The Zimbabwe Electronic Law Journal

Commentary on Contemporary Legal Issues

2016

The Editorial Board of this new electronic journal comprises:

Dr T. Mutangi, Professor L. Madhuku and Dr. I. Maja (co-Chief editors) and Professors J. Stewart and G. Feltoe.

The primary objective of this journal is to post regularly online articles discussing topical and other important legal issues in Zimbabwe soon after these issues have arisen. However, other articles on other important issues will also be published.

The intention is to post at least two editions of this journal each year depending on the availability of articles.

We would like to take this opportunity to invite persons to submit for consideration for publication in this journal articles, case notes and book reviews.

Articles must be original articles that have not been published previously, although the Editors may consider republication of an article that has been published elsewhere if the written authorization of the other publisher is provided. If the article has been or will be submitted for publication elsewhere, this must be clearly stated. Although we would like to receive articles on issues relating to Zimbabwe, we would also encourage authors to send to us for possible publication other articles.

An Analysis of Constitution of Zimbabwe Amendment (No. 1) Bill 2016

A presentation by Justice M.H. Chinhengo[1] to the workshop organised by the Southern African Parliamentary Support Trust:

Bulawayo, 8 February 2017

No legislative act contrary to the Constitution can be valid. To deny this, would be to affirm that the deputy is greater than his principal, that the servant is above the master, that the representatives of the people are superior to the people themselves, that men acting by virtue of powers may do not only what their powers do not authorize, but what they forbid.[2]

Alexander Hamilton

Introduction

At independence, Zimbabwe adopted a constitution prepared at Lancaster House in England. That constitution was amended nineteen times before it was repealed and replaced by the current Constitution in 2013. The 2013 Constitution ("the Constitution") was agreed upon by the major political parties in the country. While it necessarily had to be a compromise document, it was adopted against the background and experience in the governance of the country over thirty-three years as well as against the background of many grievances held by the people of Zimbabwe, as represented by their political parties. It was intended by many involved in crafting it to be a move towards a more democratic State, and a move to correct all that was undesirable in the Lancaster House Constitution, in particular its inconsistency with the aspirations of the people of Zimbabwe, their culture, traditions and practices.

The Preamble to the Constitution recognises the need "to entrench democracy, good, transparent and accountable governance and the rule of law"; it reaffirms the people's commitment to "upholding and defending fundamental human rights and freedoms" and their resolve "to build a united, just and prosperous nation, founded on values of transparency, equality, freedom, fairness, honesty and the dignity of hard work." Among the foundational values and principles set out in s 3 of the Constitution, which are relevant to us today, are the supremacy of the constitution, observance of the principle of the separation of powers and principles of transparency, accountability and responsiveness. The constitutional process leading to the adoption of the new Constitution was therefore informed by a transformative ideology, which is rooted in the need to change the lives of the ordinary man and woman; to make a difference. It is therefore an established tenet of the new Constitution

[1] Acting Judge of the Court of Appeal of Lesotho; Director/Chairman Africa Institute of Mediation and Arbitration; Commissioner for Zimbabwe - International Commission of Jurists; Lecturer in Procedural Law, Chitepo Law School, Great Zimbabwe University; Formerly Judge of the High Court of Zimbabwe and Judge of the High Court of Botswana

[2] www.constitution.org

that the Constitution is the supreme law and any law; practice, conduct or custom inconsistent with it is invalid to the extent of its inconsistency.[3]

There are many clauses in the Constitution that are controversial and even disliked by political parties, either together or individually, and by ordinary people or organized groups of people. That, I think, is as it should be. It speaks to the fact that the Constitution does not serve one constituency only. One or other of the negotiating parties may have scored a major victory on some provisions in the Constitution but overall it is a document that largely took into account all the views of the participating individuals and groups. The people of Zimbabwe endorsed or approved the Constitution in a referendum. Because of the ongoing discussion over the appointment of the Chief Justice, we can now say that s 180 of the Constitution is one of the controversial provisions[4]. That controversy not only led to the current litigation on the appointment of the Chief Justice, but it has also led to the current proposal to amend the Constitution as now appears in Constitution of Zimbabwe Amendment Bill No.1 of 2016 ("the Amendment Bill") published under General Notice 1 of 2017 on 3 January, 2017.[5]

Two provisions of the Amendment Bill are at the heart of my presentation today. The first is s 180 (2) relating to the appointment of the Chief Justice (CJ), Deputy Chief Justice (DCJ) and the Judge President (JP). The second is s 180 (4) which provides for the holding of public interviews by the Judicial Service Commission (JSC) in the appointment of all other judges.

