

ZIMBABWE LAWYERS FOR HUMAN RIGHTS

Position Paper on the Zimbabwe Human Rights Commission Bill HB 2, 2011

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1. INTRODUCTION

Zimbabwe Lawyers for Human Rights (ZLHR) notes that the Zimbabwe Human Rights Commission (ZHRC) can only be regarded as independent, effective and accountable if it has a legal and operational framework and mandate that fully complies with the United Nations (UN) General Assembly Resolution 48/131 (December 1993) on National Human Rights Institutions which incorporates the Principles relating to the Status of National Institutions (more commonly known as “*the Paris Principles*”).

It must be borne in mind that the current foundation of the ZHRC - as set out in the Constitution of Zimbabwe through insertion of a framework in terms of Constitution of Zimbabwe (Amendment No.19) Act - is weak and problematic and does not, in and of itself, facilitate the creation of an independent institution. Enabling legislation can go some way towards strengthening the independence and effectiveness of the ZHRC, but the foundational issues relating to appointment of the Commissioners, their mandate and independence, will remain unless further amendments are made to the constitutional framework of this body. This is a point to consider in the ongoing constitution-making exercise.

ZLHR notes that this is the first time in Zimbabwe’s independent history that intention has been translated into proposed legislation to establish a framework for considering human rights violations. This is a milestone, and is to be commended. However, although the absence of an enabling law has hindered the operations of the ZHRC since the appointment of Commissioners in December 2009, ZLHR notes that a ZHRC Act that does not comply with the Paris Principles is as good as not having a law at all.

In order to provide guidance to government on setting up credible independent human rights institutions, the United Nations (UN) Office of the High Commissioner for Human Rights has developed guidelines specifically setting out what elements or conditions are necessary for the effective functioning of domestic human rights commissions and institutions.

Some of the elements include: independence; defined jurisdiction and adequate powers; accessibility; co-operation; operational efficiency (including sufficient resources); and accountability. The Paris Principles and the elements highlighted in the UN Guidelines will be used to measure the potential impact of the Bill in operationalising the ZHRC and whether it will comply with international norms and standards for it to be regarded as independent. It is also important to note that a human rights commission which does not meet the requirements as set out in the Paris Principles will not be properly recognised in regional and international fora such as the African Union and the United Nations. This requires, therefore, that serious attention be paid to ensuring compliance with the Paris Principles so that the ZHRC can participate in and benefit fully from interaction with its peers in the region and globally.

One key issue which has not been addressed at all in the current Bill is the role of the ZHRC in elections. In light of the current political processes and developments and the importance of providing mechanisms for effective electoral dispute resolution, conflict prevention, management and resolution, it is vital that this area of debate and the roles and responsibilities of the ZHRC in such process is addressed within the legislation. This will allow the ZHRC to contribute in a positive and effective manner towards the holding of free, fair and genuine elections in which the will of the people is respected.

2. COMMENTARY ON PROPOSED CLAUSES OF THE ZHRC BILL

2.1 Clause 1: Short Title -

There should be an insertion into this provision to ensure that the Act is cited as the “**Zimbabwe Human Rights Commission Act**” (emphasis added) so that it corresponds to the manner of citation in the Constitution of Zimbabwe.

2.2 Clause 2: Interpretation of “*human rights violation*” -

The Bill seeks to define a human rights violation as only relating to “a violation of the Declaration of Rights in the Constitution; or any international human rights instrument that Zimbabwe is a party to and has domesticated as part of its laws”. It further states that “the law domesticating the instrument in question must expressly bestow on the Commission the jurisdiction to entertain complaints arising from alleged violations of the instrument” (our emphasis).

This provision and interpretation is as unfortunate as it is regrettable in a country that has been haunted by a wide range of civil, political, social, economic and cultural human rights violations throughout its history. This definition of a human rights violation is further illustrative of a government which does not have the political will to honour its obligations under international human rights law and which seeks to mislead people into believing that it will be giving effect to scrutiny of the state's international and regional obligations when in fact it is doing nothing of the sort.

The interpretation of a "human rights violation" is unreasonably narrow and too restrictive. By seeking to confine the ambit of violations which can be considered to the Declaration of Rights in the Constitution, it will be impossible for the ZHRC to consider any alleged violation which is not proscribed by this part of the Constitution.

As it presently exists, the Constitution does not protect economic, social and cultural rights; nor does it protect group rights (such as those relating to use and protection of natural resources and protection of the environment, amongst others). Even the rights which are currently constitutionally protected suffer from the effects of rigid and far-reaching "claw-back clauses" which, in some instances, render the protective provisions redundant. As such, the scope of intervention, investigation and action of the ZHRC will be seriously confined. In addition, government can still put in place laws to further restrict or undermine human rights. This has been evident with the current Constitution's Declaration of Rights, which has been undermined in the past through several constitutional amendments. This could happen in the future, thus restricting the jurisdiction of the ZHRC.

Although the ZHRC will be mandated to scrutinise violations of international human rights instruments, limiting the interpretation of a human rights violation in the manner envisaged by Clause 2 (where it can only be considered if domesticated), is dangerous due to the capacity of government to pick and choose which human rights instruments it ratifies and domesticates, and which it can continue to ignore.

Zimbabwe has assumed numerous human rights obligations under the United Nations and African Union human rights systems on a voluntary basis, but has failed to domesticate the vast majority of them. In terms of public international law, a country which accedes to, or ratifies, accepted international and regional human rights norms and standards, makes undertakings and binds itself to promote, respect, protect and fulfil the human rights norms and standards set out in these instruments. When these rights are not promoted,

respected, protected or fulfilled, the government can be held liable for such human rights violations.

The same commitment has been made with regards to human rights norms and standards that have been enunciated in the International Labour Organisation Conventions, and also by the Southern African Development Community (SADC) in a number of Treaties and Protocols to which the country is a signatory.

