



AN ANALYSIS OF ZIMBABWE'S PROPOSED CONSTITUTIONAL AMENDMENTS RELATING TO THE JUDICIARY

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Introduction

The Constitution of Zimbabwe Amendment (No. 2) Bill ('the Amendment Bill') was published in Zimbabwe's Government Gazette on 31 December 2019. The Bill seeks to make changes to the current Constitution of Zimbabwe ('the 2013 Constitution'), establishing the rules and principles by which the polity of Zimbabwe is governed. In total there are 27 proposed amendments. These relate mainly to the legislative and executive arms of government and the judiciary. This policy brief considers the Amendment Bill in so far as it relates to the judiciary and the Prosecutor-General. The Bill makes proposals which bypass the normal appointment procedures for judges, allow the President to extend the tenure of a judge beyond the mandatory retirement age of 70, and seeks to amend the procedure for the appointment and dismissal of the Prosecutor-General. Each of these amendments are discussed in more detail below, whilst highlighting the possible threats to the independence of the judiciary that may arise if these amendments are passed into law.

Appointment of Judges

International and Comparative Standards for Judicial Appointment

Judicial independence is vitally important for the fair administration of justice and the rule of law. Three reasons were advanced by Archibald Cox for judicial independence:

1. To guard against abuse of executive power;
2. To halt legislative erosion of fundamental human rights; and
3. To provide assurances to the public that judges are impartial and fair in their decision-making processes.

The judicial appointment process is a crucial mechanism through which judicial independence can be enhanced. Judges who are dependent in some way on the person who appoints them may not be relied upon to deliver neutral, high-quality decisions, and so undermine the legitimacy of the legal system. The International Association of Judges' Universal Charter of the Judge also requires judicial appointments to be open and transparent, ideally through an independent body with substantial judicial representation.

The African Charter on Human and Peoples' Rights requires States to provide a right to an impartial tribunal and to guarantee the independence of the courts. In addition the African Commission on Human and Peoples' Rights' Principles and Guidelines on the Right to a Fair Trial provide that the process for appointments to judicial bodies shall be transparent and accountable and the establishment of an independent body for this purpose is encouraged. Any method of judicial selection shall safeguard the independence and impartiality of the judiciary.

The Basic Principles on the Independence of the Judiciary ('the Basic Principles') adopted by the United Nations in 1985, explain that "any method of judicial selection shall safeguard against judicial appointments for improper motives". Principle 13 of the Basic Principles goes on to state that the "promotion of judges, wherever such a system exists, should be based on objective factors, in particular ability, integrity and experience".

A number of countries allow the President to appoint judges directly, on recommendation from the Judicial Service Commission (JSC), including Botswana, Lesotho and Namibia. However, a key requirement in these countries is that these appointments take place on the recommendation of the JSC.

In South Africa, the President can choose the Chief Justice and the Deputy Chief Justice after consultation with the JSC and the leaders of the parties represented in the National Assembly. The President may only choose the other judges of the Constitutional Court from a shortlist prepared by the JSC, and the President may request the JSC to prepare another shortlist if unhappy with certain candidates. The Constitution of South Africa provides for no exceptions based on whether the person to be appointed was already a judge.

The President's power to refuse recommendations made by the JSC for the appointment of judges was considered by the Botswana Court of Appeal in 2017. This question generated a robust debate within the Court of Appeal and resulted in four distinct judgments by Lesetedi JA (with Brand JA concurring), Gaongalelwe JA, Lord Abernethy JA and Lord Hamilton JA.

- Lord Hamilton JA argued that the Constitution only gives formal powers to the President and that it was always intended that he should follow the recommendation of the Judicial Service Commission. According to Lord Hamilton, "in constitutional law, including in the appointment of judges, the expression 'acting in accordance with the advice' has, in my view, a settled meaning. It means that the person advised must follow the advice given and act upon it."
- Lord Abernethy JA concurred with this interpretation and emphasised that it is important to look at the purpose of this framing, which is consistent with the separation of powers: "Since much of the work of the courts is concerned with disputes in which the executive is involved in one capacity or another, it is obvious that the rule of law may be at risk if the executive is not separated so far as reasonably practicable from the judiciary. Equally obviously this could extend to any substantive part the executive might play in judicial appointments."
- Lesetedi JA made short shrift of the arguments of the State around the prerogative powers of the President, stating that once the powers were set out in legislation, in this case the Constitution, they were no longer prerogative powers. Lesetedi JA further found a more cautious middle way, arguing that the inclusion of the Attorney General in the Judicial Service Commission provided an opportunity for the President to give input through the Attorney General into the appointment process. As such, it was argued that it would only be under very rare circumstances that the President ought to be able to refuse to appoint someone recommended by the Judicial Service Commission since "by the time a recommendation is made to the President his views on the candidate would have been well considered by the Judicial Service Commission".

