Such ceiling could be exceeded if Parliament is not involved in the approval of agreements with foreign organisations and entities. Hence, there is need to maintain the powers of Parliament in the approval of debt or loans guaranteed by the State.

## **10.0 Foreign Precedence**

In Zambia, there is a pending constitutional amendment to remove the jurisdiction of Parliament in approving all agreements. As has already been alluded to above, the Zambian Constitutional Amendment Bill seeks to repeal Article 63(2)(e) which currently gives the National Assembly the authority to approve

international agreements and treaties before these are acceded to or ratified. Similarly, Article 92(2)(c) of the Constitution of Zambia provides that the President power to negotiate and sign international agreements. The proposed amendment removes the requirement that presidential powers be subject to approval by the National Assembly. It may appear that this is not a best practice to learn from. It is important to note that National Constitutions in many jurisdictions are silent on the powers of Parliament to approve agreements concluded between States and foreign organisations and entities. The current practice in Zimbabwe is a unique model that should be preserved so that this best practice can be emulated in other jurisdictions. To enhance the current position, Parliament must provide a definition of what a foreign organisation or entity is as opposed to wholesomely amending the provision that is progressive. Indeed for Zimbabwe, the best option to retain the current wording and formulation of section 327 of the Constitution as it is a best practice which can be emulated by other countries in the region and beyond. In other countries such as Malawi (section 89 of the Constitution), South Africa (section 231) of the Constitution and Eswatini (section 238 of the Constitution), Parliament only approves international agreements. The Constitutions are silent on agreements with "foreign organisations and entities". This means the Zimbabwean practice went beyond the constitutional practices in many other jurisdictions by requiring Parliament to approve agreements with foreign organisations and entities. This is a constitutional practice that must be emulated by others. By seeking to repeal this constitutional clause, it can be argued that Zimbabwe is regressing.

It is important to note that even the now repealed former Constitution of Zimbabwe, despite numerous amendments to it, retained the provision for Parliament to approve agreements with foreign organisations. The former Constitution of Zimbabwe provided that "except as otherwise provided by or under an Act of

Parliament, any agreement, (a) which has been concluded or executed by or under the authority of the President with one or more foreign organizations, corporations or entities, other than a foreign State or government or an international organization; and (b) which imposes fiscal obligations upon Zimbabwe; shall be subject to approval by Parliament". This position was retained by the current Constitution as adopted in 2013. As such, there is no need to deviate from current practice as such may create fertile ground for corruption and other financial malpractices. In any case, the amendment shrinks the democratic and participatory space required in a modern democratic State.

## 11.0 Creation of the Office of the Public Protector and its effect of Fiscal Governance

Clauses 17 and 18 provide for the creation and functions of the Office of the Public Protector and the Deputy Public Protector. The Public Protector may investigate any action taken by any officer, person or authority, the ultimate goal being to protect the public from maladministration. An analysis of successive Auditor General Reports reveals that maladministration and corruption is pervasive in certain segments of the public service. Without doubt, the Office of the Public Protector may enhance fiscal accountability through competent probity on the exercise of public power. Like other Chapter Twelve institutions, the Office of the Public Protector is meant to "strengthen constitutional democracy and governance, extending but not limited to fiscal governance. The Office must promote transparency and accountability in public institutions.<sup>15</sup>

An analysis of the sum-total of sections 233, 234 and 235 of the Constitution shows that that the institution of the Public Protector may be instrumental in facilitating

good governance, transparency and accountability through competent probing and recommendation of remedial measures. In appreciation of the high sensitivity and importance of its role, regard being made to the kind of complaints, institutions and personalities likely to be investigated, as with other Chapter Twelve institutions, the Amendment seeks to guarantee the independence, impartiality, dignity and effectiveness of this institution as indispensable requirements for the proper execution of its mandate. As such, the Office must promote good financial management and use of public resources. The office must protect the public from any conduct in State affairs in any manner that could result in any impropriety or prejudice. Learning from South Africa, the Public Protector is a key institution<sup>16</sup> in the fight against corruption, unlawful enrichment, prejudice and impropriety in State affairs and for the betterment of good governance.<sup>17</sup> In this regard, therefore, the creation of the Office of the Public Protector is likely to enhance PFM. For this to happen, however, an enabling statutory framework must be put in place to ensure that the Office has the requisite autonomy and its remedial measures are binding on public office bearers. The Office of the Public Protector must be an indispensable part of good financial management and governance.

