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Commentary on Contemporary Legal Issues

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Playing Politics with the Judiciary and the Constitution?

By David T Hofisi and Geoff Feltoe

Introduction

This article provides an overview of the tangled political machinations that have taken place in relation to the appointment of a new Chief Justice of the Republic of Zimbabwe. It draws from comments made by various organizations and individuals and compares the mooted constitutional amendment bill with regional and international standards.

The most senior member of the judiciary, the Chief Justice, must be appointed purely on merit and this appointment must not be influenced by political considerations. It is therefore highly regrettable that there appear to have been political manipulation to try to influence this process. This could have extremely damaging consequences for the integrity and independence of the judiciary in Zimbabwe.

Chief Justice Godfrey Chidyausiku reached the compulsory retirement age of 70 at the end of February 2017.¹ Before he was due to retire, a process was initiated to appoint his replacement.²

The Constitutional Provisions

Section 180 of the Constitution of Zimbabwe provides for the appointment of the Chief Justice.³ The Judicial Service Commission is required to advertise the position, invite the President and the public to make nominations, and conduct public interviews of prospective candidates. It must then prepare a list of three qualified persons as nominees and submit this list to the President. The President must appoint one of these nominees as Chief Justice, but if the President considers that none of the nominees are suitable for appointment, he must require the Judicial Service Commission to submit a further list of three qualified persons, whereupon the President must appoint one of the nominees to the position.⁴

Relying on these provisions, the Judicial Service Commission called for the nomination of candidates in October 2016.⁵ Four candidates were nominated and they were due to be interviewed on 12 December 2016.⁶

Developments Prior to Interviews

Prior to the interviews and cognizant that these new appointment procedures might cause some problems, Chief Justice Godfrey Chidyausiku alerted the Executive about his concerns. As he did not receive a response, he inferred that the Executive was comfortable

¹ This is in accordance with sections 186(1)(a) (b) and (2) of the Constitution of Zimbabwe (2013)

² See "Chief Justice Vacancy Interviews on Monday" 3/12/16 article available at <https://www.dailynews.co.zw/articles/2016/12/03/chief-justice-vacancy-interviews-on-monday>

³ Section 180 provides for the appointment of: "The Chief Justice, the Deputy Chief Justice, the Judge President of the High Court and all other judges appointed by the President in accordance with this section."

⁴ See section 180 of the Constitution of Zimbabwe

⁵ See *Veritas* Zimbabwe's Court Watch 4/2016 available at <http://veritaszim.net/node/1873>

⁶ See *Veritas* Zimbabwe's Court Watch 2016 available at <http://veritaszim.net/node/1900>

with the new procedures.⁷ The Judicial Service Commission then proceeded to call for nominations and, thereafter, set the date for the interviews.⁸

A few days before the interviews were due to commence, the Chief Justice says he was surprised to receive a communication informing him that an Executive order had been issued to stop the selection process. The Chief Justice says he responded by advising that the Executive's directive could not be complied with without violating the Constitution and, as such; the interviews would proceed in terms of the Constitution. The Chief Justice says that he later ascertained that the President had not issued the alleged Executive order to stop the interviews.⁹ Regarding the media coverage of this matter, the Chief Justice had this to say:

“Ever since adopting our stance to abide by the Constitution, a segment of the media has sought to impugn the integrity of the Judicial Service Commission. This is most regrettable. This is all I wish to say on this unfortunate debate. In this regard, I am inspired by Michelle Obama's words of wisdom, 'When your detractors go low, you go higher'. You do not follow them into the gutter.”¹⁰

Five days prior to the date scheduled for the interviews, a law student, Mr Romeo Taombera Zibani, launched an application before the High Court seeking an interdict to stop the interviews from being held.¹¹

The Applicant's Arguments

The applicant argued that the process for appointing the Chief Justice mandated by section 180 of the Constitution was itself unconstitutional and ought to be amended. He asserted that the selection process violated the founding values of transparency and accountability in the Constitution because it created the possibility of biased decisions and could be seen as being incestuous.¹² Justice Rita Makarau, one of the applicants for the post, was (and remains) the secretary to the Judicial Service Commission. The other applicants for the post, Deputy Chief Justice Luke Malaba, Justice Paddington Garwe and Justice President George Chiweshe all report to the Chief Justice who chairs the selection panel.

The Affidavit from the Ministry

The Minister of Justice was one of the respondents in the case. An affidavit was placed before the court by the Ministry's permanent secretary on behalf of the Minister. The affidavit deposed to the fact that there was an intention to amend section 180 to allow the President to decide himself who should be appointed as Chief Justice without any process of public interviews. This proposed change was to be canvassed with the public. Annexed to the affidavit was a draft amendment to section 180 of the Constitution and a draft memorandum

⁷ See the *Herald* Article “Chidyausiku Speaks on Chief Justice Saga” 17/1/17 Article available at <http://www.Herald.co.zw/chidyausiku-speaks-on-chief-justice-saga/> : “As a cautionary move, I alerted the Executive to this new procedure in the appointment of the Chief Justice as early as March 2016. I did not get a response. I did not get a response. I inferred from the conduct that the Executive was comfortable with the new procedure.”

⁸ See the *Herald* Article “Chidyausiku Speaks on Chief Justice Saga” 17/1/17 *supra*

⁹ See the *Herald* Article “Chidyausiku Speaks on Chief Justice Saga” 17/1/17 *supra*

¹⁰ See the *Herald* Article “Chidyausiku Speaks on Chief Justice Saga” 17/1/17 *supra*

¹¹ See the *Newsday* Article “UZ student bids to stop Chief Justice interviews” 08/12/16 available at <https://www.newsday.co.zw/2016/12/08/mphoko-chombo-roasted-protecting-criminals/>

¹² See See the *Newsday* Article “UZ student bids to stop Chief Justice interviews” 08/12/16 *Ibid*

addressed to Cabinet highlighting the principles of the proposed amendment.¹³ Conspicuously, the memorandum did not bear the Minister's signature.¹⁴

The Judgment

Justice Charles Hungwe granted the interdict to stop the interviews for the Chief Justice from taking place. The judgment in this case is *Zibani v Judicial Service Commission & Others* High Court Harare Case Number 797 of 2017.¹⁵ Whilst agreeing that the process in section 180 was lawful, the Judge decided it was contrary to the constitutional values of transparency and accountability and was therefore unconstitutional. Upholding the Constitution ahead of an expressed intention by the Executive to amend section 180 would, he said, constitute "slavish adherence" to the Constitution. He held that the Judicial Service Commission is also accountable to politicians in the Executive and their expressed intention to amend the law had to be respected. Following the process presently mandated by the Constitution would thus, according to his judgment, amount to a threat to the independence of the judiciary. He said:

"It occurs to me that where a lawful process leads to an absurd result, in that sense that colleagues select each other for entitlement to public office, as argued by the applicant, it cannot be sanctioned on the ground that it is provided for in the law. Such an approach is irrational."¹⁶

This judgment is palpably wrong and has some very dangerous implications. It is completely at variance with the basic principles of independence of the judiciary, the separation of powers and the supremacy of the Constitution. It not only offends against the rule of law, but also threatens the proper administration of justice.

