An Analysis Of The Constitutional Amendment Bill No.2 Of 2019 On The Extension Of The Women Quota System

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FOREWORD

Our Constitution provides for national objectives, and, before enumerating those objectives, expressly states that the objective of our Constitution is the establishment, enhancement and promotion of a sustainable, just, free and democratic society in which people enjoy prosperous, happy and fulfilling lives. Gender balance is stated as one of the national objectives of the Constitutional order of the 2013 Constitution.

The government of Zimbabwe has tabled a bill which seeks to amend the Constitution by among other things, extending the women's quota.

In this analysis, a reader can glean between the lines different layers of meaning for our budding democracy of amendments to the Constitution that are not as well thought out as they should be and that are hastily conceived with little consideration for the democratic process. After reading it one is left with a sense of the urgency of the responsibility that rest on each one of us to safeguard our hard won democratic Constitution and be wary of attempts by parochial interests to use the democratic process to nibble away at the pillars in the Constitution that support the values that underlie the society that we are trying to build.

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0. EXECUTIVE SUMMARY

This is an analysis of the proposed constitutional amendment which seeks to extend the current provisions providing for representation of women in Parliament. In terms of these provisions, sixty (60) seats in the National Assembly are reserved for women elected based on proportional representation. There has been concerns that this extension does not fulfil the constitutional values and rights of gender equality.

This analysis considers the constitutionality of the proposed amendment and finds that it falls short for several reasons which are outlined. It argues for bolder reforms that fulfil the goal of gender equality.

The analysis considers the litigation strategy in great detail and finds that while there are good grounds to challenge the constitutionality of the constitutional amendment, and there is much world jurisprudence to support such a case, the issue of timing is critical. Litigating while the legislative process is on-going is likely to face a cold reception from the conservative courts which tend to defer to Parliament and the executive in the legislative making process. The analysis identifies grounds upon which the courts are likely to take refuge in refusing to deal with the constitutional challenge before the legislative process is complete.

Nevertheless, as such legal action is in the nature of public interest litigation, and is usually undertaken for advocacy purposes, the client may still wish to proceed, the high risk of rejection notwithstanding. Finally, if litigation is not used during the legislative process, there is no reason why it should not be pursued after the completion of that process if alternatives fail to persuade the law-makers.

1. INTRODUCTION

Women's political participation is a fundamental pre requisite for gender equality and genuine democracy. It facilitates women's direct engagement in public decision making and is a means of assuring better accountability to women. Political accountability to women begins with increasing the number of women in decision making positions. The highest authority for decision making and policy setting in the country is Parliament. It is therefore crucial that measures be put in place to ensure adequate representation of women in both Houses of Parliament. Measures should be designed to ensure that women Parliamentarians are not only represented by numbers but also able to participate meaningfully in crucial debates and able to influence the form and content of public policies from women's perspectives

The imperative for women's participation in decision making is expressed in several international and regional agreements that Zimbabwe is party to. Article 7(b) of the Convention of the Elimination of All Forms of Discrimination Against Women (CEDAW) obligates state parties to take all appropriate measures to eliminate discrimination against women in the political and public life of the country and, in particular, shall ensure to women, on equal terms with men, the right to participate in the formulation of government policy and the implementation thereof and to hold public office and perform all public functions at all levels of government;

Article 9 of the Protocol to the African Charter on Human and People's Rights on the Rights of women (Maputo Protocol) obligates states to guarantee women's right to participate in the political and decision making process.

Article 29 of the African Charter on Democracy, Elections and Governance obligates State Parties to recognize the crucial role of women in development and strengthening of democracy and calls on state parties to create the necessary conditions for full and active participation of women in the decision-making processes and structures

at all levels as a fundamental element in the promotion and exercise of a democratic culture. State Parties are also urged to take all possible measures to encourage the full and active participation of women in the electoral process and ensure gender parity in representation at all levels, including legislatures.

2. BACKGROUND

Pursuant to the Global political agreement of 2009, Zimbabwe embarked on a consultative Constitution making exercise. Extensive consultative meetings were held in all the provinces of the country and the views of the public on all aspects of the Constitution were collected and collated.

