

## The Judiciary

The judiciary is one of the three main branches of government, the other two being the Legislature (i.e. Parliament) and the Executive (the President, Ministers, the Public Service, the Police and Defence Forces). The judiciary consists of all judicial officers, namely, the people such as judges and magistrates who decide civil and criminal cases in courts.

In Zimbabwe the main courts are the Supreme Court and the High Court, which are presided over by judges, and magistrates courts which, as their name suggests, are presided over by magistrates. There are also local courts which administer customary law; these comprise primary courts (i.e. headmen's courts) and community courts (i.e. chiefs' courts). In addition there are other specialised courts such as the Administrative Court, which deals with applications and appeals under various Acts of Parliament, and the Labour Court which deals with labour matters. These courts are presided over by their own judicial officers, i.e. by people who are appointed to preside over the courts on a full-time basis. In addition there are other specialised courts such as the Fiscal Appeal Court, the Special Court for Income Tax Appeals, presided over by judges, and the Maintenance Court, presided over by magistrates.

All members of the judiciary, other than chiefs and headmen, are under the administrative control of the Judicial Service Commission, which is chaired by the Chief Justice.

### **Importance of the Judiciary**

An independent judiciary is essential if the rule of law is to prevail. The concept of the rule of law was dealt with in an earlier paper, but briefly it exists where:

- no one can be punished unless a court has declared that he or she has been guilty of a breach of the law;
- everyone is equally subject to the law, and no-one is above the law; and
- the courts and the law-enforcement agencies enforce and apply the law impartially.

Obviously, if these conditions are to exist there must be an effective and independent court system. The rule of law is not the same as democracy, because it is theoretically possible for the rule of law to be respected even by an undemocratic government, but it is hard to envisage a truly democratic society in which there is no rule of law. So, because an effective and independent court system is essential for the rule of law, and because respect for the rule of law is an important element of a democratic State, one can say that a functional and independent court system is vital for the existence of a truly democratic State.

Despite its importance, the judiciary is the weakest arm of government. It depends on the other branches to be able to function at all. Court officials are paid out of funds allocated by the Executive and Parliament; in criminal cases, the co-operation of the police is vital; and the enforcement of court decisions, both civil and criminal, depends on people who are employed by the Executive. If the Executive chooses to disregard a court decision – as has happened frequently in this country – there is little the courts can do about it, other than protest.

If the new constitution is to form the basis of a truly democratic society in Zimbabwe, it must seek to strengthen the independence, effectiveness and integrity of the judiciary. It can do this in the following ways:

1. by ensuring that members of the judiciary are selected through an impartial appointment process;
2. by ensuring that, so far as possible, suitably qualified and non politically partisan people are appointed to the judiciary;
3. by giving members of the judiciary security of tenure to protect them from undue influence exerted by the Executive and the Legislature;
4. by providing suitable mechanisms to ensure that members of the judiciary carry out their work efficiently;
5. by ensuring that members of the judiciary observe high standards of ethical conduct.

### **Selection of the Judiciary**

#### **Current system in Zimbabwe**

Under the present Constitution, the Chief Justice and the other judges of the Supreme Court and High Court are appointed by the President after consultation with the Judicial Service Commission (JSC). If the appointment of any of these judges is not consistent with a recommendation made by the JSC, the President must inform the Senate of that fact, but there is nothing the Senate can actually do, even if it does not agree with the President. This means, in effect, that the President can appoint whoever he likes, even if the JSC has recommended otherwise.

Judicial officers who preside over the specialised courts mentioned above (the Administrative Court, the Labour Court, etc.) are appointed by the President after consultation with the JSC, though there is no provision for the President to inform the Senate if he goes against a recommendation made by the JSC. Magistrates are appointed directly by the JSC.

The JSC consists of the Chief Justice or his or her deputy, the chairperson of the Public Service Commission, the Attorney-General and between two and three other members appointed by the President. No member of the JSC, therefore, is independent of the direct or indirect influence of the executive (but, as indicated above, even if the JSC was genuinely independent it would not matter anyway). Not surprisingly, there have been repeated allegations that judicial appointments and promotions have been politically motivated.

How can the new constitution improve the selection process? Internationally, there are two main ways of selecting members of the judiciary: election and appointment.

#### **System 1: Electing members of the judiciary**

If the principle to be observed in a democracy is that all legal and political authority derives from the people, then logically the people should elect, not only members of the Executive and the Legislature, but members of the judiciary as well. Most countries do not have judicial elections, however, prominent exceptions being the some States of the United States, Japan and Switzerland.

#### **Advantages of judicial elections:**

- *Legitimacy*: The election of judges gives them sufficient legitimacy to be co-equal with the other branches of government.

