

# **The Effect of the Constitution of Zambia (Amendment) Bill No. 10 of 2019 on Public Financial Management and Debt Management**







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# Summary

One of the major components of the proposed amendment is a revision to Zambia's systems of financial accountability. With current debt statistics at US\$10.23 billion external debt and K60.3 billion CUTS has sought to understand the implications of the proposed revisions on the country's debt contraction and public financial management.

Following an analysis, the provisions that would impact Zambia's debt management are as follows:

Section 13 of the Constitution of Zambia (Amendment) Bill seeks to delete paragraphs (d) and (e) of Article 63 (2) the Constitution of Zambia Act No. 2 of 2016, which seeks to remove National Assembly's ability to approve public debt before it is contracted and approved; and international agreements and treaties before these are acceded to or ratified is removed. This proposed provision weakens the system of checks and balances and restricts transparency in the contraction of debt. At present, in addition to providing oversight, the process of submitting agreements to National Assembly allows public scrutiny through National Assembly's consultative meetings with stakeholders. The proposed amendments would, therefore, mean agreements are secret and confidential and are not available for public scrutiny.

Section 26 of the Constitution (Amendment) Bill proposes to amend Article 92 (b) by making the President responsible for negotiating, ratifying, acceding or withdrawing from international agreements. This means that National Assembly will have no say or oversight over agreements that would potentially bind the Zambian people to debt. This provision, by removing the requirement of National Assembly approval, implies that National Assembly will have no oversight over debt contraction particularly foreign debt.

Section 36 of the Constitution (Amendment) Bill seeks to provide for revising the system of debt contracting by giving Cabinet the authority to approve loans contracted by the State as well as guarantees on loans contracted by state institutions. The quorum for a Cabinet decision is the President plus one minister or Vice-President. This means that in effect the proposed amendments allow the President with one other member of Cabinet to approve loans or guarantees contracted by the State or State Institutions.

The proposed amendments make the approval of public debt a function of Cabinet and not only breach the principle of separation of powers but also removes any transparency and public accountability over the contraction of public loans and debt. When considered with the other proposed amendments relating to public finance management, the amendments mean that the Executive will be free to borrow and use public finance in a manner that is not transparent and will not be held accountable because of the weakened systems and public accountability institutions.

The need for strong systems to monitor debt contraction and the need for parliamentary oversight in Zambia is reflected in reports from both the Government as well as international organisations such as the World Bank and the International Monetary Fund. In the 2017 National Debt Strategy, the Ministry of Finance recommended that Parliament's oversight over debt contraction be strengthened by enhancing the legal and institutional framework. Proceeding with these proposed amendments removes public accountability and transparency and could have negative implications on our country's already growing debt burden.

# Introduction

On the back of the National Dialogue Forum, the Government of the Republic of Zambia introduced The Constitution of Zambia (Amendment) Bill. A major component of this amendment was a revision to Zambia's systems of financial accountability. The focus of this particular analysis will be on the proposed revision of the oversight role of Parliament with regards to debt contraction. However, there will be a section at the end of the paper that will give an overview of some of the other proposed revisions and its likely impact on public financial management and debt management in Zambia.

## Conceptual Background on Debt Contraction

The Constitution of Zambia creates three branches of the state: Executive, Legislature and Judiciary. In theory, each institution is created to operate independently of the other to enhance checks and balances as well as accountability. The independence of the three organs do not, however, entail total independence as the organs operate as one government and therefore, are interrelated for the efficient functioning of government.

Two of the most important functions the Legislature plays are budgetary oversight as well as approving debt before it is contracted by the Executive. The need for strong systems to monitor debt contraction and the need for Parliamentary oversight in Zambia is reflected in reports from both the Government as well as international organisations such as the World Bank and the International Monetary Fund<sup>1</sup>. In the 2017 National Debt Strategy, the Ministry of Finance recommended that Parliament's oversight over debt contraction be strengthened by enhancing the legal and institutional framework.

