

Article

The Merits of the Proposed Constitutional Changes in South Africa

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Since it was passed in 1996, the Constitution of South Africa has been amended on several occasions. However, this time around there is mounting resistance against its reform. The proposals tabled by the Department of Justice and Constitutional Development relates to these aspects:

- The authority of constitutional court will be increased with a corresponding decrease in the authority of the Supreme court of Appeal
- The president will appoint the judges president and the deputy judges president of the various divisions of the High Court
- No court will be entitled to make an order suspending the commencement of an act of parliament or of a provincial council¹

In an endeavour to determine the merits of these proposed changes, one would need to ask:

- Are the proposed constitutional changes necessary and justifiable?
- Do the alterations poses any threat to our democracy and the independence of our judiciary system in South African

The proposed amendments should be seen as undesirable as they may violate the basic foundation of the constitution. They are unacceptable to the judiciary. It is quite glaring that there are no good grounds or plausible merits whatsoever for the proposed amendments. There are however, very good grounds for its rejection. We can not afford to compromise the integrity of the constitution. The constitution guarantees independent courts, the rights of the people of South Africa and sets the direction of our democracy. Section 165 of the Constitution denotes that:

- The courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice.
- No person or organ of the state may interfere with the functioning of the courts
- Organs of state, through legislative and other measures, must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts²

The objectivity of the judiciary shall never be tempered with for it aspires to pledge and protect the rights of the citizens against any direct or indirect violation either by the state, group of people or individuals. The judiciary shall be empowered to carry out this task without any fear, bias or intimidation.

The reform of the two judiciary bills raised much controversy. The International Bar Association vehemently rebuffed the proposal and advised the government to revisit the drafts. It warned that, should the Superior Court Bill and the Constitution 14th Amendment Bill be endorsed by parliament, they invariable will sabotage and interfere with the independence of the judiciary. Consequently the functioning of the courts will be susceptible to manipulation by the state.

The rejection of the draft laws relates exclusively to the institutional independence of the judiciary and the separation of powers. Justice Robert Nugent, a member of the Supreme Court of Appeal in Bloemfontein, reiterates that 'the current controversy is about maintaining a separation between the courts and the influence of state power'³.

Similarly, should the Bills be passed as they stand now, it will eventually dispossess the courts of the autonomy and responsibility they ought to undertake over crucial administrative and budgetary matters. The amendment of the Bills is sought to accord the minister supreme control

¹ Mr Justice Robert Nugent. The judiciary, the courts and the Constitution: Why so much controversy? Fast Facts publication, no 6/2006/June 2006

² The constitution of the Republic of South Africa, 1996, chapter 8

³ Quotation taken from the Fast Facts publication, No 6/2006/June 2006

and authority over the appointment of acting judges on the constitutional court. This is perceived, across the legal frontiers and academia, as a gross interference with the administration of the court. The General Council of the Bar of South Africa has made detailed submissions to the National Assembly's Justice Committee on the Superior Courts Bill and the Constitutional Fourteenth Amendment Bill. Several other academics and legal gurus, including the human rights lawyer George Bizos, had presented their opinions to the controversial protest over the government driven exercise to reform the judiciary. They are all convinced that the draft bills are nothing but a blatant move to dent the autonomy of the judiciary and will inevitably make inroads into the separation of power doctrine. Bizos reiterated that the 'independence of the judiciary is an absolutely vital principle enshrined in the constitutional principles'⁴. It should be noted that if the Bills should be enacted they will not only undermine the functioning of the judiciary, but also that of the entire democratic order and its institutions. All democrats should vociferously oppose the proposed amendments, added Bozos. The ministry of justice has consistently rejected the outcry.

As civil society organizations it is crucial to take a centre stage role in ensuring that the constitution of this country is not manipulated for selfish gains or myopic reasons. We ought to ensure that the democracy of this country is safeguarded and protected. The basic tenets of the constitutions shall be sheltered and preserved for the maturing of South Africa's democratic order. This future is intrinsically linked to a constitution that is well defended and all bodies of the state shall be accountable to it.

The intervention by President Thabo Mbeki to suspend the Bills has been applauded and considered as a crucial move to ensuring that proper consultation is done. There is indeed a need to revisit the drafts and invite all relevant stakeholders on board to air their views and eventually to draft the way forward on this matter. Any constitutional changes should:

- Guarantee the legitimacy of the judiciary system,
- Be appropriate for our newly democratic order,
- Create a harmonious atmosphere across the legal and political arenas

The people of South Africa do not desire for any divisive amendments in the constitution. If changes are inevitable they shall be acceptable and admissible to all role players. Most importantly, amendments must ascertain the independence and impartiality of courts so that they are fully accountable to the constitution.

⁴ Quotation taken from the Mail & Guardian 24 February to 2 March 2006.