

CONSTITUTION OF ZIMBABWE AMENDMENT (NO. 17) BILL, 2005 (HB , 2005)

REPRESENTATIONS MADE BY THE ZIMBABWE HUMAN RIGHTS NGO FORUM TO THE PORTFOLIO COMMITTEE ON JUSTICE, LEGAL AND PARLIAMENTARY AFFAIRS

INTRODUCTION

The Zimbabwe Human Rights NGO Forum is a coalition of Zimbabwean human-rights organisations. It is particularly concerned with providing assistance to victims of organised violence and torture, but its activities extend to upholding all aspects of human rights as set out in the international conventions to which Zimbabwe is a party.

Because it is a human-rights organisation, the Forum will confine its comments to those provisions of the Constitution of Zimbabwe Amendment (No. 17) Bill which are likely to affect those rights. The political and economic implications of the Bill, important though they are, will not be dealt with in this document, therefore, except peripherally.

THE BILL'S MEMORANDUM

Before dealing with the individual provisions of the Bill, the Forum feels it necessary to comment on the Bill's memorandum. The purpose of such a memorandum is to explain the various clauses of the Bill in clear and objective terms so that Members of Parliament and the public, after reading the memorandum, understand the effect of the Bill and can assess its implications. With that understanding, interested members of the public are able to lobby their Members of Parliament, and Members of Parliament are sufficiently well informed to debate the Bill adequately when it is presented in the House.

The memorandum of this Bill is woefully inadequate. It dismisses clause 2 of the Bill, which will allow land to be expropriated by notice in the *Gazette*, with the words:

“A new provision will confirm the acquisition of land for resettlement purposes which took place pursuant to the Land Reform Programme beginning in 2000, and provide for the acquisition in the future of agricultural land for resettlement and other purposes.”

In regard to the composition of the new House of Assembly, it suggests that the number of presidential appointees will be reduced from the current 12 to 10. In fact there will be no such reduction. The memorandum goes on to say that clause 1 of the Bill sets out dates of commencement of the Bill's provisions. The clause does no such thing. In regard to clause 3, which will seriously restrict freedom of movement, the memorandum does not state what the restrictions will be but simply gives a specious example of “the type of mischief that may justify the imposition of [such]

restrictions” (the reason why the example is specious will be explained later). Clause 20 of the Bill, which will disenfranchise large numbers of people, is not mentioned at all.

In short, the memorandum is skimpy and inaccurate, if not downright misleading.

The Forum respectfully urges the Portfolio Committee to make strong representations to the responsible Ministry to ensure that such a memorandum is never produced again.

CLAUSE 2 OF THE BILL

This clause will insert a new section 16B into the Constitution, the effect of which will be as follows:

- certain specified pieces of agricultural land that were Gazetted for acquisition for resettlement purposes before 8 July 2005 will vest in the State (i.e. will pass into the State’s ownership) when the Bill becomes law;¹
- any agricultural land Gazetted for acquisition for resettlement purposes between 8 July 2005 and the date of commencement of the Bill will similarly vest in the State when the Bill becomes law;²
- any agricultural land which may be Gazetted in the future as being needed for any purpose at all, whether public or private, will vest in the State 30 days after the Gazette notice;³
- no compensation will be payable for any such land, except for improvements;⁴
- landowners whose land has been Gazetted will not be allowed access to a court to challenge the State’s right to take their land, nor will anyone else who has a right or interest in the land. Their only redress will be to challenge the amount of compensation payable for improvements, and that compensation will be regulated by the provisions of the appropriate law in force when the Bill comes into force as an Act;⁵
- it will be possible for an Act of Parliament to make it a criminal offence for anyone to possess or occupy land that has been Gazetted for acquisition, or any land that is vested in the State.⁶

The new section is appalling in its wide reach and arbitrary nature.

There is no applicable definition of “agricultural land”, so almost all land in Zimbabwe will be subject to expropriation under the new section. The only land that will fall outside the ambit of the section is land on which it is impossible to conduct any form of agriculture. Hence even residential stands in urban areas will be subject

¹ See the new sec 16B(2)(a)(i), as read with the new Schedule 7 inserted by clause 22 of the Bill.

² See the new sec 16B(2)(a)(ii).

³ See the new sec 16B(2)(a)(iii).

⁴ See the new sec 16B(2)(b).

⁵ See the new sec 16B(3). The law referred to is the Land Acquisition Act [*Chapter 20:10*]. Amendments made to that Act after the date of commencement of the Bill will presumably not have effect for the purposes of the new sec 16B(3).

⁶ See the new sec 16B(6). It will be possible to criminalise a landowner’s occupation even before his land vests in the State.

to compulsory acquisition under the section, provided the stands are large enough to produce a few flowers and vegetables (horticulture being a form of agriculture).

