

25 July 2017

Zimbabwe: constitutional amendment undermines judicial independence

The ICJ is concerned with the passing of Constitutional Amendment no. 1 of 2017 by the House of Assembly of Zimbabwe on 25 July 2017.

The House of Assembly voted with over two-thirds majority for the amendment of the Zimbabwean Constitution.

The amendment grants the President the right to appoint to office, the Judge President of the High Court, the Deputy Chief Justice and the Chief Justice of Zimbabwe.

Before this amendment the Judicial Services Commission (JSC) spearheaded the process of selection and appointment of judges with the President merely appointing from candidates recommended to him by the JSC.

The enactment of this Bill to law is likely to have a negative effect on the public's perception of the judiciary. It also has the potential to affect the impartiality and the independence of the judiciary

The ICJ is of the opinion that this amendment is objectionable, for the following reasons:

- a) The law as it is currently set out in the Constitution is in line with international best practice. All decisions concerning the professional career of judges should be based on objective criteria, and the selection and professional development of judges should be based on merit, having regard to qualifications, integrity, ability and efficiency. International standards and norms, also call for the appointment procedure of judges to be conducted in an open, transparent, independent manner. The *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa* adopted by the African Commission on Human and Peoples' Rights to guide States in implementing obligations under the African Charter on Human and Peoples' Rights, for instance, 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." (Principle A(4)(h))

The objectivity, transparency, and independence of the procedure for appointing judges is important in fostering confidence in the judicial system. The appointment procedure as it is generally set out in Chapter 8 of the Constitution provides an objective criterion and independent process for appointment and outlines a process in s180 that is both transparent and clear.

An amendment of the Constitution in the manner proposed, removing the appointments of these three most senior judicial officers from the general criteria and procedure in s180 and placing them under the sole discretion of the President, would be a departure from international standards and best practice and would weaken an otherwise exemplary appointment procedure.

b) The amendment grants the President exclusive powers to appoint, the Judge President of the High Court, the Deputy Chief Justice, and the Chief Justice. The ICJ is of the view that the executive should not be allowed to play any substantive role in the selection of judicial officers. The constitution, laws and policies of a country must ensure that the justice system is truly independent from other branches of the State. This is in keeping with the Separation of Powers doctrine. The separation of powers is an essential element of the Rule of Law, and is designed to prevent abuse of power and to safeguard freedom for everyone. The amendment places in the hands of the executive too much authority to decide on key senior appointments that, in light of their role and functions, could have wide-ranging impacts on the independence and impartiality of other serving judges. Additionally, in so far as judges who might be interested in eventually progressing to occupy one of these posts may now tend to consider (whether consciously or otherwise) throughout their judicial career their relationship to the President, this amendment has the potential to render the judiciary partial to the executive's thinking and weaken its ability to act as an independent arbiter and guarantor of the rule of law.

Arnold Tsunga, the ICJ Africa Director said: "The amendment to the 2013 Constitution will negatively affect public confidence in the judiciary. Not only is this a departure from a position that was in line with international standards and best practices; the amendment is likely to have a ripple effect on the judiciary. In the short term the executive now has a carrot, which it can dangle in front of judicial officers. If a judge wants to be promoted to Judge President, Deputy Chief Justice or Chief they may have to align themselves with the thinking of the executive. Over time, given the central roles that these three office bearers play in the appointment process and thought leadership, Zimbabwe is likely to have a very executive minded bench."

To this end the ICJ calls upon the government of Zimbabwe to reconsider its decision to amend the Constitution in the manner proposed in the bill.

The procedure in section 180 of the constitution had distinguished Zimbabwe's appointment procedures as exemplary in the region.

It is unfortunate that through this amendment the country has failed to consolidate this leadership position. The amendment would be regressive and poses a real risk of undermining the essential role of the judiciary in securing the rule of law in Zimbabwe.