On the question of gender equality and the rights and welfare of women, while there was general consensus nationally that the Constitution should recognise and guarantee the rights of women and enshrine provisions enabling and promoting greater women's participation in decision making, there was little agreement on how this could be achieved. Much of the discussion was around the electoral system. While it was recognised that a first-past-the-post electoral system was unlikely to produce a great number of elected representatives in Parliament due to such impediments as political violence, lack of solidarity amongst women and lack of resources for campaigning, there was no great appetite to embrace a complete proportional representation system that would result in equal numbers of men and women in Parliament similar to what obtains in South Africa. The compromise that was eventually reached was to retain a first-past-the-post system for 310 members and a women's quota of 60 members on the basis of proportional representation for the National Assembly. For the Senate a complete proportional representation system was provided for which allowed for equal numbers of men and women.

The women's quota was supposed to be a temporary measure with a life span ending in 2023. The thinking seems to have been that by the end of the 10-year period of the new democracy, political parties would have attained a sufficient level of internal maturity and transformation

creating a conducive environment for women to compete equally with men for seats in a first-past-the-post electoral system.

Six Years into the new constitutional dispensation, it has been observed that the Women's Quota represents a façade that has kept women playing second fiddle to their male counterparts. There is plenty of anecdotal evidence that women appointed of the women's quota are not viewed as equals by their counterparts who represent constituencies (most of whom are men) they lack acumen and their influence is greatly reduced due to their status as "women's quota MPs".

Despite these observations the government introduced the Constitution of Zimbabwe Amendment (No. 2) Bill, which was gazetted by the Government of Zimbabwe on 31 December 2019 in terms of General Notice No. 2186 (hereafter "the proposed Constitutional amendment") which seeks (amongst other things) to extend the women's quota. The extension, like the initial provisions in 2013 is seen by some gender equality practitioners as mere tokenism.

3. ANALYSIS

3.1 The Proposed Amendments

The proposed constitutional amendment seeks, among other changes, to extend the current provision which reserves a maximum quota of sixty (60) party-list seats for women in the National Assembly for a further two Parliaments. Purely, for purposes of convenience, this arrangement shall be referred to as "the Women's Quota". When the Constitution was enacted in 2013, it provided for the Women's Quota for a maximum of 2 Parliaments, covering two terms between 2013 and 2023 after which it would expire. The proposition is to extend the Women's Quota to 4 Parliaments, that is, covering 2023 to 2033.

At first sight, the extension of the Women's Quota appears to be a considerate step to promote the representation of women in Parliament. However, there has been concerns that this is not the case and that

appearance obfuscates the realities of women's experiences. The major concern may be summarized as follows:

> *The proposed change to the Women's Quota is inconsistent with and a repudiation of the State's Constitutional obligations to promote and ensure equal representation of women in Parliament. The concern is that the proposed extension is merely a façade that provides cover for the perpetuation of an unequal system that effectively keeps women in the margins of politics.*

3.2 Whether The Proposed Amendment Is Constitutional

This requires an examination of the existing constitutional provisions regarding gender equality in Parliament to establish the Constitutional standard against which to measure the constitutionality of the proposed amendments.

This, in turn, requires an examination of the limits of the State's powers to amend the Constitution. A preliminary question is whether these powers can be challenged at all in a court of law. Put differently, the legal analysis examines the following question: ***Can a constitutional amendment be held to be un Constitutional and if so, what are the chances of pursuing a legal challenge through the courts?*** This raises questions of justiciability and access to the courts.

In addition to the text of the Constitution and case law, I have relied upon jurisprudence and scholarship from various jurisdictions around the world on the issue of the Constitutionality of Constitutional amendments.

Constitutionality refers to the quality of conforming to the Constitution. It is important to establish the basis upon which the Constitutionality of a Constitutional amendment may be judged. In this regard, there are at least two classes of grounds upon which the constitutionality of a constitutional amendment may be challenged. The first class is procedural and the second is substantive[2].

3.2.1 Procedural unconstitutionality

Procedural unconstitutionality is where the State fails to comply with the procedures of amending the Constitution. The Constitutional amendment procedure is distinctly different from the amendment of ordinary legislation. A basic example is where amending a specific part of the Constitution requires a referendum but a referendum is not held, the amendment can be challenged and invalidated on the basis that it is procedurally deficient.