This presentation will analyse the Bill against four fundamental principles of constitutional law - the rule of law, judicial independence, the need for transparency in governmental public processes, and respect for the separation of powers. With these provisions in mind, I shall endeavor to show that, upon a close analysis, the Bill may not be faithfully reflective of some of the foundational principles and values of the Constitution, namely the principles of transparency and respect for the separation of powers. I shall suggest the way in which I think the Bill should be improved to accord and fully comply with these principles. I consider my contribution to be a part of this workshop's efforts to feed into the consultative process required under s 141 (a) and (b) of the Constitution.[6]

The rule of law, which is one of the main foundational values of the Constitution as set out in s 3(b) of the Constitution, eschews any tendencies or leanings towards despotic approaches in the governance of the country in that it seeks to eliminate wide and untrammelled discretionary power and authority in governmental processes and decision making. The principle assumes the existence of liberties, values and principles, which the government should not violate. Simply put, it restricts the arbitrary exercise of power by subordinating it to requirements of transparency and accountability, among others.

---

[3] Section 2(2) of the Constitution of Zimbabwe (Amendment No 20) Act
[4] *Zibani v Judicial Service Commission and Ors* HH-797-16
[5] Constitution of Zimbabwe Amendment Bill No.1 of 2016
[6] Section 141 (a) and (b) provides for public access to and involvement in parliament and states-
… "Parliament must –
facilitate public involvement in its legislative and other processes and in the processes of its committees;
ensure that interested parties are consulted about Bills being considered by Parliament, unless such consultation is inappropriate or impracticable;"

The existing provision in relation to the appointment of the CJ, the DCJ and the JP is of course s 180. They are appointed in the same way as all the other judges by a process involving advertisement of the positions, nominations of candidates, public interviews of the candidates and the submission of a list of qualified persons as nominees for the offices by the Judicial Service Commission (JSC) to the State President. If the President considers that none of the people on the list are suitable for appointment, he is enjoined to require the JSC to submit a further list of qualified persons from whom the President must appoint one of the nominees to the office concerned. This provision vests the power of selecting and appointing the CJ and all judges not in one person but in two authorities, the JSC and the President with the former selecting and the latter appointing. It ensures that the person appointed to any of these high offices is not beholden to one person. Such an outcome enhances the independence and impartiality of the courts as provided in s 164(2) of the Constitution, a provision that is central to the rule of law and democratic governance.

The appointment of the CJ must therefore conform to the dictates of the rule of law and not in any way compromise judicial independence and the role of the courts. The appointment must also be based on considerations of merit, which the process at JSC level is designed to procure. Chapter 9[7] of the Constitution, to which little or no reference is made these days, sets out the basic values of and principles governing public administration, among them, the promotion and maintenance of a high standard of professional ethics, transparency and accountability and the mandatory requirement that –

> "Appointments to offices in all tiers of government, including government institutions and government-controlled entities and other public enterprises, must be made primarily on the basis of merit."

It cannot be doubted that the process of public nomination of candidates and public interviews conducted by the JSC were designed to ensure the appointment of judges on merit. This will be lost, and it will be perceived as lost, if the appointment process does not subject the CJ, DCJ and JP to public scrutiny and interviews.

The Amendment Bill seeks to repeal s 180 and replace it with provisions that remove the CJ, DCJ and the JP from the process to which all the other judges are subjected[8] but this must be said with a small rider. If these high office bearers are appointed from the ranks of former judges and serving judges it can be said some of the dangers sought to be addressed by the process set out in the current provision are to some extent eliminated. To be a judge in the first place one would have gone through the rigours of public interviews and scrutiny by the JSC. If a judge who has risen to serve on the Supreme Court or Constitutional Court Bench is otherwise unsuitable for appointment to any of these three positions, then the JSC must

---

[7] Section 194 (1) (a), (f) and s (2).

[8] The amendment reads-

"(2) The Chief Justice, the Deputy Chief Justice, and the Judge President of the High Court shall be appointed by the President after consultation with the Judicial Service Commission.

(3) If the appointment of a Chief Justice, Deputy Chief Justice, and the Judge President of the High Court is not consistent with any recommendation made by the Judicial Service Commission in terms of subsection (2) the Senate shall be informed as soon as possible:

Provided that, for the avoidance of doubt, it is declared that the decision of the President as to such appointment shall be final."

partly share the blame, as it is it that first recommended the appointment. If the appointments under the proposed Bill were to be made only from those that are serving or have served on the bench, then the fears of those who are critical of the proposed appointment process may be soothed somewhat.

Subsection (2) of s 180 of the Amendment Bill provides that the president will make the appointment "after consultation with" the JSC. The framers of Constitution found it necessary to define the phrase "after consultation with" in view of past experience. Section 339 (2) provides that-

> "Whenever this Constitution requires any person or authority to consult anyone else, or to act after consultation with anyone else, the person or authority must –
>
> (a) inform the other person in writing, what he or she proposes to do and provide the other person with enough information to enable the other person to understand the nature and effect of the proposed act;
>
> (b) afford the other person a reasonable opportunity to make recommendations or representations about the proposal; and
>
> (c) give careful consideration to the recommendations or representations that the other person may make about the proposal; but the person or authority is not obliged to follow any recommendations made by the other person."