- *Accountability*: Elections make judicial officers more democratically accountable. Elected judges are likely to be more in tune with public opinion.
- *Transparency*: Judicial elections are more competitive, open and fair than most appointment procedures.

#### Disadvantages of judicial elections:

- *Lack of professionalism*: Ordinary voters do not have enough information to pick the best judges. They may not appreciate the professional qualities required for a judge, and judicial candidates cannot voice their opinions like candidates for political office (it would be improper for a candidate judge to pander to the electorate's baser instincts by promising to hang all murderers and rapists, or to penalise the rich).
- *Political influence*: Elected judges will be tempted to give judgments that will ensure their re-election; this is the obverse side of accountability.
- *Corruption and bias*: Although the election of judges does not inherently require political partisanship, there is a danger that elected judges become too closely aligned to political parties or individuals who contributed to their election campaigns.

The fact that few countries have chosen to have a system of elected judges is very telling. If electing judges was a self-evidently superior system, one would expect it to be in much greater use, but very few countries have such a system. Judges and magistrates are usually appointed, subject to safeguards to ensure their independence, by the Executive or the Legislative branch, or by both branches.

#### **System 2: Appointing members of the judiciary**

If judges and magistrates are to be appointed, the questions arise: who should appoint them? What procedures should be followed?

##### Appointment by whom?

Usually, the appointment of judges is, at least formally, made by the head of State. In the case of magistrates and other junior judicial officers the appointment may be made by other authorities. In Zimbabwe magistrates were previously appointed by the Public Service Commission because they were part of the Public Service; now they are part of the Judicial Service and appointed by the JSC.

There seems no reason to change this position: under the new constitution senior judicial officers should continue to be formally appointed by the head of State, while junior officers should be appointed by the JSC or whatever other body is created to oversee the judiciary. What needs to be changed is the pre-appointment procedures for selecting appointees (see above) and procedures for appointment.

##### Pre-appointment procedures

###### *Little or no formal process*

In Canada and Australia, judges are appointed by the head of State (the Governor-General) acting on the advice of the Cabinet which is conveyed to him or her through the Prime Minister. In Canada an advisory committee is formed whenever a vacancy occurs on the Supreme Court bench, and this allows for greater consultation though it does not fundamentally alter the largely informal process.

In India judges of the Supreme Court are appointed by the President in consultation with the Supreme Court, and appointments are generally made on the basis of

seniority and not political preference. Judges of state High Courts are appointed by the President in consultation with the Chief Justice of India and the governor of the state concerned.

While in these countries the Executive theoretically has a great deal of freedom in choosing judges for the highest court, it needs to be remembered that they are all strong democracies with a vigorous free press. Consequently, politicians must act with caution.

#### *Defined formal process*

In the United States, Supreme Court justices, and judges of Federal appeal courts and district courts, are nominated by the President and confirmed by the United States Senate. The Senate Judiciary Committee typically conducts confirmation hearings for each nominee. The system is open to criticism: the hearing process, for one thing, is said to be intrusive and time-consuming; Senators try to get candidates to commit themselves to a particular line on contentious issues; and nominations are very much affected by the President's own political outlook.

In the United Kingdom a Judicial Appointments Commission is responsible for selecting judges in England and Wales. It is an independent statutory body made up of 15 members of whom nine are drawn from the judiciary and the legal profession and six are lay-people. The Commission interviews applicants and selects them on merit measured by five core qualities: intellectual capacity, personal qualities (integrity, independence, judgement, decisiveness, objectivity, ability, willingness to learn), ability to understand and deal fairly, authority and communication skills, and efficiency. Successful candidates are formally appointed by the Lord Chancellor (not the head of State).

In South Africa judges of the Constitutional Court are appointed by the President after consultation with the JSC and the leaders of parties represented in the National Assembly (the President is free to disregard their opinion). The candidates for appointment are chosen from lists prepared by the JSC after public interviews. The President appoints judges of the Supreme Court of Appeal and the various High Courts *on the advice of* the JSC (he must follow the advice) and he appoints the Chief Justice, the President and Deputy President of the Supreme Court of Appeal *after consultation with* the JSC (but can disregard its opinion).

The South African JSC is a large body comprising judges, members of the legal profession, the Cabinet and members of both Houses of Parliament; when it considers appointments to a provincial High Court, it includes the premier of the province concerned and the judge heading that High Court. Hence the legal profession, the public and politicians all have a say in the appointment of judges.