In the case of **Nkomo & Anor V Attorney-General & Ors** 1993 (2) ZLR 422 (S) one of the questions was a challenge over the procedure which had been used to amend the Constitution. The challenger argued that the constitutional amendment was invalid because the process had not been conducted in compliance with the relevant Parliamentary and constitutional procedures. However, the court left the issue open because the matter had already been decided on other grounds. Arguably, it would be illogical if the courts refuse to entertain a matter where breaches of Constitutional procedures are alleged. The court must ensure that the Constitution is complied with and protected from violations. It would also make a mockery of the special Constitutional amendment procedures if their terms were not enforced.

3.2.2 Substantive unconstitutionality

Substantive unconstitutionality is where the content of the amendment violates provisions of the Constitution that should not otherwise be amended. This is where the Constitution either specifically or implicitly prohibits amendment.

The distinction between the two types of unconstitutionality is captured by Professor Jacobsohn who states, "**procedural unconstitutionality**

involves *how* an amendment is made, substantive unconstitutionality concerns *what* is amended."

For example, our Constitution prohibits the amendment of provisions of fundamental rights unless the amendment is adding to the existing rights. In other words, under no circumstances should an amendment reduce existing rights. If the Constitutional amendment has the effect of reducing an existing fundamental right it may be challenged in court. The court's inquiry in such a case goes beyond procedures. It would have to consider the content of the amendment to determine whether or not an existing right is being reduced by the amendment.

However, substantive unconstitutionality may also be based on less obvious grounds, such as where a Constitutional amendment violates or undermines the values and principles of the Constitution. This is succinctly put by Professor Jacobsohn, "**An amendment may be invalidated for substantive unconstitutionality where the content of the amendment is inconsistent with non-procedural Constitutional values. These values may derive from the Constitutional text, they may be rooted in the fundamental though unwritten rules of Constitutionalism or they may rely on the distinction between amendment and revision"**

Nevertheless, this is a subject that divides analysis and as I shall explain, our courts have been quite conservative on this point. It is important, however, to note that this is a subject that has produced a wealth of positive and persuasive jurisprudence around the world.

India is by far the jurisdiction that has the richest seam of jurisprudence on the issue of unconstitutional constitutional amendments. Not only does this jurisprudence serve to confirm justiciability, but it also guides the standard of judging Constitutionality of a Constitutional amendment. The Supreme Court of India's jurisprudence on unconstitutional Constitutional amendments was developed in a line of judgments stretching from 1951 and 1981, the landmark decision being the Kesavananda case in 1975[3]. In those cases, the Supreme Court of India invalidated Constitutional amendments which the government had passed, establishing the notion that Parliament's power to amend the Constitution is limited.

In Kesavananda, the Indian government had amended the Constitution in a manner that affected fundamental rights and ousted the jurisdiction of the courts. The majority of the Indian Supreme Court ruled that while the government had the right to amend fundamental rights, it could not ring-fence its conduct from judicial review. The court asserted its authority to invalidate Constitutional amendments if they were found to defy the “basic structure” of the Constitution.

In doing so, the court reaffirmed its role as the supervisory authority with the responsibility to define the meaning of the Constitution and to protect it. As the Chief Justice wrote in that case, **"every provision of the Constitution can be amended provided in the result the basic foundation and structure of the Constitution remains the same".** It is from that the famous “Basic Structure” doctrine emerged. Justice H.R. Khanna added: **“The word ‘amendment’ postulates that the old Constitution survives without loss of its identity despite the change and continues even though it has been subjected to alterations.”**

In a later case, **Minerva Mills Ltd v Union of India**[4]**,** the court also invoked the “Basic Structure” doctrine to invalidate Constitutional amendments which sought, ironically, to limit the Court's power to review Constitutional amendments. One of the judges, in that case, Justice Chandrachud stated, **“Amend as you may even the solemn document which the founding fathers have committed to your care, for you know best the needs of your generation. But, the Constitution is a precious heritage; therefore you cannot destroy its identity.”** This means in terms of this doctrine, while Parliament can use its power of amendment, it must not do so to change the identity of the Constitution. Another judge, Justice P.N. Bhagwati stated: **“If by Constitutional amendment, Parliament were granted unlimited power of amendment, it would cease to be an authority under the Constitution, but would become supreme over it, because it would have power to alter the entire Constitution including its basic structure and even to put an end to it by totally changing its identity.”**

