



1 September 2021

Mr. Diego García-Sayán  
Special Rapporteur on the Independence of Judges and Lawyers  
United Nations

Dear Special Rapporteur García-Sayán,

### **Re: Concerns Over Judicial Independence in Zimbabwe**

We, the undersigned organisations, write to call your urgent attention to the widespread attacks on judicial independence and growing public mistrust of the judiciary in Zimbabwe. In particular, we are concerned by the recent passage of Constitutional Amendment No. 2, and the executive's growing influence over the judicial branch, which is inconsistent with international and regional standards and risks the integrity of the judicial system while diminishing public confidence. This letter is intended to provide information on the current status of judicial independence in Zimbabwe as well as an overview of key incidents from the past year, emblematic of the disturbing trend of partiality in the judicial system.

Ahead of Zimbabwe's upcoming consideration under the Universal Periodic Review (UPR), we strongly urge your mandate to investigate the situation further and publicly call on the Zimbabwean government to fully respect and guarantee judicial independence in Zimbabwe.

### **Current Status of Judicial Independence in Zimbabwe**

#### *Constitution of Zimbabwe Amendment No. 2*

Concerns over judicial independence are not new to Zimbabwe, but disturbing recent developments under President Mnangagwa's rule have brought renewed attention to the issue. Since 2017, Parliament passed Constitutional Amendment Bill (No.1), intended to eliminate judicial interviews and public scrutiny in the appointment process of senior judicial officials (including the Chief Justice, the Deputy Justice, and the Judge President of the High Court), and give the President full and final authority to appoint members of the judiciary. The Constitutional Court ruled that the passing of the Bill was in violation of the Constitution because Parliament passed the Bill in the Senate without the requisite two-thirds of votes from the House. However, the Court then suspended its order allowing for a new vote. A new vote was eventually taken and the Bill was passed but not procedurally, only after the lapsing of the previous Parliament, and now awaits regazetting four years later.

Shortly following this ruling, in 2019 President Mnangagwa proposed a similar bill, Constitution of Zimbabwe Amendment (No. 2). Pursued under the guise of COVID-19, the amendment vests power solely with the Presidency to promote superior court judges from one court to another, allows for the extension of a judges' tenure beyond the mandatory retirement age subject to Presidential approval, allows for the appointment of the Prosecutor-General by the President and shrouds the process in secrecy, and generally obscures constitutionally protected processes and procedures. As described by the Southern African Development Community Lawyers' Association (SADC LA), the amendment

greatly diminishes the opportunity for qualified candidates outside the judiciary to apply for judicial vacancies, removes public accountability and transparency in the process of appointing judges, and increases the risk of politically-motivated judicial appointments.

On 20 April 2021, Zimbabwe's National Assembly (the Lower Chamber of Parliament) passed the Constitution of Zimbabwe Amendment (No. 2) Bill by a two-thirds majority vote, and on 4 May 2021, the Bill passed through the Senate (the Upper Chamber of Parliament). On 7 May 2021, President Mnangagwa signed the bill into law, establishing the Constitution of Zimbabwe Amendment (No. 2) Act and effectively changing the 2013 Constitution of Zimbabwe. The Act gave the President significant power and control over the judiciary –blurring the boundaries between the two separate branches of government– including by enabling him to extend the tenure of the Chief Justice who was set to reach retirement age later that month, and providing him with “unchecked authority” to fill the seats of the three most senior judges in the country.

The Amendment was almost immediately challenged in Court, with numerous legal challenges still pending, including from the Law Society of Zimbabwe. One application, brought by Zimbabwe Lawyers for Human Rights (ZLHR) and the Young Lawyers Association of Zimbabwe (YLAZ), together with a consolidated application by the Zimbabwe Human Rights NGO Forum, challenged whether the Chief Justice could benefit from the amendment<sup>1</sup>. On 15 May 2021, Zimbabwe's High Court ruled that the extension of tenure of the Chief Justice was unconstitutional, as the constitution prohibits incumbents from benefiting from constitutional amendments providing for term extensions. This decision has since been appealed and is likely to be overturned by the Constitutional Court, whose judges have declined to recuse themselves (a case memorandum is attached as an annexure hereto).

#### *Other Concerns Related to Judicial Independence*

Fixed Term Appointments: Section 186(3) of the 2013 Constitution provides for fixed term appointments, creating an unequal system where judges appointed through the typical system receive tenure, while judges appointed on fixed term contracts have no tenure. This raises concerns of executive manipulation and overreach because it gives the President or any other appointing person the power to limit the tenure of judges they dislike.