By seeking to confine human rights violations only to those outlined under the Declaration of Rights, and those that have been domesticated into law, the government is making a back-door attempt to escape scrutiny and sanction where it is responsible for, or encourages, or nurtures the violation of Zimbabwe's additional wide-ranging international and regional human rights obligations as long as they are not domesticated by being incorporated into the Declaration of Rights or other subordinate laws right under the nose of an institution whose chief mandate should be the promotion and protection of all human rights. This violates public international law and cannot withstand scrutiny in terms of the Paris Principles or the Vienna Convention on Treaties.

The further inclusion of a requirement that the domesticating law must expressly allow the ZHRC to have jurisdiction in relation to violations of a human rights instrument is included in bad faith. It is patently clear that no such jurisdiction exists in any domesticated legislation, as the ZHRC has never existed until now. This is therefore an attempt to escape scrutiny of any violations of human rights instruments, whether domesticated or not.

Recommendations

- The definition of a human rights violation must be significantly widened to encompass violations arising from - at the very least - the disregard of any and all human rights norms and standards as articulated in all the human rights instruments to which Zimbabwe is a State Party after having signed, or acceded to, or ratified the instrument in question, whether or not it has been domesticated.
- The proviso in the definition must be completely removed from the Bill.
- The definition should also be wide enough to allow for scrutiny, investigation and action in relation to any alleged violations which are proscribed under customary international law.

- The definition of a human rights violation must be wide enough to allow for evolution, over time, of what can be considered to be a human rights violation. This is in recognition and acceptance of the fact that new rights and duties arise over time, and there are changing morals, norms and standards throughout history. Currently, the definition of a human rights violation as something focussed on provisions contained in the Constitution or current international obligations means that the crafters assume that human rights are static and do not change at any time.

2.3 Clause 2: Interpretation of “Minister” -

The Bill assigns administration of this Act to the Minister of Justice and Legal Affairs.

This is peculiar in that the ZHRC is a constitutional commission.

Recommendation

The administration of this Act and the affairs of the ZHRC should be assigned to the Minister of Constitutional and Parliamentary Affairs.

2.4 Clause 3: Corporate Status -

The ZHRC is a corporate body, capable of suing and being sued and, subject to this Act, performing all acts that corporate bodies may by law perform.

No issues arise with this standard provision. However, there is need to ensure the independence of this Commission - at both the institutional and individual levels - for both the Commissioners, as well as the secretariat.

Recommendation

Consideration should be given to inserting a provision to reaffirm the institutional and individual independence of the ZHRC, its Commissioners, and its secretariat.

2.5 Clause 4: Functions of Commission -

The ZHRC's functions are to promote awareness of and respect for human rights and freedoms at all levels of society, promote the development of such, monitor and assess observance of human rights in Zimbabwe, recommend to Parliament effective measures to promote human rights and freedoms, investigate alleged violations of the Declaration of Rights committed by any authority or person, and assist the Minister to prepare human rights report according to human rights instruments.

The first point to note is that this is a closed set of functions and is thus too restrictive; it does not give any room for exercise of discretion or expertise to take up other functions which may normally be required of a human rights commission and which allows it to be organic and remain relevant to the environment.

The general functions as currently outlined in the Bill focus almost exclusively on promotional activities and ignore the protective functions that a commission should play. Where they are able to investigate alleged violations, there is an attempt to again restrict the mandate of the ZHRC merely to violations of the Declaration of Rights and not other regional and international obligations.

Although the ZHRC will be able to advise Parliament, it is not clear how far this role can be effectively played, at what critical stages this will become possible, and whether Parliament is bound to follow such advice. Once again, the advice is only in relation to promotional measures and not protective.

Once again, the ZHRC is hamstrung by only being able to assist the Minister in preparing human rights reports for various human rights bodies and not produce its own reports. Making it mandatory for the ZHRC to assist the Minister to produce reports can also create an unnecessary burden on ZHRC whose resources may become overstrained.

Recommendations

ZLHR maintains its previously stated position - as set out in a Paper on the ZHRC produced in 2009 (and attached hereto) - that the functions and mandate of the ZHRC must be elaborated and widened in order to comply with the Paris Principles. It should not have a closed set of functions. The functions should be expanded to include the protective mandate so that it does not become a lame duck, by including investigative and adjudicative functions. In particular, the following must be included:

- Promote and raise awareness and respect for human rights and freedoms in particular among young people, police officers, defence forces personnel and other public officers. The ZHRC should also be empowered to promote the teaching of human rights in schools, universities and other educational institutions and encourage research on human rights issues.
- Promote the development and strengthening of human rights and freedoms as articulated in international, regional and sub-regional human rights instruments.
- Monitor and assess the observance of human rights in Zimbabwe with regards to government's compliance with its obligations and the recommendations of treaty-monitoring bodies and other human rights mechanisms established by the UN, the AU and SADC.
- Recommend to Parliament and government departments effective measures to be adopted to promote and protect human rights and freedoms in their activities, programmes and policies.
- Investigate the conduct of any authority or person, where it is alleged that any of the rights in the Declaration of Rights or in international, regional and sub-regional treaties, or customary international law principles that are founded in human rights has been violated by that authority or person.
- Require any person, body, organ, agency or institution, whether belonging to or employed by the State, a local authority or otherwise, to provide the Commission annually with such information as it may need for the purpose of preparing and submitting any report required to be submitted to any regional or international body constituted or appointed for the purpose of receiving such reports under any human rights convention, treaty or agreement to which Zimbabwe is a party.
- Prepare its own independent reports required to be submitted to any sub-regional, regional or international body constituted or appointed for the purpose of receiving such reports under any human rights convention, treaty or agreement to which Zimbabwe is a party.
- Advise Parliament and the government on accession to, ratification, domestication, and implementation of international and regional human rights instruments, and further advise the Government on steps to be taken to harmonise Zimbabwean law with international and regional human rights instruments to which Zimbabwe is a State Party.

- Scrutinise Bills and other draft or existing legislation and advise the lawmakers concerned on the effect of such draft or existing legislation on the enjoyment and protection of human rights and freedoms in Zimbabwe.
- Other powers to be bestowed on the ZHRC must include the capacity to consider and adjudicate cases and hand down appropriate remedies for redress in relation to proven human rights violations.

