CONSTITUTION WATCH 2 /2017
[25th January 2017]
Constitutional Amendment to Extend Presidential Powers

Introduction
Just before Christmas the Government published the Constitution of Zimbabwe Amendment (No. 1) Bill, 2016 (HB 15, 2016). If enacted the Bill will give the President a free hand in appointing senior judges, namely the Chief Justice, the Deputy Chief Justice and the Judge President of the High Court. The Bill was republished in the Gazette on the 3rd January, apparently because the original notice of publication was signed by the Clerk of Parliament and not by the Speaker.

In this Constitution Watch we shall examine the changes which the Bill seeks to make to the Constitution, and set those changes in the context of the increasing concentration of Executive power that has been a feature of Zimbabwean politics since Independence in 1980.

What Amendments are Proposed to be Made by the Bill?

Appointment of judges
As indicated above, the main purpose of the Bill is to give the President a free hand in appointing the Chief Justice, the Deputy Chief Justice and the Judge President of the High Court. These are all senior judges: the Chief Justice is head of the judiciary and in charge of the Constitutional Court and the Supreme Court, the Deputy Chief Justice, as the title suggests, deputises for the Chief Justice, while the Judge President of the High Court is in charge of that court.

At present, under section 180 of the Constitution, all judges, including the Chief Justice, the Deputy Chief Justice and the Judge President, are appointed by the President from lists of three nominees selected by the Judicial Service Commission [JSC] after interviewing prospective candidates. The process is an open one: vacancies are advertised and candidates are interviewed in public.

The Bill proposes to change this open process in the case of the three senior judges: they will be appointed by the President after consultation with the JSC. What “consultation” means is explained in section 339(2) of the Constitution: the President will have to inform the JSC of the person whom he proposes to appoint, will have to give the JSC a reasonable opportunity to comment on the proposal, and will have to give careful consideration to
the JSC’s comments – but he will not be bound to follow any recommendations the JSC may make. If he makes an appointment inconsistent with the JSC’s recommendations, the Bill states that he will have to inform the Senate – but the Senate will not be able to set aside the appointment because, according to clause 6 of the amendment Bill, the President’s decision will be final.

It should be noted that in making these senior judicial appointments the President will not have to act on the advice of, or even consult, the Cabinet[

Section 110(6) of the Constitution says that the President must act on advice of the Cabinet except when he or she is acting in terms of section 110(2) – and one of the functions listed under section 10(2) is making constitutional appointments such as appointments of judges]. In choosing who to appoint, however, the President will presumably be guided by advice given to him by the Minister or Vice-President responsible for justice.

**Other amendments**
The Bill will make other minor amendments to the Constitution:

- It will make it clear that the Labour Court and the Administrative Court are subordinate to the High Court, which means that decisions of those courts can be reviewed by judges of the High Court. It should be noted that this is the law at present and there is not much doubt about it, but if the point needs clarification it can be done perfectly well through an amendment to the High Court Act rather than by amending the Constitution.

- It will change the titles of the Judge Presidents of the Administrative Court and the Labour Court to “Senior Judges” – but the Bill does not make the consequential amendments that are needed to sections 163 and 181(2) and (3) of the Constitution.

**Undesirability of Proposed Amendments**
The main amendments in the Bill run counter to two fundamental constitutional values laid down in section 3(3) of the Constitution, namely:

- **transparency** and
- **respect for the separation of powers**.

The current procedure for appointing senior judges is transparent, in that nominees on the short-list for appointment are chosen after public advertisements and public interviews; it also respects the separation of powers in that the nominees are selected by the JSC without interference from the Executive or Parliament.
The Bill proposes to replace this process with one where the President is allowed to appoint anyone he chooses, so long as the person is qualified to be a judge – i.e. is at least 40 years old and has either been a judge or a legal practitioner for 12 years or more [section 177 of the Constitution]. The President’s choice of appointee will be a personal one: as pointed out above, he will not have to act on anyone’s advice, even the Cabinet’s, in making the appointments though in practice he will probably go along with recommendations made by the Minister responsible for justice. That means, almost inevitably in Zimbabwe’s current political climate, that partisan considerations will guide appointments of senior judges.

**Continual Extension of Presidential Powers**

Successive constitutional changes since 1980 have concentrated more and more Executive powers in the President:

- In the original Lancaster House Constitution – the constitution bequeathed to Zimbabwe at Independence – the President was a ceremonial figurehead. Although executive power was nominally vested in him he had to act on the advice of the Cabinet – i.e. he had to do whatever Cabinet advised him to do [section 66(1)]. Real power was exercised by the Cabinet and the Cabinet was presided over by a Prime Minister who also chose its members. The Prime Minister was therefore the effective head of government.

- In 1987 the Lancaster House constitution was amended to create an executive President. The office of Prime Minister was abolished and the President became both head of State and head of government. He still had to act on the advice of Cabinet in most cases, including the appointment of judges, [section 31H(5) of the Constitution] but since he appointed and chose the members of the Cabinet this was not much of a brake on his exercise of personal power.

