YOUNG LAWYERS ASSOCIATION OF ZIMBABWE JOURNAL

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INTERIM EDITOR

Evidence James – University of Cape Town

Introduction

Young Lawyers Association of Zimbabwe (YLAZ) has recently seen a rapid increase in its membership base and audience. This growth is greatly attributable to the growing active involvement by YLAZ in matters of public concern (for example, through the filing of the recent High Court Application on the unconstitutional extension of tenure of the Chief Justice, which was successful). YLAZ continues to engage and collaborate with other related institutions to promote the interests of its members and those of the public, to ensure respect for the rule of law, respect for human rights and by raising public awareness on many areas of the law and the Constitution of our great nation. To this end, it becomes critical that we grow a culture of scholarship amongst our members, to allow the expression of ideas on the interpretation of the law, law reform, critique of case law, exploring the interdisciplinarity of the law and to bridge the gap between the law and the ordinary legal subject.

This Issue, composed of short piece articles, is the first of its kind for YLAZ. It is an effort towards the establishment of a Journal for the Association where full-length Journal Articles will be published regularly. We hope that this initiative will provide a platform to the many legal scholars amongst our members and that it will endure the test of time, building a timeless scholarship legacy. Further particulars in respect of the Journal shall be availed to members in due course. This will include a call for volunteer Reviewers and Editors and appeals for sponsorship to sustain the Journal. Our gratitude goes out to colleagues who contributed articles published in this Issue as trailblazers for YLAZJ. Enjoy the reading and find ignition to come on board for future publications.

Thank you.

E. James
Interim Editor

A Word from the Chair

When the Young Lawyers Association was set up in 2019, one of its objectives – as set out in our Constitution – was:

> "*To promote training and maintenance of high standards in the practice of the law among young members of the legal profession*".

One of the ways in which the above objective can be fulfilled, I believe, is through the promotion of legal research and by encouraging discussion on existing laws and legal reform. It is not enough for a young lawyer to simply know how to do something, they must also develop critical analysis skills if they are to succeed.

This is our first issue, which has been put together primarily by one of our members – Evidence James – whose hard work is reflected not only in the fact that he edited the articles received, but also wrote one himself! It will not be perfect, but it is a start, and we can only go up from here.

I am pleased to note that the articles contained within this first Issue, not only interrogate our laws from a national and international perspective but are also rooted in a desire to see human rights and rule of law upheld. I am also encouraged by the number of articles written by law students – who will (hopefully) become future members of our Association. I encourage all law students and members of our Association to respond to the next call for articles or to join the editorial team to assist in the publication of the next Issue.

To our members – continue to read, argue, and interrogate the law, but also open your minds to the world around you – and write about it! As Sir Walter Scott once said:

> "A lawyer without history or literature is a mechanic, a mere working mason; if he possesses some knowledge of these, he may venture to call himself an architect."

Happy reading!

Emma Drury
Chairperson of the Young Lawyers Association of Zimbabwe

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The International & Domestic Law Protections of Minority Groups against Forced Evictions: Reflecting on the Chilonga Eviction Case in Zimbabwe - "It is not over yet".

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"Forced eviction" refers to the removal of individuals, families and/or communities, permanently or temporarily, against their will from the homes or land they occupy, without the provision of, and access to, appropriate forms of legal or other protection such as alternative housing, schools, sanitation, and health facilities[1].

On 26 February 2021, the Minister of Local Government, Urban and Rural Development, July Moyo, caused the publication of a legal notice (**Communal Lands (Setting Aside of Land) (Chiredzi) Notice, Statutory Instrument 50 of 2021**) ordering thousands of people on 12,940 hectares of Chilonga Communal Land in Chiredzi to "*depart permanently with all of his or her property from the said land by the date of publication of [the] notice, unless he or she acquires rights of use or occupation to the said land in terms of section (9)(1) of the Communal Land Act [Chapter 20:04]*". The land clearing was meant to pave way for the planting of lucerne grass by Dendairy, the second-largest dairy producer in Zimbabwe.

The Chilonga people who resided in the prescribed location, were strongly opposed to the attempted evictions that was to be effected in the execution of the Statutory Instrument (SI). The Government did not provide reasonable notice for relocation, nor did they disclose any plans to pay compensation, or to provide alternative land with infrastructure such as schools, clinics, hospitals, and roads.

