

Zambia Electoral Analysis Project (ZEAP) Briefing paper series

Briefing Paper 8: The Right For Prisoners To Vote In Zambia

Findings

- The Zambian Constitution of 2016 allows prisoners to vote.
- Prisoners will vote for the first time in the 2021 general election.
- Although the law allows prisoners to vote, it lacks clear mechanisms for ensuring the freedom and fairness of prisoner votes.
- Senior prison officers, especially the Commissioner of Prisons, have made public statements indicating that the opposition may not have an equal opportunity to campaign in prisons.
- Prisoners are susceptible to various forms of manipulation owing to their prison circumstances.

Policy implications

- Although the prison population is small (about 14,000 registered voters), it could prove decisive in a close election.

Introduction

The Zambian Constitution was extensively amended in 2016. One of the consequences of the amendment was to allow prisoners to vote. Although the changes to the law were made in 2016, prisoners will vote for the first time in 2021, as in the past no registration of voters was allowed in prison. During the voter registration process in 2020, a total of 14,963 prisoners were registered to vote.¹

This briefing paper highlights the legal basis of extending the right to vote in Zambia and discusses potential areas of concern. Although the prison population is relatively small, in a close election, that small number may matter. For example, in the 2015 presidential by-election, the difference between the winner and the runner-up was around just 20,000 votes.

The law relating to prisoner voting

The Zambian Constitution was extensively amended in 2016. The franchise is now governed by Article 46 of the Constitution which states: “A citizen who has attained the age of eighteen years is entitled to be registered as a voter and vote in an election by secret ballot.” As can be seen, there are two operative requirements in the provision, that is, being a citizen and having attained the age of 18 years. Therefore, a citizen who has attained the age of 18 years of age is entitled to be registered as a voter and to vote in an election by secret ballot. The right to vote or franchise is, by virtue of this provision, unqualified (beyond the age and citizenship requirements).

This provision can be contrasted with the repealed article 75(1) which was qualified and provided: “Every citizen of Zambia who has attained the age of eighteen years shall, unless he is disqualified by Parliament from registration as a voter for the purposes of elections to the National Assembly, be entitled to be registered as such a voter under a law

in that behalf, and no other person may be so registered.” This provision allowed Parliament to pass laws that restricted franchise under certain circumstances. It was under this provision that provisions in subordinate laws restricting prisoners from voting were sustained.

Despite this generous provision on the franchise in the constitution, the Electoral Process Act No. 35 of 2016, which is the principal law governing the electoral process, has limitations on who qualifies to vote. Section 9(1)(d)(e) and(f) as read with section 47 restrict the rights of prisoners to vote. Section 47 categorically states: “A person shall not be entitled to vote at an election if, at the date of the election, that person is in lawful custody or the person’s freedom of movement is restricted under any written law.” Considering that the Constitution is supreme, and the clause in the constitution providing for franchise is unqualified, it means that provisions in the Electoral Process Act that are inconsistent with the Constitution are a nullity. The Constitutional Court, in the case of **Godfrey Malembeka**

(Suing as Executive Director of Prisons Care and Counseling Association) v Attorney General and The Electoral Commission of Zambia 2016/CC/0013 Selected Judgment Number 34 of 2017, held that provisions in the Electoral Process Act that prohibit prisoners from voting or registering to vote were unconstitutional. This case opened the way for prisoners to vote.

The *Malembeka* case was decided shortly before the 2016 elections. As a result, the Court ordered that the relevant institutions should put in place mechanisms to allow voting in the subsequent elections. In May 2021, Parliament amended the Electoral Process Act to provide mechanisms for prisoners to vote. The Electoral Process (Amendment) Act 2021 expressly repeals restrictions under section 9 and 47 which prevented prisoners from voting.

The Act contains very little guidance, however, in terms of how the prison vote will be managed. It only contains two substantive amendments relating to the exercise of the franchise by prisoners. First, the Act allows for the establishment of a polling station within prison.² Such a polling station may also be used by members of the public. The provision, however, is drafted in a confusing manner as at the same time it envisions prisoners being ferried to go and vote at polling stations outside prison facilities.³ Second, the Act provides for categories of people who may have access to polling stations located within prison facilities. These are listed, by purpose, under section 24B as follows:

- (a) the Commission for the purposes of conducting electoral processes;
- (b) a candidate in an election for the purposes of distributing campaign material in a prescribed manner;

(c) an accredited polling agent, observer and monitor for the purpose of observing or monitoring an election; and

(d) a member of the public for the purposes of voting.⁴

Regardless of the challenges that may arise in relation to the actual implementation of the prison vote, the granting of the right to vote to prisoners is based on sound constitutional and human rights principles. Many countries have lifted restrictions banning prisoners from voting. In South Africa, for example, in declaring such restrictions unconstitutional, Justice Albie Sachs stated:

The universality of the franchise is important not only for nationhood and democracy.

The vote of each and every citizen is a badge of dignity and of personhood. Quite literally, it says that everybody counts. In a country of great disparities of wealth and power it declares that whoever we are, whether rich or poor, exalted or disgraced, we all belong to the same democratic South African nation; that our destinies are intertwined in a single interactive polity.⁵

Potential areas of concern

As this will be the debut election that prisoners in Zambia can vote in, naturally, scepticism, concerns, challenges, and lessons are expected. This is all the more so considering the high stakes in this edition of Zambian elections. The prison vote merely adds a subplot, albeit a significant one, to what is already seen as a hotly contested election. In other words, prison is a miniature society, and electorally, what obtains in society will be in some way mirrored in what is happening in prisons. In this section, we highlight some of the main concerns unique to the prison vote.