- The Chidyausiku Commission draft constitution, which was rejected at a referendum in 2000, would have restored the office of Prime Minister and given him or her the function of directing the operations of government[clause 92] and choosing Cabinet Ministers [clause 98(1)]. The President would have retained a few personal powers, in particular the power to appoint and dismiss the Prime Minister [clause 100]. Since the draft constitution was never implemented, however, the President retained all the considerable powers that were vested in him under the amended Lancaster House constitution.
In the present Constitution, enacted in 2013, the President’s powers have been extended even further:

- He appoints the heads of the Defence Forces, the Police Service, the intelligence services and the Prisons and Correctional Service without reference to the Cabinet – though he must consult the individual Ministers responsible for those forces and services [sections 110, 216, 221, 226 and 229];

- He can also act without reference to Cabinet, or indeed anyone else, when appointing and dismissing members of the Service Commissions responsible for the Public Service, the Defence Forces, the Police Service and the Prisons and Correctional Service [sections 110, 202, 217, 222 and 230]. The same applies to members of the Zimbabwe Land Commission [sections 110 and 296];

- He does not have to consult the Cabinet, or anyone else, when deploying the Defence Forces inside or outside the country, though after deploying them he has to tell Parliament why he did so [sections 110 and 214];

- He merely consults the Cabinet, and does not have to act on its recommendation, when granting pardons [section 112];

- He also acts in his own personal discretion when calling elections and referendums, when conferring honours and awards and when appointing ambassadors [section 110].

In all, the President has enormous personal powers under the present Constitution, greater than those he could exercise under the Lancaster House constitution even after it was amended. The Bill, if enacted, will extend those personal powers yet further.

**Procedure to be Followed for Enacting the Bill**

Now that the Bill has been published, the procedure for enacting it is laid down in section 328 of the Constitution:

**Delay before presentation in Parliament:** As it is a Bill amending the Constitution, at least 90 days must elapse after the Bill was published in the *Gazette* before it can be presented in the Senate or the National Assembly [section 328(3)]. This means it cannot be presented in either House before the 23rd March – or the 3rd April, if one regards the second publication of the Bill as the valid one. Taking into account the time needed for the Bill to be debated and passed in both Houses of Parliament, it is
unlikely to be promulgated as an Act before the beginning of May. By then the new Chief Justice should have been appointed in terms of the current provisions of the Constitution because the office will fall vacant at the end of February and the obligation to fill constitutional vacancies must be performed without delay [section 324 of the Constitution].

**Public debate:** During the 90-day period after the publication of the Bill, Parliament must invite the public to express their views on it through written submissions and in public meetings convened by Parliament [section 328(4)]. This public debate cannot be treated as a mere formality. Parliament has a general duty to involve the public in its legislative processes and to ensure that interested parties are consulted about forthcoming legislation [section 141 of the Constitution]. This is particularly important when it is proposed to amend the Constitution, the supreme law of the land. Hence it is not enough for Parliament merely to convene a few meetings; it must also:

- ensure that members of the public are aware of what the Bill provides and that they understand its implications. Parliament must therefore publicise the Bill as widely as possible and explain its implications;
- convene public meetings in all areas of the country and ensure that members of the public can attend them and express their views freely;
- record the views expressed at the meetings;
- ensure that all members of Parliament are made aware of views expressed by the public at the meetings and in written submissions sent to Parliament.

This will be time-consuming and very expensive. Will it be worth the expense for an amendment which, as already noted, cannot be enacted in time to be used to fill the forthcoming vacancy in the Chief Justice’s office?

**Justification for the Bill?**

The reasons advanced for amending section 180 of the Constitution are unconvincing. Those reasons are:

- *Section 180 of the Constitution in its present form allows junior judicial officers to evaluate their seniors.* This is spurious. Most members of the JSC who evaluate the candidates are respected lawyers and professionals, not members of the judiciary. In the present case only two judges are on the interviewing panel, and one of them is the current Chief Justice who is senior to all the candidates. Furthermore, in virtually every
sphere of organised social activity office-bearers are elected or appointed on the basis of other peoples’ evaluation of them, and often the people who do the evaluation are junior or less experienced that those who are being evaluated. Company shareholders elect or appoint their directors, and boards of directors elect or appoint their chairpersons; societies elect their office-bearers; citizens elect their Presidents. In every one of these cases the electors’ choice is based on their assessment of the candidates for election. How can such a universally accepted procedure be right in all these cases but wrong when it comes to the selection of judges?

- **We should revert to the position under the amended Lancaster House constitution, where the President was not restricted in his choice of Chief Justice.** There are two answers to this. Firstly, as pointed out earlier, the Bill will give the President an even wider discretion than he had under the amended Lancaster House constitution because he will not have to act on the advice of the Cabinet, as he did under that constitution. Secondly, in 2013 the electorate voted to replace the Lancaster House constitution with the present one, which emphasises the separation of powers between the Executive, the Legislature and the Judiciary to a much greater extent than did the Lancaster House constitution.

**Conclusion**

It is most regrettable that the Government is seeking to amend the Constitution so soon after it was enacted, and for such unsubstantial reasons. The Constitution is the supreme law, the foundation of all other laws in the country. It may not be immutable, but it should not be amended lightly – and certainly not so as to compromise the independence of the Judiciary, one of the constitutional pillars on which the rule of law rests. Parliament took five years and much effort to draft the new Constitution. COPAC, the parliamentary constitutional committee, held meetings throughout the country to find out the views of citizens about constitutional change; members of Parliament also consulted their constituents widely. This attempt to amend the Constitution undermines that work and effort. Also it may well harm Zimbabwe’s image. We have been congratulated having modern progressive constitution and changing it so soon will send out wrong signals. This may be unwise considering the economic situation and that potential trading partners are demanding clear, straightforward and impartial rule of law before investing.