



An Analysis of Zambia's Proposed Constitutional Amendments Relating to the Judiciary

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Overview

The Zambian Constitutional Amendment Bill was released for public comment on 21 June 2019. Section 79 of the Constitution provides that a Bill which seeks to amend the Constitution must be published in the Gazette 30 days before its first reading. On the second and third readings the Bill must be supported by two thirds of all members of the National Assembly in order to be enacted into law. This Policy Brief considers some of the proposed constitutional amendments relating to the Judiciary. The current Zambian Constitution provides for the independence of the judiciary. Article 122 of the proposed Bill states that “the Judiciary shall be autonomous and shall be subject only to this Constitution and the law and not subject to the control or direction of a person or an authority”. This is to be commended, but it remains necessary to scrutinize the other proposed constitutional amendments in order to ascertain whether they may result in political interference with the judiciary.

Judicial Independence

International Principles of Judicial Independence

According to the OHCHR Basic Principles on the Independence of the Judiciary; the independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the law of the country. The principles state further that there shall not be any inappropriate or unwarranted interference with the judicial process and that it is the duty of all governmental and other institutions to respect and observe the independence of the judiciary. Therefore, when making any amendments to provisions relating to the judiciary, policymakers need standards against which they can measure the current performance of the judiciary in order to make meaningful changes. The African Charter on Human and Peoples’ Rights provides a right to an “impartial tribunal” as well as a state duty to “guarantee the independence of the Court.”

Composition of Zambian Courts

The proposed Constitutional Amendment Bill is replete with the phrase “as prescribed”, removing much of the detail in the current Constitution to legislation.

This is the case with the stipulated number of judges to make up the various courts. These prescriptions can be found in the Court of Appeal Act, 2016 and the Constitutional Court Act respectively. In addition to the number of judges being removed from the Constitution, we also see Article 127 being amended so that the Constitutional Court comprises of a Chief Justice and a President.

Different approaches have been taken by judiciaries in the Southern African Region. Some constitutions provide for a stipulated number of Judges, as is the case with Zimbabwe, whilst others leave it to be prescribed by subordinate legislation, as is the case with Botswana. Furthermore, there is no uniform position on whether the Judiciary should be headed by a President or a Chief Justice, as this also differs across the region. In the case of Zambia, it is unclear as to whether the proposed amendments will have a remarkable impact on the independence of the judiciary. A brief analysis of the composition of other regional judiciaries as stipulated in their respective constitutions is done below:

Country	Constitutional Court	Supreme Court or Court of Appeal
Botswana	Does not have a Constitutional Court.	The Court of Appeal is constituted of the President of the Court of Appeal, such number, if any, Justices of Appeal as may be prescribed by Parliament and the Chief Justice.
Zimbabwe	Consists of the Chief Justice, Deputy Chief Justice, and no fewer than two other judges of the Court and any additional ones appointed as required.	Supreme Court consists of the Chief Justice, Deputy Chief Justice, no fewer than two other judges and any additional judges as required.
Eswatini	Does not have a Constitutional Court.	Chief Justice and no less than four other judges of the Supreme Court.
South Africa	Consists of the Chief Justice, Deputy Chief Justice and nine other judges of the Court. A matter in this Court must be heard by at least 8 judges.	Consists of a President, Deputy President and the number of judges determined in acts of Parliament.

If the State wants the constitution-making process to be open and transparent, it would be best served by stating why it is proposing certain amendments. Proposing changes without explaining the rationale therefore contributes to mistrust.

Procedure for the Removal of a Judge

Under any jurisdiction, the question of when and how a judge may be removed from office is of vital importance to the rule of law as there is the threat to judicial independence when the removal process is used to penalise or intimidate judges. On the other hand there is always the danger of a judge engaging in serious misconduct and requiring immediate removal to uphold the rule of law. In order to strike the correct balance between these concerns, it is paramount that any procedure for the removal of a judge should include appropriate safeguards to ensure fairness.

In Zambia, the Judicial Complaints Commission (JCC) is established in terms of the Judicial (Code of Conduct) Act 13 of 2006, Article 24 states that the JCC has the authority to:-

- a) Receive any complaint or allegation of misconduct and to investigate any complaint or allegation made against a judicial officer, Provided that where, in the opinion of the authority a complaint or allegation of misconduct made against the judicial officer does not disclose any *prima facie* case, the authority may dismiss such a complaint or allegation without investigating the complaint or allegation; and
- b) Submit its findings and recommendations to—
 - i. the appropriate authority for disciplinary action or other administrative action; and
 - ii. the Director of Public Prosecutions for consideration of possible criminal prosecution
- c) The appropriate authority or the Director of Public Prosecutions shall, where a report is made by the authority under subsection (1), notify the member against whom the report is made within seven days from the date the report is received and shall

thereafter notify the authority of the action taken, if any, on the authority's recommendation.

The current Constitution provides that the removal of a judge may have been initiated by the Judicial Complaints Commission or by a complaint made to the Judicial Complaints Commission. Article 144 of the proposed Bill now removes this oversight function from the Judicial Complaints Commission and gives it to the Judicial Service Commission, furthermore the President must now appoint a Tribunal, which consists of a Chairperson and 2 additional members (who hold or have held the office of a Judge). The Tribunal shall hear and determine the matter against the Judge and shall recommend to the President for either the re-instatement or the removal of the Judge, of which the president must then act on the recommendation. Basically, the Tribunal shall now hold the functions which the Judicial Complaints Commission previously held of hearing and determining a matter regarding a complaint against a Judge. However, the responsibility for the appointment of members of the Tribunal rest with the President.

