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REPORT

OF THE

PARLIAMENTARY LEGAL COMMITTEE

ON THE

**CRIMINAL LAW (CODIFICATION AND
REFORM) BILL [H.B.10, 2003]**

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1. INTRODUCTION

Mr. Speaker Sir, the Parliamentary Legal Committee considered the Criminal Law (Codification and Law Reform) Bill, [HB 10, 2003], within the framework of its mandate and regrets to report that it found the provisions of clauses 22, 33, 37, 46 and 182(2) of the Bill to be in violation of the Bill of Rights contained in the Constitution of Zimbabwe. Your committee in consequence came to the unanimous conclusion that these clauses would, if enacted, be in contravention of the Declaration of Rights of the Constitution.

2. OBJECT OF THE BILL

The Bill is aimed at codifying the criminal law of Zimbabwe.

3. CLAUSE 22 OF THE BILL

3.1 Clause 22 of the Bill provides as follows:

(1) In this section-

“coercing” means constraining, compelling or restraining by-

(a) physical force or violence or, if accompanied by physical force or violence or the threat thereof, boycott, civil disobedience or resistance to any law, whether such resistance is active or passive; or

(b) threats to apply or employ any of the means described in paragraph (a);

“unconstitutional means” means any process which is not a process provided for in the Constitution and the law.

(2) Any person who, whether inside or outside Zimbabwe-

(a) Organizes or sets up, or advocates, urges or suggests the organization or setting up of, any group or body with a view to that group or body-

(i) overthrowing or attempting to overthrow the

Government by unconstitutional means; or

(ii) taking over or attempting to take over Government by unconstitutional means or usurping the functions of the Government; or

(iii) coercing or attempting to coerce the Government;

or

(b) Supports or assists any group or body in doing or attempting to do any of the things described in subparagraph (i), (ii) or (iii) of paragraph (a);

shall be guilty of subverting constitutional government and liable to imprisonment for a period not exceeding twenty years without the option of a fine. (emphasis added)

3.2 The committee is of the considered view that the definition of “coerce” in this section is too wide as to render it unconstitutional. This finding arises from the fact that the definition of the term includes the employment of constitutionally guaranteed forms of self and collective expression in the form of boycotts or other forms of civic engagement. Your Committee has no problems with the prohibition of a boycott if it is accompanied by violence. It however has difficulties with the propriety and constitutionality of a clause that prohibits the threat of a boycott if it is not accompanied by violence, as clause defined in paragraph (b) of subsection (1) of clause 22 of the Bill. Sections 20 and 21 of the Constitution guarantee the right to freedom of expression and that of assembly and association respectively. A provision that seeks to derogate from these fundamental freedoms cannot be constitutional unless it is one of the exceptions provided for in the Constitution. In consequence your Committee finds clause 22(1)(b) unconstitutional to the extent that it can be read to mean threats of civil disobedience if unaccompanied by threats of force are criminal.

4. CLAUSE 33 OF THE BILL

4.1 Clause 33 (2) provides;

- (2) *Any person who publicly, unlawfully and intentionally-*
- (a) *makes any statement about or concerning the President or an acting President with the knowledge or realizing that there is real risk or possibility that the statement is false and that it may-*
 - (i) *engender feelings of hostility towards; or*
 - (ii) *cause hatred, contempt or ridicule of; the President or an acting President, whether in person or in respect of the President's office; or*
 - (b) *makes any **abusive**, indecent or obscene **statement about or concerning the President or an acting President, whether in respect of the President or the President's office;***
- shall be guilty of undermining the authority of or insulting the President and liable to a fine not exceeding level six or imprisonment for a period not exceeding one year or both.(emphasis added)*

4.2 It is your committee's finding that, given the nature of the Presidency in Zimbabwe, which is a public elected political office, to ring-fence that office against criticism amounts to derogation from fundamental freedoms protected by the Constitution, particularly with respect to the freedom of expression. Your Committee finds that an abusive statement should not be criminalised in the political context; it goes with the nature of the office. Indecent and obscene statements can be properly criminalised. Accordingly, we find clause 33 (2) (b) to the extent that it criminalizes "*abusive*" statements to be unconstitutional.