Judicial Appointment in Zimbabwe

The judicial appointment procedure in the 2013 Constitution of Zimbabwe reflects the efficacies of multiple actors driving the appointment process. Some scholars have concluded that this is an international best practice. This is because it allows for consultations with a broad range of professionals including accountants, lawyers, professors and human resource management personnel. There is strong scrutiny of potential candidates which facilitates the appointment of the best qualified candidates.

Prior to 2013, the President had the power to handpick judges. Zimbabweans, however, overwhelmingly voted to pass a new Constitution that included a new procedure. Section 191 of the 2013 Constitution mandates the JSC to conduct its business in a just and transparent manner. This provision seeks to ensure

that the JSC maintains fairness and transparency in its work to avoid any political manipulation. The JSC is thus intended to act as a watchdog to conduct checks and balances over the President and to ensure that judicial appointments are made without any undue political influence. It is safe to say that the maintenance of an independent JSC is imperative in ensuring there is no impartiality in the appointment process.

Presently, under section 180 of the Constitution, the JSC is required to advertise vacancies for judicial positions and then hold public interviews. The JSC then prepares a shortlist of three candidates and submits this to the President. While the President can appoint judges, he must do so from the shortlist prepared by the JSC. He can accept the first shortlist or request a second shortlist in the event he is not satisfied with the first.

The Amendment Bill seeks to amend the current Constitution with regards to the appointment of judges to the Supreme Court and Constitutional Court by inserting section 180(4a): “Notwithstanding subsection (4) the President, acting on the recommendation of the Judicial Service Commission, may appoint a sitting judge of the Supreme Court or High Court to be a judge of a higher court whenever a vacancy arises in such court.” This drastically reduces the chance for outside and independent candidates to apply for vacancies; removes the public accountability and transparency in the appointment of judges; and creates a risk of judges being promoted on political grounds. It can also be argued that appointing Constitutional Court judges from existing judges goes against the original intent of the Constitution which was to get experts in constitutionalism on the bench.

The Amendment Bill does not suggest that the President alone has the power to promote judges and does require that he must do so “acting on the recommendation of the Judicial Service Commission”. This phrase is helpful if the interpretation of the Botswana Court of Appeal is followed. On such an interpretation, the President is still constrained in appointment by the Judicial Service Commission, and it is hoped that prior to the JSC making any recommendations it would have reviewed existing judges’ track record in office.

Former Judge, Justice M H Chhengo previously made the following suggestion regarding the appointment of judges:

“The practicable approach in our circumstances, which I put forward as a necessary improvement to the draft Amendment Bill (2016) is to provide that the Chief Justice and the Deputy Chief Justice be appointed by the President with the approval of the National Assembly. The people choose the President. The people choose members of the National Assembly. The President and the National Assembly must therefore be required by the Constitution to agree on who the head of the third arm of the State, the Judiciary, and his deputy should be.”

Term of Service of Judges

The security of tenure of judges is also key to securing the independence of the judiciary. Although the Constitution provides that judges cannot be removed from office unnecessarily, it does stipulate a compulsory retirement age for judges. At present, judges in the Constitutional Court and Supreme Court serve fixed terms of 15 years subject to a mandatory retirement age of 70. The Amendment Bill allows for an extension beyond the age of 70, if judges so elect, but subject to what is in effect a yearly Presidential approval, and “after consultation with the Judicial Service Commission”. During that extended term, judges would effectively serve for as long as the President gives approval. This could compromise judicial independence in that it could result in judges handing down judgments favourable to the President or the current government to ensure an extension of their tenure.

The Basic Principles explain that “the term of office of judges, their independence, security, adequate remuneration, conditions of service, pensions and the age of retirement shall be adequately secured by law. Judges, whether appointed or elected, shall have guaranteed tenure until a mandatory retirement age or the expiry of their term of office, where such exists.” Moreover, the Basic Principles recognise that the “body responsible for the objectivity and the transparency of the method of appointment or re-appointment as a full-time judge are of special importance”. In particular, “the decision regarding re-appointment must be made entirely objectively and on merit and without taking into account political considerations.”

The Consultative Council of European Judges states that “every decision relating to a judge’s appointment or career should be based on objective criteria and be either taken by an independent authority or subject to guarantees to ensure that it is not taken other than on the basis of such criteria”.