In another part of the world, in Colombia, the Constitutional Court has also developed a similar doctrine called the Constitutional Replacement Doctrine. While the Colombian Constitution grants courts the power to review Constitutional amendments, it expressly limits this power to reviews on procedural grounds. In other words, the courts can review the Constitutionality of a Constitutional amendment but only on grounds of whether or not it is compliant with Constitutional procedures. However, as Colombian scholar, Carlos Bernal[5] has eloquently articulated, the Colombian Constitutional Court has gone on to review the content of Constitutional amendments.

The reasoning behind the Colombian Constitutional Court's Constitutional Replacement Doctrine is that the power to amend a Constitution does not include the power to replace it and whether or not there is replacement can only be assessed by reviewing the content of the amendment. This allows it to get around the constraint in the Colombian Constitution which would otherwise limit it to reviewing Constitutional amendments on procedural grounds only. In a series of cases, the Colombian Constitutional Court has held that while the power to amend the Constitution consists of the power to any provisions, such changes must not derogate from the Constitution or replace it with a different one.

Closer to home, in South Africa, very early on the Constitutional Court had to deal with a question that required it to consider the Constitutional validity of the new Constitution in 1996[6]. After the end of apartheid in 1994, there was a transitional period during which an interim Constitution was in operation. The parties had agreed that a new Constitution would be adopted within two years. In terms of the interim Constitution, the Constitutional Court had a duty to ensure that the new Constitution complied with certain agreed Constitutional principles. The review by the Constitutional Court revealed that certain elements of the

new Constitution had failed to satisfy the standard, rendering the new Constitution unconstitutional.

Professor Jacobsohn[7] has shown that although it has not invalidated a Constitutional amendment, the German Constitutional Court in the post-war era has declared that this is **"conceptually possible"**, pointing out that it would not stand idle while allowing formal legal means to be used to **"legalize a totalitarian regime"**. The German Court's view is doubtless informed by the country's past where formal legal means were used to achieve dictatorship. As stated in the Southwest Case, BverfGE 1, 14 (1951): **"That a Constitutional provision itself may be null and void, is not conceptually impossible just because it is a part of the Constitution. There are Constitutional provisions that are so fundamental and to such an extent an expression of a law that precedes even the Constitution that they also bind the framer of the Constitution, and other Constitutional provisions that do not rank so high may be null and void because they contravene those principles. … "**

The German Basic Law also contains an "eternity clause" which ring-fences certain areas of the Constitution from amendment[8]. As stated in the Privacy of Communications Case (Klass Case), BverfGE 30, 1 (1970): **"The purpose of Article 79, paragraph 3, as a check on the legislator's amending the Constitution is to prevent the abolition of the substance or basis of the existing Constitutional order, by formal legal means of amendment … and abuse of the Constitution to legalize a totalitarian regime."**

Professor Albert provides a persuasive argument for determining unconstitutionality based on what he refers to as *"non-negotiable founding values"*:

"The court might also invalidate an amendment on the basis of what I wish to identify as a non-negotiable founding value … Non-negotiable founding values, as defined here, are entrenched ordinarily like all other freely amendable Constitutional provisions, with no express protections against amendment. What makes a non-negotiable founding value special is the Court's interpretation in the course of litigation that a given provision is worthy of heightened status relative to others. The result is to transform an ordinary textual provision into a non-negotiable founding value with the capacity to disable another Constitutional provision or to invalidate governmental action that would otherwise be permissible notwithstanding that founding value."

I have made reference to this wide jurisprudence to demonstrate the broad acceptance of the view that it is possible for a court to find that a constitutional amendment is unconstitutional. This is not to dismiss the fact that there is a counterview. Indeed, as I shall show shortly, our courts have traditionally taken a more conservative approach to the issue, although this does not mean it's a lost cause. We have a new Constitution which places string limitations Parliament's power to amend the it and in that spirit the courts may change their approach to how they consider questions of constitutionality of constitutional amendments. In my analysis there is strong jurisprudential support for the view that a Constitutional amendment that violates the constitutional rights, and its founding values and principles would be unconstitutional.