5. CLAUSE 37 OF THE BILL

5.1 Clause 37 of the Bill provides as follows:

- (1) *Any person who-*
- a) *acts together with one or more persons present with him or her in any place or at any meeting with the intention or realising that there is a real risk or possibility of forcibly-*
 - (i) *disturbing the peace, security or order of the public or any section of the public; or*

(ii) invading the rights of other people;

or

(b) acting together with one or more other persons present with him or her in any place or at any meeting performs any action, utters any words or distributes or displays any writing, sign, or other visible representation that is obscene, threatening, abusive or insulting, intending thereby to provoke a breach of the peace or realising that there is a risk or possibility that a breach of the peace may be provoked; or

(c) acting together with one or more other persons present with him or her in any place or at any meeting utters any words or distributes or displays any writing, sign or other visible representation-

i) with the intention to engender, promote or expose hatred, contempt or ridicule any group, section or class of persons in Zimbabwe solely on account of the race, tribe, nationality, place of origin, national or ethnic origin, colour, religion or gender of such group, section or class of persons; or

ii) realising that there is a risk or possibility that such behaviour might have an effect referred to in subparagraph (i);

shall be guilty of participating in a gathering with intent to promote public violence, a breach of the peace or bigotry, as the case may be, and liable to a fine not exceeding level ten or imprisonment for a period not exceeding five years or both.

5.2 Your committee finds this clause unconstitutional. It unduly restricts the right of persons to participate in public gatherings, meetings and demonstrations, which are legitimate means of exercising the freedoms, protected by sections 20, 21 and 22 of the Constitution. This view is fortified by the substance of clause 37(2) which creates the offence of participating in a gathering with intent to promote public violence, a breach of the peace or bigotry regardless of whether the conduct complained of was spontaneous or planned in advance, and whether the incident took place at a public or private place. This exposes innocent by-standers to prosecution. Thus people who have no criminal intent but just happen to find themselves at the wrong place and time are exposed to unfair prosecution. Such a provision can hardly be consistent with democratic values. Accordingly, we find this clause to be unconstitutional to the extent that it criminalizes unintended participation

in spontaneous demonstrations or public gatherings.

- 5.3 Your committee also finds the clause vague and unclear and thus open to abuse. It does not explain what rights it suggest may be invaded.

6. CLAUSE 46 OF THE BILL

- 6.1 Clause 46 of the Bill provides:

Any person who does any of the acts specified in the Third Schedule shall be guilty of criminal nuisance and liable to a fine not exceeding level five or imprisonment for a period not exceeding six months or both.

- 6.2 Paragraph 2 of the schedule gives a list of acts that are prohibited. These include:

- making any noise or disturbance or playing a musical instrument or wireless in a public place (paragraph (2)(a)(ii));
- shouting or screaming in a public place to the annoyance of the public (paragraph (2)(m)); and,
- employing any means whatsoever which are likely materially to interfere with the ordinary comfort, convenience, peace or quite of the public or any section of the public, or doing an act which is likely to create a nuisance or obstruction (paragraph (2)(v)).

- 6.3 Your committee finds these specific limitations to human conduct unconstitutional, extreme and unjustifiable. They are inconsistent with the provisions of section 20(1) of the Constitution in that they are an undue limitation to the freedom of expression.

- 6.4 The provisions of clause 46 are also in violation of section 20 (1) of the Constitution which protects the freedom of expression in that they criminalise the possible use of this freedom to express legitimate

criticism of the police force.

7. CLAUSE 182 (2) OF THE BILL

7.1 Clause 182 (2) of the Bill provides:

Without limiting subsection (1), a person may impair the dignity, reputation or authority of a court by doing any of the following acts-

(a) having been properly summoned as a party or witness in any judicial proceedings to attend any court for the purpose of giving evidence or producing any document or thing before the court-

(i) ...

(ii) and having attended the court, refusing to give evidence or to produce the document or thing, as the case may be...

7.2 The right to the protection of the law is guaranteed by section 18(1) of the Constitution. Section 18(8) of the Constitution recognizes the right to silence. Thus an accused person cannot be compelled to give evidence at his or her trial. Clause 18(2)(a)(ii) does not recognize such privilege to the extent that it criminalises refusal to testify for whatever reason. It is your Committee's finding that this clause is unconstitutional to the extent that it is inconsistent with the right to silence as protected in section 18 of the Constitution.

8. CONCLUSION

For the reasons cited above Mr Speaker Sir, Your Committee reached the unanimous conclusion that the provisions of clauses 22, 33, 37, 46 and 182 (2) of the Bill would, if enacted, be in violation of the Bill of Rights, particularly sections 20 and 21 of the Constitution.

PROF W NCUBE

CHAIRMAN – PARLIAMENTARY LEGAL COMMITTEE