Provisions must also be inserted to allow for action on all violations and not only those of the Declaration of Rights in the Constitution.

2.6 Clause 5: Deputy Chairperson of Commission

The Deputy Chairperson is appointed by the President after consultation with the Committee on Standing Rules and Orders who shall act as the Chairperson in the case of a vacancy or absence of the Chairperson.

The ZLHR position in relation to the appointment process of the Commissioners as stipulated in the Constitution is known and is attached hereto. The appointment procedure is problematic, with a lot of Executive influence and possible politicisation. This is a matter of public record in relation to the irregularities in relation to the interview procedures and subsequent appointment of the current complement of Commissioners. To now seek to impose further Executive control and interference in the appointment of the Deputy Chairperson is also contestable. Further, there is no clarity on the selection criteria to be used. It is also not clear what weight the President is supposed to attach to the recommendations coming out of the consultation process with the Committee on Standing Rules and Orders, and whether the President is bound to follow the outcome of this consultation.

Recommendation

In order to ensure a measure of institutional and individual independence and the smooth running of the ZHRC the Commissioners must be allowed to choose their own Deputy Chairperson as this will create a high level of ownership amongst the Commissioners, and they will be able to identify the most competent person with appropriate leadership qualities amongst themselves. The current provisions of the ZHRC Bill do not cultivate

independence of the ZHRC since all the leadership of the ZHRC is chosen by politicians and the Executive.

2.7 Clause 6: Executive Secretary, and other staff of Commission and consultants

The appointment of the Executive Secretary is to be done by the Commission. The appointment of other key staff members, including consultants where necessary, is to be done by the Commission in consultation with the Minister of Justice and Legal Affairs and the Finance Minister. Functions and responsibilities of the Executive Secretary are also outlined.

It is positive that the legislation seeks to create the post of an Executive Secretary and the appointment will be done by the Commission and without the Minister, as this prevents Executive interference in this critical appointment. However, confining the responsibility for such a key appointment to the ZHRC itself, without clear provisions as to how the appointment will be done, what procedures will be used, and how this can be publicly scrutinised, owned, and thus accepted, by the various stakeholders of the ZHRC, is a matter of concern.

As the provisions exist at the moment, the Executive, in the form of Ministers, has too much influence in relation to the staffing and (by effect) operations and functioning of the Commission. Recruitment of staff members and even other contractual labour such as consultants must be done by the Commissioners and the Executive Secretary. They should be responsible for decision-making in relation to staff and operations of the ZHRC for this institution to maintain its independence and also avoid packing of the ZHRC with sympathisers of members of the Executive whose independence could then be compromised.

In relation to the responsibilities of the Executive Secretary, there appears to be separation of the policy-making role (which is the function of the Commissioners) and the implementation of policy and management of the day-to-day affairs of the ZHRC (which rests with the Executive Secretary and staff). However as the provisions currently stand they still allow for potential far-reaching interference at the management level from the Commissioners, as the Executive Secretary is subject to the general control of the Commission with no clarity on how far the Executive Secretary can act in implementing policy without interference.

A glaring omission relates to the accountability of the Executive Secretary and how s/he is to be disciplined. The provisions put the Executive Secretary outside the ambit of the Public Service and its mechanisms for accountability and discipline (see clause 6(2)). This (being outside the ambit of the Public Service) is not in itself necessarily a negative; however, in the absence of clear provisions relating to how issues of accountability and disciplinary procedures will be dealt with, this allows a “rogue” Executive Secretary, as well as “rogue” Commissioners, to effect the business of the ZHRC without any mechanisms of accountability and control whatsoever. This will lead to similar challenges currently being experienced in relation to scrutiny of the actions of the Attorney-General of Zimbabwe and matters of his discipline.

Recommendations

- The provision relating to appointment of the Executive Secretary by the Commissioners should be maintained. However, there is need for insertion of additional provisions which set out a clear procedure for appointment, which includes wide public advertisement of the post; qualifications required and job description; process of assessing applications; a public interview process by a panel which includes (at least) input from representatives of other independent stakeholders such as human rights organisations - even better would be representation and participation in the interview panel; and a transparent feedback on the findings of the interview panel before the eventual confirmation of the appointment. This will ensure that unqualified personnel, politically partisan nominees, and perpetrators of human rights violations are not appointed to this office and that there is public scrutiny of the procedure and person prior to appointment to this critical post.
- Staffing of the ZHRC must be undertaken by the ZHRC alone, together with the Executive Secretary following a similar public procedure as above for senior personnel, and which includes vetting to ensure that perpetrators of human rights violations are not recruited.
- The Executive - through Ministers - should not play any role whatsoever in the consideration of candidates to the post of Executive Secretary and other senior staff posts.

- The ZHRC must be enabled to appoint staff members in such a way that will ensure that it becomes pluralistic and representative of society as required under the Paris Principles.
- The provisions relating to the role and functions of the Executive Secretary should be improved to ensure clear segregation of the duties and responsibilities of the Commissioners (policy-making and oversight) and those of the Executive Secretary (implementation of policy, day-to-day management).
- Provisions need to be inserted to ensure accountability of the Executive Secretary to the Commissioners, and to outline clearly instances in which disciplinary action can be taken, and the mechanism for such discipline. If these are not inserted, there will be no method to ensure public scrutiny of the Executive Secretary and to discipline or remove an incumbent who fails to adhere to her/his mandate (apart from contractual obligations which are not known to stakeholders).

2.8 Clause 7: Independence and impartiality of Commission, Commissioners etc -

Commissioners or members of staff shall serve impartially and independently, in good faith, without fear or favour, bias or prejudice subject to Constitution and the law. State or non state actors must not interfere or obstruct the Commission or staff in the performance of their functions. The ZHRC shall be assisted by state actors in the discharge of its mandate. Commission personnel must not investigate when they have a personal interest otherwise the ZHRC can take steps to ensure a fair, unbiased and proper investigation.