Section 180 of the Constitution sets out the process to be followed in the appointment of judges. This procedure was introduced by the Constitution of Zimbabwe (2013) to enhance transparency and accountability in appointing judges, including the Chief Justice.¹⁷ The Judicial Service Commission has a duty in terms of section 191 of the Constitution to conduct its business in a fair, just and transparent manner.¹⁸ Further, in terms of Section 324 of the Constitution, all constitutional obligations must be performed diligently and *without delay*.¹⁹ Thus, there was a clear and incontrovertible duty on the Judicial Service Commission to conduct the interview process and to do so without delay. These

¹³ See the *Sunday Mail* Article "Justice Ministry Won't Oppose Zibani" 5/3/17 available at <http://www.sundaymail.co.zw/justice-ministry-wont-oppose-zibani/>

¹⁴ See page 15 of the *Zibani* judgment available at: http://www.veritaszim.net/sites/veritas_d/files/Zibani%20v%20JSC%20%26%20Others%20-%20Hungwe%20J.pdf

¹⁵ See <http://www.pindula.co.zw/news/wp-content/uploads/2016/12/Justice-Hungwe-Judgement-on-Romeo-Taombera-Zibani-Case-Interdicting-JSC-Interviews-.pdf>

¹⁶ See Pages 6-7 of the Judgment in the *Zibani* judgment *Ibid*

¹⁷ This point is dealt with more fully below in the paragraph titled: "Judicial Appointment in the Constitution of Zimbabwe"

¹⁸ See Section 191 of the Constitution of Zimbabwe: "The Judicial Service Commission must conduct its business in a just, fair and transparent manner."

¹⁹ See Section 324 of the Constitution of Zimbabwe: "All constitutional obligations must be performed diligently and without delay."

constitutional provisions notwithstanding, Justice Hungwe found that the process which the Commission intended to follow was unconstitutional.

The finding by the judge that the selection process is unconstitutional is legally untenable. The Constitution is supreme law of the country and any law, practice, custom or policy which is inconsistent to the Constitution is, to the extent of the inconsistency, invalid.²⁰ Judges are the guardians of the Constitution and are sworn to uphold it.²¹ The Judicial Service Commission is thus obliged to follow the process provided for in section 180. It was entirely wrong for Justice Hungwe to interdict and stop a lawful constitutional process on the basis of concerns of a private individual about the nature of the process or indeed on the basis of an unsigned communication of the intention to amend section 180 of the Constitution. Stated intentions to amend laws cannot be the basis for not obeying them – this is an abrogation of the rule of law.²²

There is no provision in the Constitution which would allow a court to declare as unconstitutional a provision in the Constitution. It is a trite rule of statutory interpretation that a statute is interpreted in favour of internal consistency, more so when that law is a constitution whose provisions are presumed to be mutually consistent.²³ If a constitutional provision turns out to be ill-considered or to have unacceptable consequences, the only recourse is for the Executive to propose that the provision be amended and to go through the required Parliamentary process of amendment.

Renowned academic Alex Magaisa has this to say about Judge Hungwe's ruling;

“The implication of Justice Hungwe's reasoning is that if any citizen does not like a constitutional clause which requires a constitutional body to do something, they can go to court to stop the constitutional body from carrying out its mandate and the court can order the Executive or Parliament to amend the Constitution. Meanwhile, the Constitution is put in abeyance, pending the fulfilment of the litigant's desires. It negates the basic principle that the Constitution, however objectionable it might be, is supreme. It also breeds uncertainty and confusion.

If Justice Hungwe's reasoning were to be followed, it would allow constitutional bodies to disobey the Constitution arguing that they are lobbying government to pass a law to change it. For example, ZEC might refuse to register voters, arguing that they are waiting for government to process an amendment to the Constitution. Such reasoning, which Justice Hungwe's judgment encourages, would be a recipe for disaster. You could have citizens suing to interdict constitutional bodies for all manner of reasons, the ultimate end of which is to stop them from carrying out their constitutional mandate. A constitutional democracy does not work like that. It prioritises the constitution above all else.”²⁴

²⁰ See Section 2(1) of the Constitution of Zimbabwe

²¹ See the Judicial Oath or Affirmation in the Third Schedule of the Constitution of Zimbabwe

²² The rule of law is mentioned seven times in the Constitution of Zimbabwe

²³ See Principles of Constitutional Interpretation: <http://thefederalistpapers.org/principles-of-constitutional-interpretation>

²⁴ See Alex Magaisa, “Comment on Justice Hungwe's Judgment in the Zibani matter”

Veritas provided the following trenchant comment on the Hungwe judgment:

“The Constitution is the supreme law and the Judicial Service Commission must obey it. The argument that section 180 is unconstitutional verges on nonsense. The Constitution is an integral whole, and no part of it can be regarded as invalid or unconstitutional. The fact that the government or a faction within government would like to amend section 180 cannot justify the Judicial Service Commission disregarding it.”²⁵

The Holding of Interviews

Immediately after this judgment, the Judicial Service Commission lodged an appeal which had the effect of suspending the ruling.²⁶ The Commission then decided to go ahead with the interviews and they interviewed three judges, Justices Luke Malaba, Rita Makarau and Paddington Garwe.²⁷ Justice George Chiweshe was not interviewed because, although he was invited to the interview, he did not attend.²⁸

The Supreme Court Appeal Decision

In a unanimous verdict, the Supreme Court allowed the appeal filed by the Judicial Service Commission on 13 February 2017 and set aside the interdict imposed by Justice Hungwe.²⁹ The Supreme Court ruled that the Judicial Service Commission had acted lawfully by following the process currently provided for in the Constitution.³⁰ The executive’s plans to amend the present constitutional provisions did not in any way affect the finding of the Supreme Court as the proposed constitutional amendment might not even be passed.³¹ Thus, the entirely flawed basis for the decision by Justice Hungwe was emphatically rejected.

Alex Magaisa alleges that there was more political gamesmanship at the Supreme Court hearing. According to him, the failure by Mr Zibani’s lawyers to follow the elementary requirement to submit heads of argument and the subsequent request for postponement at the hearing is evidence of attempts to delay the hearing so the constitutional amendment is enacted ahead of further judicial scrutiny.³²

15/12/16 Article available at <https://www.bigsr.co.uk/single-post/2016/12/15/Comment-on-Justice-Hungwe%E2%80%99s-Judgment-in-the-Zibani-matter>

²⁵ *Veritas* Court Watch 2 March 2017 “Chief Justice Succession: The Continuing Saga.”