This was not the first time that such an action had been taken by Government. Human Rights Watch established that between 2012 and 2014 approximately 20,000 people were displaced from the Tokwe-Mukosi dam basin and relocated to Chingwizi, without consultation or compensation. Thousands of people forcibly moved to the Chingwizi camp were left destitute, relying on food from international aid agencies.

The Chilonga Community is dominated by the Shangaan people who have lived in the area since the 1830s. On 5 March 2021, the Chilonga Community filed two urgent High Court applications in Masvingo seeking to have **SI 50** be declared unconstitutional and invalid.

Due to public outcry and the pressure resulting from litigation, Government initially amended **S1 50 of 2021** through **SI 63A of 2021** and later repealed **SI 50 of 2021**, replacing it with **SI 72A of 2021**. However, the threat of eviction is not over yet as SI 72A of 2021 now seeks to establish an irrigation

[1] As set out by the United Nations Human Rights Office of the High Commissioner

scheme with consequences that evictions may continue.

The eviction attempts on Chilonga people are reminiscent of the state-wide campaign of organized, systematic, and violent eviction of the Rohingya people by the Myanmar government beginning in August 2017. In the African context, the threat of eviction of the Chilonga people echoes the deprivation of the Ogiek community ownership and use of their ancestral land over which they depend on "for their social, economic and cultural existence in the Mau Forest Complex and forced evictions by the Kenyan government. The African Court on Human and Peoples' Rights ruled in favour of the Ogiek in *African Commission on Human and Peoples' Rights v. Republic of Kenya,* ACtHPR, Application No. 006/2012 (2017).

In *Ben Djazia and Bellili v. Spain* (E/C.12/61/D/5/2015)the Committee on Economic, Social and Cultural Rights underlined "the obligation of State Parties to provide, to the maximum of their available resources, alternative accommodation for evicted persons who need it includes the protection of the family unit, especially when the persons are responsible for the care and education of dependent children" (para. 15.4).

Domestically, the intended evictions violate provisions of **the Constitution of Zimbabwe, 2013**, including the national objectives on children – **Section 19** and elders – **Section 21**. In the **Chapter 4 (Declaration of Rights)**, the evictions contravene the rights set out in **Section 51 (Dignity)**, **Section 52 (personal security)**, **Section 53 (Cruel and Inhuman Treatment)**, Section 56 (Equality) an**d Non-discrimination), Section 80 (Rights of Women)**, **Section 81 (Children`s Rights)** and possibly **Section 83 (Rights of People with Disabilities)**.

Regionally, the rights of the Chilonga People are protected by the **African Charter on Human and Peoples' Rights**, and the intended evictions may contravene **Article 2** - freedom from discrimination, Article **14** - the right to property**, Article 17(2) and (3)** - the right to culture, **Article 22**- the right to development, and Article 1 – the provision which obliges all Member States in Africa to uphold the rights guaranteed by the Charter.

Internationally, the intended evictions violate the obligation of States to refrain from, and protect against, forced evictions from home(s) as provided by the **Universal Declaration of Human Rights**, the **International Covenant on Economic, Social and Cultural Right**s (art. 11, para. 1), **the International Covenant on Civil and Political Rights** (art. 17, 23 and 27) **the Convention on the Rights of the Child** (art. 27, para. 3), and the **Convention on the Elimination of All Forms of Discrimination against Women** (art 14, para 2 (h)).

Reforming land tenure is the solution

A sustainable solution to preventing forced evictions at the instance of the State is to align the **Communal Lands Act [Chapter 21: 05]** with the Constitution to give Zimbabweans in rural areas title over land occupied by them. In the short term, Government must consult, compensate and/or provide alternative land and housing before evicting families and communities in line with supreme law of Zimbabwe and international law.

The Advent of Cyber Law in Zimbabwe: A Survey of Cybercrimes

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Cybercrime is generally defined as a computer-related crime. It is any illegal conduct directed by means of electronic operations that targets the security of computer systems and any data processed by them.[2] Cybercrimes fall within the cyber law realm which is a relatively new area of law, particularly in Zimbabwe.

