

Analysis of the Written Laws (Miscellaneous Amendments) (No.3) 2020

Legal and Human Rights Centre (LHRC), Centre for Strategic Litigation, Tanzania Human Rights Defenders Coalition, Twaweza East Africa

**Submitted to
The Parliamentary Committee on Legal and Constitutional Affairs**

Submitted on June 06, 2020

Honorable Chair and distinguished members of the Committee,

We have honored your kind invitation to contribute to the review of these important amendments (as received) by submitting our written analysis.

Broadly, we acknowledge the intention to keep updated the respective laws with changes so far in their implementation. We note that this updating is proposed through revising some sections and/or adding some new ones with the aim of enhancing clarity and/or aligning with the Constitution of the United Republic of Tanzania of 1977.

However, given the lack of time afforded for analysis and consultation, here we focus on a number of deeply troubling proposed amendments. While a few objects and reasons for the proposed amendments provide clarity and enhance alignment between the respective laws and the Constitution, most of the proposed amendments are unsubstantiated and directly contravene the Constitution.

The combined amendments have significant and far-reaching negative impact on the rule of law in the country and on a number of the key principles of both natural and procedural justice, as well as the basic tenets of our constitutional democracy as stipulated in Article 3 of our Constitution.

The proposed amendments threaten the core constitutional principles of equality before the law, separation of powers, accountability, public interest, and even the position of the Constitution as the foundational or mother law. It sets a dangerous precedent for Parliament to tamper with the cornerstones of our peace, unity and democracy through these proposed amendments.

Equality before the law is violated

In the amendments proposed to the Basic Rights and Duties Enforcement Act, (CAP. 3) and the Law Reform (Fatal Accidents and Miscellaneous Provisions) Act, (CAP. 310), citizens are denied the opportunity to directly hold their national leaders accountable through the courts of law. Similarly, in the proposed amendment to The Judiciary Administration Act, (CAP. 237), all judicial employees are afforded wide immunity from prosecution. This essentially creates a class of government officials who are above the law in contravention of Article 13 of our constitution. The proposed amendments do not provide any justification for “enhanced immunity” of the named officials.

Separation of powers is violated

The basic foundation of any democratic society are the three institutions of government: the Legislature, the Judiciary and the Executive all working independently to hold each other accountable for performance, delivery and ethics. The Amendment of The Laws Revision Act, (CAP. 4) and the Amendment of The National Assembly (Administration) Act, (CAP. 115) give the President and the

Attorney General undue mandate over parliamentary business. The President is the Head of the Executive and as such should not be allowed to determine the conduct of the affairs of the National Assembly. It is the independence of the arms of government that ensures their efficient function. Allowing for this undue interference tampers with the Legislature's capacity to hold the Executive to account and violates parliamentary supremacy as provided for by Article 63 of the constitution.

Accountability is eroded

By affording employees of the judiciary and key government officials immunity from prosecution, even for constitutional violations, the concept of responsibility for your actions in office is eroded. Public officials personally take oaths to uphold and defend the constitution and in these amendments they are being provided immunity for violating their own oath.

The wide scope of the public interest is circumscribed.

Amendments proposed to the Basic Rights and Duties Enforcement Act, (CAP. 3) essentially prohibit the filing of public interest cases. More insidiously the proposed amendments suggest that we are not responsible for standing up for the rights of our fellows but instead we should only seek redress when our own rights are denied. This contravenes section 26(2) of the Constitution which states that "Every person has the right, in accordance with the procedure provided by law, to take legal action to ensure the protection of this Constitution and the laws of the land."

The proposed amendment unfortunately departs from already established maxims in our jurisprudence in that "the principles of public interest litigation are expressed in the constitution (Articles 12-29) by vesting capacity of an individual and of a member of the community with double standing to sue". This important guidance offered by our High Court in 1995 remains an integral part of our law.

The integrity of the Constitution is jeopardised

By positing a hierarchy of articles in the Constitution, the amendments proposed to the Basic Rights and Duties Enforcement Act, (CAP. 3) challenge the position of the Constitution as the mother law and set the precedent for parliamentary legislation with the authority to over-ride constitutional provisions. This threatens the basic structure of our Constitution and may thus immediately open room for legal challenge against the amendments

Our call

Given the scope of the changes proposed, it is imperative that we ensure that we think collectively and carefully about the possible outcomes and consequences of these amendments on the rule of law in Tanzania before enacting them with undue haste.