²⁶ See “Chidyausiku hits back; Chief Justice interviews still on as JSC appeal to Supreme Court” 11/12/16 available at <http://www.pindula.co.zw/news/2016/12/11/chidyausiku-hits-back-chief-justice-interviews-still-jsc-appeal-supreme-court/#.WMEI9W997IU>

²⁷ See *Herald* Article “Chief Justice interviews go head (sic)” 13/12/16 Article available at <http://www.Herald.co.zw/chief-justice-interviews-go-head/>

²⁸ See *Herald* Article “Chief Justice interviews go head (sic)” 13/12/16 *supra*

²⁹ See *Herald* Article “Supreme Court Upholds” 14/02/17 available at <http://www.Herald.co.zw/supreme-court-upholds/>

³⁰ See *Herald* Article “Supreme Court Upholds” 14/02/17 *supra*

³¹ See *Herald* Article “Supreme Court Upholds” 14/02/17 *supra*

³² “... Zibani’s lawyers deliberately failed to file heads of argument. It is an elementary rule of the court that a litigant must submit heads of arguments. In lay terms, heads of arguments constitute a summary of the main arguments that a party will make at the hearing. They allow judges and counter-

Application to the Constitutional Court

Following the decision by the Supreme Court, Mr Romeo Taombera Zibani applied to the Constitutional Court for an order setting aside the Supreme Court's judgment on the ground that the appointment of retired Judge, Vernanda Ziyambi, to preside in the appeal was unconstitutional.³³ The second respondent, the Minister of Justice, raised the additional issue of the possible failure by Justice Ziyambi to take the oath of office.

"I do not take issue with the averments made by the applicant in paragraphs 1 to 8 of his founding affidavit. However, I believe third respondent did not comply with the peremptory provisions of Section 185 (2) of the Constitution. The peremptory provisions of Section 185 (2) of the Constitution require that a judge takes the oath of office upon appointment. My belief is premised on the fact that the letter of appointment of the fourth respondent, which I also received, makes no mention of that issue."³⁴

Veritas have pointed to Section 186(3) of the Constitution which precludes compulsory retirement at the age of 70 for judges appointed in an acting capacity.³⁵

"It was always accepted that under the equivalent provisions of the former constitution, retired judges could be called on to serve on the Bench when necessary. Indeed the conditions of service of judges require them to undertake such service when asked to do so, failing which they will not be paid their pensions."³⁶

This matter remains pending before the Constitutional Court.

The Political Context

parties to get a preview of the main arguments before the actual hearing. However, Zibani and his lawyers did not submit these heads. Their argument, apparently, was that the appeal had been improperly set down ahead of other matters. They forgot that they had submitted their High Court application on an urgent basis. If the application was urgent, why shouldn't the appeal be treated as urgent too? Instead, when they appeared at the Supreme Court, they sought to have the matter postponed, exposing the move as a no more than a delaying tactic. The object seems to have been to delay the matter as long as possible until the constitutional amendment, which is not yet before Parliament, is done. However, the Supreme Court made these machinations redundant by dismissing the application for a postponement and ruling in favour of the appeal. The ball is now firmly in President Mugabe's court. It is up to him to uphold the Constitution by proceeding with the current process or to defy the Constitution by waiting for the amendment." Available at <https://www.bigsr.co.uk/single-post/2017/02/13/Comment-on-the-Supreme-Court-decision-on-judicial-appointments>

³³ See "Chidyausiku dragged to court over successor" 24/02/17 available at <https://www.newsday.co.zw/2017/02/24/chidyausiku-dragged-court-successor/>

³⁴ See "Retired Chief Justice Chidyausiku could have violated constitution in Ziyambi appointment" 08/03/17 available at <http://www.chronicle.co.zw/retired-chief-justice-chidyausiku-could-have-violated-constitution-in-ziyambi-appointment/>

³⁵ See 'Court Watch 2017' available at <http://www.veritaszim.net/node/1991>

³⁶ See 'Court Watch 2017' *supra*

There is speculation that the factional fighting within ZANU PF underlies the development (and possible denouement) of this matter.³⁷ According to this notion, the Vice President in charge of the Justice Ministry prefers the appointment of Justice Chiweshe as Chief Justice because he is sympathetic to the Vice President's faction.³⁸ Thus, in any litigation involving a challenge to the presidency after the current president ceases to be the incumbent, Justice Chiweshe would lean in favour of the current Vice President. On the other hand, at least some of the other three nominees are allegedly sympathetic to the other ZANU PF faction.³⁹ According to this theory, the proposed change to section 180 to give the President the sole discretion in appointing the Chief Justice is to enable the President to appoint Justice Chiweshe who has a liberation war background and strong ties with the military.⁴⁰ It is further speculated that Justice Chiweshe did not attend the public interviews because he might not be recommended for appointment by the panel. Some reports suggest he might have been aware that the amendment of section 180 was imminent and he would stand a better chance of appointment if the decision rested solely with the President; whilst the other reason proffered for his absence was the ruling by Justice Hungwe halting the interview process.⁴¹

All of this is pure speculation. However, any veracity in relation to these claims would bode ill for the integrity and independence of the judiciary as it would be symptomatic of an attempt to politically influence the judicial appointment process. Alex Magaisa maintains:

“What is clear from this case is that the process of appointing the Chief Justice has been the subject of political gamesmanship within the context of ZANU PF's succession politics. While Zibani, the litigant who tried to stop the interviews is a private citizen, there is much to suggest that he was not a lone ranger, but that he was, in fact, a proxy of a political faction which is pushing for a particular candidate to take over as Chief Justice. It is hardly a coincidence that Romeo Zibani submitted his application at the same time that the Ministry of Justice was also crafting an amendment to the process of appointing a Chief Justice and that the Ministry had no interest in opposing Zibani's application. On the contrary, the Ministry of Justice seemed to be quite happy with Zibani's application, instead of defending the existing provisions of the Constitution, as it is legally obliged to do. It curiously gave precedence to a proposed constitutional amendment, ahead of an existing and valid provision of the Constitution.”⁴²

Veritas had this to say:

³⁷ See *The Zimbabwe Independent* “Race to succeed Chidyausiku takes a factional dimension,” 25/11/16 Article available at: <https://www.theindependent.co.zw/2016/11/25/race-succeed-chidyausiku-takes-factional-dimension/>

³⁸ See *The Zimbabwe Independent* “Race to succeed Chidyausiku takes a factional dimension,” 25/11/16 *supra*

³⁹ See *The Zimbabwe Independent* “Race to succeed Chidyausiku takes a factional dimension,” 25/11/16 *supra*

⁴⁰ See *The Zimbabwe Independent* “Race to succeed Chidyausiku takes a factional dimension,” 25/11/16 *supra*

⁴¹ See “Ministers in fierce row over chief justice,” 23/12/16 Article available at: <https://www.theindependent.co.zw/2016/12/23/ministers-fierce-row-chief-justice/>

⁴² See Alex Magaisa: “Comment on the Supreme Court decision on judicial appointments” 13/02/17 available at <https://www.bigsr.co.uk/single-post/2017/02/13/Comment-on-the-Supreme-Court-decision-on-judicial-appointments>

"It is most unfortunate that the appointment of the new Chief Justice seems to have fallen prey to political factionalism. Even the appearance of political involvement in the appointment process diminishes the authority and prestige that should attach to the office. It is to be hoped that whoever finally becomes Chief Justice will be able to reassert the independence of his or her office and the judiciary as a whole."⁴³