Cyber law has emerged out of the advancements of technology among other socio-economic developments. The rate at which people are exposed to risk of attacks, direct or indirect, through the internet and technology is ever increasing. The more that people access cyberspace and actively engage or indulge in activities through the use of the internet and technology, the more vulnerable they are to cyber-attacks.

As a developing country, Zimbabwe does not rank high in terms of technological advancement. Individuals and organizations within the country, however, still find themselves exposed to cyber-attacks. Cybercrime usually manifests in the form of scams, cloning, hacking, and phishing. The most common cybercrimes in Zimbabwe of late have been social media hacking (such as hacking an individual's Facebook or WhatsApp account) and debit or credit card cloning. As a result of cloning and hacking, many have lost their hard-earned money and their private information is exposed. However, there is usually little to no legal recourse to the aggrieved parties in the current legal framework.

The major challenge with cybercrime is that there is no physical being or scene to attach to the crime. A criminal can easily hack into an innocent person's account for the sake of committing a crime. In such circumstances, the trace will not lead to the actual perpetrator but to another victim of cybercrime.

Cybercrime is not limited by space or distance. It can be committed from anywhere in the world by anyone. There are usually no conclusive traces to be followed for investigations to be efficiently and promptly carried out, no identified natural person, no physical address. The identity of the perpetrator is always hidden behind the web. These limitations make it almost difficult to bring perpetrators to justice.

Worse still there is no law in Zimbabwe that specifically speaks to issues to do with cybercrime. Cybercrime is an invasion of the

[2]M Gercke *Understanding Cybercrime, Phenomenon, Challenges and Legal Response* (2012) 19.

right to privacy[3] and personal security[4]. It is a highly organized crime with devastating and sometimes irreversible consequences.

The rapid spread of cybercrime does not correlate to the development of the cyber law targeting cybercrime in Zimbabwe The Law Development Commission of Zimbabwe in collaboration with the Ministry of Justice, Legal and Parliamentary Affairs and the Ministry of Information Communication Technology, Postal and Courier Services embarked on a programme meant to introduce new forms of admissible electronic evidence to deal with the potential challenges that may arise in trying to prosecute and investigate cybercrimes as a result of the rapid sophistication of cybercrime.[5] Three bills have been drafted in this regard.

The **Computer Crime and Cybercrime Bill** criminalizes various cyberspace activities and other traditional crimes committed using computers and the internet. The **Data Protection Bill** regulates the processing of data by private and public bodies and protects the rights of data subjects. The **Electronic Commerce and Electronic Transactions Bill** provides regulation, legal certainty, and enforceability in respect of electronic transactions[6].

The Bills, when eventually passed into law, have the potential to curb the challenges of cybercrime. Currently, cybercrime under Zimbabwean law is covered in the Criminal Law Codification and Reform Act[7] in an abstract and very narrow sense. It is hoped that once these Bills become law they will help in the control of cybercrime and in bringing the perpetrators to justice.

[3] See section 57(a), (d) of the Constitution of Zimbabwe Amendment (No.20) Act, 2013.
[4] See Section 52(a) of the Constitution of Zimbabwe, 2013.
[5]Law Development Commission, Position Paper (2016) page 2
[6] Law Development Commission Position Paper, page 2.
[7]Section 162- 168 of the Criminal Law Codification and Reform Act [Chapter 9:23].

Corporates Violating Human Rights in Africa – Chilonga and Dinde Case Studies: Assessing Policy Response Options.

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The global shift of momentum towards sustainable development demands more diligent business practices. Instead, most corporates are palpably involved in human rights abuses instead of spearheading sustainable development without profiteering. The significance of the corporate world to the global economy and efforts to eradicate poverty, especially in developing countries, cannot be overstated. However, the burden of human rights violations is becoming heavier in the global south, particularly in the extractive and agricultural industries. This article highlights a few cases of human rights violations by corporates in Zimbabwe.

Numerous communities in Zimbabwe are facing the consequences of corporate impunity. Civil society has called Chinese investors out for abusing locals working in Chinese mines and has petitioned for the investigation of human rights violations in these mines[8]. There are reports of locals being tortured, being exposed to unfavourable working conditions, and facing abuse for demanding protection of their rights.