## 12.0 The Effect of Clause 10 on PFM: Increasing the Number of Ministers from Outside Parliament

Basically there are three democratic systems of government: parliamentary system<sup>18</sup>, presidential system<sup>19</sup> and semi-presidential system.<sup>20</sup> The effect of appointing more ministers outside parliament on PFM depends more on the institutional and political context existing in a country. The separation of ministerial office from membership of parliament reflects a particular

<sup>15</sup>Section 233(d) of the Constitution of Zimbabwe

<sup>16</sup>*Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others* [2016] ZACC 11

<sup>17</sup>section 6(4)(a)(iii) and (iv) of the Public Protector Act, South Africa

<sup>18</sup>In a parliamentary system the executive holds office on the basis of the confidence (political support) of the parliamentary majority and can be removed from office by a parliamentary vote of no confidence.

<sup>19</sup>In a presidential system the executive (who typically combines the functions of ceremonial head of state and effective head of government) is separately elected, alongside the legislature, and normally serves for a fixed term.

<sup>20</sup>Semi-presidential systems are a mixture of the two, with a directly elected president who co-exists with a prime minister who depends upon parliamentary support.

historical epoch in which representative institutions were adopted long before parliamentary (the political responsibility of the ministers to the legislature and their dependence on legislative confidence) was established. Clause 10 of the Bill seeks to raise the number of Ministers appointed from outside Parliament from the current five to seven. In fact, if passed, the clause may enable the President to appoint more people with special skills and competencies to Cabinet for the betterment of good governance, accountability and transparency. This can create a "government of all talents". Indeed, as the demands placed on Cabinet become more complex, it has become increasingly desirable for Ministers to have specific and technocratic expertise.

The need for additional expertise is also a result of the rising number of career politicians: as a consequence, technical expertise can be lacking from the narrow talent pool from which Ministers are traditionally drawn. However, it must be emphasised that such appointments must be on proven merit otherwise the experts may become "doves amongst the eagles". This may compromise their competencies. In countries like Luxembourg, Switzerland and Belgium that use parliamentary systems but with strict separation between the legislative and executive arms of government, members of parliament chosen to be cabinet members have to resign from parliament. Selecting professionals may have benefits for democracy and governance such as preventing plutocracy and capture of politics by interest groups.<sup>21</sup> In the UK the constraints to appoint non MPs to be cabinet ministers are political rather than constitutional while in South Africa the constitution allows only for two ministers.

Politically, large cabinets help to satisfy the ambitions of many politicians due to the prestige and influence associated with the position (Indridarson & Bowler

2014).<sup>22</sup> Usually political fragmentation (factionalism) is positively related to cabinet size which may contribute to fiscal deficit (Joachim, 2010).<sup>23</sup> Party leadership may use the leverage to appoint ministers outside parliament to satisfy party factions which may result in more government expenditure on ministers than necessary. It will increase government expenditure given the benefits that accrue to ministers which tend to overburden the citizens. This can also be used to accommodate those who would have failed to win parliamentary elections which then defeats the pool of talents argument. The size of Zimbabwean economy may struggle to support a big cabinet. For instance the People's Republic of China has a population of 1.35 billion and about US\$14 trillion GDP but its cabinet has about 38 members. Globally the average cabinet size is 30. When you look at the proportion of benefits of Ministers and other senior civil servants they constitute a huge proportion of the wage bill for instance Minister Chinamasa in 2016 proposed cutting salary packs of Ministers as one of the measures of reducing government wage bill which was consuming over 80% of the national budget.

The idea of selecting ministers from parliament is premised on the assumption that such ministers are more accountable to the citizens who voted them into power and they are likely to advocate for policies that cater for the needs of people who voted for them. This has a certain democratic quality to it i.e. the ministers are chosen (only) from among those whom the people have elected hence reduce nepotism to some extent. This makes ministers to be less dependent on the head of government and therefore better able to resist executive autocracy. Ministers from parliament has both physical and social proximity with other MPs which allows informal interactions and closer to local needs in constituencies. Most ministers from outside parliament may have the skills and expertise but lack political and parliamentary experience make it difficult for their

<sup>21</sup> Beckman, L. (2006). 'The Competent Cabinet? Ministers in Sweden and the Problem of Competence and Democracy.' Scandinavian Political Studies 29: p. 127.