Independence of the Judiciary

Judicial independence is vitally important for the fair administration of justice and for the upholding of the rule of law.⁴⁴ Three reasons were advanced by former U.S. Solicitor General, 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.⁴⁵

The scholars James Melton and Tom Ginsburg note that two thirds of all constitutions written since 1985 include at least two of the six constitutional features identified as enhancing judicial independence.⁴⁶ This is a marked progression from the pre-1985 period in which 60% of constitutions either contained only one of these features or none at all.⁴⁷ As of 2017, 77% of all constitutions contained a statement requiring judicial independence.⁴⁸ This normative consensus is reflected in Zimbabwe's Constitution which states that judicial independence is central to the rule of law and good governance.⁴⁹ Further, the courts are subject only to the constitution and the law.⁵⁰

Whilst necessary, statements of judicial independence are insufficient drivers for actual independence. Some scholars opine that the formal provision for judicial independence, *de jure* independence, is the most important determinant for actual, *de facto*, independence.⁵¹ However, Melton and Ginsburg express skepticism regarding this claim since the marked increase in *de jure* independence has not had a concordant rise in *de facto* independence.⁵² They make the seminal inquiry regarding textual drivers for and supporters of judicial independence.⁵³ It is their finding that, even though the popular zeitgeist is to have a

⁴³ *Veritas* Court Watch 2 March 2017 "Chief Justice Succession: The Continuing Saga."

⁴⁴ See also Lord Bingham '(i)t is a truth universally acknowledged that the constitution of a modern democracy governed by the rule of law must effectively guarantee judicial independence.' *The Business of Judging: Selected Essays and Speeches* (2000) OUP at 55.

⁴⁵ Archibald Cox 'The Independence of the Judiciary: History and Purposes' (2006) 21 *University of Dayton Law Review* 565 at 567-74

⁴⁶ See James Melton & Tom Ginsburg, "Does De Jure Judicial Independence Really Matter? A Re-evaluation of Explanations for Judicial Independence" (Coase-Sandor Institute for Law & Economics Working Paper No. 612, 2014).

⁴⁷ See James Melton & Tom Ginsburg *supra*

⁴⁸ See James Melton & Tom Ginsburg *supra* at page 192

⁴⁹ See Section 164 of the Constitution of Zimbabwe (2013) and also Section 79B of the Lancaster House Constitution (as amended)

⁵⁰ See Section 164 of the Constitution of Zimbabwe (2013) *Ibid*

⁵¹ See Hayo, Bernd, and Stefan Voigt (2007) "Explaining De Facto Judicial Independence" *International Review of Law and Economics* 27:269-90.

⁵² See James Melton & Tom Ginsburg *supra* at page 188

⁵³ See James Melton & Tom Ginsburg *supra* at page 191

constitutional statement of judicial independence, different countries will have different levels of demand for judicial independence ranging from the nominal to the radical.⁵⁴

To illustrate, a country could require judicial independence in the constitution but give all powers of nomination and appointment to the executive, thereby undermining actual independence. This is important since the view has been expressed by the official in charge of the Ministry of Justice, Legal and Parliamentary Affairs claiming that the proposed amendment has no effect on judicial independence since the provisions relating to judicial independence remain unaltered: “So, the amendment is to deal with the issues of procedures. It does not derogate anything concerning independent of the judiciary. Independence of the judiciary is guaranteed in the Constitution. We are not tempering with that. I wanted that to be clear.”⁵⁵ This claim cannot be sustained since judicial independence is the result of a number of constitutional features. As noted above, Melton and Ginsburg draw on various studies to identify six central constitutional features which enhance judicial independence.⁵⁶ These are:

1. Statement of Judicial Independence;
2. Judicial Tenure;
3. Selection Procedure;
4. Removal Procedure;
5. Limited Removal Conditions;
6. Salary Insulation.⁵⁷

Judicial Appointment Procedures – Normative Claims

Thus, there are other constitutional and legal provisions which enhance judicial independence, key for this analysis being the selection procedure. Judicial appointment is a crucial mechanism to enhance judicial independence as “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 as a whole.”⁵⁸ Provisions on judicial independence which provide for multiple bodies to be involved in appointment, promotion or removal of judges enhance actual independence as other actors can retaliate and increase the political cost of ignoring the constitutional text.⁵⁹ As noted by Melton and Ginsburg:

“*Ceteris paribus*, textual promises will facilitate enforcement to the extent that they raise the visibility of judicial independence or designate multiple officials to be involved in the institutional processes related to the judiciary.”⁶⁰

For this reason, they note that the use of judicial councils in judicial appointments enhances judicial independence.⁶¹

⁵⁴ See James Melton & Tom Ginsburg *supra* at page 192

⁵⁵ See *Herald* Article “ED Speaks on Govt, JSC row” 21/3/17 available at <http://www.Herald.co.zw/ed-speaks-on-govt-jsc-row/>

⁵⁶ See James Melton & Tom Ginsburg *supra* at page 195-196

⁵⁷ See James Melton & Tom Ginsburg *supra* at pages 195-196

⁵⁸ See United States Institute of the Peace, “Judicial Appointments and Judicial Independence.” January 2009, www.usip.org at page 1

⁵⁹ See James Melton & Tom Ginsburg *supra*

⁶⁰ See James Melton & Tom Ginsburg *supra* at page 194

There are other reasons for supporting the use of judicial councils/commissions in judicial appointment processes.⁶² Regional and international instruments implore the need to ensure transparency in appointment of judicial officers. The African Principles and Guidelines on the Right to a Fair Trial provide as follows:

“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.”⁶³

Similarly, the Universal Declaration on the Independence of Justice (Montreal Declaration) provides that:

“Judges shall be nominated and appointed, or elected in accordance with governing constitutional and statutory provisions which shall, if possible, **not confine the power of nomination to governments** or make nomination dependent on nationality.”⁶⁴ (emphasis added.)

The Universal Charter of the Judge also requires judicial appointments to be open and transparent and encourages that this is done by an independent body with “substantial judicial representation.”⁶⁵ The ineluctable conclusion is that there is regional and international impetus for the use of an independent judicial council/commission in the appointment of judicial officers.⁶⁶

Judicial Appointment in the Constitution of Zimbabwe

The appointment procedure provided in the Constitution of Zimbabwe (2013) is a reflection of the efficacies of multiple-actor driven appointment processes. It is an instance of constitutional convergence with the Constitution of South Africa which, by and large, provides for a similar procedure.⁶⁷ Some scholars have concluded that this is an international best practice.⁶⁸ This is because it allows for consultations with a broad range of professionals including accountants, lawyers, professors and human resource management

⁶¹ See James Melton & Tom Ginsburg *supra* at page 196: “We consider appointment processes that involve a judicial council or two (or more) actors as enhancing judicial independence.”