Section 339 (2) renders the proviso to ss (2) of s 180 of the Amendment Bill, superfluous and unnecessary. If we have strong, diligent, independent and fearless members of the JSC; if we have a JSC which is itself institutionally independent, and if our system of decision making at all levels is sufficiently transparent and the whole proposed appointment process is open to publicity on the recommendations of the JSC and the reasons for which the President departs from such recommendations, then the potential dangers posed by the proposed appointment procedures may be eliminated or at least minimized. The JSC needs not be reminded about one of its roles in terms of s 190 (2) of the Constitution: it "must promote and facilitate the independence and accountability of the judiciary and the efficient, effective and transparent administration of justice…"

It is necessary to take a comparative view of approaches to the appointment of the CJ, DCJ and JP before we adopt a negative view of the Amendment Bill. In Kenya, United States of America and India, the selection process of the CJ is different from that which currently obtains in Zimbabwe. The American Constitution, Article 2, Section 2(2), for example, provides that the CJ is appointed by the President and confirmed by the Senate. It reads:

> "He (the President) shall nominate and by and with the Advice and Consent of the Senate… and shall appoint Ambassadors, other public Ministers and Consuls Judges of the Supreme Court…."

India employs the most progressive, if not the most logical system of appointment of the Chief Justice. The Indian Constitution provides for the appointment of all judges and by convention "the most senior judge of the Supreme Court becomes the Chief Justice" on the

recommendation of the outgoing Chief Justice. If there is doubt as to the suitability of the most senior judge for such appointment, the other judges are consulted.

The Botswana Constitution provides in s 96 that "the Chief Justice shall be appointed by the President" and that other judges of the High shall be appointed by the President acting in accordance with the advice of the JSC. It is clear that, in Botswana, the President appoints the Chief Justice.

The function of the CJ and the JP is to guide or lead the other judges, but the judges who are to be led have no say in their appointment. The JSC will now have minimal influence on who occupies these high offices. The Kenyan approach is instructive in this regard. Section 166(a) of the Kenyan Constitution provides that –

> "The President shall appoint –
> the Chief Justice and Deputy Chief Justice, in accordance with the recommendation of the Judicial Service Commission, and subject to the approval of the National Assembly; and
> all other judges, in accordance with the recommendation of the Judicial Service Commission."

The Kenyan President has the appointing powers but those powers are exercised subject to approval by the National Assembly. In terms of s 164(2) the judges of the Court of Appeal elect the President of that Court from among themselves. Similarly by s 165(2) the Principal Judge of the High Court is elected by the judges of that Court from among themselves.

The South African Constitution in s 174(3) provides that –

> "The President as head of National Executive, after consulting the Judicial Service Commission and the leaders of parties represented in the National Assembly, appoints the Chief Justice and the Deputy Chief Justice, and after consulting the Judicial Service Commission, appoints the President and Deputy President of the Supreme Court of Appeal …".

This provision is similar to what is proposed in the Amendment Bill.

Before I come to what I think should be this workshop's recommendation or in-put into the law making process currently underway, I should make some remarks on the constitution amendment process itself.

Section 328 of the Constitution provides for the amendment of the Constitution and the methods of doing so and does not entrench the provisions relating to the judiciary in the same way as does Chapter VI, s 89(3)(b) and (4) of the Botswana Constitution, which requires that any amendment to that chapter should be submitted to a referendum. Thus our Constitution can be amended but the procedures for doing so must be strictly adhered to. The provisions relating to the judiciary are not as severely entrenched as those relating to the Bill of Rights (Chapter 4) and Land (Chapter 16) and Term limits (Section 328 (7) and (8).

As long as the Executive is following the laid down procedure for amending the Constitution, no legally sound criticism of its action would be justified. As we have seen the proposed amendment will not be too dissimilar from the position in South Africa and other democracies where the Chief Justice is virtually appointed by the head of State. That, however, is not what I would prefer myself.

My preference is that the most senior judge of the Constitutional Court should become the Chief Justice as is the case in India. This system of appointment depends very much on the integrity of the whole appointment system for Judges. If we chose the right people to compose our Supreme Court and Constitutional Court benches we would not entertain any reasonable fear that any of them cannot become Chief Justice. The Indians do it, so we too can do it. I appreciate that this may not be a feasible approach in Zimbabwe because some of our appointments to the highest courts are not entirely beyond reproach.

The practicable approach in our circumstances, which I put forward as a necessary improvement to the draft Amendment Bill is to provide that the CJ and the DCJ 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. As for the JP I would recommend the Kenyan approach whereby his or her colleagues on the bench choose him or her. This will enhance the separation of power of which as we know Montesquieu, the French philosopher, had this to say:

> "Political liberty is to be found only where there is no abuse of power. But constant experience shows that every man invested with power is liable to abuse it and to carry his authority as far as it would go… To prevent this abuse, it is necessary from the nature of things that one power should be a check on another… When the legislative and executive powers are united in the same person or body, there can be no liberty…Again there is no liberty if the judicial power is not separated from the legislative and executive… There would be an end of everything if the same person or body whether of the nobles or of the people, were to exercise all three powers."

I thank you.

Justice M H Chinhengo (former Judge)