1. Access to voters. Prisons are total institutions secluded from the rest of society and under formal micro-management on day-to-day basis. In order for anyone to meet with the prisoners, they need express permission from officers legally authorised to give such permission. These officers belong to the Zambia Correctional Service (ZCS) that is mandated with securing inmates and rehabilitating them for a successful re-entry into society. The question arises, therefore, regarding the neutrality of ZCS in availing prison voters to the various political contesters. All political parties have been denied physical access to correctional facilities. They have only been allowed to distribute political messages through “pamphlets and leaflets which will be displayed at advantageous places where inmates can access them”.⁶ However, without the openness to enable political parties to routinely and randomly check display of their information, it is uncertain whether indeed the information is continually displayed and at the same locations as the ruling party’s.

2. Politicisation of the ZCS. Politicisation of the security wings of the state has come under scrutiny under President Lungu’s reign.⁷ Of concern is the perceived partiality of the ZCS Commissioner General, Dr. Chileshe Chisela who is appointed by the president, a candidate in the elections. There is little to allay the fears as Dr Chisela acts as Lungu’s *de facto* campaign manager for the prisons. While in Monze district of Southern Province (the political base for leading opposition leader, Hakainde Hichilema), Chisela attacked pro- United Party for National Development (UPND) voters and said his officers were instructed to not allow the opposition campaign in prisons on account of their opposition to President Lungu.⁸ He is reported by state media two days before the elections as

saying “his officers have seen what he has done and will not listen to empty promises [by the opposition]”.⁹ It is clearly a worrying sign that a person holding a non-partisan constitutional office is making an ostensibly political statement directed at opposition supporters. Could this affect access to correctional facilities for opposition political parties wishing to sell themselves to the prisoners? For a fair election, all political parties should have equal freedom of access to the electorate.

3. Prisoners’ right to information. Conversely to the first point, all voters have a right to all available information for their franchise to be meaningful. Even if posters and flyers were availed to prisoners, not all prisoners are literate. Listening to competitors speak would circumvent the illiteracy barrier. Voting in the absence of information from the candidates diminishes the essence of voting – to choose based on adequate information on the available candidates. Denial of access to information is a form of disenfranchisement as the voters may not be able to make an informed decision.

4. Voter deception. This is a problem in the free population which can only get worse in prisons. Vulnerable groups tend to be targeted for deceptive information during elections. These tend to be minorities with low literacy levels. Without free access to information from various sources, prisoners are doubly susceptible to deceptive messages. Prisoners may be misinformed on the technicalities of voting. For example, inmates maybe misinformed about the time, date, or place of voting and voting methods. They may also be told their vote is not secret; that the ruling party will know which inmates voted for the opposition. They may also be misinformed about what issues are at stake in the elections. As an example, as Brebner

Changala, an outspoken human rights activist envisages, the Patriotic Front (PF) might say to inmates, “if you vote for us, we shall release you, you will be freed, the opposition cannot free you, we are the only people who can free you.”¹⁰ Indeed, Lungu has pardoned more than 10,000 inmates since assuming office in 2015. This may send a message to serving inmates that they, too, may soon be beneficiaries of such a gesture. Officials also recently made pronouncements which seem intended to buy the support of inmates. For example, in May 2021, the Commissioner of Prisons announced that the government will introduce a two week holiday for inmates,¹¹ and in July 2021 announced that the government will allow the use of phones in prison.¹²

5. Voter intimidation. Prisoners are susceptible to be threatened with various forms of punishment or sanctions for voting in a certain way. Physical and other forms of abuse in Zambian prisons is well-documented. Threats of being subjected to one form of abuse or another can therefore effectively disenfranchise inmates while unfairly tilting the vote towards the ruling party which has monopoly of the effective means of intimidating inmates. Intimidation can be carried out by party proxies such as officers and prison captains. Promoted inmates may themselves be open to threat of demotion to the level of an ordinary inmate with the accompanying hardships. Such cases of abuse have long been documented.¹³

4. Conclusion

Since 2016, Zambian law allows inmates to vote. However, prisoners will be voting for the first time in the 2021 election. Although the number of registered prisoners (14,963) is relatively small, it could have an impact in a close election. There are generally no legal disputes about extending the franchise to prisoners. Most of the disputes relate to how effective the mechanisms in place will be in assuring the freedom and fairness of the prison vote. This is considering that the prisons are not easily accessible, candidates and parties (especially the opposition) may not have an opportunity to interact with prisoners. The prisoners are vulnerable and the ZCS senior officers have made clearly partisan statements in favour of the ruling party. However, the limited number of prisoners suggests that the greatest challenge to the electoral process may generally not come from the exercise of the prison vote.

Authors: O'Brien Kaaba (UNZA) and Julius Kapembwa (UNZA)

References

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² Section 24A(1) Electoral Process (Amendment) Act 2021.

³ Ibid, section 24A(2).

⁴ Ibid, section 24B.

⁵ August and Another v Electoral Commission and Others (CCT8/99) [1999] ZACC3, para.17.

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¹³ See, for example, Human Rights Watch, *Zambia, Unjust and Unhealthy: HIV, TB, and Abuse in Zambian Prisons* (Human Rights Watch, 2010).

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