⁶² For a discussion on the need for judicial appointments to enhance judicial independence and ensure appointments are based on merit and promote equality, diversity and judicial accountability, see Ila Suame *The Constitutional Touchstones of Judicial Appointments*

⁶³ See Principle A, Paragraph 4(h) of the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa. See also the Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region, Principles 13-17 and the Latimer House Guidelines, Principle II.1

⁶⁴ See Paragraph 1.11 of the Universal Declaration on the Independence of Justice (Montreal Declaration)

⁶⁵ See Article 9 of the Universal Charter of the Judge available at <http://www.iaj-uim.org/universal-charter-of-the-judges/>

⁶⁶ See also Paragraph 8 of the UN Basic Principles on the Independence of the Judiciary which state that methods of judicial appointment must safeguard against appointment for improper motives and discrimination.

⁶⁷ See Section 174(4) of the Constitution of South Africa

⁶⁸ See Sarkar Ali Akkas, “Appointment of Judges: A key issue of Judicial Independence: available at <http://epublications.bond.edu.au/cgi/viewcontent.cgi?article=1293&context=blr> : In this regard the composition and working system of the South African Judicial Services Commission may be an acceptable model. Such a mechanism may be very effective to ensure the appointment of the best-qualified people to judicial office.”

personnel.⁶⁹ There is strong scrutiny of potential candidates and this ensures appointment of the best qualified candidates.⁷⁰ It is transparent, open and reduces executive control over the process.⁷¹ It was a welcome departure from the secretive method of appointment under the former Constitution as noted by prominent lawyer and academic, Mr Derek Matyszak:

“The manner in which appointments are to be made under the (then) draft has also been improved and diminishes Presidential influence in this regard. Rather than the opaque manner in which the JSC comes to consider prospective candidates which exists under the (then) current constitution...”⁷²

As shown above, this method of appointment is strongly recommended by regional and international instruments. For these reasons, the Comparative Constitutions Project (CCP) gives the Constitution of Zimbabwe a score of four (4) out of six (6) in respect of judicial independence.⁷³ This score is higher than that of *inter alia* Sweden, Switzerland, U.S.A., and the United Kingdom.⁷⁴ This does not necessarily support a claim that the judiciary in Zimbabwe is more independent than that of the U.S.A. or the United Kingdom, but shows the progressive nature of the constitutional text compared to others.

Provenance of Section 180 of the Constitution of Zimbabwe (2013)

In his blog post entitled “Five myths behind ZANU PF’s proposed constitutional amendment,” Alex Magaisa emphatically denies the claim that section 180 of the Constitution is a clause proposed by the Movement for Democratic Change (MDC) during the constitution making process.⁷⁵ Instead, he asserts that the MDC wanted a more rigorous process which required parliamentary approval of nominations and that all judges re-apply for their jobs as was done in the Kenyan Constitution Reform Process⁷⁶. Section 180 of the Constitution therefore represents, according to Magaisa, the compromise reached by all parties to the constitution-making process in light of best practices in other jurisdictions, including South Africa.⁷⁷

Judicial Appointment in Constitution of Zimbabwe Amendment (No.1) Bill

The Government of Zimbabwe published the Constitution of Zimbabwe Amendment (No. 1) Bill, 2016 (HB 15, 2016) in December of 2016, beginning the formal process of shifting appointment powers back to being entirely within the whim of the Executive. It seeks to get rid of the public advertisements and interviews in respect of the three senior positions of Chief Justice, Deputy Chief Justice and Judge President of the High Court. These

⁶⁹ See the composition of the Judicial Services Commission in Section 189 of the Constitution of Zimbabwe (2013)

⁷⁰ See Sarka Ali Akkas *supra* at page 208

⁷¹ See Sarka Ali Akkas *supra* at page 208

⁷² See Derek Matyszak “Presidential Power and the Draft Constitution,” RAU February 2013 available at <http://researchandadvocacyunit.org/system/files/PRESIDENTIAL%20POWER%20AND%20THE%20DRAFT%20CONSTITUTION.pdf>

⁷³ See Constitution Rankings available at: <http://comparativeconstitutionsproject.org/ccp-rankings/>

⁷⁴ See Constitution Rankings available at: <http://comparativeconstitutionsproject.org/ccp-rankings/>

⁷⁵ See also “Five myths behind ZANU PF’s proposed constitutional amendment,” 24/12/16 by Alex Magaisa in dealing with Myth Number 3 available at <https://www.bigsr.co.uk/single-post/2016/12/14/Five-myths-behind-ZANU-PF%E2%80%99s-proposed-constitutional-amendment>

⁷⁶ See Alex Magaisa, “Five myths behind ZANU PF’s proposed constitutional amendment,” 24/12/16 *supra*

⁷⁷ See Alex Magaisa, “Five myths behind ZANU PF’s proposed constitutional amendment,” 24/12/16 *supra*

appointments are to be made by the President after consultation with the Judicial Service Commission. Section 339(2) of the Constitution defines the phrase “after consultation” as requiring the proffering of views which are not binding on the appointing authority.⁷⁸ Thus, appointment would be wholly in the hands of the Executive President. Any difference of opinion between the President and the Judicial Service Commission would require the Senate to be informed without any effect on his/her sole discretion to appoint these three judicial officers. This is because there is no provision allowing the Senate to override a decision by the President which is contrary to the recommendation of the Judicial Service Commission. The amendment proposes a return to the provisions of the Lancaster House Constitution (as amended), which scholars noted was “legally opaque” and only allowed for appointment of persons acceptable to the government.⁷⁹ The process of appointing the most senior judges would be neither open nor transparent and the amendment would give even more sweeping powers to an already powerful presidency.⁸⁰

Presidential Power and Constitution of Zimbabwe Amendment (No.1) Bill

The scholar Nicolas van de Walle noted in 2001 that in all constitutional reform processes in Africa, “not a single democratizing state chose to move to a parliamentary form of government.”⁸¹ In the words of renowned constitutional scholar Kwasi Prempeh;

“The presidential form of government remains the unrivalled favorite of Africa’s constitutional designers....the contemporary Africa president generally retains within the constitutional and political orbit the essential attributes of imperium long associated with presidential power in postcolonial Africa.”⁸²

Similarly, the Constitution of Zimbabwe (2013) retained an all-powerful presidency congruent with H. Kwasi Prempeh’s concept of the Imperial African Presidency.⁸³ The president remains the head of State and government with powers to appoint an unlimited number of Ministers and dissolve Parliament if it passes a vote of no confidence or refuses to pass the national budget.⁸⁴ A notable exception was the new section 180 which, as noted above, was largely welcomed since it espoused judicial independence and accountability.⁸⁵ In seeking to remove this provision, the executive intends to restore presidential monopoly over judicial appointments in respect of the three most senior members of the bench. The pitfalls of such an approach are self-evident:

⁷⁸ See Section 339 (2) of the Constitution of Zimbabwe (2013)

⁷⁹ See Derek Matyszak *supra*

⁸⁰ This point is fully argued in the next paragraph

⁸¹ Nicolas van de Walle, The Impact of Multi-Party Politics in Sub-Saharan Africa, 1-2001 *F. Dev. Stud.*,31 (2001) quoted in “Africa’s “constitutionalism revival”: False start or new dawn?” by H. Kwasi Prempeh 13/06/2007