#### **Qualifications of Judges**

In Australia and South Africa, the qualifications for appointment as a judge are not specified with any precision. The South African Constitution requires the JSC to take into account "the need for the judiciary to reflect broadly the racial and gender composition of South Africa". In Zimbabwe an appointee must either:

- have been a judge of a superior court in a foreign country where the common law is Roman-Dutch or English, and English is an official language, or

- have been qualified to practise as a legal practitioner in Zimbabwe for at least seven years.

These qualifications seem reasonable. Should the new constitution specify any others – such as, age, race or gender, political opinions or background?

- *Age*: It seems unnecessary to specify a minimum age for appointment to the Bench. If a candidate has already served as a judge in a foreign country, or has been qualified to practise in the legal profession for seven years, then he or she should be mature enough to serve as a judge. The question of a maximum age for judges will be dealt with later, under security of tenure.
- *Race or gender*: Should there be any racial or gender considerations, as required in South Africa? There are arguments for and against this sort of affirmative action. Race should be irrelevant 31 years after independence. While women constitute a little over 50 per cent of the population, the same does not apply to the legal profession so there is smaller pool of qualified persons to choose from. Although gender balance is desirable on the Bench, over-emphasis of a person's gender at the expense of his or her ability and suitability for the office must be avoided. The appointment of judges who are not highly skilled is more likely to undermine public confidence in the administration of justice than an unrepresentative judiciary.
- *Political opinions*: Selection on the basis of a candidate's known conservative or liberal tendencies (as in the US) should be avoided. Lawyers, like anyone else, have their views on political and social issues, but a conscientious judge will avoid letting these views affect his or her decisions. A litigant or accused person should not feel that the case will be determined because of the judge's political views.
- *Disqualification of former politicians*: Zimbabwe has a long tradition of appointing former Ministers of Justice to the Bench. Some have been good judges, some have not. There is no reason in principle why former politicians should not be considered for appointment as judges, but a sideways step from ministerial office to the Bench gives the impression (a) that the appointment is a reward for political services; and (b) that the appointee's former political allegiance will be reflected in his or her decisions.

### Protection from Undue Influences

Three core characteristics of judicial independence are said to be:

1. Security of tenure;
2. Financial security; and
3. Administrative independence.

#### **Security of tenure**

A constitution can give judges security of tenure by fixing clearly their terms of office and ensuring that they cannot be removed from office without good cause.

#### Term of office

How long should a judge stay in office? There are three possibilities:

- Life tenure
- Tenure for a specified term
- Tenure until retirement at a prescribed age.

The debate over which of these to adopt centres on the need to remove senile and debilitated judges from office, as against the need to retain experienced and learned judges who are healthy enough to continue serving.

Giving judges life tenure creates the risk of judges who are clearly incompetent remaining in office well beyond their useful time. In the United States, judges of the Supreme Court and Federal Court have life tenure. The retirement age for judges in state courts in the United States is variable; a number of states have no mandated retirement ages, while others range from 70 to 75 years of age.

Most other countries have an upper age limit, after which a judge must retire. Zimbabwe has the relatively young retirement age of 65, with a possible extension to 70 if the judge so elects and produces a medical report showing that he or she is mentally and physically fit to continue in office. Any specified retirement age is inevitably an arbitrary figure. There is usually no scientific or sociological reason to pick on a particular age as the time when an individual should retire.

The third option – tenure for a specified period – appears to be unusual. Only the Constitutional Court of South Africa seems to have adopted that system. Judges of that court hold office for a non-renewable term of twelve years or until they reach the age of 70 years, whichever occurs first. The idea was to ensure a regular rotation of judges in the Constitutional Court, so that constitutional interpretation reflected changing attitudes of society.

#### Removal from office and grounds for removal

Obviously judges sometimes have to be removed from office, and the grounds for doing so and the procedure to be followed should be laid down in the constitution.

In Zimbabwe, a judge may only be removed from office for inability to discharge the functions of his office, whether arising from infirmity of body or mind or any other cause, or for misbehaviour. These grounds are similar to those specified in many other countries such as Botswana, Zambia, Namibia, Australia, Canada and India; South Africa and Uganda add gross incompetence as a further ground.

“Misbehaviour” is not defined in our Constitution or in any of the others mentioned above, but it can be taken to mean misbehaviour in matters concerning the office of judge and would include a conviction for an offence that would render the person unfit to carry out judicial functions. Official misconduct and neglect of official duties would probably constitute misbehaviour. Whether incompetence (in the sense of persistently reaching illogical or perverse decisions) would constitute misbehaviour is less than clear, but could arguably be regarded as inability to discharge the functions of office. Poor legal knowledge may also fall into this category.

The new constitution should state the grounds for removal of judges as broadly as they are stated in the present Constitution, but should perhaps add gross incompetence as a further separate ground. And, if a judicial code of ethics is formulated (see below), serious breaches of that code should constitute misbehaviour meriting removal from office.