Currently, there are two unfolding cases of corporate activities related to chaotic displacements in Zimbabwe, in Chiredzi (Chilonga) and Dinde. The Government issued (**Communal Lands (Setting Aside of Land) (Chiredzi) Notice, Statutory Instrument 50 of 2021** which sought to evict the Chilonga people from their land, in order to make way for Dendairy`s Lucerne grass project. The Government, after being taken to court, amended and later repealed **SI 50 of 2021**. However, Chilonga remains of interest with irrigation scheme prospects.

The Dinde community is also at the brink of displacement to make way for the proposed Chinese Beifer Investments coal-mining project[9]. In addition to possible displacement, the looming threats to the livelihoods of the people in the Dinde area include negative environmental impacts, such as land degradation and pollution of water sources.

Both cases have been criticized for the government`s failure to take proper measures in engaging and compensating the communities, and in so doing has violated local and international provisions, including **Section 74 of the Constitution of Zimbabwe, 2013**, which provides for freedom from arbitrary eviction.

The Cause

Inequalities of bargaining power, weak institutions and lack of accountability measures, and state capture have resulted in

[8] See for example, the Zimbabwe Environmental Law Association (http://www.zela.org/human-rights-obligations-of-chinese-investors-in-zimbabwe-a-focus-on-the-mining-sector/)

[9] See https://www.cnrgzim.org/dinde-community-fights-to-stop-coal-mining-project/.

agreements between African States and large corporations, without taking into consideration human rights implications, which leads to a feeling of impunity on the part of the corporate entities.

This is not only a Zimbabwean problem, but once experience across Africa. In January 2021, in the case of *Milieudefensie et al v Royal Dutch Shell*[10], a District Court in the Hague ordered Shell to compensate for harm done to Nigerian farmers due to oil spills. It was thereafter held by the United Kingdom Supreme Court in February 2021 in the case of *Okpabi v Royal Dutch Shell PLC and Anther*[11], that Shell could face lawsuits in the courts of the United Kingdom for violations by its Nigerian subsidiaries. However, this is just one of the numerous lawsuits filed against Shell dating back to the late 90`s Wiwa family lawsuits.

The United Nations declared 2021 as the International Year for the Elimination of Child Labor, intending to end all forms of child labour by 2025. However, in Western African cocoa farms, child labour has remained a concern, particularly in Ghana and Ivory Coast. In February 2021, former child workers from Ivory Coast filed a claim[12] in the United States against Nestle, Mars and Hershey, the leading chocolate manufacturers, for child trafficking and child slavery. The litigation is still pending.

A reflection on the cases referred to above gives hope that the outcomes will set a precedent whereby African States are afforded the opportunity to sue for human rights abuses against large multinational companies in foreign jurisdictions. This precedent offsets the futile litigation in African courts (as seen in the *Wiwa* cases against Shell[13], where it was found among other factors determining jurisdiction, that Nigerian courts had no effective remedies for the plaintiffs' claims resulting in the US court assuming jurisdiction).

Global policy response

The policy is still developing, with the current discussion on the Treaty on Business and Human Rights (BHR) at the international level. Presently, BHR issues are regulated by the **United Nations Guidelines on Business and Human Rights**. However, these guidelines are non-binding, and can therefore be ineffective. The UN has urged countries to adopt National Action Plans (NAPs) on BHR.

Despite the urgency, not many African countries have developed these NAPs. Africa, however, remains attractive to many corporates both local and transnational due to its wealth of resources. As such, binding guidelines specifically regulating BHR are a need, not only at the international level but regionally and nationally to curb violations before, during and after any business operations, in addition, providing victims with effective remedies.

[10] ECLI:NL:RBDHA:2021:5337

[11] [2021] UKSC 3

[12] *Issouf Coubaly and 7 Ors v Nestle USA and 7 Ors – Case 1:21-cv-00386* – Filed in the United States District Court for the District of Columbia.

[13] *Wiwa v. Royal Dutch Petroleum, Wiwa v. Anderson, and Wiwa v. Shell Petroleum Development Company* - Case 1:04-cv-02665-KMW-HBP

The Uncertainty with Internal Labour Appeals: Reviewing SI 15 of 2006.