⁸² See H.Kwasi Prempeh *supra* at page 497

⁸³ For a full discussion of the powers retained by the President, see the Paragraph 8 of the National Constitutional Assembly (NCA)’s Vote No Campaign published on 5 February 2013 and available here:

http://archive.kubatana.net/html/archive/demgg/130205nca.asp?sector=POLPAR&year=2013&range_start=1111

⁸⁴ See National Constitutional Assembly (NCA)’s Vote No Campaign published on 5 February 2013 *Ibid*, also see Derek Matyszak *supra*

⁸⁵ See Derek Matyszak, *supra*

“Persistent presidential monopoly of policy initiative continues to impoverish policymaking in Africa, because its practical import is to confine to a single perspective—the president’s—the range of possible solutions to any given societal problem.”⁸⁶

The use of constitutional amendments to give more discretionary powers to the President is not without precedent. Then Minister of Justice, Legal and Parliamentary Affairs, Dr Eddison Zvobgo, famously articulated his pride and “privilege” in introducing the bill which abolished the positions of Prime Minister and ceremonial President in *lieu* of the all-powerful Executive Presidency.⁸⁷ It was widely believed that Dr Zvobgo crafted these provisions with the hope of succeeding Mugabe as President.⁸⁸ He would later complain about President Mugabe’s failure to step down and hand over power.⁸⁹ The current official in charge of the Ministry of Justice, Legal and Parliamentary Affairs has been similarly fervid in his views regarding Constitution of Zimbabwe Amendment (No.1) Bill; going as far as to claim that the Head of State is above all branches of government and in that lofty capacity, must not only choose the Chief Justice, but the Speaker of Parliament as well: “We have one person who is above the executive, the judiciary and the legislature – the Head of State. So when he exercises his powers to appoint the Speaker, Chief Justice – he does that as Head of State...”⁹⁰

Needless to state that this view is not supported by law or common practice. The Speaker of Parliament is not appointed by the Head of State but is elected by the National Assembly at its first sitting.⁹¹ Further, the proposed amendment has no backing or basis in regional and international instruments. It is a return to the direct appointment of judges by a single person (the advice of the Judicial Services Commission notwithstanding), a practice which, at least in Europe, is no longer extant.⁹² It is another layer of imperium added to an already powerful

⁸⁶ See H. Kwasi Prempeh *supra* at page 498

⁸⁷ See Hansard Vol.14, No.131 at 15554 quoted by L Madhuku in “A Survey of Constitutional Amendments in Post-independence Zimbabwe (1980-1999); Zimbabwe Law Review 1999 Volume 16: “Mr Speaker, Sir, this is a proud moment for me. Just over two months ago, I came before this house to present the bill which led to the removal of racial representation in Parliament and rid our constitution of the taint of racialism. Now I come before a House with the privilege of introducing another Bill, one which will fundamentally change, indeed revolutionise, the political structure of this country... This bill, Mr Speaker, will introduce what is generally known as an Executive Presidency into our political system.”

⁸⁸ See The Guardian “Eddison Zvobgo (Obituary)” 24/08/04 available at <https://www.theguardian.com/news/2004/aug/24/guardianobituaries.zimbabwe> “Critics suggested he was creating powers that he hoped to enjoy himself once Mugabe retired.”

⁸⁹ See Ibbo Mandaza “Will ZANU PF survive after Mugabe” in “The Day After Mugabe” Gugulethu Moyo and Mark Ashurst (ed) African Research Institute 2007 available at <http://africaresearchinstitute.org/newsite/wp-content/uploads/2007/11/TheDayafterMugabe-r.pdf> where Dr Zvobgo complained that President Mugabe had “...the mentality of a madman who, when given a baton in a race, flees with it into the mountains instead of passing it on.”

⁹⁰ See *Herald* Article “ED Speaks on Govt,JSC row” 21/3/17 available at <http://www.Herald.co.zw/ed-speaks-on-govt-jsc-row/> : “We have three arms of State – the Executive, headed by the President, the judiciary by the Chief Justice and the legislature by the Speaker (of Parliament). We have one person who is above the executive, the judiciary and the legislature – the Head of State. So when he exercises his powers to appoint the Speaker, Chief Justice – he does that as Head of State...Ndiwomatongegwo enyika aya (This is how a country is ruled).”

⁹¹ See Section 126(1) of the Constitution of Zimbabwe (2013)

⁹² See Katalin Kelemen, “Appointment of Constitutional Judges in a Comparative Perspective – with a Proposal for a New Model For Hungary” available at <https://poseidon01.ssrn.com/delivery.php?ID=54009810411912301000008708807001707802008504108503906810108409908111702111106508311204512403803111001000309610712200911408906>

presidency which betrays the separation of powers, judicial independence and rule of law clauses in the Constitution.

Local Critiques of Constitution of Zimbabwe Amendment (No.1) Bill

Two reasons advanced in favour of amending the current constitution are to the effect that the current constitution allows junior judicial officers to assess and select their superiors⁹³ and that the country must revert to the scenario under the former constitution when the President was unhindered in his choice of Chief Justice.⁹⁴ The first argument is demonstrably fallacious since ordinary people frequently select their superiors, most markedly in the form of the person who will be President and Commander-in-Chief of the Defence Forces.⁹⁵ *Veritas* have gone on to argue that not all members of the Judicial Service Commission are judges (and thus juniors of the Chief Justice) and listed other instances of similar selection processes including company shareholders electing or appointing directors and boards of directors appointing their chairpersons.⁹⁶ The argument for reverting to the former Constitution is counter intuitive given the extensive work that went into drafting a new Constitution which was resoundingly approved in a referendum.⁹⁷ *Veritas* have rightly argued that that amendments to the constitution must not be done lightly and indeed, "...not so as to compromise the independence of the Judiciary, one of the constitutional pillars on which the rule of law rests."⁹⁸

The Law Society of Zimbabwe also severely criticized the proposed constitutional amendment and expressed dismay at the willingness to amend the constitution when so many provisions are yet to be implemented. They noted that the amendment bill "... negates the spirit of accountability and transparency...gives unfettered power to a single individual to appoint the most influential positions in the judiciary. This has dire consequences on judicial independence."⁹⁹

Comparative Analysis: Judicial Appointment Procedures

[611901102806603209707301110608110800501500501807900908200308208301011120082080126116074125071071003007100069008070107072018072&EXT=pdf](http://www.zebra.co.zw/2016/03/02/611901102806603209707301110608110800501500501807900908200308208301011120082080126116074125071071003007100069008070107072018072&EXT=pdf)

⁹³ See "VP Mhangagwa on JSC appointment: Arrangement where Chief Justice is appointed by juniors untenable" 03/02/17 available at <http://www.chronicle.co.zw/vp-mhangagwa-on-jsc-appointment-arrangement-where-chief-justice-is-appointed-by-juniors-untenable/>

⁹⁴ See Derek Matyszak *supra*

⁹⁵ See the Election of the President and Vice President, Section 92 of the Constitution of Zimbabwe (2013)