Public debt is defined as publicly guaranteed external debt plus domestic public debt<sup>3</sup>. Public debt is sometimes also referred to as government debt. It represents the total outstanding debt (bonds and other securities) of a country's central government<sup>4</sup>. Over the past 25 years, the significant levels of public debt and external finance are more likely to have enhanced macroeconomic vulnerability than to have increased economic growth in developing countries. This applies not just to countries with a history of high inflation and past default, but also to those in East Asia with a long tradition of prudent macroeconomic policies and rapid growth<sup>5</sup>.

Developing countries often struggle with large external debts as they consider that debt provides them with room for important investment to facilitate economic growth.

The International Monetary Fund has noted that in spite of the increasing risks of debt, these risks can be mitigated by enhancing debt transparency stating:

**"Greater debt transparency enables borrowers and lenders to effectively evaluate the sustainability of public debt and monitor emerging risks. Recent cases of hidden debt demonstrate the adverse social, economic, and political consequences borrowers can face."**<sup>6</sup>

Debt transparency is important not only at the international level or between lenders and borrowers as indicated above, but also at the local level between the government and the people. Debt is invariably paid back by the citizens and it is to them that ultimately governments should be accountable.

## Public Debt Transparency and Oversight Mechanisms in Zambia

All government borrowing is allowed by virtue of Article 207 (1) of the Constitution of Zambia<sup>7</sup>, which provides that -

**"The Government may, as prescribed—**

- (a) raise a loan or grant on behalf of itself, a State organ, State institution or other institution;**
- (b) guarantee a loan on behalf of a State organ, State institution or other institution; or**
- (c) enter into an agreement to give a loan or grant out of the Consolidated Fund, other public fund or public account."**

This means that all borrowing or guarantees must be done according to legislation enacted by Parliament.

The Constitution of Zambia (Amendment) Act, No. 2 of 2016 further provides for public debt in Article 208 as follows:

**(1) A public debt shall be a charge on the Consolidated Fund or other public fund.**

**(2) For the purposes of this Article, "public debt" includes the interest on that debt, sinking fund payments in respect of that debt and the costs, charges and expenses incidental to the management of that debt.**

The Constitution in this article merely provides that public debts are to be charged to the Consolidated Fund and does not define “public debt”. The Consolidated Fund is a fund, to which all credited revenues and other monies accruing to the Treasury are paid<sup>8</sup>. The Treasury is the office in the ministry responsible for finance, which receives and keeps receipts, manages and disburses public funds<sup>9</sup>. This means all public debt is paid by the Ministry of Finance and is subject to the controls and regulations that public funds are dealt with.

## Parliamentary Oversight Over Debt Contraction

For the purpose of this paper, Parliament is distinguished from National Assembly. The role National Assembly plays in debt contraction oversight is discussed in the next part of this paper. The Zambian Parliament is established by Article 62 of the Constitution of Zambia (Amendment) Act, No. 2 of 2016. Parliament comprises of the President and National Assembly<sup>10</sup>. Parliament only has one function, to enact legislation. This can be interpreted from reading articles 62 (2) and 63 (1)<sup>11</sup> of the Constitution. In relation to Parliamentary oversight over debt contraction, Parliament’s role is limited to oversight through its legislative mandate, this means through the enactment of legislation allowing the contraction of debt on behalf of the Government of the Republic of Zambia as well as enacting legislation, which limits the government’s ability to contract debt. It is important to note the difference between Parliament and National Assembly. The distinction is important as “Parliament” refers to the National Assembly and the President meaning a mixture of executive and legislative authority and, therefore, any oversight would be mooted as the Executive cannot provide oversight over itself.

## National Assembly Oversight

The National Assembly of Zambia is mandated by Article 63 (2) (d) of the Constitution to approve public debt before it is contracted. This means that before any public debt is contracted, National Assembly has to approve of such debt. In order to carry out its functions better, National Assembly is allowed by Article 80 to establish Parliamentary Committees. Section 156 (1) of the Standing Orders of the National Assembly 2016 establishes a Budget Committee, which is mandated to examine (emphasis our own) public debt before it is contracted<sup>12</sup>.

Although there is no express provision to the effect, the committee makes recommendation to the full house to then make a decision on whether such debt should be approved.