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Legal certainty is a fundamental element of the principle of legality. Within the context of labour law in Zimbabwe, any legal uncertainty may prejudice an employer, or infringe on the Constitutional rights of an employee involved in a labour dispute. However, legal uncertainty remains an issue, particularly in our labour law. This article examines legal certainty issues relating to internal labour appeals and provides recommendations for law reform.

The objective of the **Labour (National Employment Code of Conduct) Regulations**, **Statutory Instrument 15 of 2006** ('the Code') is to provide clear machinery and procedure for internal disciplinary action that can be taken against employees charged with misconduct.

Section 6 of the Code provides for the initial disciplinary procedure, while **Section 8** sets out the procedure for internal appeals.

Section 8(1) of the Code reads as follows: "*Depending on the size and circumstances of an establishment, an employer may appoint a person in his or her employment as an Appeals officer or with the agreement of his or her employees or workers' representatives and Appeals Committee to preside over and decide an appeal*."

Several issues arise for a disgruntled employee who wishes to appeal the outcome of his or her disciplinary hearing. Firstly, it is unclear whether an Appeals Officer or an Appeals Committee should be in perpetual existence or should be constituted on an *ad hoc* basis. If an employer does not have an Appeals officer or committee, a disgruntled employee does not have a clear path forward. Would the employee need to request that the employer to appoint an officer or set up a committee or should the employer be required to do so automatically after a hearing?

An aggrieved employee also faces further stumbling blocks. The provision in **Section 8(1)** is clearly discretionary and dependent on the size and circumstances of the employer. The use of the word "may " in **Section 8(1)** gives the employer the ability to refuse to appoint an Appeals officer or committee. In the case of *Air Duct Fabricators (Pvt) Ltd v A.M. Machado & Sons (Pvt) Ltd* [2016] ZWHHC 54, Chigumba J noted that "*when the legislature uses the word "may" in statute… the intention is to confer the power only, without a duty to exercise it*". Such a proviso in the construction of the law leaves the employee stranded in cases where an employer refuses to cooperate, which is a great possibility due to the conflict nature of the proceedings.

It was previously believed that the appeal in terms of Section 8, where no internal system existed, should be handled by a labour officer. However, in the recent case *Makumire v Minister, Public Service, Labour and Local Welfare* [2020] ZWCC 01, the Constitutional Court considered a matter wherein a labour officer declined jurisdiction to hear an appeal as it had been referred to him from the Disciplinary Authority and not

an appeals officer or committee as envisioned in **Section 8(6) of the Code**. The Labour officer advised the Applicant to appeal to the Labour Court in terms of **Section 92D of the Labour Act [Chapter 28:01]**. The Labour Court subsequently refused to hear the matter as the Appellant had failed to exhaust internal remedies. The facts of the case give light to the chaos caused by the lack of clarity provided by section 8 and still, no clear path exists for the employee. In the Constitutional Court case, the Court had been asked to confirm a finding that Section 93(5a) of the Labour Act was unconsituttional. It declined to do so on based on the specific facts of that matter.

The Supreme Court, in the case of *Sakarombe and Anor v Montana Carswell Meats (Pvt) Ltd*[14] had also held that no right of appeal from an internal disciplinary hearing lay to a labour office in terms of **Section 93(5) of the Labour Act**. It is not clear what the effect of that finding will be on the numerous cases dealt with by labour officers following appeals noted under the provisions of the Code.

This legal uncertainty inherent in **Section 8 of the Code** is problematic considering that labour matters require both the exhaustion of internal remedies before appealing to the courts and further, strict time bars leave little room for error when a party decides to appeal. It is not the duty of the Courts to rectify this defect in the law, rather, the legislature must revisit the provisions of Section 8 to bring about legal certainty.

In order to bring clarity to the issue, **Section 8(1)** should provide specificity as to when an internal Appeals structure should be set up. This can be based on the number of employees engaged by the employer.

Secondly, a provision must be added stating, "Where no Appeals officer or Appeals Committee exists in terms of Section 8(1), or where a person or party who is aggrieved by a decision or manner in which an appeal is handled by his or her employer or an Appeals Authority as the case may be, shall refer the matter to the Labour Court, within seven working days or receipt of such decision" in order to bring effect to the findings in the *Sakarombe v Montana Meats* matter.