3.2.3 "Basic Features" in Zimbabwe

The doctrine in Kesavananda has had a cold reception in Zimbabwe by the Supreme Court of Zimbabwe. It was considered in the Campbell case where applicants had challenged the validity of a Constitutional amendment on the basis, among others, that it breached certain essential features or core values of the Constitution which were

unchangeable. Constitutional Amendment No. 17 had ousted the jurisdiction of the courts in matters relating to the acquisition of agricultural land. The challengers argued that the amendment abrogated essential features of the Constitution based on their rights to due process and protection from unfair racial discrimination The challengers argued that these essential features were beyond the legislature's power to amend the Constitution.

However, the Supreme Court was hostile to the application of the Basic Features doctrine. It reasoned that the doctrine was irrelevant in the specific case since the language to be interpreted was clear and unambiguous. In its view, the doctrine was merely an aid to interpretation where the words were unclear and ambiguous. It was therefore unnecessary where the provisions were "clear and unambiguous". As the lead judge, Malaba JA (as he then was) stated:

> "**The restrictions or conditions imposed on the exercise of a power of the state conferred on any of the three organs of state must be ascertained from the language of the Constitution. The language used in the provisions of ss 11, 50 and 52(1) of the Constitution is clear and unambiguous. The question of construction, which would have required the application of the doctrine of essential features or core values as an aid to the ascertainment of the intention of the makers of the Constitution, does not arise in this case. The words used in these provisions define with express precision the only restrictions and conditions which the Legislature has to comply with the exercise of the power conferred on it. There is no room for implied limitations."**

The Court did not show much inclination towards the doctrine and labeled it "controversial" and explicable only by the context of the Indian Constitution. The lead judge, in that case, is now the Chief Justice of the Constitutional Court, which suggests that the Court is likely to retain an aversion towards the doctrine. Nevertheless, this should not deter

deployment of the argument, given that there is a new Constitution which, unlike the previous one, contains clear limitations on the State's power to amend its provisions. Besides, the Campbell case dealt with an issue that was highly-sensitive and politically-charged at the time. The Court had been reconfigured principally to ensure that the land acquisition process proceeded without legal challenges. Also, the new Constitution makes clear provisions on founding values and principles which ought to be enforced and protected from infringement. Where Constitutional amendments do not advance these founding values and principles they ought to be challenged.

In the Nkomo case, the Supreme Court reaffirmed its Constitutional mandate to protect and enforce the rights provided for in the Constitution. **"Where one of the provisions of the Declaration of Rights is being, or is likely to be, infringed, it is the Supreme Court that is mandated by the Constitution to fulfil its protective rule and enforce the particular fundamental human right or protection to which the individual is entitled. In doing so it exercises a judicial power."** The reasoning can be extended to the court's duty to protect and enforce the entire Constitution.

4. SUMMARY: JUSTICIABILITY AND STANDARD OF CONSTITUTIONALITY

The following is a summary of key points from the jurisprudence discussed above:

i. Parliament has the right to amend the Constitution, including provisions relating to fundamental rights, except where the Constitution specifically forbids amendment.

ii. However, Parliament's power to amend the Constitution is not unlimited. In a Constitutional democracy,

Parliament is subject to the Constitution like all other persons and must comply with its requirements, including founding values and principles. The limits to the power of amendment may be specifically imposed by the Constitution but they may also be implied in the Constitutional values and principles. Jurisdictions have developed different qualifications to the power to amend the Constitution – in India, it's the Basic Structure doctrine; in Colombia, it's the Constitutional Replacement doctrine. Although the predecessor to the current Constitutional Court of Zimbabwe gave the Indian doctrine a cold reception, the current Court has the opportunity under a new Constitution to develop its doctrine based on the newly defined Constitutional values and principles.

iii. The court takes on the role of the ultimate protector and guarantor of the Constitution. Normative questions as to whether it is appropriate for the court to do so are not relevant because the Constitution already confers that power. The major theme in world jurisprudence is that amendments must not destroy or change the identity of the Constitution. This identity comprises certain pillars found in the values and principles of the Constitution, which may or may not be written into the Constitution.