In South Africa and Botswana, the retirement age of judges is also 70, however, the President has no power to extend the term by a fixed period. In South Africa, Constitutional Court judges serve a term of 12 years, subject to a mandatory retirement age of 70 and this may only be extended by an Act of Parliament and there is no discretion vested in the President to determine a judge’s term. The South African Constitutional Court has considered a case relating to the President’s decision to extend the term of office of the Chief Justice of South Africa for five years. The Court held that any Act empowering the President to extend the term of office of the Chief Justice usurped the power the Constitution entrusted to Parliament and was unconstitutional.

In Botswana, Court of Appeal judges are appointed until they attain the age of 70 or any other age specified in an Act of Parliament. However, they may remain in office with the permission of the President to finish existing cases for a maximum period of up to three years.

The Prosecutor-General

Appointment of the Prosecutor-General

The Prosecutor-General’s independence is constitutionally mandated. At present, the process for appointing the Prosecutor-General is the same as appointing a judge, which requires public advertisements and public hearings in section 259(3), and the involvement of the JSC. The JSC prepares a shortlist of three candidates from which the President must choose. The President may request a second shortlist if not satisfied with the first. What the Amendment Bill seeks to do is to allow for the Prosecutor-General to be appointed by the President “on the advice of the Judicial Service Commission” without any of the additional procedures followed in the appointment of judges.

It can be argued that what the Amendment Bill seeks to achieve is not uncommon as this proposed procedure of appointing the Prosecutor-General has also been adopted elsewhere. In South Africa there is a single national prosecuting authority consisting of a National Director of Public Prosecutions (NDPP), who is the head of the prosecuting authority, and is appointed solely by the President, as head of the national executive and is governed by the National Prosecuting Authority Act. Similarly, section 112 of the Constitution of Botswana states that the power to appoint and remove the Attorney-General from office vests in the President.

Recently, the appointment of the Prosecutor-General caused some contention when the appointment was challenged on grounds that the President failed to adhere to constitutional provisions and rejected more

qualified candidates without cause. It was submitted that the person who had been appointed disqualified himself during the public interviews by announcing that he was not prepared to be independent but would take instructions from the executive. This example illustrates the potential ramifications if procedures for the appointment of the Prosecutor-General are made less stringent.

Removal of the Prosecutor-General

The Amendment Bill can be commended for requiring the President to appoint an independent tribunal to investigate whether the Prosecutor-General should be removed. The current Constitution merely followed the same procedure for the removal of a judge to remove the Prosecutor-General. The Amendment Bill now proposes that the Prosecutor-General may be removed from office on the following grounds: inability to perform the functions of his or her office due to mental or physical incapacity; gross incompetence; or serious misconduct.

If the President considers that the question of removing the Prosecutor-General from office ought to be investigated, the President must appoint a tribunal to inquire into the matter. Once referred to a tribunal, the Prosecutor-General is suspended from office until the President, on the recommendation of the tribunal, revokes the suspension or removes the Prosecutor-General from office.

In South Africa, the President may provisionally suspend the National Director or a Deputy National Director from his or her office, pending such enquiry into his or her fitness to hold such office as the President deems fit. The criteria for removal are similar to those in Zimbabwe. This shall then be communicated to Parliament, who will then pass a resolution as to whether the NDPP should be dismissed.

In Botswana, a person holding the office of Attorney-General may be removed from office only for inability to perform the functions of his office (whether arising from infirmity of body or mind or any other cause) or for misbehaviour. If the President considers that the question of removing a person holding the office of Attorney-General from office ought to be investigated, then he shall appoint a tribunal to advise the President whether the Attorney-General ought to be removed from office.

Conclusion

The United Nations [Universal Declaration of Human Rights](#) provides a starting point in considering the independence of the judiciary from a human rights perspective. The Declaration proclaimed that every individual “is entitled to a fair and public hearing by an independent and impartial tribunal”.

Zimbabwe’s method for judicial appointments as enshrined in the current Constitution is strongly recommended by regional and international instruments and the [Comparative Constitutions Project](#) (CCP) even gives the Constitution of Zimbabwe a score of four (4) out of six (6) in respect of judicial independence. The Amendment Bill which could potentially undermine existing provisions should be scrutinised carefully. If a country has sufficient principles enshrined in its Constitution to ensure judicial independence but then gives a great deal of power to the executive, this can ultimately undermine judicial independence. The Amendment Bill has raised several red flags in relation to judicial independence.

A competent, independent, and impartial judiciary is essential for the protection of human rights and the enjoyment of all other rights. The foundation for a proper administration of justice requires a transparent and independent judicial appointment process. The moral authority and integrity of the judiciary is of the utmost importance in a modern democratic society.