[14] [2020] ZWSC 44

The Chilonga Eviction Scandal – A Violation of the Right to Administrative Justice: Reflecting on the Administrative Justice Act and the 2013 Constitution.

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On the 26th of February 2021 and 10th of March 2021, the Government of Zimbabwe issued two Statutory Instruments namely**, SI 50 of 2021** and **SI 163A of 2021**, respectively. The SIs ordered the people occupying the Chilonga Communal lands to depart the area permanently on the day of publication of the SIs. These SIs contravened **Section 68 of the Constitution of Zimbabwe Amendment (No.20) Act, 2013**, which provides that "*every person has a right to administrative conduct that is…substantively fair*", in that the government did not give the Chilonga people reasonable notice of the eviction. The Government later repealed the SIs. It must be noted that both SIs were not only in violation of **Section 68 of the Constitution of Zimbabwe, 2013** but also of **Section 3(1)(a) of the Administrative Justice Act [Chapter 10:28]** (AJA).

It must be noted that the issuance of SIs (which are a form of delegated legislation) amounted an administrative action and as such they must have complied **with Section 68 of the Constitution** by being procedurally and substantively fair. **Section 332 of the Constitution** defines an administrative action as "*any decision of a person performing a function of a public nature, and a failure or refusal of such a person to reach such a decision or to perform such an act*".

Section 2(1)(c) of AJA provides that administrative action is "*any action taken or decision made by a Minister or Deputy Minister of the State*". The AJA, in paragraph 1 of the first part of its Schedule, excludes executive functions of the Cabinet as an administrative action. However, *Du Plessis (*in *Du Plessis LM ``Interpretation of Statutes and the Constitution'' Bill of Rights Compendium (1998), 19*), argues that broadly speaking, the enactment of SI can be seen as an administrative action.

Government's order that the Chilonga people depart their land of more than four centuries on the day of publication of the SI was substantially unfair, especially considering that no alternative place of abode was provided. **Section 3(1)(a) of AJA** provides that administrative action must be lawful, reasonable, and fair. Unlike South Africa's **Promotion of Administrative Justice Act 3 of 2000**, AJA does not set out whether fairness must be procedural or substantive or both. This gap, however, is filled by **Section 68 of the Constitution** which provides that administrative action must be both substantively and procedurally fair. In being fair, the SIs should have, in respect of **Section 2 of AJA**, given the Chilonga people adequate notice of the nature of the action they intended to take, and thereafter allowed them to make representations.

The court in *Zinyemba v Minister, Lands & Rural Settlement & Another* (CCZ 3/2016 CCZ 123/13) [2016] ZWCC 03 stated that, since **Section 68** is broadly modelled on basis of **Section 33(1) of the Constitution of the Republic of South Africa, 1996**, it is important that South Africa's jurisprudence be applied. In being fair also, as pointed out

by Sachs, J, in the case of *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC), evictions done without considering all relevant circumstances must be abhorred. Some circumstances that need to be taken into consideration are the rights and needs of children, the elderly and the disabled members of the communities targeted by evictions. None of these were considered by the Government in dealing with the Chilonga people.

Therefore, the government, by ordering evictions without any consideration of the needs of the vulnerable members of the Chilonga people and the apparent lack of reasonable notice, acted arbitrarily and in violation of the highest law in the land.

This scandal has brought to bear the lacunae in the current AJA. Such a disparity creates confusion thus must be abhorred. Geoff Feltoe (in *G. Feltoe 'Aligning the Administrative Justice Act with the Constitution'* (2019) has lamented that AJA is not a reflection of the provisions in the Constitution in that **Section (3)(1)(a) of AJA** emits words which are encapsulated in the Constitution such as 'prompt', 'efficient', 'proportionate', 'impartial' and 'substantively' and called for the inclusion of such words in the Act.

The outrage brought about by the Chilonga case should push Government to speed up the alignment of AJA with the Constitution. The Constitution must always be supreme, and any Act must be consistent with it as per **Section 2**. AJA must, in terms of **Section 68(3)** of the Constitution, give effect to the rights contained in the Constitution.

The Patriotic Bill: Is it the final nail to the coffin of democracy in Zimbabwe? Interrogating the Intention, Philosophy, and Construction of the Bill.