Consultation enables engaging more minds and varying perspectives to the question, ensuring we explore many possibilities and come up with the best solutions. It can minimize the unforeseen outcomes, help sensitize stakeholders to decisions and lead to smoother implementation. However, we are concerned that, offering organisations two days to analyse a law and organise their submissions does not allow for sufficient time to ponder these critical questions. Moreover, the Covid-19 context prevents adequate public consultation necessitating the need for more creativity and expanding modalities for public consultations in this situation.

There are examples in the recent past of making well-intentioned decisions that lead to unforeseen negative consequences, partly due to inadequate stakeholders consultation. For example, the Statistics Act which was amended, and was then amended again after less than a year. The Political Parties Act was passed and was immediately challenged in court. Regional courts found that there was

merit in a number of legal challenges to the laws (Political Parties Act, Media Services Act – East African Court).

In this preamble and our subsequent comments we have revealed how unsubstantiated the objects and reasons for the proposed amendments are and how the proposed amendments categorically contravene the Constitution. We clearly foresee that these amendments, should they pass without significant changes, will be immediately challenged in courts.

We humbly submit,

Centre for Strategic Litigation
Legal and Human Rights Centre
Tanzania Human Rights Defenders Coalition
Twaweza East Africa

Analysis of the Written Laws (Miscellaneous Amendments) (No.3) 2020

Legal and Human Rights Centre (LHRC), Centre for Strategic Litigation, Tanzania Human Rights Defenders Coalition, Twaweza East Africa

AMENDMENT OF THE BASIC RIGHTS AND DUTIES ENFORCEMENT ACT, (CAP. 3)			
S/N	Provision	Challenges	Proposed Amendments
1	Section 7(b)(2) An application under subsection (1) shall not be admitted by the High Court unless it is accompanied by an affidavit stating the extent to which the contravention of the provisions of Articles 12 to 29 of the Constitution has affected such person personally.	<ul style="list-style-type: none"> - This amendment contravenes Article 26 of the Constitution of the United Republic of Tanzania, 1977 by limiting the parties able to seek legal redress for violations of the Constitution. - This amendment contravenes Article 107A of the Constitution in which only the courts are vested with powers to adjudicate matters and dispense justice. Accessing rights and protections guaranteed by the Constitution is the fundamental right of every citizen. These rights include the filing of public interest cases. - This amendment contravenes the High Court ruling on the interpretation of Article 26(2) of the Constitution given during Legal and Human Rights Center v. Mizengo Peter Pinda and the Attorney General and the well established principle in the Christopher Mtikila v the Attorney General (1995) that citizens have double standing as individuals and members of the community in suing on matters of public interest. This decision is indeed part of our law and the amendment therefore violates such law. - This amendment has the effect of denying people with disabilities (particularly mentally challenged persons) and children who might not be able to complete the affidavit as proposed, with their fundamental rights to justice as provided for by the Constitution. - This amendment violates the principle of solidarity, standing for another. 	Retain the original language of Section 4 in the Principal Act to avoid creation of laws that contravene the Constitution of the United Republic of Tanzania
2	Section 7(b)(3) For avoidance of doubt, a person exercising the right provided for under Article 26(2) of the Constitution shall abide with the provisions of Article 30(3) of the Constitution.	<ul style="list-style-type: none"> - This amendment contravenes Article 26(2) of the Constitution, by limiting the parties able to seek legal redress for violations of the Constitution. - This amendment contravenes Article 30(2) of the Constitution by preventing the protection of public interest through the courts. - This amendment contravenes Article 13(3) of the Constitution which mandates the courts or agencies established by law as the arbiters of civic rights, duties and interests of every person - This amendment contravenes the High Court ruling on the interpretation and conclusion of Article 26(2) of the Constitution given during Legal and Human Rights Center v. Mizengo Peter Pinda and the Attorney General - This amendment violates the primacy of the Constitution by enabling parliamentary legislation to qualify rights granted in the Constitution. Parliamentary legislation cannot dictate the application of the Constitution. - This amendment violates the principle of solidarity, standing for the rights of another. 	Retain the original language of Section 4 in the Principal Act to avoid creating laws that contravene the Constitution of the United Republic of Tanzania.