As a constitutional body, provisions should exist in the Constitution which protect the institutional and individual independence of the ZHRC (particularly its Commissioners and staff) in a similar (but improved) manner to protective provisions relating to the Judiciary and to the Attorney General. This is not currently the case with the ZHRC in the Constitution. This clause seeks to address the gap in the Constitution, although it would be preferable to address it in the Constitution. As it stands the provision will enjoin Commissioners and the staff to carry out their functions independently, transparently and impartially, without undue influence from any external interference, and this is commendable, subject to enforceability.

This declaration of institutional independence will also ensure that the ZHRC is not subject to undue influence from other quarters that include but are not limited to government and other state and non-state actors.

The fact that the ZHRC Bill provides that no person can conduct an investigation if there have a pecuniary interest in the matter is commendable. There is no clarity on whether the ZHRC can impose penalties on a person who fails to disclose their interest and the ZHRC Bill only provides that steps will be taken to ensure a fair unbiased and proper investigation.

Recommendations

- The provisions ensuring independence should be included in the Constitution, as provisions for independence in an Act of Parliament can easily be amended by Parliament. A constitutional provision is more durable as it will not be easily amended to erode the independence of the ZHRC.
- There must be a provision clearly outlining the action that the ZHRC can take in the event that an investigation has become compromised by virtue of non-disclosure of interest by staff members or even Commissioners.

2.9 Clause 8: Reports of Commission -

The ZHRC shall submit annual reports on its operations and activities no later than 60 days after the end of the financial year to the Minister. Additionally the Commission must submit any other information required by the Minister on its operations, or submit any other report that the ZHRC considers desirable. The Minister must table the report presented to him no later than 30 sitting days after receiving the report to whichever House of Parliament sits first after s/he receives the report.

Presentation of the annual report must be primarily to the House of Assembly, or alternatively to both Houses sitting together, giving details of the yearly activities and state of human rights observance in Zimbabwe. There appear to be no guidelines on information that must be included. To ensure greater accountability some minimum requirements must be placed on the format and content of the report and this must also be periodic, on the progress being made in terms of human rights promotion and protection in Zimbabwe by the government, state actors and non-state actors. The

reporting by the ZHRC must not only be on the conduct of its activities but it must be in a transparent manner that will also benefit the whole country.

Recommendations

- This report must cite non-co-operation on the part of government officials and/or state institutions and give recommendations for remedial action.
- This report must not just be presented but must be debated and published by Parliament. There must be provision to allow for submission of reports to Parliament upon request, whilst the ZHRC must also be able to submit unsolicited reports to Parliament on specific human rights issues.
- All reports must be made public and widely disseminated whether they relate to the financing of the ZHRC or the activities.
- Other measures of accountability include the printing of progress reports, which can be done in the form of occasional publications by the Commission and distributed to members of the public, as this is currently not provided for in the Bill.

2.10 Jurisdiction of Commission to conduct investigations -

Clause 2: In the interpretation clause, the jurisdiction of the ZHRC is restricted to violations of international instruments which are domesticated and expressly bestow on the Commission the jurisdiction to entertain complaints arising from alleged violations of the instrument.

This provision has already been previously considered and recommendations made above. This must be urgently addressed by removal of the proviso as it virtually renders the ZHRC powerless as it currently stands. There is no law in Zimbabwe which bestows on the ZHRC any jurisdiction to hear violations that are of a human rights nature. Domesticated human rights are found in a number of Acts of Parliament and even subsidiary regulations: for instance, the right to education is found in the Education Act and workers' rights are found in the Labour Act and Labour Relations regulations. However, none of the existing laws recognise the jurisdiction of the ZHRC as it was non-existent when they were

promulgated. Additional problems arise in the case of law reform, where amendments to law have generally taken a long time to be promulgated and enforced over the years.

Clause 9(1-3): The ZHRC has jurisdiction to investigate an actual or perceived violation, on its own initiative, or after a written complaint and request for investigation from an affected person. Where the affected person is unable to act, being dead or otherwise, a legal representative or a member of the family may act on their behalf. The Commission can also allow “such other person [it] considers suitable to represent him or her”.

The first jurisdictional issue relates to the unnecessary restriction on who can lodge a complaint with the ZHRC.

Other than the victim, only a legal representative or a family member is specifically mentioned. The provision goes on to allow for “such other person as the Commission considers suitable to represent” the victim when s/he is dead or unable to act. This is too vague and indeterminate, and allows too much unchecked discretion on the part of the ZHRC in deciding who can and cannot represent a victim.

Another limitation arises when it comes to legal representation. In its interpretation, Clause 2 defines a legal representative as the representative recognised by law of any person who has died, or is an infant or minor, or of unsound mind, or otherwise under a disability. As such it would appear that only dead people, minors or mentally unstable and people living with disabilities can be represented by a legal representative and that those who do not fall within the description to be represented by a legal representative can only be alternatively represented by family members.

This provision does not take into account the fact that many victims of human rights violations are the most vulnerable and poverty-stricken. In the event that human rights violations affect them and they are alive and cannot have legal representation, in some cases their families will not have capacity to represent them and articulate their concerns. In addition, their family members may not be willing to file a complaint on their behalf, either because they are also victims, or because they may in fact be the perpetrators.

With these restrictions, justice for human rights violations will remain the preserve of those who, if still alive, have courage to approach the ZHRC and, if deceased, have left

enough resources and proper instructions to engage legal representatives. This defeats the objectives for which national human rights institutions exist.

The narrow jurisdiction provisions also seem to be aimed at preventing human rights and other non-governmental organisations from approaching the ZHRC on behalf of victims. This is often their core business and, in the context of Zimbabwe, the NGOs have been filling - and will continue to fill for the far foreseeable future - a gap which has been left by the collapse of state-organised legal aid and assistance. Unless the organisation is “acceptable” to the ZHRC (and there are absolutely no provisions to show what criteria they will use to reach such a decision), it can be blocked, and it will be the victim who suffers.