#### Procedure for removal from office

In most constitutions the procedure for removing judges from office is lengthy and cumbersome, which ensures that judges cannot be lightly threatened with removal.

In Zimbabwe, if the President considers that the question of the removal from office of the Chief Justice ought to be investigated, he must appoint a tribunal to inquire into the matter. All the members of the Tribunal are chosen by the President; most are judges or former judges, but the President can appoint one or more legal practitioners nominated by the Law Society. However, he does not have to do this. If the tribunal recommends that the President should refer the question of removing the judge to the JSC, the President must do this; and if the JSC recommends the judge's removal the President must remove him or her from office. The Constitution does not provide any formal system whereby allegations of misconduct may be made by professional bodies or by members of the public. It is possible, presumably, for a complaint to be made to the JSC and for it to investigate in terms of the Judicial Service Act. It could then refer the complaint to the President or the Chief Justice. As mentioned above, the JSC is not genuinely independent, so the whole process of removing judges from office is very much in the hands of the Executive.

Under the South African Constitution, a judge may be removed from office only if the JSC has found that the judge suffers from incapacity, is grossly incompetent or is guilty of gross misconduct, and if the National Assembly passes a resolution by a two-thirds majority calling for the judge to be removed.

Under the new constitution there should be a more open system of bringing allegations of misconduct against judges. The South African example seems a good one to follow. Whatever procedure is adopted in the new constitution, it should apply to magistrates and other judicial officers, not just to judges.

### **Financial security**

Financial security, the second core element of judicial independence, should mean:

- that the judge's income is not reduced while he or she holds office; and
- that judges' recompense is adequate (bearing in mind that accepting judicial office almost invariably means a drop in income) and appropriate for the work and responsibility. The salary should be such that there is not even the temptation, let alone the need, for a judge to have a sideline business or to receive rewards that may raise doubts about his or her impartiality.

Ensuring financial security can present problems, particularly when inflation erodes judges' salaries. In Zimbabwe there is no legislative or constitutional provision compelling the executive or legislature to adjust judicial salaries for inflation. Some provision of this sort needs to be inserted in the new constitution, so that we do not again see such things as occurred in recent years, where the Reserve Bank bought luxury goods for the judges.

### **Administrative independence**

In most countries that follow the Westminster system of government, the courts are administered by the Executive, that is to say, the registrars and clerks who do the administrative work to keep the courts functioning are members of the public service employed or at least paid by the Executive. In Zimbabwe since the Judicial Service Act came into operation in June 2010, they have fallen under the control of the Judicial Service Commission. It is debatable whether this is necessary for judicial independence. In other countries the courts have remained independent despite executive administration of the courts; and even if the courts are given

administrative autonomy they inevitably lack financial autonomy because they are funded from money allocated by the Executive and Parliament. The independence of the judiciary is best maintained by the character of the judges themselves rather than through administrative autonomy.

### **Ensuring an Effective Judiciary**

There is little that a constitution can do directly to ensure the judiciary does its work efficiently. Handing administrative control over the courts to the judiciary in the form of the JSC is unlikely to enhance judicial independence, as pointed out above, and it is unlikely to improve efficiency either. Good judges are not necessarily good administrators. Lack of finance has been cited as one of the reasons for the sclerosis affecting Zimbabwe's court system. The new constitution must contain a provision obliging the government to provide the judiciary with sufficient funds.

Perhaps the best the new constitution can do is to permit the JSC to lay down standards of efficiency to be observed by judicial officers, for example, requiring them to be reasonably diligent, to attend court when required, to work normal business hours, and perhaps to complete their case-loads within a reasonable time. A judicial officer who fails to observe these standards should be liable to disciplinary action and ultimately dismissal.

### **Code of Ethical Conduct**

The Zimbabwean judiciary no longer enjoys the high reputation for integrity it had in the years immediately after Independence. There are good reasons for this. The economy deteriorated from the mid-1990s, eventually making it impossible for judicial officers to manage on their official salaries. This compelled them to engage in other activities such as commercial farming and trading, and made them more open to undue influence. The absence of an official code setting out clear rules of ethical conduct made it more difficult for judicial officers to resolve the serious ethical dilemmas with which they were faced. The new constitution should oblige the JSC to draw up such a code, and should declare breaches of the code to be misbehaviour justifying disciplinary action.

### **Final Considerations**

No matter what fine-sounding provisions are inserted in the new constitution to secure judicial independence, such independence is meaningless if the Executive does not respect the rule of law. Where the Executive can direct the police not to investigate clear offences and not to obey court orders that the Executive does not like, the rule of law does not exist.