S/N	Provision	Challenges	Proposed Amendments
	Section 7(b)(4) Where redress is sought against the President, Vice-President, Prime Minister, the Speaker, Deputy Speaker or Chief Justice for any act or omission done in the performance of their duties, a petition shall only be brought against the Attorney General.	<ul style="list-style-type: none"> - This amendment contravenes Article 26(1) of the Constitution which provides that everyone has a duty to observe and abide by the provisions of the Constitution. - This amendment volates with the oath of office taken by these officials to uphold, protect and promote the Constitution. These officials take oath individually to uphold and defend the constitution. Such individual commitment can not then be transferred to another individuals or representative of the government. 	(4) Where redress is sought against the President, Vice-President, Prime Minister, the Speaker, Deputy Speaker or Chief Justice for any act or omission done in the performance of their duties, a petition shall be brought against them individually or against their respective organs.

AMENDMENT OF THE JUDICIARY ADMINISTRATION ACT, (CAP. 237)

S/N	Provision	Challenges	Proposed Amendments
1	Section 65A. An employee of the Judiciary shall not be liable in an action or suit in respect of anything done or omitted to be done in good faith in the performance of judicial function.	<ul style="list-style-type: none"> - This amendment contravenes Article 13 of the Constitution which provides for equality before the law by stopping the named individuals from being held directly accountable - This amendment is wide and vague. The Judiciary Administration Act and the Judicial Services Act provide interpretations and define immunity for Judicial and Non-Judicial Officers in clear and specific terms. The broad language here means any employee of the judiciary will not be liable for their actions. Good faith is subjective and open to interpretation. - This amendment is unnecessary given the clear definitions of judicial immunity provided for in the Constitution and the Principal Act. - This amendment violates the principle of accountability and equality before the law. - This amendment contravenes international best practice on granting immunity to Judicial Officers. - This amendment encourages corruption by providing wide-reaching and subjective immunity even to administrative and lower level employees of the judiciary. 	65A. An employee of the Judiciary should be liable in an action or suit in respect of anything done or omitted in the performance of judicial function.

AMENDMENT OF THE LAW REFORM (FATAL ACCIDENTS AND MISCELLANEOUS PROVISIONS) ACT, (CAP. 310)

S/N	Provision	Challenges	Proposed Amendments
1	Section 18A. Notwithstanding any provisions to the contrary, leave of application for orders under section 18 or any other suit under this Act for any act or omission by the President, Vice-President, Prime Minister, Speaker, Deputy Speaker or Chief Justice shall be sought or brought against the Attorney General.	<ul style="list-style-type: none"> - This amendment contravenes Article 4 of the Constitution which provides for separation of powers. If the Attorney General can be sued on behalf of members of the other organs of state, separation is eroded. The law should allow for suing of the Speaker and the Chief Justice on behalf of the Legislature (Parliament) and the Judiciary, respectively, to maintain the important Constitutional provision of separation of powers. - This amendment contravenes Article 13 of the Constitution which provides for equality before the law by stopping the named individuals from being held directly accountable for their actions. - This amendment violates the principles of equality before the law; individual accountability; and public service. 	Section 18A. Notwithstanding any provisions to the contrary, leave of application for orders under section 18 or any other suit under this Act for any act or omission by the President, Vice-President, Prime Minister, Speaker, Deputy Speaker or Chief Justice shall be sought or brought against the Attorney General for on behalf of the Executive, the Speaker on behalf of the Legislature (Parliament) or the Chief Justice on behalf of the Judiciary.

AMENDMENT OF THE NATIONAL ASSEMBLY (ADMINISTRATION) ACT, (CAP. 115)

S/N	Provision	Challenges	Proposed Amendments
1	45. The principal Act is amended in section 5-(a) in subsection (1), by adding immediately after the words "There shall" the words "upon approval by the Presidents;"	<ul style="list-style-type: none"> - This amendment contravenes Article 4 of the Constitution which provides for separation of powers by giving the President mandate over the business of the Parliamentary Services Commission. - This amendment contravenes Article 62 of the Constitution which states that the President is a Member of Parliament but not a Member of the National Assembly and therefore should not have this level of discretion over the business of the Parliamentary Services Commission. - This amendment contravenes Article 63 of the Constitution which provides for the supremacy of Parliament. - This amendment contravenes Article 4(3) of the Principal Act which states that employees of the Parliamentary Service should not take directions in the discharge of their duties from external sources. - This amendment violates the principles of accountability and separation of powers. 	Retain the original language of Section 5 in the Principal Act