Another issue that is problematic is the fact that the complaint has to be in writing. This provision does not take into account the fact that at times the victims or their families may be illiterate - not able to read and write - and this may potentially block their capacity to bring to the attention of the ZHRC serious violations that occur to them.

Recommendations

- The provisions needs to be widened to allow for other stakeholders such as human rights and other non-governmental organisations, or any other person or body, to be able to file a complaint of human rights violations with the ZHRC on behalf of any victim without restriction. Maximum accessibility is required for there to be compliance with the Paris Principles and ensure access to justice.
- The only restriction that could be required is that the ZHRC has discretion to determine whether there is a reasonable suspicion that a human rights violation has occurred before it proceeds to investigate, regardless of who brings the complaint.
- The provisions must allow for complaints to be registered in written form or, where the complainant is illiterate and cannot write, they should be able to file verbal complaints that are reduced to writing by ZHRC secretariat.

Types of victims serviced - Clause 9(4)(a): The ZHRC can investigate only if the aggrieved person was a citizen, resident or visitor of Zimbabwe at the time the complaint occurred.

The current Constitution provides for the enjoyment of rights to everyone in Zimbabwe with no limitation on the grounds of citizenship or residence status. It is progressive for the ZHRC to be able to receive complaints involving violations of the rights of visitors for human rights violations that occur whilst they are in Zimbabwe. However the gap still remains with foreigners who are not necessarily visitors. To make matters worse sometimes these people who cannot be regarded as visitors (not having entered through the normal immigration procedures because of reasons beyond their control such as victims of trafficking) cannot approach the ZHRC for redress. This violates the fundamental right to non-discrimination on the basis of origin and other status as highlighted in the Constitution as well as key human rights instruments that Zimbabwe has ratified.

It is interesting to note that the fact that the perpetrator is not a citizen or legal visitor does not appear to be an issue that will prevent the ZHRC from considering a matter.

There appears to be no clarity on what action the ZHRC can take to intervene to prevent possible future human rights violations although when there is a perceived violation a victim can approach the ZHRC. There must be sufficient clarity on what can be done as with other human rights institutions, including the courts of Zimbabwe and regional and international tribunals, they are empowered to provide remedies (provisional measures) to prevent a violation - especially those which can cause irreparable harm.

Recommendations

- The ZHRC must be able to determine cases of human rights violations that occur as long as they occur in the country whether the victim is or is not recognised a visitor so as to protect other categories of vulnerable groups such as victims of trafficking or human rights violations committed against illegal immigrants, refugees and/or asylum seekers.
- The ZHRC must be able to intervene even when there are cases of possible violations that can occur in future. It must have power to order pro-active (provisional) preventative measures where a violation is imminent and is likely to cause harm, rather than just reactionary measures once a violation has already occurred.

Clause 10(4b-d): The ZHRC cannot investigate violations where subject matter concerns civil proceedings with competent court, actions relating to exercise of the prerogative of mercy, or action or omission relating to government and foreign government unless there is an allegation of violation by a citizen or resident of Zimbabwe.

Although civil proceedings can be pending in a competent court, it is not a given that the human rights norms and standards and possible violation is always up for discussion in these matter and some human rights concerns may be left unaddressed.

Exclusion of violations in cases where there has been a prerogative of mercy unjustifiably limits the capacity of victims to approach the ZHRC under the veil of executive action which can be arbitrary and not justifiable in a democratic society respecting human rights and the rule of law.

Inability of visitors and illegal immigrants and other foreigners to approach the ZHRC for remedy when the action concerns the government and a foreign government is unacceptable as it unreasonably exposes them to human rights violations with no possibility of intervention.

Recommendations

- The ZHRC must be able to assess whether the human rights aspects of a violation which is subject of court action is actually being determined by the court in that matter.
- The prerogative of mercy must not act as a bar in cases where human rights violations under the Constitution or international instruments occur, as this presents a shield to perpetrators of human rights violations that cannot be justified.
- Human rights protection from the ZHRC must be available to everyone who finds themselves in the country without limitation to their status. The provision as it stands exposes visitors and illegal immigrants to violation of their human rights by state actors with no review of government action that is sometimes arbitrary.

Temporal Jurisdiction - Clause 9(4)(a): The ZHRC can only hear complaints of violations which are filed within three years from the date on which the act or omission occurred

*and not earlier than 13 February 2009. Further, **Clause 15(2)** - Provisions of the State Liabilities Act will also apply to actions against state actors.*

The temporal jurisdiction is unduly restrictive and is probably the most controversial segment of this Bill. Effectively it stops the ZHRC from investigating or taking any other action in relation to violations (actions or omissions) which would have occurred prior to 13 February 2009. Whilst reference is made to prescription after 3 years, this is later reversed by reference to the stipulated date.

More seriously, the temporal jurisdiction limitations seek to shield perpetrators of grave human rights violations and international crimes from investigation and prosecution as long as they perpetrated their evil deeds before 13 February 2009.

It is an accepted principle of public international law that grave human rights violations and international crimes which are part of customary international law - such as torture, crimes against humanity, genocide and war crimes - attract accountability for perpetrators no matter how long a period has passed since they were committed. Thus violence amounting to torture and crimes against humanity from previous election periods, the atrocities of Operation *Murambatsvina*, the heinous crimes committed in the 1980s in Matabeleland and Midlands during *Gukurahundi*, and even those crimes against humanity committed by the colonial regime prior to Independence will not be able to be considered by the ZHRC - whether for purposes of redress, historical record, memorialisation, or otherwise.

It is a principle of statutory interpretation that actions or omissions cannot be criminalised in retrospect; however this is further covering up a situation where violations which are clearly contrary to customary international law have been committed, have never been investigated or acted upon in any way, and now cannot even be discussed or considered in any manner by a national human rights institution.

Even should this argument not be accepted, violations of human rights that occurred after the ZHRC was established by the Constitution will likewise go unchecked under the proposed temporal jurisdiction provisions.

The inclusion of reference to the State Liabilities Act is also unfortunate, as that Act has unreasonable timeframes within which claims against the police and other state actors must be filed before they prescribe.