The Loans and Guarantees (Authorisation) Act Chapter 366 of the Laws of Zambia provides in Section 3 that:

**“The Minister may raise from time to time, in the Republic and elsewhere, on behalf of the Government such loans as he may deem desirable, not exceeding in the amount outstanding at any one time-**  
**(a) in the case of loans raised under this Act for a period of not more than one year; or**  
**(b) in the case of loans raised under this Act for a period in excess of one year;**  
**such amount as he shall from time to time be authorised by resolution of the National Assembly to prescribe by statutory instrument.”**

This provision is meant to further enhance parliamentary oversight by requiring that National Assembly approve an amount, the Minister may by Statutory Instrument prescribe. Further to this, Section 15 of the Act reads:

**(1) The total contingent liability at any one time under all guarantees given under subsection (1) of Section 14 shall not exceed such amount as the Minister shall from time to time be authorised by resolution of the National Assembly to prescribe by statutory instrument.**

**(2) The total contingent liability at any one time under all guarantees given under subsections (2) and (3) of Section 14 shall not exceed such amount as the Minister shall from time to time be authorised by resolution of the National Assembly to prescribe by statutory instrument.**

**(3) In determining the total contingent liability under subsections (1) and (2) of this section, no account shall be taken of any interest or other sum accrued or which may accrue (other than the principal sum), and which may become payable in respect of any loan or any portion of a loan guaranteed pursuant to Section 14.**

When considered together with Section 3 of the Act, it would appear that under the Loans and Guarantees (Authorisation) Act, Chapter 366, that National Assembly oversight is in addition to the oversight provided in the Constitution through providing statutory limits on the total amount of loans the Minister of Finance may contract on behalf of the Zambian government.

# Other Legislation on Public Debt & Parliamentary Oversight

There are other pieces of legislation that regulate the contraction of public debt. A lot of the legislation governing debt contraction that is currently on the statute book is colonial with amendments shortly after independence. Without express provisions repealing these Acts, they are still law and applicable. Some of these Acts were enacted to cater to specific loans agreed by the Zambian Government shortly after independence, but their availability indicates the prominent role Parliament played in approving public debt. Some of the legislation still on the statute book in the absence of express repeal includes:

## 1. General Loans (International Bank) Act Chapter 365 of the Laws of Zambia

Enacted in 1966, this Act empowers the Government to raise loans in foreign currency from the International Bank for Reconstruction and Development.

## 2. The General Loans (Guarantee) Act Chapter 358 of the Laws of Zambia

Enacted in 1964, this Act empowers the Government to guarantee the discharge by certain corporations of their obligations under agreements between such corporations and governments, the International Bank for Reconstruction and Development, the Commonwealth Development Corporation or other bodies or organisations outside Zambia.

## 3. The Loans (Authorisation) Act Chapter 355 of the Laws of Zambia

Enacted in 1954 and last amended in 1965, this Act makes provision for the raising of loans by the President or on the authority of the President, the Permanent Secretary or Minister of Finance.

## 4. The Treasury Bills Act Chapter 348 of the Laws of Zambia

Enacted in 1929, the Act allows for the Government to borrow off Treasury Bills. A treasury bill is short term instrument that the Zambian Government issues in order to borrow money through Bank of Zambia for a period of one year or less. This Act enables such borrowing and matters related to such borrowing.<sup>13</sup> This implies that Treasury Bills can be used as security by the government.

As indicated, in the absence of express repeal, these laws remain binding on the government. In understanding the implication on debt transparency, it is important to note as the Constitution is the supreme law, National Assembly is mandated to approve all public debt before it is contracted and, therefore, regardless of what any other law provides to the contrary, all debt must be approved by National Assembly.