iv. It is legally possible to challenge the Constitutionality of a Constitutional amendment. There is no justifiable reason why the courts should refuse to entertain challenges against the Constitutionality of Constitutional amendments, particularly where the Constitution already prescribes restraints on the amendment power and Parliament is required to comply with the Constitution.

v. An appropriate standard for determining the Constitutionality of a Constitutional amendment may be stated in terms of the following non-exclusive strands:

- Does the amendment comply with the procedural requirements of the Constitutional amendment process?
- Does the amendment derogate from fundamental rights in the Declaration of Rights in the Constitution?
- Does the amendment violate or undermine the founding values, principles, and objectives of the Constitution?
- Does the amendment change the basic features of the Constitution to the point of altering its identity and character?

It is arguable that if the answer to one of these questions is in the affirmative, then the Constitutional amendment should be regarded as unconstitutional.

Therefore, the answer to the question of justiciability of a Constitutional amendment is that it is justiciable, but most likely ***after*** the amendment is passed rather than before. Whether or not the proposed Constitutional amendment extending the Women's Quota for another two Parliaments is unconstitutional is, however, a separate question whose resolution depends on answers to the standard of Constitutionality which is set out above, and to which I now turn.

4.1 Is the proposed Constitutional Amendment Constitutional?

The **standard of Constitutionality** is articulated in the text of the Constitution. Setting out these provisions provides the threshold against which to measure whether or not the proposed Constitutional amendment is unconstitutional.

The first point of recognition is in the provisions of the founding values and principles of the Constitution. Section 3(1)(g) expressly states **"gender equality"** as one of the founding values. Also, recognition of the rights of women is stated as one of the founding principles in section 3(2)(i). These founding values and principles set out the "gold standard" of Constitutionality, as anything that deviates from or undermines them would arguably be unConstitutional. As there must be due regard to the founding values and principles when interpreting the Constitution, the same must apply to proposed amendments. Any amendments must promote and advance rather than undermine these founding values and principles and it is better to pre-empt them than wait until after they have been adopted.

Section 80(1) provides that **"Every woman has full and equal dignity of the person with men and this includes equal opportunities in political, economic and social activities."** (my emphasis) This means women must be guaranteed equal opportunities with their male counterparts. However, this must be read together with the qualification to the equality and non-discrimination in section 56.

The qualification to section 56 is that the State must take reasonable measures, including legislative measures, to advance the position of people who have suffered historical disadvantage on account of their status so that they achieve equality. This is in recognition of the futility of guaranteeing equality without acknowledging pre-existing inequality as a result of previous unfair discrimination. It is a historical fact that women have suffered unfair discrimination and marginalization throughout history.

As has already been stated in the introduction, section 124 provides for the Women's Quota. This provision acknowledges the fact that women have historically been disadvantaged in the political field, a factor that made it impossible to achieve equal representation of women in Parliament. It is this provision that has been extended for another two Parliaments and therefore, at first sight, gives the impression that the State is taking measures to promote women's equality in line with the qualification to the equality and non-discrimination clause (section 56). However, as will be argued in the next section, this extension is

deceptively dangerous as it perpetuates a legacy of gender inequality under the guise of promoting equality.

The peremptory nature of equal representation between genders is also evident in section 17, which sets out the national objective to promote gender balance. This provision requires the State **"to promote full gender balance in Zimbabwean society".** The provision states in particular that, **"the State must promote the full participation of women in all spheres of Zimbabwean society on the basis of equality with men"**. By using the word "full" in both instances, the designers of the Constitution intended to leave no room for half-measures or tokenism on the issue of gender balance.

Critically, section 17 compels the State to take **"all measures, including legislative measures, needed to ensure that … both genders are equally represented in all institutions and agencies of government at every level … women constitute at least half the membership of all Commissions and other elective and appointed governmental bodies established by or under this Constitution or any Act of Parliament …"** The Constitutional designers' intentions to ensure equal representation between genders in Parliament and other bodies could not be more emphatic.