Recommendations

- The ZHRC must be given a wide mandate to interrogate human rights violations from various time periods when such violations amount to grave violations and/or international crimes which are accepted as such under customary international law.
- In any event, the violations to be determined must be those that occurred ever since the ZHRC was established under the Constitution, being the date Constitutional Amendment No.19 came into force and effect.
- Provisions of the State Liabilities Act must not apply to violations investigated by the ZHRC.

Clause 16: When questions of whether the ZHRC has jurisdiction arise, then the matter must be referred to the High Court for determination, any expenses incurred shall be met from the funds of the ZHRC.

This provision defeats the whole purpose of having a Human Rights Commission which is supposed to be complementing the work of the High Court and other institutions in promoting and protecting human rights. This provision can be abused to delay determination of human rights violations by the ZHRC or remove certain violations from the scrutiny of the ZHRC. Further there is no mechanism to ensure that the matters are heard quickly so as to mitigate the occurrence of further violations. Another issue that can present problems is the fact that the expenses incurred in such determination have to be met from the funds of the ZHRC, this can unnecessarily eat into the funds of the ZHRC or, where resources are not available, restrict or do away with the ability of the Commission to interrogate those violations.

Recommendation

The ZHRC must have the sole discretion to determine human rights violations as it deems necessary according to its own assessment to avoid delays that can result in victims of violations suffering irreparable harm, and to prevent the covering up of human rights violations. The courts have not been able to dispense justice timeously due to understaffing and other challenges and it is not necessary to increase the workload of the High

Court with matters that can be determined by a more suitable institution. In any event this process has a negative budgetary implication on the ZHRC.

Clause 13: No Commissioners shall participant in a hearing of a violation or voting in a matter in which they have an interest and which conflict with the individual's functions as Commissioner. A penalty of fine or imprisonment is imposed for such participation.

The shortcoming presented by this provision in its current form is the lack of clarity on who is responsible for conducting a preliminary investigation to determine whether this provision has indeed been violated. It does not outline whether the Commissioners can sit amongst themselves and appoint a committee to look into this matter. As the provision stands, it opens room for failure of the preliminary investigation to be undertaken, or to arbitrary arrest of Commissioners by overzealous police officers who have in the past even arrested judges without any reasonable suspicion that they have committed any offences.

Recommendation

Commissioners must be granted power to conduct their own enquiry to determine allegations of conflict of interest amongst them. In petty cases they must be able to resolve these through internal mechanisms as they can be unduly exposed to criminal justice proceedings that can be retrogressive to the operations of the ZHRC where the allegations are not well founded or supported by evidence.

Clause 21: The ZHRC, staff members, Executive Secretary or Commissioners are not liable to legal proceedings for anything done in good faith and without gross negligence.

This provision will go a long way in ensuring that the ZHRC operations are carried out without fear of malicious prosecutions, or other civil proceedings from state and non-state actors who may want to intimidate staff and Commissioners with threats of legal proceeding to prevent them from investigating.

2.11 Clauses 10-12, 14-16: Complaints, Investigative Procedures and other Regulations of ZHRC -

Clause 10(1-3): The ZHRC Bill sets out the manner in which a complaint shall be made; it may require a complainant to support their claim with evidence. The ZHRC shall not refuse to consider a matter solely on the basis that the complaint is not in proper form or has not complied with prescribed requirements, or is not accompanied by required documentation.

This provision must be interpreted liberally by the ZHRC, given that even if they are to come up with Regulations it may be very difficult for the ordinary citizen to be able to follow them or know what is required unlike other experienced practitioners such as lawyers who can unfortunately currently only assist when the complainant is deceased. Depending on how this provision is enforced it may become unreasonable and can result in perpetuation of human rights violations which can easily be stopped once the ZHRC takes action.

Recommendations:

- This provision must be amended to make it very clear that the ZHRC must not refuse to investigate a complaint where the victim is unable to provide certain evidence, as currently the word “solely” allows unnecessary discretion and can be used restrictively.
- In any event procedural issues should not form part of the principal provisions of the Bill but can be left to the discretion of the ZHRC to formulate in its Regulations.

Clause 11: ZHRC can refuse to investigate if not authorised under the Act or Constitution and can inform the complainant or any party complained against stating reasons and advise complainant of alternative remedies

Clause 12(1): The ZHRC can conduct private or public hearings. It will have power to summon an authority or person to attend and produce documents, or to question that person or authority who must respond. The Commission can request the assistance of the police during its investigations.

There is no clarity on what factors are taken into account to determine if an investigation should be carried out in public or private and this may result in privatisation of investigations that should be done in the public view and which are of public interest.

Requiring that the police assist in investigations may not in the long term be in the best interests of the ZHRC as the same investigators may be perpetrators in some cases. Generally investigations done by the police have been problematic and they have refused to investigate certain cases of human rights violations with some exhibiting partisan tendencies.

Recommendations

- The ZHRC be empowered to serve its own summons and be assisted by police escort when there is a need.
- There must be clear guidelines on when hearings can be carried out in private, and the decision must be taken in a transparent manner with full justification which is made public.
- The ZHRC must be empowered to appoint its own investigators and, when required, enlist additional investigators from other state departments. There must also be a provision which ensures that police comply with requests or face sanction.

Clause 12(2-3): During investigations not bound by strict rules of evidence, persons accused of violating human rights must be afforded an adequate opportunity to respond.

This provision is welcome although it can present dangers of long hearings with no rules limiting what can be excluded. Lack of a time frame to respond is a dangerous provision which, if it is not time-bound, might result in further human rights violations occurring or undue delays in finalisation of complaints by victims. Justice delayed is justice denied.

Recommendations

- Issues relating to broad time-lines for responses and other interventions should be made clear in the principal legislation, and can then be elaborated in the Regulations.
- Although issues relating to procedure should be left to Regulations made by the Commission, such regulations must be sufficiently publicised to facilitate the smooth running of operations and other activities of the ZHRC and ensure that

those who make use of the Commission are well aware of how it is supposed to operate and within what time-lines.