However, questions may still arise with regards to legislation that was enacted before the Constitution of Zambia Amendment Act No. 2 of 2016, which allowed the minister responsible for finance to borrow and its effect in light of the amendments in 2016. Section 10 of the Constitution of Zambia Act No. 1 of 2016 further provides that:

**“Liabilities, property and other assets that were incurred or vested in the President, the State, Government or the Republic immediately before the effective date shall continue to be so incurred or vested after the effective date.”**

The implication of both provisions is that liabilities of the Government including debts incurred before the enactment date of the Constitution of Zambia Act No. 2 of 2016 continues to exist. Inversely, all debts that were to be contracted after January 2016 required National Assembly approval and if such debts were contracted after enactment date without the requisite National Assembly approval, they are illegal and void ab initio. In June 2019, the Constitutional Council of Mozambique ruled that a government-guaranteed \$850 million Eurobond issued by state-run tuna-fishing company in 2013 was illegal and a nullity and the respective sovereign guarantee granted by the government in 2013 was also null and void as it breached nation's laws relating to the registration of loans.<sup>14</sup>

# Other Areas of National Assembly Oversight

Other National Assembly oversight of the Executive is done by virtue of Article 63 (2) and paragraphs (b) and (c) which provide:

**“The National Assembly shall oversee the performance of executive functions by—**

**(b) appropriating funds for expenditure by State organs, State institutions, provincial administration, local authorities and other bodies;**

**(c) scrutinising public expenditure, including defence, constitutional and special expenditure.”**

The Constitution defines “state institutions” as including ministries or departments of the Government, public offices, agencies, institutions, statutory bodies, commissions or companies, in which the Government or local authority has a controlling interest, other than State organs, which are the Executive, Judiciary and Legislature.

The Minister of Finance (Incorporation) Act Chapter 349, which makes provision for the Minister of Finance as a corporation sole and other matters incidental thereto<sup>15</sup> provides in Section 3 as follows:

**“The Minister of Finance shall be a corporation sole by that name, with perpetual succession and an official seal, and with power to acquire and hold in that name lands, Government securities, shares in any company, securities for money, and real and personal property of every description, to sue and be sued, to execute deeds, to enter into agreements binding on himself and his successors in office, and to do all other acts necessary or expedient to be done in respect of the above matters or any of them.”**

A corporation sole is an individual person who represents an official position, which has a single separate legal entity.<sup>16</sup> As stated already, by virtue of Article 207 of the Constitution of Zambia Act No. 2 of 2016, the government can raise loans on behalf of public institutions as well as guarantee loans on behalf of public institutions.

When considering the scope of public debt, not much consideration is extended to government’s commercial engagement (companies in which government has a controlling interest), which are primarily owned through the Minister of Finance as a corporation. The Industrial Development Corporation Limited is a state-owned enterprise charged with the mandate to spearhead the Zambian Government’s commercial investments agenda. It was incorporated in January 2014 and is wholly owned by the Government through the Minister of Finance pursuant to the Minister of Finance (Incorporation) Act.<sup>17</sup>

The Industrial Development Corporation’s portfolio includes ZESCO Limited, Zambia Consolidated Copper Mines — Investment Holdings, ZAMTEL Limited and Zambia Railways Limited. Of the companies listed under its portfolio, several are recipients of debt contracted on behalf of the Zambian government.<sup>18,19</sup> As entities with legal personality, these corporations have independent borrowing capabilities limited only by their articles.

# The Constitution of Zambia (Amendment) Bill No. 10 of 2019

The Government of the Republic of Zambia introduced a bill to amend the Constitution of Zambia with proposals to revise National Assembly oversight over debt contraction as well as proposals to revise systems for financial accountability.

## 1. Section 13 of the Constitution of Zambia (Amendment) Bill

The proposed provisions delete paragraphs (d) and (e) of Article 63 (2) the Constitution of Zambia Act No. 2 of 2016, which provides that:

**“The National Assembly shall oversee the performance of executive functions by—**

- (d) approving public debt before it is contracted; and**
- (e) approving international agreements and treaties before these are acceded to or ratified.”**

National Assembly’s ability to approve public debt before it is contracted and approved; and international agreements and treaties before these are acceded to or ratified is removed. This proposed provision weakens the system of checks and balances and restricts transparency in the contraction of debt.

In its current form, in addition to providing oversight, the process of submitting agreements to National Assembly allows public scrutiny through National Assembly’s consultative meetings with stakeholders. The proposed amendments, given current practice would mean agreements are secret and confidential and, therefore, not available for public scrutiny.