Agricultural land — whatever that is — may be acquired for any purpose whatever. Sections 16 and 16A of the Constitution specify the purposes for which property, including land, may be acquired compulsorily, but under the new section the purpose of the acquisition is irrelevant and cannot be challenged. The mere fact that a landowner has fallen from political favour will be sufficient reason to expropriate his land.

No formal process is laid down for the acquisition of land. Nothing more than a notice in the *Gazette* will be needed, and 30 days after the notice the Gazetted land will vest automatically in the State. It is not even clear if there must be a law under which acquisition notices are published in the *Gazette*, or if the notices are to be published in terms of the new section. Nor is it clear who will be allowed to publish the notices: an “acquiring authority” must publish them, but who or what is that? So broad is the language of the section that any Government officer, it seems, will have power to acquire agricultural land on behalf of the State. A headmaster, for example, will be able to acquire a neighbour’s land for his school’s playing fields, if he is enterprising enough to publish a notice in the *Gazette*; and if he does so the State’s acquisition of the land will follow automatically 30 days later, whether or not he had authority from his superiors to publish the notice. For it will not be possible for the State to revoke or alter a *Gazette* notice; once it is published it will be unalterable, whatever errors it may contain, and the State’s acquisition of the land concerned will follow inevitably.⁷

No one will be allowed to challenge an acquisition under the new section, so persons whose land is acquired will be denied protection of the law in that they will have no access to a court to determine the lawfulness of the acquisition.⁸ This will be the case, it seems, even if the person who published the acquisition notice had no authority to do so and even if the State purports to acquire land that is unsuitable for agriculture — factory premises, for example, or residential stands.

Not only landowners will be affected: anyone with an interest or right in land will lose their right or interest if the land is acquired under the new section, and they will not receive compensation except for improvements. Mortgagees will therefore lose their security and will be unable to recover anything from the State to mitigate their loss.

As indicated at the beginning of this memorandum, the Forum’s primary concern is with human rights, not economics, but the disastrous economic effects of the new section 16B are so obvious that they cannot be ignored. Owners and occupiers of land, particularly rural farmland, will lose all security of tenure. They will become mere tenants-at-will of the State. Large-scale commercial agriculture will be impossible because financial institutions will not be willing to underwrite agricultural activities for fear that someone will publish a notice in the *Gazette* and render their security worthless. Any hope of economic recovery through agricultural development, therefore, will wither as soon as the new section comes into force. Industrial

⁷ Because the new sec 16B(2)(a) contains no provision — as it should — for the amendment or withdrawal of a *Gazette* notice.

⁸ There is a specific statement in the new sec 16B(3) that sec 18(9) of the Constitution will not apply in relation to the acquisition of agricultural land.

development, too, may be retarded because, as indicated above, the section will apply to land that is capable of being used for agriculture even if it is being used for something else.

The impact of the new section on human rights is equally obvious. It will deprive Zimbabweans of their rights to property and to protection of the law, although these rights are guaranteed by our Constitution and by international instruments to which Zimbabwe is a party.

Right to property

Section 16 of our Constitution lays down requirements that must be met by a law which provides for the compulsory acquisition of property. They are as follows. Any compulsory acquisition must be effected for public purposes specified in the section; the law under which the property is acquired must afford the owner reasonable notice of the acquisition; the law must provide for fair compensation⁹; and the law must afford the owner an opportunity to have disputes over the acquisition settled by a court.¹⁰ The new section 16B will nullify all these rights: landowners will be given no notice, they will get no compensation except for improvements to their land, and they will have no right to approach a court.

Article 17 of the Universal Declaration of Human Rights, to which Zimbabwe is a party, states:

“(1) Everyone has the right to own property alone as well as in association with others.

(2) No one shall be arbitrarily deprived of his property.”

And Article 14 of the African Charter on Human and Peoples’ Rights, to which Zimbabwe is also a party, states:

“The right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws.”

Under the new section, ownership of agricultural land will be reduced to mere tenancy-at-will, and landowners will be deprived of their land arbitrarily, in the sense that the deprivation may be effected without reason and at the whim or caprice of any official of the State.¹¹ Public need and the general interest of the community will not be the criteria for the acquisition of agricultural land: it may be taken simply to satisfy private greed.

Protection of the law

Section 18(1) of our Constitution states that everyone is entitled to the protection of the law, and section 18(9) goes on to guarantee everyone the right to have disputes

⁹ In the case of agricultural land acquired for the purposes of resettlement, however, this right is restricted by sec 16A of the Constitution.