Clause 12(4)-(5): Any person appearing before the ZHRC may be represented by a legal practitioner and information obtained at closed hearing is not to be disclosed to any person unless the identity of the person is protected or it is needed for the purpose of perjury.

While perpetrators may be represented by lawyers according to a strict reading of this provision, it is rather unfair that the victims can only be represented by a relative or lodge the complaint themselves.

Recommendation

Due to the fact that lawyers are well trained to refute allegations made against their clients it is only fair that even the victims be allowed to be represented by lawyers at any stage to protect their interests and ensure that allegations are well-founded and able to stand the possible challenges and loopholes that lawyers may want to take advantage of.

Clause 12(6): The Minister, by notice, may indicate that certain evidence must not be disclosed due to grounds of defence, external relations or internal security, or the economic interests of the State. Aggrieved persons may apply against this in terms of the Administrative Justice Act.

This is unacceptable Executive interference in the affairs and investigations of the ZHRC. It contributes to lack of transparency, reduces public confidence in the processes and outcomes of the investigations of the Commission, and fuels impunity for human rights violations. The grounds on which the Minister can prevent disclosure of documentation and evidence are unacceptably wide and subject to abuse, and there is no method to challenge the manner in which the Minister applies his mind and discretion in such instances.

There are several pieces of legislation where such a procedure is allowed and in which the discretion has been abused - every time it is challenged in court, the judiciary has found methods to avoid making a decision on the substantive issue - indicating that such discretion is problematic, although fear prevents a courageous judicial decision. To allow

such a provision to remain will be a disservice to the work of the Commission and its integrity.

Recommendation

- The Executive must not have the capacity to limit the information that can be disclosed by the ZHRC. The ZHRC must have the sole discretion to decide on what information will not be available for public consumption according to the standards set out in the human rights instruments. This will go a long way in complementing the independence of the ZHRC from executive excesses and abuse.
- Should there be issues affecting national security - these need to be properly defined and framed and it should be the ZHRC which considers whether the information should be allowed, or heard in private, or not.

Clause 14(1) and (2): The ZHRC can decide on whether action or omission needs to be abolished, whether the person against whom the complaint was made should give further consideration to issues, whether the action or omission should be rectified, the law, action or omission reconsidered, or other action taken or reason given for act complained of. In all such incidences, the ZHRC can make recommendations and send its report to Minister. The ZHRC can issue report with recommendations to release a complainant from prison, payment of compensation to a victim or her/his family, or that the complainant seeks redress from the courts. If no adequate action is taken, the ZHRC may submit a special report to the Minister to present to the President to lay before Parliament.

This provision is loaded, creates confusion, and provides no direct or prompt remedy for the victim. The ZHRC has no power to order redress and can only make a report to the Minister and there is no clear provision which states what remedy or course that the Minister offers to the victim. This can end up being an academic exercise with victims not getting any proper remedy. Another problem arises when in the report some recommendations include payment of compensation, as there are no provisions of how this is to be done and the time-frames.

The ZHRC does not have any authority to enforce its report with recommendations but only after some time sends a special report to the Minister and he presents it to the President who lays this before parliament. Since Parliament does not have judicial or

enforcement powers, it can only debate such a report and there is no other enforcement mechanism for meaningful recourse to the victim of human rights violation.

Recommendations

- The ZHRC must be given stronger powers which allow it to provide increased types of remedies for victims of human rights violations. This links to previous submissions and recommendations that the Commission should have adjudicative functions and be able to provide effective remedies in order to build public confidence in its work and act as an effective deterrent to perpetrators.
- In the event that the ZHRC continues not to have quasi-judicial powers, a better provision is to include the ability of the ZHRC to register its report and recommendations as Court Orders at the High Court so that they become enforceable.
- Sending reports to the Minister who, at his/her discretion can send this to the President and then Parliament, only creates room for delays, executive and legislative interference with the work of the ZHRC, and impact on speedy and effective resolution of disputes, which is not necessary and cannot be justified. It is strongly recommended that the Minister play no part in such a process and that any action which is required and which cannot be provided by the ZHRC should be referred for enforcement through the Courts of Zimbabwe, as the second-best option to giving the Commission such powers for itself.

2.12 Clauses 17-19: Financial Probity -

Clause 17: Funds of the ZHRC include moneys appropriated by Act of Parliament paid as salaries, allowances, administration expenses, donations, grants bequests as approved by the Minister, and other funding accruing to the ZHRC by Act of Parliament and any other amount that may vest in or accrue to ZHRC in terms of the Act or otherwise. Money which is not required by ZHRC may be invested with the approval of Ministers of Justice and Finance.

The ability of the ZHRC to prepare and control its own budget and expenditure that is funded through the Consolidated Revenue Fund will enhance its independence. The ZHRC does not appear to have any input in the budget preparation and allocation that it

considers necessary and should receive for its operations for it to be able to effectively carry out its mandate. The ZHRC must be able to receive its funds from the Consolidated Revenue Fund in a timely manner to ensure that there is no disruption of its activities and this is not addressed in this Bill. Although it is recognised that it may accept donations, the ability of the Minister to veto such donations without providing reasons will impact negatively on the ZHRC.

The capacity of the ZHRC to invest funds that are not necessarily required is welcome; however the fact the two Ministers have to be consulted can have a negative impact. Government ministries have often been associated with bureaucratic processes that are unnecessarily long. These delays can negatively affect the capacity of the ZHRC to invest and gain from the proceeds of such investment in a timely fashion.

Recommendations

- The ZHRC must be able to accept donations as long as this does not impact on its independence.
- Estimates of revenue and expenditure for every financial year must be prepared by the ZHRC and be made public, as must the audited accounts of the Commission on an annual basis and in a timely manner.
- The ZHRC must be able to invest its moneys in a manner that it sees fit without being unnecessarily hindered by bureaucratic procedures that can be imposed by the Executive which can frustrate its efforts.
- The Minister must not play a role in approving donations and other funds, as this is Executive interference and impacts on the processes of the Commission, as well as its institutional independence.