> Any view suggesting that national objectives are not legally binding lacks soundness. The designers of the Constitution were alive to the possibility of attempts to give a low estimate to the national objectives. This way they made it clear in section 8(2) that **"Regard must be had to the objectives set out in this Chapter when interpreting the State's obligations under this Constitution and any other law."** The use of peremptory language was deliberately designed to confirm the mandatory nature of the requirement to advance and fulfill the national objectives. This means State conduct that does not demonstrate regard to the national objective of gender balance in section 17 would be

unConstitutional. The question in this matter is whether the GOZ's proposal to extend the Women's Quota seats for a further two Parliaments does enough to demonstrate the State's regard to this national objective or detracts from its obligations to promote gender balance in Parliament.

There are other provisions in the Constitution that, although not dealing with Parliamentary representation demonstrate the mandatory need for equal representation between genders in other areas of the State. Section 104(4) requires the President to **"be guided by considerations of regional and gender balance"** when appointing Ministers and Deputy Ministers. Section 320(4) provides that where an independent commission established under the Constitution has **"a chairperson and a deputy chairperson, they must be of different genders"**. The importance of these provisions is that they amplify the theme of gender equality which runs throughout the Constitution.

5. CONCLUSION

In conclusion, the following points can be made:

i. There are good grounds to challenge the Constitutionality of the proposed Constitutional amendment. The extension of the Women's Quota represents a façade that is likely to keep women playing second fiddle to their male counterparts. The extension, like the initial provisions in 2013 is mere tokenism.

ii. While public interest litigation is a strategy that would raise the profile of the matter, the conservative approach of the courts suggests that they would refuse to entertain an application before the completion of the Constitutional amendment process. In my analysis, even

though there is a good cause, the courts are likely to defer to the Parliament because they cannot interfere in the legislative process unless specifically invited and in any event, that there are adequate avenues to make representations to influence the outcome of the legislative process and achieve Constitutionality.

iii. The fact that chances of a litigation breakthrough before the amendment are passed into law does not affect the possibility of challenging the Constitutionality of the amendment after it becomes law. The same issues discussed in this analysis would remain relevant should the client still wish to challenge the Constitutionality of the Constitutional amendment.

iv. There are other strategic options (complementary rather than separate) which should be considered including:

a. Participating actively in the public consultation process as the relevant Parliamentary committees go around the country. This requires cross-country mobilization so that the same issues are reiterated at each hearing.

b. Petitioning Parliament and setting out in cogent detail objections to the extension of the Women's Quota and presenting alternatives. This requires the client to build broad networks of co-operation with other stakeholders and actions may include exercising the right to demonstrate and freedom of expression.

c. Lobbying key stakeholders who may influence the legislative process. This includes key caucuses in Parliament and other groups outside Parliament, including the intellectuals and students. There has to be a flood of analysis from key voices objecting to the extension and advocating for a bold alternative.

Reference

[1] Richard Albert, The Theory and Doctrine of Unconstitutional Constitutional Amendment in Canada (2015) 41:1 Queen's Law Journal

[2] Canadian Constitutional scholar, Professor Albert, refers to these categories as "p*rocedural unconstitutionality" and "substantive unconstitutionality".*

[3] **His Holiness Kesavananda Bharati Sripadagalvaru and Ors. v. State of Kerala and Anor.** AIR 1973 SC 1461

[4] 1980 AIR 1789

[5] **Carlos Bernal, Unconstitutional Constitutional amendments in the case study of Colombia: An analysis of the justification and meaning of the Constitutional replacement doctrine** *International Journal of Constitutional Law*, Volume 11, Issue 2, April 2013, Pages 339–357, https://doi.org/10.1093/icon/mot007

[6] Certification of the Constitution of the Republic of South Africa, [1996] ZACC 26

[7] **Gary Jeffery Jacobsohn, An unconstitutional Constitution? A comparative perspective** *International Journal of Constitutional Law*, Volume 4, Issue 3, July 2006, Pages 460–487, https://doi.org/10.1093/icon/mol016

[8] This is similar to some provisions of our Constitution which ring-fence certain parts of the Constitution against any amendment

[9] It would be useful to get witness statements showing the challenges that party-list MPs face compared to their constituency MPs. A demonstration of the inequalities would go a long way to show that the Women's Quota system has done little to improve the position of women in politics, which is supposed to be the object of this system.

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