Judicial Officers' Rights to Freedom of Expression and Association: The government of Zimbabwe has made attempts to prevent judges and magistrates from expressing their opinions. For example, in 2018 the Judicial Service Commission (JSC), the constitutionally-mandated body whose duty it is to hold the judiciary accountable, found the Chairperson and the Secretary-General of the Magistrate's Association of Zimbabwe guilty of illegally communicating with the press. The JSC has power related to employment, discipline and conditions of service of those employed in the Constitutional Court, Supreme Court, and High Court among others. However, the Magistrates Association was formed as independent from the JSC and provides magistrates with the ability to represent their interests and protect their independence. The JSC's control over the Magistrate's Association violates the organization's right to freedom of association as protected under international and regional law.

Systematic Denial of Bail to Government Critics: There has been a developing trend of a partial judiciary denying bail to opposition party members and others speaking out against the government, while almost always granting bail to those in government and with connections to the Executive. Journalist Hopewell Chin'ono and political activist Jacob Ngarivhume, as well as activists with the opposition party Movement for Democratic Change (MDC) Alliance Joanah Mamombe, Cecelia Chimhiri, and Netsai Marova, were each detained for over 60 days after being denied bail by lower courts. These high profile Human Rights Defender (HRD) cases are being tried by a specialised “Anti-

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<sup>1</sup>M. Paulick, *Zimbabwe government appeals ruling that denied chief justice term extension*, Jurist, 18 May 2021  
<https://www.jurist.org/news/2021/05/zimbabwe-government-appeals-ruling-that-denied-chief-justice-term-extension/>

Corruption Unit” of the Magistrates Court, with the same magistrates systematically delaying proceedings and denying bail. ZLHR’s former chairperson and member lawyer Beatrice Mtetwa—who has been repeatedly subjected to arbitrary arrests and harassment by the state for her tenacious representation of human rights defenders<sup>2</sup>—was also arbitrarily removed<sup>3</sup> from representing Mr. Hopewell Chin’ono, and recommended to be disbarred by a magistrate from the same Anti-Corruption Unit, delaying proceedings and extending Mr Chin’ono’s pre-trial detention period in maximum security prison. Meanwhile, former Health Minister Obadiah Moyo and a top police officer Erasmus Makodza, among others, have been awarded bail immediately. There are also allegations from MDC Alliance activist, Tungamirai Madzokere, that MDC-T officials told him that their leader, Douglas Mwonzora, negotiated with the President for his release from prison as a trade-off for supporting Constitutional Amendment No. 2.

Oversight of Individual Judges: On 16 July 2020, Chief Justice Luke Malaba issued a Practice Directive requiring the superior and special courts to have their judgements “seen” by the Head of Court Division before they handed down their rulings. While the word “approval” was removed from the Directive, the pressure created by this mandate represents a significant blow to judges’ individual independence when making judicial determinations and rulings.

On 17 June 2021, Justice Erica Ndewere was dismissed after a disciplinary tribunal singled her out for alleged misconduct, following her granting of bail on appeal to human rights defender and MDC Alliance Deputy Chairperson Job Sikhala. She accused Chief Justice Malaba of punishing her for refusing to follow his “unlawful” directive to deny bail to both former Labour Minister Priscah Mupfumira and Job Sikhala. She stated, “The allegations [against me] are not only false and malicious, but are calculated to compromise my independence as a judge and gives the second respondent (Chief Justice Malaba) unlawful power to control and direct judges to act upon his instructions as it suits him.” On July 9, she filed an urgent chamber application demanding a copy of the adverse findings after her termination, claiming that she never received any official notice.

Corruption: In February 2020, the Prosecutor-General described how cartels have infiltrated major parts of the government, including the judiciary. Lower courts in particular have the highest perception of corruption, raising significant concerns given their proximity to the public. Despite such perceived corruption, no publicly known investigations or prosecutions against members of the judiciary have been undertaken by the authorities including the Anti-Corruption Commission.

Retaliation Against Those Speaking Out Against Threats to Judicial Independence: In spring 2021, the Law Society of Zimbabwe (LSZ) became the target of online attacks following its submission of an application challenging Constitutional Amendments No. 1 and 2. Following the High Court ruling described above decreeing it unconstitutional for Chief Justice Malaba to continue to work after age 70, the Minister of Justice, Legal and Parliamentary Affairs, Ziyambi Ziyambi (a party in the case) also issued a public statement undermining this ruling, the Courts as a whole, and Zimbabwe Lawyers for Human Rights, claiming “the Judiciary has been captured by certain elements both within and outside Zimbabwe who want to destabilise the second Republic.” LSZ publicly condemned this statement as “unfair, unwarranted,” and threatening judicial independence. Subsequently, in July, the Cabinet approved amendments to the Legal Practitioners Act, enabling Ziyambi Ziyambi to personally approve or disapprove external funding raised by the LSZ - effectively restricting their funding - and increasing the number of Ministerial appointments to their board.