Clause 18: The ZHRC shall keep proper accounts, other records in respect of activities, funds and property and records as Minister may direct, preparing statements of account as soon as possible at end of year after each financial year or periods as the Minister directs.

Clause 18(3): Section 80 of the Public Finance Management Act [Chapter 22:19] shall apply with the necessary changes to the appointment of the internal auditor as if ZHRC were a ministry or department of a ministry.

Clause 19(1): The ZHRC shall be audited by the Comptroller and Auditor General according to powers conferred by sections 7 & 8 of the Audit Office Act.

Whilst these provisions provide some level of accountability for the ZHRC, there appears to be an assumption that all the funds will be derived from government coffers. There appears to be no recognition that the ZHRC can get additional funding from other donations and it may become necessary to ensure that such amounts are audited separately by an independent auditor.

Recommendation

The ZHRC should be given powers to appoint independent auditors with regards to the independent donations that they may receive and produce a report on that.

Clause 19(2): Any person who refuses to provide the Comptroller and Auditor General with explanations as required shall be guilty of an offence and liable to payment of a fine and/or imprisonment.

The whole essence of this provision is to guard against fraud or mismanagement of finances at the ZHRC and commendable.

Recommendation

It must be clear that the Auditor General must restrict his audit to government funded activities and those that are funded by other donations must be audited separately.

2.13 Clause 20: Removal of Commissioners from office -

This can be done by the President after appointment of a tribunal of three members to look into the matter. All members of the tribunal are appointed by the President. Grounds for removal include misbehaviour, failure to discharge functions caused by infirmity of body or mind, or other factors. Pending a determination by the tribunal, the President may suspend the Commissioner.

The first issue is the role of the Executive in disciplinary matters which have a substantive impact on the work of the Commission and its institutional and individual independence. The Executive must not play any role in such processes.

Further, there is no clarity on who is supposed to sit in this tribunal, selection processes, and the calibre of candidates.

Removal on the ground of misbehaviour is vague as there is no explanation as to what will constitute misbehaviour that can result in the removal of the Commissioners or suspension under the Act. As a result, the Executive can remove Commissioners who are not sympathetic to its views.

Recommendations

- The ZHRC Commissioners must develop an enforceable Code of Conduct that will set out the parameters of what conduct will be deemed to be misbehaviour.
- The ZHRC must also develop a Code of Conduct for members of the secretariat.
- Removal of the Commissioners must only be done by the Parliamentary Committee on Standing Rules and Orders as it is the same body that appoints the Commissioners.
- A tribunal must be appointed by the Committee to investigate and make recommendation for the removal from office. The suspension of the Commissioner must be done by the Portfolio Committee pending determination of the matter.
- The Executive must not be allowed to play any role in such matters of discipline and/or removal of Commissioners so as to protect independence and ensure the work of the ZHRC is carried out without fear or favour.

2.14 Clause 22: Accessibility -

The ZHRC shall endeavour to establish a principal office and offices at provincial, district and other administrative levels as it considers fit for the better performance of its functions.

Firstly, it is regrettable that this provision is put in the miscellaneous provisions of the ZHRC Bill despite its importance. It must be mandatory for the ZHRC to establish a principal office from which its operations can be coordinated. There should not be any discretion in this regard.

Although there is clear commitment to decentralise the offices of the ZHRC to facilitate accessibility, which is to be commended as in line with the Paris Principles, there is no clarity on where these offices will be, and who will be responsible for deciding on the location. Issues of financial feasibility need to be considered, and the provision to establish offices at provincial and administrative levels may be too complicated. Setting up of too many offices will result in a strain in the budget of the ZHRC and it will not be able to carry out its work efficiently. Presently other institutions such as the Judiciary are already struggling with financial resources and it is not practical for the ZHRC to get any more funding that will empower it to set up too many offices. Coordination of activities and other ancillary issues might become strained once there are too many offices operational given the fact that this is also a fairly new institution that has never operated before.

The Bill is also silent of the exact location of the offices especially the fact that they should be at neutral venues and should not be compromised places, so as to encourage victims to approach the ZHRC and file complaints without possibilities of fear, harassment and/or intimidation.

Recommendations

- The Bill must provide that the main office will be at a place decided upon by the Commissioners so that there is clarity on who is responsible for such a decision. It should be a central location which offers efficient communication and administrative facilities and which allows for close and frequent communication, collaboration and interaction with stakeholders, including Ministries, the Parliament of Zimbabwe, other state institutions such as the Judiciary, as well as local authorities and the civil society.
- The ZHRC should endeavour to establish branch offices in regions throughout Zimbabwe, rather than provinces, as a first step, and then seek to expand as and when adequate resources and networks become available.

- The ZHRC must also take care to site its offices in places where people can access them easily (geographical location) and in a manner which ensures that those who seek its assistance will feel free and safe from possible reprisals. The enabling legislation must specifically state that offices of the ZHRC must not be situated near any premises occupied by a political party, near a police station, army barracks, cantonment area or other place where police officers or members of the defence forces are permanently stationed or any place that, for any reason, may give rise to a reasonable apprehension on the part of victims of human rights violations that they may suffer retribution if they lodge a complaint.

2.15 Other Issues outlined in the Schedules -

First Schedule: Provides for the terms of office of the ZHRC Commissioners, conduct of meetings, minutes of proceedings, formation of working groups

The terms of office of Commissioners must be provided in the main provisions of the Bill as they are critical to the whole operations of the ZHRC. Issues of terms of office or tenure have an impact on the overall independence and impartiality of Commissioners and must be treated with the importance they deserve. Legislative drafters recommend that only incidental issues be included in the schedule of any law. The existence of schedules in laws is to ensure that the Bill is more structured and that the key provisions are not necessarily clouded by issues that are not key.

Recommendations

Provisions relating to tenure of office, conduct of meetings, minutes of proceedings and formation of working groups must be included in the main sections of the Bill and not the Schedule.

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