¹⁰ Except in the case of land acquired for resettlement purposes, disputes over compensation must also be settled by a court.

¹¹ See *Kaplan v Salisbury Liquor Licensing Court* 1951 (4) SA 233 (SR) and the various definitions of “arbitrary” in the Oxford English Dictionary, viz discretionary, not fixed; derived from mere opinion or preference, not based on the nature of things; capricious, uncertain, varying. The word is defined in Collins Concise Dictionary as meaning “founded on or subject to personal whims, prejudices, etc.”

over civil rights decided, after a fair hearing, by an independent and impartial court or tribunal.

Article 8 of the Universal Declaration of Human Rights states:

“Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.”

Article 7.1 of the African Charter on Human and Peoples’ Rights states:

“Every individual shall have the right to have his cause heard. This comprises: (a) the right to an appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force ...”

And Article 14.1 of the International Covenant on Civil and Political Rights, to which Zimbabwe is a party, states:

“In the determination of ... his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.”

All these rights will be taken away by the new section, which in express terms states that persons whose land has been taken away will not be not allowed to approach a court for redress, and will prohibit any court from giving them a hearing.

Anyone who holds land in Zimbabwe, therefore, will do so at the whim of the politicians currently in power. If those politicians decide to expropriate the land, however *mala fide* their reasons, the land-holder will get no redress from the courts.

Racial discrimination?

Most, if not all, the land whose acquisition is dealt with in the new section 16B has been acquired from white commercial farmers, or from companies whose members are white. It is arguable that this amounts to racial discrimination prohibited by section 23 of the Constitution. The Forum does not wish to press this argument, however, because the new section contains no expressly discriminatory provisions and any discrimination in the acquisition of commercial farmland can be explained, at least partially, by the fact that most of that land was owned by whites. The argument has been raised, though, and should be noted by the Portfolio Committee.

The Forum understands that the list of *Gazette* notices specified in the new Schedule 7 (clause 22 of the Bill) does not comprise all the land that has been purportedly acquired by the State since 2000. The Forum respectfully recommends that the Portfolio Committee should ascertain from the responsible Ministry if that is true and, if it is, what land has been excluded from the list and why it has been excluded.

CLAUSE 3 OF THE BILL

This clause will amend section 22 of the Constitution, which guarantees freedom of movement, i.e. the right to move freely within Zimbabwe, the right to reside in Zimbabwe, the right to enter and leave Zimbabwe and immunity from expulsion from Zimbabwe. At present these rights, except the right to leave Zimbabwe, may be limited in the interests of defence, public safety, public order, public morality or public health. No limitation may be imposed on a person’s right to leave Zimbabwe.

The Bill will amend the section to allow limitations to be imposed in “the national interest”, in “the public interest” and in “the economic interests of the State”.

The right to leave Zimbabwe will be capable of restriction in the same way as any other right guaranteed by section 22.

As pointed out earlier, the Bill's memorandum does not explain why these limitations are necessary and confines itself to giving, as an example of the sort of restrictions that might be imposed, stopping people from leaving Zimbabwe to engage in terrorist training. This is a specious example. Restrictions for that purpose can be imposed under the existing section in the interests of public safety or public order. And anyone who tries to leave the country for terrorist training can be arrested and put on trial for attempting to contravene section 8 of the Public Order and Security Act [*Chapter 11:17*]. Furthermore, the example does not explain why it is considered necessary to restrict people's movements in the economic interests of the State.

In the absence of a sensible justification for the clause, the Forum urges the Portfolio Committee to reject it, on the ground that it will unreasonably restrict a recognised human right and will violate our obligations under international conventions to which Zimbabwe is a party.

Article 12.2 of the African Charter on Human and People's Rights states:

"Every individual shall have the right to leave any country including his own, and to return to his country. This right may only be subject to restrictions, provided for by law for the protection of national security, law and order, public health or morality."

To the extent that the clause will allow additional restrictions to be imposed on the right to leave Zimbabwe, namely restrictions in the national interest, the public interest or the economic interests of the State, the clause will violate the Charter.

Article 12 of the International Covenant on Civil and Political Rights provides as follows:

"1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.

2. Everyone shall be free to leave any country, including his own.

3. The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.

4. No one shall be arbitrarily deprived of the right to enter his own country."

Again, the restrictions on freedom of movement that may be imposed under the clause exceed those permitted under the Covenant. To that extent, the clause will violate Zimbabwe's obligations under the Covenant.

Article 13 of the Universal Declaration on Human Rights states:

"(1) Everyone has the right to freedom of movement and residence within the borders of each state.

(2) Everyone has the right to leave any country, including his own, and to return to his country."

These rights may be subjected to:

"such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society."