S/N	Provision	Challenges	Proposed Amendments
2	45. The principal Act is amended in section 5-(b) in subsection (2), by adding immediately after the words "The Commission may" the words "upon approval by the President, and".	<ul style="list-style-type: none"> - This amendment contravenes Article 4 of the Constitution which provides for separation of powers by giving the President mandate over the business of the Parliamentary Services Commission. - This amendment contravenes Article 62 of the Constitution which states that the President is a Member of Parliament but not a Member of the National Assembly and therefore should not have this level of discretion over the business of the Parliamentary Services Commission. - This amendment contravenes Article 63 of the Constitution which provides for the supremacy of Parliament. - This amendment contravenes Article 4(3) of the Principal Act which states that employees of the Parliamentary Service should not take directions in the discharge of their duties from external sources. - This amendment violates the principles of accountability and separation of powers. 	Retain the original language of Section 5 in the Principal Act
3	46. The principal Act is amended in section 7 by deleting subsection (3).	<ul style="list-style-type: none"> - This amendment contravenes Article 87 of the Constitution by failing to reference its provisions as requirements in the selection of the Clerk. - This amendment contravenes Article 4 of the Constitution which provides for separation of powers by giving the President sole mandate over the appointment of the Clerk. <p>Principal Act: 7(3) Subject to Article 87 of the Constitution, the Commission shall recommend three names of persons who are suitable for appointment to be the Clerk.</p>	Reinstate the original language of Section 7(3)

AMENDMENT OF THE INTERPRETATION OF LAWS ACT, (CAP. 1)

S/N	Provision	Challenges	Proposed Amendments
1	33. The principal Act is amended in section 84, by (a) adding immediately after subsection (1) the following: "(2) The Attorney General may translate any written law from one language of enactment into another and, by notice in the Gazette, publish the version which is translated."	Translating laws into Kiswahili is important so that they can be accessible to the majority of Tanzanians. However translation is a subtle and complex art with significant space for debate and discussion on the translation of terms. In addition laws and legal documents are particularly open to multiple interpretations such that their translation can not be tasked to one individual. This amendment gives sole responsibility to the Attorney General for overseeing and gazetting into law translations of laws without any oversight or deliberation process. The amendment is also silent on what to do in case of inconsistencies between translations, how to handle errors in translation or how to address terms that cannot be literally translated.	33. The principal Act is amended in section 84, by (a) adding immediately after subsection (1) the following: "(2) The Attorney General may translate any written law from one language of enactment into another and, submit the translated version for review and passage, subject to the Regulations to this Act." and "(3) Regulations to the Principal Act will establish the process by which: translations should be produced, parliament should be given the opportunity to review and amend the translations; and the process to undertake if the translated law is substantively different to the original."

AMENDMENT OF THE LAWS REVISION ACT, (CAP. 4)

S/N	Provision	Challenges	Proposed Amendments
1	39. The principal Act is amended in section 4, by (a) adding immediately after subsection (2) the following: "(3) Notwithstanding any other provision to the contrary, the Attorney General may require the Chief Parliamentary Draftsman to carry out a specific revision of any written laws. (4) Notwithstanding the provision of section 12(1), the written laws revised in terms of subsection (3) shall come into operation on such date as the Attorney General may, by notice published in the Gazette, appoint."	Under the Principal Act, the Attorney General has the power to order revisions of laws as mandated in the Principal Act and their publication in the Gazette. However in this case new language is introduced in the newly proposed article (4) that allows the Attorney General to make wider revisions that are not qualified by the Principal Act and to bring these revisions into law directly. - This amendment contravenes Article 4 of the Constitution which provides for separation of powers by allowing the Attorney General to revise laws without the oversight of Parliament. - This amendment contravenes Article 63 of the Constitution which provides for the supremacy of Parliament. - This amendment violates the principles of accountability, participation and separation of powers.	39. The principal Act is amended in section 4, by (a) adding immediately after subsection (2) the following: "(3) Notwithstanding any other provision to the contrary, the Attorney General may require the Chief Parliamentary Draftsman to carry out a general revision of the laws in accordance with this Act. (4) Notwithstanding the provision of section 12(1), the Attorney General shall then publish the written laws revised in terms of subsection (3) in the Gazette for review and passage by Parliament."