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"*Authority without wisdom is like a heavy axe without an edge, fitter to bruise than polish*" - Anne Bradsett

The above quote is descriptive of the Zimbabwean political landscape where men with power abuse it to the detriment of the Zimbabwean populace, signifying an era of decay. The Patriotic Bill currently under debate is a case in point, flawed in philosophy, intention, and construction.

In March of 2021, the now late Honorable Mpofu, moved the motion for the enactment of a law which "*prohibits any Zimbabwean citizen from willfully communicating messages intended to harm the image and reputation of the country on international platforms or engaging with foreign countries with the intention of communicating messages intended to harm the country's positive image and/or to undermine its integrity and reputation*".

The motion was directly birthed out of the Zim Lives Matter movement that trended from mid-year of 2020. At face value, the purpose of the proposed enactment seems noble, as other jurisdictions such as the U.S and Egypt have related counter-terrorism legislation. Considering the September 11 attacks, the government of the United States enacted the U.S.A Patriotic Act of 2001, to uproot any acts of domestic terrorism before they even materialize. The Act conferred extensive powers to various entities responsible for state security to increase surveillance and monitor communications of citizens. This was out of necessity as the government was exercising its mandate to provide state security and not as an act of declaration of war against outspoken citizens who criticize poor governance. In the present case, the timing and the wording of the proposed Bill is beyond doubt the cementing of the iron fist rule of the current administration.

First, the proposed Bill, both in its draft state and any revision that may be – due to the complex dimensions of the subject matter (patriotism) intended for legislative prescription, does not comply with the principles of legality. This Bill fails to comply with the *ius certum* principle, which requires that crimes be formulated clearly. The wording in the proposal is "void-for-vagueness" which renders it difficult for courts to classify what exactly is the punishable act in question. The purpose of any law is to regulate human behavior and if the law is unclear on what acts are unlawful then the legislature would have failed in delivering its mandate, and citizens become victims of injustice.

The first problematic word used in the Bill is "willfully". It means that there must be intention on the part of the accused to know and will an unlawful act. If one sends a message to a friend or relative on WhatsApp or Facebook, how can one foresee what

words “harm” the country’s reputation to the extent that the element of willfulness will be proven? If the Bill is passed with such obscurity, there is a real risk that citizens can be targeted for freedom of speech, the right to freedom of conscience and the right to the privacy of communications which are constitutionally embedded rights alluded to in the preamble as well as **Section 61 (1)(d)**, **Section 60 (1)(b)** as well as **Section 57 (d)** respectively of the **Constitution of Zimbabwe Amendment (No.20) Act, 2013**.

Secondly, another controversial word that appears in the Bill forming the core definitional element of the supposed crime is the word “harm”. What exactly constitutes harm? Can a tweet that says Zimbabweans are hungry constitute “harm” to the image of the country? Can a video be showing the dilapidated state of our health care system is classified as “harm”? Does pointing out a gross violation of human rights not constitute patriotism? Can such conduct be said to be unpatriotic? Can we legislate patriotism? These are questions which the proposed Bill fails to consider in its apparent aim to oppress the citizenry who seek to hold the government to account as contemplated by the democratic Constitution of the country.

If there is no clear scope of what constitutes “harm” then the Bill is flawed as it will be unclear as to what conduct is punishable.

Thirdly, an issue of concern is the definition of "country". Given past actions taken by Government against “activists”, the Bill may tread a fine line with great potential of the term “country” being confused for a particular political party or view point. **Section 3(2) (a)** read together with **Section 67(4) of the Constitution** allows for a multi-party state and this is at odds with the thinking that any party should be considered to be synonymous with Zimbabwe.

In short, this could imply that any form of criticism against political parties, such as a tweet saying: “Zanu-PF must go”, which is not specifically a criticism to the country, may be seen as an act of campaigning against the country. That on its own is detrimental to the State as it not only promotes politicking over democracy and offends the founding values of the Constitution.

The Constitution contemplated the imperative of checks and balances from the citizenry hence the right to vote, the freedom of speech, freedom of the media and freedom of conscience. Should this Bill succeed it may result in irreparable damage to our constitutional democracy and the future of generations to come.

Therefore, the Patriotic Bill must not be approved and passed into law, until such time that provisions can be made in future after wide public debate and out of national interests, rather than partisan interest as is the case now.

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