⁹⁶ See Constitution of Zimbabwe Amendment (No. 1) Bill, 2016 (HB 15, 2016) - Analysis by *Veritas* Zimbabwe available at <http://www.zimlil.org/content/constitution-zimbabwe-amendment-no-1-bill-2016-hb-15-2016-analysis-veritas-zimbabwe>

⁹⁷ The Constitution was approved by 95% of voters, see: "Zimbabwe: Draft New Constitution Approved In Referendum," 26/03/2013 available at <http://www.loc.gov/law/foreign-news/article/zimbabwe-draft-new-constitution-approved-in-referendum/>

⁹⁸ *Veritas* Constitutional Amendment to Extend Presidential powers in Constitution Watch 2 of 2017 (25 January 2017); See also "Five myths behind ZANU PF's proposed constitutional amendment," by Alex Magaisa in dealing with Myth Number 3 available at <https://www.bigsr.co.uk/single-post/2016/12/14/Five-myths-behind-ZANU-PF%E2%80%99s-proposed-constitutional-amendment>

⁹⁹ See "Law Society of Zimbabwe statement on Constitutional Amendment Bill (No. 1) of 2016" 12/01/17 available at http://www.pindula.co.zw/news/2017/01/12/law-society-zimbabwe-statement-constitutional-amendment-bill-no-1-2016-full/#.WMepH_I97IU

The African phenomenon of the 'imperial presidency' is akin to the Latin American experience with the 'hyper-presidency.'¹⁰⁰ Chile, Mexico, Paraguay, Uruguay and Argentina have all had to deal with presidencies with sweeping powers.¹⁰¹ One measure adopted to counter the growing power and influence of the executive branch has been the use of a judicial council in judicial appointments.¹⁰² This was also the basis for their introduction in France and Italy.¹⁰³

The judicial council/commissions model, used by 60% of countries in the world, is by far the world's most popular method of judicial appointment.¹⁰⁴ The ubiquity of this model is because it is a 'happy medium' between "the polar extremes of letting judges manage their own affairs and the alternative of complete political control of appointments, promotion and discipline."¹⁰⁵ This model is used in Ireland, Israel, New Zealand and the Netherlands.¹⁰⁶ Most American States have also adopted this model, in the form of 'merit commissions', as a reaction to partisan judicial elections.¹⁰⁷ American merit commissions usually provide the short-list of three nominees to the Governor to appoint.¹⁰⁸

Some jurisdictions go as far as to require legislative approval after appointment of a nominee from the judicial council/commission process. This ensures participation by all three branches of government.¹⁰⁹ This is not the case in Zimbabwe and indeed in Australia and Canada where appointment, further to the judicial council/commission process, is the sole responsibility of the executive.¹¹⁰ Proponents of this model argue that reducing the number of branches of government involved would also reduce the number of actors the judiciary feels beholden to and thus, increase judicial independence.¹¹¹

It goes without saying that concentrating powers of both nomination and appointment in a single branch is deleterious to judicial independence and democratic governance. Whilst defending the separate nomination and appointment process in respect of the President in the Constitution of the U.S.A., Alexander Hamilton stated that "...every advantage would in substance, be derived from the power of nomination, which is proposed to be conferred upon him; while several disadvantages which might attend the absolute power of

¹⁰⁰ See Iveth A. Plascencia; "Judicial Appointments, A Comparative Study of Four Judicial Appointment Models Used by Sovereigns Around The World" 12/2/2013 at page 5: "Hyper-Presidency is a term used to refer to a President or any head of the executive branch that has sweeping powers to rule at his or her discretion. This concentration of power in the President throws off the balance required in a democracy in that there is no separation of powers or a system of checks and balances."

¹⁰¹ See Iveth A. Plascencia *supra*

¹⁰² See Iveth A. Plascencia *supra* at page 5

¹⁰³ See USIP *supra* at page 5

¹⁰⁴ United States Institute of the Peace, "Judicial Appointments and Judicial Independence." January 2009, www.usip.org at page 4

¹⁰⁵ See USIP *supra* at page 4

¹⁰⁶ See Sarka Ali Akkas *supra* at page 207

¹⁰⁷ See USIP *supra*

¹⁰⁸ See USIP *supra* at page 5

¹⁰⁹ See the *Constitution of Argentina* Chapter III, Powers of the Executive Branch

¹¹⁰ See Mary L. Volcansek, Judicial Selection: Looking at How Other Nations Name Their Judges, 53 *The Advoc.* (Texas) 95 (2010) and F.L. Morton, Judicial Appointments in Post-Charter Canada: A System in Transition, in *Appointing Judges in an Age of Judicial Power* 56, 57 (Kate Malleson and Peter H. Russel, eds, (2006).

¹¹¹ See Iveth A. Plascencia *supra* at pages 22-25

appointment in the hands of that officer would be avoided.”¹¹² Heavy reliance on one branch of government “...tarnishes the purity of the judiciary” and what is needed is an “...appointment process which is open and transparent...”¹¹³ For these reasons, the American President requires the advice and consent of Senate to approve his or her judicial nominations.

This American model¹¹⁴ is replicated in the Czech Republic and is also used in Slovenia with the distinction that it is the lower house (*Državni zbor*) which votes for or against the nominee.¹¹⁵ The Slovak Republic provides for the converse, with the unicameral parliament providing nominees for the head of state to confirm.¹¹⁶ Further, and perhaps most importantly, the pioneer Constitutional Court conceived by Hans Kelsen, the Austrian Constitutional Court, also provides for appointment by the President following nomination by the federal government and two houses of the federal parliament.¹¹⁷ Thus, appointment of judges is generally upon collaboration of at least two branches of government.

The Other Side: Institutional Variation in the Judicial Appointment Process

It must be conceded that institutional variation in the judicial appointment process is not uncommon. Separate appointment procedures for the most senior members of the bench, or even for the highest court in the land, is not only common practice but has been identified as a key feature in jurisdictions in which constitutional adjudication is within the exclusive purview of one court/higher courts.¹¹⁸ It has already been mentioned that in the U.S.A. merit commissions usually submit nominees to the Governor whereas Federal Judges are nominated by the President and approved by the Senate. Three African countries have similar variation in judicial appointment. In Ghana, the appointment the Chief Justice is done by the President in consultation with the Council of State and with the approval of parliament.¹¹⁹ There is no role for the Judicial Council in respect of this key appointment, unlike the appointment of the other Supreme Court Justices where the President acts on the advice of the Judicial Council in consultation with the Council of State and with the approval of parliament.¹²⁰ In Kenya, The President appoints the Chief Justice and Deputy Chief Justice in accordance with the recommendations of the Judicial Service Commission, subject to the approval of the National Assembly.¹²¹ All other judges are appointed in accordance with the recommendation of the Judicial Services Commission without need for parliamentary approval.¹²² More poignantly, the Chief Justice and Deputy Chief Justice in

¹¹² See Alexander Hamilton, The Federalist Papers Number 76 “The Appointing Power of the Executive” available at

<https://www.congress.gov/resources/display/content/The+Federalist+Papers#TheFederalistPapers-76>

¹¹³ See Iveth A. Plascencia *supra* at pages 37-38

¹¹⁴ In respect of the Presidential nominations as distinct from the widespread State practice of using Merit Commissions to short list candidates to the Governor

¹¹⁵ See Katalin Kelemen *supra* at page 14

¹¹⁶ See Katalin Kelemen *supra* at page 14

¹¹⁷ See Katalin Kelemen *supra* at page 15

¹¹⁸ See Ferreres, Victor, "The Consequences of Centralizing Constitutional Review in A Special Court." (2004). *SELA (Seminaro en Latinoamérica de Teoría Constitucional y Política) Papers*. 39. http://digitalcommons.law.yale.edu/yls_sela/39 at page 3

¹¹⁹ See Section 144(1) of the Constitution of Ghana

¹²⁰ See Section 144(2) of the Constitution of Ghana. In respect of Justices of the Court of Appeal and of the High Court and Chairmen of Regional Tribunals, the President acts on the advice of the Judicial Council.