Once again, the clause goes beyond those limitations and so violates the Declaration.

CLAUSE 4 OF THE BILL

This clause will amend section 23 of the Constitution, which provides protection against discrimination, to add physical disability as a prohibited ground of discrimination.

The Forum applauds the sentiment behind this clause, but wonders if those who formulated it have thought carefully enough about its implications.

It is important to note that section 23(1) declares certain forms of discrimination to be absolutely prohibited: discrimination on the ground of race, tribe, place of origin, political opinions, colour, creed or gender is not allowed whether it is fair or unfair. The only exceptions are those listed in subsections (3), (4) and (5) of the section. In this respect the section differs from section 9(3) of the South African Constitution, which prohibits only unfair discrimination, but does not specify the grounds on which discrimination is to be regarded as unfair. A couple of examples may make the distinction clear. Under our Constitution, discrimination on the ground of religion (creed) is absolutely forbidden, whether the discrimination is fair or unfair, while under the South African Constitution such discrimination is prohibited only if it is unfair. Under our Constitution, on the other hand, discrimination on the ground of sexual orientation is permissible, whether fair or unfair, while under the South African Constitution it is prohibited if it is unfair.

Another point to remember when considering the clause is that “discrimination” means nothing more than differentiation coupled with inequality of treatment.¹² A law discriminates between people, therefore, if it treats them unequally in the slightest respect.

By adding physical disability as a ground on which discrimination may not take place, the effect of the clause will be that no law may treat disabled and able-bodied persons differently, i.e. unequally, even if the unequal treatment is fair — unless the discrimination falls within one of the exceptions permitted by subsections (3) to (5) of section 23 of the Constitution. As a result it will not be lawful, for example, for the Defence Forces to insist that recruits meet prescribed standards of physical fitness, if those standards would disqualify disabled persons from joining the Forces. Other examples spring to mind, but that one is enough to suggest that the clause may need to be reconsidered.

CLAUSE 20 OF THE BILL

Under paragraph 3(1)(b) of Schedule 3 to the Constitution, adults who have been lawful permanent residents of Zimbabwe since the end of 1985 are entitled to be registered as voters and to vote in parliamentary and presidential elections. Clause 20 of the Bill will repeal this provision, thereby disenfranchising those voters.

The history behind paragraph 3(1)(b) is that when dual citizenship was abolished, many persons of foreign origin — mainly farm-workers who had come, or whose parents had come, from Malawi, Mozambique and Zambia — were deprived of their Zimbabwean citizenship because they had failed, through ignorance or inertia, to sign the prescribed form renouncing their foreign citizenship. Paragraph 3(1)(b) was enacted in 1990 to ensure that they were not deprived of their vote as well as their citizenship.

¹² *Mehta v City of Salisbury* 1961 R & N 911 (SR).

There is no explanation of the clause in the Bill's memorandum, so the Forum does not know why it has been put into the Bill. The Government may believe that the people concerned have all become Zimbabwean citizens, and that there is no longer any need to keep paragraph 3(1)(b) in the Constitution. If that is the reason, then with respect it is wrong. In 2003 the Citizenship of Zimbabwe Act [*Chapter 4:01*] was amended¹³ to allow people who were born in this country, but whose parents came here as migrant workers from a SADC country, to "confirm" their citizenship of Zimbabwe by signing a special form renouncing their foreign citizenship. Regrettably, the amendment was published after most of the people concerned had already lost their Zimbabwean citizenship,¹⁴ so there was nothing for them to "confirm". The amendment did not have retrospective effect

If the paragraph is repealed, these people will no longer be entitled to vote. That will be grossly unfair, because they are all long-term residents of this country, many of them were born here, and most belong to the poorest sections of our society. Their foreign origin should not be held against them, and to do so amounts to a form of discrimination that is prohibited under section 16 of the Constitution.

CONCLUSION

For the reasons stated at the beginning of this memorandum, the Forum has not advanced submissions on the provisions of the Bill that will introduce a Senate and recreate the Electoral Commission as a constitutional body. Those provisions may well be open to criticism, but such criticisms are mainly of a political nature and it is not for the Forum to make them.

The Forum does, however, respectfully ask the Portfolio Committee to give careful consideration to the criticisms, comments and suggestions that are made in this memorandum regarding those provisions of the Bill that touch on the Forum's field of expertise, namely human rights.

4 August, 2005

¹³ By Act 12 of 2003.

¹⁴ Because they had failed to renounce their foreign citizenship in accordance with the law of the foreign country concerned, as required by section 9 of the Citizenship of Zimbabwe Act as amended by Act 12 of 2001. The deadline for this renunciation was 6 January 2002, and Act 12 of 2003 came into operation more than two years later.