<sup>22</sup> Indridason, I. H. & Bowler, S. (2014). Determinants of cabinet size. European Journal of Political Research, 53(2), 381–403.

<sup>23</sup> Joachim, W. (2010). Cabinet structure and fiscal policy outcomes. European Journal of Political Research, 49(5), 631–653.

policies to be effective. The more professionalised politicians are, the more distant they become from the public they are meant to serve. Ministers appointed from outside parliament, who do not have the same sense of institutional loyalty to parliament and are more likely to side with an executive leader against parliament e.g. Minister Mthuli Ncube has a bad experience with parliament since his appointment including not seeking approval before borrowing and

expending outside approved budget without seeking condonation.<sup>24</sup> Globally, the primary considerations when selecting ministers are party balance, maintaining loyalty and image management. Expertise and competence are secondary consideration hence we have witnessed the same ministers being rotated in various portfolios.

## 12.0 Recommendations

- i. To enhance fiscal accountability and transparency, Parliament must ensure that there is **absolute compliance** with the accountability and transparency framework provided in the Constitution. The capacity of Parliament in international negotiations and debt oversight must be enhanced so that it effectively asserts its authority in PFM.
- ii. Parliament must maintain its power to approve and exercise complete oversight on all agreements, including international agreements and those contracted with foreign organisations and entities. As such, Parliament must develop guidelines on the Approval and Consideration of International Treaties and Other Agreements with Foreign Organisations and Entities.
- iii. Parliament **must interrogate** the terms and conditions of the loan agreements at the approval stage and once these have been published in the Gazette.
- iv. Any amendments that violate the basic tenets of constitutionalism should be rejected such as clause 23. Clause 23 must be **severed** from the Amendment Bill as it does not promote transparency and accountability in PFM.
- v. A definition of “foreign organisation and entity” must be provided in the Constitution rather than removing such agreements from prior approval by parliament.
- vi. The government should take a more consultative and collaborative approach to reduce the current resistance to the amendments.
- vii. At this stage it is more critical for the government to focus on aligning the various pieces of legislation to the constitution rather than trying to amend.
- viii. The constitution amendment should pay attention, to dreams, pains and aspirations of citizens and should not serve the interests of a few ruling elites.
- ix. Although the idea of increasing the talent pool is appealing in appointing more ministers outside parliament, studies and experiences of other countries have shown that maintaining party balance and loyalty remains the primary considerations. Therefore the status quo should be maintained which also reduce unnecessary expenditure and fiscal deficits.

<sup>21</sup> Public Accounts Portfolio Committee first and second report of 2019 to parliament

### **13.0 Conclusion**

Emanating from the above discussions, it is concluded that the Clause 23 of the Amendment Bill may undermine Parliament's role in PFM. Empowering the Executive to conclude agreements without approval by Parliament may amount to diluting and undermining the role of Parliament in PFM. This is not consistent with the constitutionally enshrined principle articulated in section 298 of the Constitution that public borrowing and all transactions involving the national debt must be carried out transparently and in the best interests of Zimbabwe. The overall trend has been to revert

to the status before the 2013 constitution although the 1980 constitution has not helped to usher in good fiscal governance historically. Quantitatively, the ruling party has sufficient number in parliament to pass the amendment, however, what is more important is the quality of the amendment in serving interests of citizens not the ruling elite. The analysis has shown that the proposed amendments have no material value and do not address a clear gap in public finance management in Zimbabwe hence they should be allowed.

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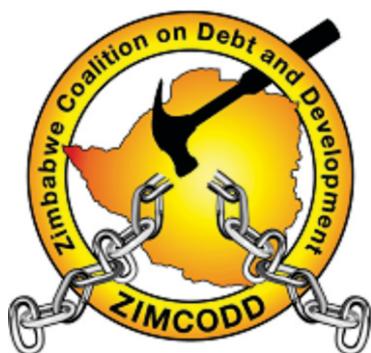
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ON DEBT AND DEVELOPMENT**

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