A brief analysis of the procedure for the removal of a judge in other regional jurisdictions indicates that some of the proposed amendments to the Zambian Constitution relating to the Judiciary do not stray too far from other existing constitutions in Southern Africa.

Country	Authority to Remove a Judge	Composition of Tribunal/Commission
<u>Botswana</u>	If the President considers that the question of removing a judge of the High Court under this section ought to be investigated then he shall appoint a Tribunal.	The tribunal shall consist of a Chairman and not less than two other members, who hold or have held high judicial office. The tribunal shall enquire into the matter and report on the facts thereof to the President and advise the President whether the judge ought to be removed from office.
<u>Zimbabwe</u>	If the Judicial Service Commission advises the President that the question of removing any judge, including the Chief Justice, from office ought to be investigated, the President must appoint a tribunal to inquire into the matter. The tribunal must report its findings to the President and recommend whether or not the judge should be removed from office. The President must act in accordance with the tribunal's recommendation.	A Tribunal appointed under this section must consist of at least three members appointed by the President.
<u>Eswatini</u>	The King is to refer a matter regarding removal to the Judicial Service Commission for investigation. The Judicial Service Commission will inquire and recommend action to the King. King will then act on the recommendation of the Commission.	No Provision for a Tribunal

South Africa

The removal of a judge is done by the President following consultation with the Judicial Service Commission. The Commission has a Judicial Conduct Committee. Any person may lodge a complaint about a judge with the Chairperson of the Committee.

The Judicial Service Committee may recommend appointment of a Tribunal in respect of impeachable complaints and the Chief Justice must appoint a Judicial Conduct Tribunal, whenever requested to do so by the Commission.

A Look at Best Practices

The UN Basic Principles on the Independence of the Judiciary of 1985, stipulates that “judges shall be subject to suspension or removal only for reasons of incapacity or behaviour that renders them unfit to discharge their duties” and that “all disciplinary, suspension or removal proceedings shall be determined in accordance with established standards of judicial conduct” and that the proceedings be subject to independent review.

The Human Rights Committee, in its General Comment No. 32 on the right to equality before the courts, recommended that States should establish clear procedures and objective criteria for the suspension and dismissal of members of the judiciary.

The 2018 Report of the Special Rapporteur on the independence of judges and lawyers submitted to the Human Rights Council, emphasized that “the responsibility for disciplinary proceedings against judges should be vested in an independent authority (such as a judicial council) or a court.” The report emphasized that the executive branch should not have any role to play in a disciplinary body. The report highlighted the importance of judicial councils in guaranteeing the independence and autonomy of the judiciary. Given this appointment, their role should be stipulated in the Constitution itself. In Zambia, Section 5 of the Service Commissions Act says that the President may give general directions to the Judicial Service Commission, which suggests that the implementing legislation itself is not without concern. In addition, the members of the Judicial Complaints Commission (previously the Judicial Complaints Authority) are currently appointed by the President but subject to ratification by the National Assembly. The Secretary to the Authority is appointed by the President acting on his own.

A 2015 analysis of best practices on the appointment, tenure and removal of judges in the Commonwealth provides a useful framework in which to assess the proposed constitutional amendments.

There are several models for the removal of judges in Commonwealth jurisdictions. These are by way of:

- 1) Ad-hoc tribunals;
- 2) Disciplinary processes;
- 3) Mixed processes (disciplinary and parliamentary); and
- 4) Parliamentary processes

Several Commonwealth jurisdictions contain constitutional provisions authorizing the establishment of ad-hoc tribunals to inquire into specific allegations of judicial misconduct or incapacity. The function of the tribunal is to inquire into the facts alleged to constitute grounds for dismissal and to make a recommendation which is either immediately binding on the executive or, in some cases, subject to appeal or mandatory referral to a court. Once the determination of the ad-hoc tribunal has become final, the Head of State is then usually responsible for the formal act of removal from office, as is the case with the proposed Bill in question.

According to the Commonwealth principles, in order to determine how a tribunal process might operate fairly, it is necessary to consider questions which arise at different stages of the process:

- 1) Who is responsible for deciding whether to institute a tribunal inquiry,
- 2) How any allegations against a judge are investigated and whether the judge is given an opportunity to respond before the decision is made;
- 3) How the members of the tribunal are selected and who selects or approves them;
- 4) If the judge is liable to be suspended while tribunal proceedings are pending, how and by whom that decision is made;
- 5) How tribunal proceedings are conducted, including both procedural and evidential aspects and the provision of reasons for the tribunal's decision; and
- 6) Whether tribunal decisions are subject to review, appeal or confirmation by a court.

In many of the Commonwealth jurisdictions which adopt the use of ad-hoc tribunals, there is little provision in the constitution or in subsequent legislation, governing the procedure to be followed by a tribunal which would answer the aforementioned questions, this is also the case with the proposed Zambian amendments. It is often the case that, to ensure independence, a tribunal is empowered to regulate its own procedure. However, advanced regulation would be preferable, not only for legal certainty but also to guard against the pressure to craft rules of procedure in response to a particular set of alleged facts which will ultimately undermine the rule of law.

Conclusion

In order to ensure that amendments to the Constitution will uphold the rule of law, law makers in Zambia need to be cognisant of international law principles and standards. It is also important to observe the processes being adopted in neighboring countries in the region in order to ascertain whether the adoption of new legislation is likely to be effective in the Zambian context. Concerns about the proposed constitutional amendments have been raised by the Zambian Law Society, opposition parties, civil society as well as the public at large. Any threat to the independence of the judiciary is a serious issue that, if left unattended, can result in a grave undermining of the rule of law. Constitutional amendments should accordingly be deliberated on with care to safeguard against this risk.