¹²¹ See Section 166(1) (a) of the Constitution of Kenya

¹²² See Section 166 (1)(b) of the Constitution of Kenya

South Africa are appointed by the President after consultation with the Judicial Service Commission and leaders of parties represented in the National Assembly.¹²³ The President and Deputy President of the Supreme Court of Appeal are appointed by the President after consulting the Judicial Service Commission.¹²⁴ In other words, the appointing authority (the President) is only required to consult but is not bound by the views of the other bodies in the choice of these top judicial officers.¹²⁵ Further, there is no requirement for the rigorous public interview process in respect of these top judges, even though other judges of the Constitutional Court are subjected to this process under Section 174(4) of the Constitution of South Africa.

The reference to this practice is not a commendation of the mooted amendment to the Constitution. To the contrary, it is vital to note that in Kenya, Ghana and the U.S.A. there is need for some form of parliamentary approval of the President's appointee – in other words the appointing power is not left entirely to the executive branch of government. The President needs to collaborate with the legislature. In South Africa, where no such legislative sanction is required, there are growing calls to amend Section 174(3), which provides for appointment of senior judicial officials, to move it towards Section 174(4), which provides for the appointment of all other Constitutional Court judges.¹²⁶ In fact, the South Africa organization *Freedom Under Law* offers four seminal reasons why the process under Section 174(3) should move towards Section 174(4). This is vitally important as these arguments are advocating for a provision of law which would be similar to the current section 180 of the Constitution of Zimbabwe and distinct from the situation as proposed by the mooted amendment of the Constitution of Zimbabwe. The reasons are as follows:

First: it would prevent a situation where, if the Chief Justice was not appointed from the ranks of the Constitutional Court judges, his elevation to that court as Chief Justice could be seen as less rigorous than for other Constitutional Court judges.

Second: given the inherent equality in the position of such judges... there seems little reason why a similar process of appointment should not be adopted for the appointment of all Constitutional Court judges.

Third: to the extent that there is a distinction to be drawn, the unique position of the Chief Justice **requires greater, not fewer, safeguards**, to insure that his appointment is, and is seen to be, consistent with the highest standards of independence of the judiciary.

¹²³ See Section 174(3) of the Constitution of South Africa

¹²⁴ See Section 174(3) of the Constitution of South Africa

¹²⁵ Whilst the Constitution of South Africa does not define the phrases "in consultation" and "after consultation," it uses them both and these were defined in the Interim Constitution of South Africa, suggesting that the drafters were guided by the same meaning. See "FUL Proposes Changes to Appointment of Chief Justice" by Jeremy Gauntlett S-20-08/11 available at <http://constitutionallyspeaking.co.za/ful-proposes-changes-to-appointment-of-chief-justice/>

¹²⁶ See Jeremy Gauntlett SC *Ibid*: "The one relatively simple option in order to better cater for the concerns of the independence of the judiciary and the rule of law, is for s 174(3) to be amended to follow more closely the scheme created in s 174(4), which deals with the appointment of Constitutional Court judges other than the Chief Justice and Deputy Chief Justice."

Recent depictions of Justice Mogoeng as the President's lapdog [42]¹²⁷ (whatever their origin or accuracy) are indicative of how quickly a system without vigorous institutional safeguards can lead to a perception, however unwarranted, that a judge is not independent. When that judge is thereafter appointed as Chief Justice, such perceptions may undermine the rule of law.”

Thus, where there is institutional variance in judicial appointments, there is still the requirement of consent of another branch of government as is the case in Kenya, Ghana and the U.S.A. A failure to provide such a safeguard is deleterious to judicial independence and accountability as has been noted in the case of South Africa. Any amendment of the Constitution should enhance rather than reduce judicial independence and accountability and this is the hurdle where Constitution of Zimbabwe Amendment (No.1) Bill fails.

Conclusion

The politicization of the judiciary to create a compliant judiciary is inimical to the rule of law and proper administration of justice. The intimidation of judges who hand down judgments at variance with the ruling party's interests is a matter of on-going concern.¹²⁸ The president has openly criticized judges who have acted in a manner which he perceives to be unfavourable to ruling party interests.¹²⁹ Further, the purging of the Gubbay led Supreme Court bench in 2001 orchestrated by the ruling party allowed for the appointment of new judges that were more acceptable to the ruling party.¹³⁰ The current Constitution departs from this paradigm by insulating judicial appointments from the whims of the executive. Any changes to the appointment process must, in the letter and spirit of the Constitution, facilitate greater independence and accountability. Unfortunately Constitution of Zimbabwe Amendment (No. 1) Bill, 2016 is the antithesis of independence, accountability and indeed good governance.

Postscript

The attempted political manipulation surrounding the post of Chief Justice has come to nought. The Justice Malaba has now been appointed as Chief Justice as from 27 March 2017 and will soon be sworn in to this post. Justice Malaba was previously the Deputy Chief Justice and has been in that post since July 2008. He was interviewed for the post of Chief Justice by the Judicial Service Commission and scored the highest mark of all the applicants for this post. This appointment was made on merit after following the procedure set out in the Constitution.

¹²⁷ This is a reference to a cartoon by Jonathan Shapiro, popularly known as Zapiro, which appeared in the *Mail and Guardian* on 19 August 2011 which is available at <http://blackopinion.co.za/wp-content/uploads/2016/05/Zapiro.jpg>

¹²⁸ See “Mugabe Warns Judges over current wave of protests” 3/9/19 available at <http://www.newzimbabwe.com/news-31051-Stop+allowing+protests;+Mugabe+warns+judges/news.aspx>

¹²⁹ See “Mugabe Warns Judges over current wave of protests” *supra*

¹³⁰ See Justice Anthony Gubbay, “THE PROGRESSIVE EROSION OF THE RULE OF LAW IN INDEPENDENT ZIMBABWE” THIRD INTERNATIONAL RULE OF LAW LECTURE: BAR OF ENGLAND AND WALES INNER TEMPLE HALL, LONDON WEDNESDAY 9 DECEMBER 2009 available at http://www.barcouncil.org.uk/media/100365/rule_of_law_lecture_agubbay_091209.pdf

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