Parliament is responsible for expenditure through budgetary oversight. Debt repayment, therefore, falls within the oversight of National Assembly as ultimately it is the Zambian public that is responsible for the repayment of any debt the government owes.

## 2. Section 26 of the Constitution (Amendment) Bill

Section 26 proposes the amendment of Article 92 (b) by making the President responsible for negotiating, ratifying, acceding or withdrawing from international agreements. The proposed Article provides:

**“(2) Without limiting the other provisions of this Constitution, the President shall—**

- (c) negotiate and sign international agreements and treaties and, ratify or accede to, or withdraw from, international agreements and treaties.”**

This means National Assembly will have no say or oversight over agreements that would potentially bind the Zambian people to debt. It is important to note that foreign debt is incurred by virtue of agreements entered into by the Zambian government. This provision, by removing the requirement of National Assembly approval implies that National Assembly will have not oversight over debt contraction particularly foreign debt.

## 3. Section 36 of the Constitution (Amendment) Bill

The proposed amendments provide for revising the system of debt contracting by giving Cabinet the authority to approve loans contracted by the State as well as guarantees on loans contracted by state institutions. The proposed amendments state:

**“The functions of Cabinet are as follows —**

- (e) approve—**

- (i) loans to be contracted by the state; and**
- (ii) guarantees on loans contracted by State institutions.”**



The proposed amendments in effect limit parliamentary oversight to the legislative mandate of prescribing the manner, in which loans and guarantees are contracted and agreed by the State and removing National Assembly's oversight. Cabinet, which is established as by Article 113 of the Constitution, comprises the President, Vice-President, Minister and the Attorney general as and ex officio member.

The quorum for a Cabinet decision is the President plus one minister or Vice-President. This means that in effect the proposed amendments allow the President with one other member of Cabinet to approve loans or guarantees contracted by the State or State Institutions. Legislation, other than the Constitution, can be amended anytime by a simple majority.

## Proposed Amendments Vis-à-Vis Recent Enactments

The Public Finance Management Act No. 1 of 2018 in Section 26 prohibits institutions from borrowing money, issuing guarantees, indemnities, securities, entering into a hire purchase or lease agreements or any other transaction that binds or may bind that institution or the Consolidated Fund to any future financial commitment, unless that borrowing, guarantee, indemnity, security, hire purchase, lease or other transaction is authorised by the Constitution, the Loans, Grants and Guarantees (Authorisation) Act 2018 or any other law.

The Loans, Grants and Guarantees (Authorisation) Act referred to in the Public Finance Management Act is not enacted. This means the only existing limitations on debt contraction are those in the Constitution and any other laws in addition to any provisions contained in the Public Finance Management Act.

However, where there may be any inconsistencies between any other law, the Public Finance Management Act has a "supremacy clause", which provides that where there are any inconsistencies between the Act and any other legislation other than the constitution, the provisions of the Public Finance Management Act will prevail to the extent of that inconsistency.

This essentially means that the effect of the Constitutional (Amendment) Bill is that the only limitation on debt contraction is through what is prescribed in ordinary legislation, which may be amended at any time by a simple majority of the National Assembly.

# The Constitution of Zambia (Amendment) Bill and Public Finance Management

A key concern that has brought a rise in the need for debt oversight is often the systems in borrowing countries do not effectively ensure the prudent use of resources. The Constitution of Zambia Act No. 2 of 2016 was considered progressive in that it strengthened the oversight systems to ensure the prudent use of resources.

The proposed amendments make several changes in that regards. Some of these changes are as follows:

1. Section 65 of the Amendment Bill proposes the deletion of the provision in Article 184, which provides:

**"(2) A Permanent Secretary shall-**

**(d) be responsible and accountable for the proper financial management and expenditure of public monies appropriated to the Province, ministry or department;"**

The effect of this would be that Permanent Secretaries who are holding officers in government ministries and departments are absolved of all accountability for the proper financial management and expenditure. This effectively removes the responsibility in government ministries and departments to properly manage and spend public monies.