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<sup>2</sup> *Case History: Beatrice Mtetwa*, Frontline Defenders, <https://www.frontlinedefenders.org/en/case/case-history-beatrice-mtetwa>; *Beatrice Mtetwa’s arrest shows all is not well in Zim*, Mail & Guardian, 20 March 2013, <https://mg.co.za/article/2013-03-20-00-beatrice-mtethwa-arrest-shows-all-is-not-well-in-zim/>

<sup>3</sup> *Comment on the call for the prosecution and disqualification of Beatrice Mtetwa in Zimbabwe*, International Bar Association, 3 September 2020, <https://www.ibanet.org/article/341F01C7-30B5-41C1-8A34-D22F89441922>

Separately, on June 25, 2021, pro-democracy activists and students Youngerson Yahwe Matete, Namatai Kwekweza, and Prince Gora appeared at the Harare Magistrates Court after they were arrested in 2020 for trying to turn in a petition against Constitutional Amendment No. 2. They were charged with unlawful gathering, with intent to promote public violence, and their trial continues to be postponed.

### **Violations of International Law**

The actions described above threaten the independence of the judiciary and violate the individual right to a hearing before an independent and impartial tribunal as established in international, regional, and domestic law.

- **Article 14 of the International Covenant on Civil and Political Rights**, to which Zimbabwe is a party, states that, “everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.”
- Similarly, **Article 26 of the African Charter on Human and Peoples’ Rights** requires State Parties to guarantee the independence of the judiciary. General Comment No. 34 interprets the independence of the judiciary under ICCPR Article 14 to refer to, “the procedure and qualifications for the appointment of judges, and guarantees relating to their security of tenure until a mandatory retirement age or the expiry of their term of office...and the actual independence of the judiciary from political interference by the executive branch and legislature.” Further, it states that, “a situation where the functions and competencies of the judiciary and the executive are not clearly distinguishable or where the latter is able to control or direct the former is incompatible with the notion of an independent tribunal.”
- **Zimbabwe’s Constitution** likewise guarantees the right to a fair hearing before an “independent and impartial court” It specifically requires independent courts, stating that “[t]he independence, impartiality and effectiveness of the courts are central to the rule of law and democratic governance, and therefore neither the State nor any institution or agency of the government at any level, and no other person, may interfere with the functioning of the courts.” The Constitution also declares that members of the judiciary “must strive to enhance their independence in order to maintain public confidence in the judicial system,” and that they must make judicial decisions “freely and without interference or undue influence.”

The United Nations Human Rights Council explained in 2020 that an independent and impartial judiciary and the integrity of the judicial system are “prerequisites” for the protection of human rights and the application of the rule of law. Similarly, the African Commission on Human and Peoples’ Rights has noted the vital role of an independent judiciary for “enjoying the confidence of the people and for sustainable democracy and development,” and calls upon African governments to: 1) “repeal all their legislation which are inconsistent with the principles of respect of the independence of the judiciary, especially with regard to the appointment and posting of judges”, 2) “incorporate in their legal systems, universal principles establish the independence of the judiciary, especially with regard to security of tenure,” and 3) to “refrain from taking any action which may threaten directly or indirectly the independence and security of judges and magistrates.”

The recent Constitutional amendments violate these laws and principles by placing the judiciary under the power and influence of the Executive, which is “incompatible with an independent judiciary.” Such amendments that specifically hamper independence through issues related to security of tenure, appointments, and political influence are also in violation of the abovementioned laws, as well as the U.N. Basic Principles on the Independence of the Judiciary providing that “promotion of judges, wherever such a system exists, should be based on objective factors, in particular ability, integrity and experience.” Additionally, the government of Zimbabwe has made attempts to interfere with judicial

decisions, such as the Practice Directive issued by Chief Justice Malaba, which violate both international law and the Zimbabwe Constitution.

Individually, each of these actions are in violation of Zimbabwe's obligations under international law. Together, they represent a dangerous threat to the administration of justice and human rights in Zimbabwe.

### **Looking Ahead**

In light of the aforementioned developments and the concerning deterioration of the independence of the judiciary in Zimbabwe, we respectfully urge your mandates to publicly intervene and urge the government of Zimbabwe to repeal Constitutional Amendment No. 2 and other legislation which is inconsistent with the principle of an independent judiciary. We are on hand to provide additional information and support as required.

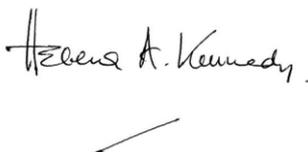
Yours sincerely,



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