2. Section 64 of the Amendment Bill proposes the removal of the requirement that the appointment of the Secretary to the Treasury must be done in consultation with the Civil Service Commission. The Secretary to the Treasury is responsible for the proper financial management and expenditure of public monies. It goes without saying that such a person must have the requisite professional and moral capacity to carry out the functions of the office diligently. The person must be able to apply himself independently without fear or loyalty to the President. Leaving such an important position to serve at the pleasure of the President greatly weakens the systems of financial management.

3. Section 74 of the Constitution Amendment Bill further proposes the repeal of Part XVIII of the Constitution, which provides for Service, Investigative and Other Commissions and Independent Offices. Independent oversight institutions or watchdog institutions exercise oversight of the executive and public administration in a different and more specialised way compared to how parliaments exercise oversight. As Members of Parliament conduct oversight on policies at specific times and often in a more generic way, independent oversight institutions do so continuously, by specialised staff and with an explicit mandate based in legislation.<sup>20</sup>

These independent oversight institutions need to be independent for them to be able to perform effectively. Establishing an institution based upon a secure legal foundation is a first indicator for independence. The institution can be based upon provisions of the country's constitution, specific national legislation, parliamentary rules of procedures or the ratification of international treaties or conventions. It is evident that best practice dictates that independent or oversight agencies be established by a constitution, which the bill proposes to move against. With regards to the oversight institutions related to public finance, the bill proposes provisions that limit the scope and authority of the Public Protector.

It is important that we consider the effect of every provision together rather than singularly. The proposed Article 224 (c) bars the Public Protector from investigating any matter that involves relations or dealings between the government and any foreign or international organisation. This when considered with the fact that the proposed Bill removes any sort of oversight over international agreements and debt contraction means there will be a free reign on the part of the executive with regards to debt contraction. We can perhaps attribute this to the investigation of Lusaka Ndola dual carriage.

4. The Bill further proposes in Article 231 (1) that the Auditor General shall hold office for a term of seven years. This does not provide any possibility of renewal and does not address the qualifications or suitability for office. A guaranteed/fixed term of office for the head of the institution or agency is another key element to ensure the independence of an institution or regulator. With a guaranteed term of office, and the possibility for renewal of the term in office, the head of the institution can exercise his/her role without being undermined by short-term political interests.

## Conclusion

While it appears that various pieces of legislation govern National Assembly oversight over debt contraction, they are all governed by the Constitution of Zambia, which empowers National Assembly to approve public debt before it is contracted. Any provisions in any other law that provides for debt contraction without National Assembly approval is unconstitutional and null and void to the extent of that inconsistency.

The proposed amendments make the approval of public debt a function of Cabinet. When considered together with the provisions of the Public Finance Management Act of 2018, there would be no constitutional National Assembly oversight over the contracting of debt from the Legislature other than through the legislative interventions of Parliament.

The Public Finance Management Act of 2018 makes brief provisions for debt management but appears to leave a lacuna in the laws regarding debt management as it refers legislation that has not been enacted, has a supremacy clause and is only subject to the Constitution. This renders contradicting provisions in other legislation void.

The proposed amendments to the Constitution not only breach the principle of separation of powers but also removes any transparency and public accountability over the contraction of public loans and debt. Leaving any National Assembly oversight to simple pieces of legislation that may be amended at any time by a simple majority means that public accountability is greatly reduced. When considered with the other proposed amendments relating to public finance management, the amendments mean that the Executive will be free to borrow and use public finance in a manner that is not transparent and will not be held accountable because of the weakened systems and public accountability institutions.

# Endnotes

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6. <https://www.imf.org/external/np/g20/pdf/2018/072718.pdf>
7. The Constitution of Zambia (Amendment) Act No. 2 of 2016.
8. Article 200 (1), The Constitution of Zambia (Amendment) Act, No. 2 of 2016
9. Article 266, *ibid*
10. Article 62 (1)
11. Article 62 (1) states that the legislative authority of Zambia is vested and shall be exercised by Parliament. Article 63 (1) provides that Parliament shall enact laws through bills passed by National Assembly and assented to by the President.
12. Standing Orders of the National Assembly, 2016
13. According to Parliamentary records, these Acts were last reviewed in 1965.
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