

The Interception of Communications Bill: The Constitutionality of the draft Bill

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Introduction

This is an inquiry into the constitutionality of the interception of citizens' private mail and telecommunication-related activities, by the government, as provided in the Draft Bill.

Interception connotes interference, obstruction, and stoppage of flow, seizure, and grabbing, among other negative processes. Communication involves the imparting or exchange of information, ideas, or feelings. This can be done via verbal, physical, electronic, written, telephonic, virtual or other various available channels. The Draft Bill targets "telecommunication, postal or any other related service system", which means practically all forms of communication.

Premise

This discussion proceeds from the premise that Zimbabwe is a free and democratic society. After all, as they say, the impetus behind the war of liberation was the quest for freedom and democracy for all Zimbabweans. In the first place, the reigning government came to power in 1980, via a democratic process.

The government is in power on claims that it was democratically elected into office, by free citizens. After all, isn't freedom and democracy the essence of the annual Independence celebrations that both the 'equal' and the 'more equal' citizens celebrate?

Indeed, it has been proven in many countries that the governance of people in almost all societies is best optimized under a democratic configuration. It is also true for many that the potential of an individual or a society, best matures into reality, where freedom prevails.

Constitutionality and Reasonableness

The above introductory statements set out the framework within which governance is discharged, or should be discharged in a country, more so how citizens' rights are bestowed and ought to be respected.

The subject of this analysis ... constitutionality ... is one of those ambient factors that are fundamental to the sustenance of a democratic society. In a democratic society, decisions, actions, plans, operations and laws, all have to be constitutional.

The reference to constitutionality then makes it absolutely necessary to also deal with the concept of 'reasonableness'. That is to say relevant things must be "reasonable" in a "democratic society". It is only these two variables – 'constitutionality' and 'reasonableness in a democratic society' that informs the analysis of the Interception of Communications Bill.

Constitutionality – refers to the extent or degree to which a particular statutory or administrative provision is consistent with a constitution. This concept should be differentiated from *constitutionalism*, which means that statutory, administrative and other forms of provisions must be crafted in compliance with the basic principles, spirit, or system of governance in accord with widely accepted characteristics of a good constitution. Hence, one law might be constitutional but at the same time be inimical to the concept of constitutionalism.

In the context of Zimbabwe, an instrument, provision or decree is constitutional *only if* it is consistent with the Constitution of Zimbabwe¹ ("the Constitution"). Section 3 of this Constitution establishes the supremacy of the Code, and it also establishes the test for Constitutionality upon all Zimbabwean laws.

¹ S.I 1979/1600 of the UK plus all the 17 subsequent amendments

Any law, that does not comply with any section of the Constitution, is unconstitutional and therefore null and void.

The Draft Bill and the Constitution

The twenty-one (21) sections of the Interception of Communications Draft Bill deal essentially and precisely with the activity described in the document's title – that is, the interception of Communications. The question therefore is – the interception, or interference with, obstruction of, stoppage of the flow, seizure or grabbing - of communications by government constitutional?

The sections of the Constitution that deal with communication include:

1. s11 (b) protection of the freedoms of conscience, expression, and association
2. s11 (c) protection of the right to privacy
3. s13 protection of the right to personal liberty
4. s15 Protection from ... inhuman or degrading punishment or treatment.
5. s16 Protection from deprivation of property
6. s18 Protection by the law
7. s19 Protection of Freedom of Conscience
8. s20 Protection of Freedom of Expression
9. s21 Protection of Freedom of Association

Reasonableness

At law, as in most other fields of study or anthropology, to every general rule there is an exception. It is therefore widely accepted that in enshrining fundamental rights and freedoms in the Constitution and in other legal instruments, drafters may formulate exceptions to the enshrined rights and freedoms.

In the famous case of *Ratigan*², the court held that:

“... where rights and freedoms are conferred on persons, derogations therefrom, as far as the language permits, should be narrowly or strictly construed”.

Wide and vague formulations are, therefore especially, unacceptable in rights-related, or constitutionally enshrined entitlements and freedoms. Such formulations are therefore unconstitutional.

Further, in any democratic society, these exceptions ought to be subjected to the reasonableness test. If an exception has to be made, then it must be absolutely necessary, justifiable or “reasonable in a democratic society”. If it fails that test, then what remains is for it to be struck down for its want of reason. It becomes unconstitutional. The onus is on the person who seeks to impose the exception, to illustrate the reasonableness or sound necessity of the imposition.

The Constitution itself already carries exceptions to the rights and freedoms clauses. This Draft Bill seeks to supplement the enshrined exceptions, relating to communications.

However, the gods of the Draft Bill, that is under review could not provide, or at least conjure up any reason or justification for these “bonus” exceptions. In most statutes or statutory

² *Rattigan & Others v Chief Immigration Officer & Others* 1994 (2) ZLR 54 (S)

instruments, the motives or explication of the given provisions, are furnished in the preamble to the instrument.

In the Draft Bill, according to the Preamble section, the 'purpose' is simply to establish (interception) that is, to intercept for the sake of interception. Can that be reasonable? In most democratic societies, additional exceptions would arise only from additional or fresh circumstances. In this case, what fresh mischief has necessitated this proposed Zimbabwean law?

In Zimbabwe no new circumstances or threats to national security have arisen and besides the Zimbabwe government could simply be out to replace those sections of the Postal and Telecommunications Act³ ("the Act") which were struck down by the Supreme Court of Zimbabwe on 15 May 2003.

Postal and Telecomms Act

Despite objections from concerned citizens, and from the telecommunications industry, the Zimbabwe government all the same introduced the Act on 16 June 2000, and the statute came into operation on 1 January 2001. Two, among many sections of the Act, were particularly repulsive. Section 98 (2) and s103 had exactly the same effect as the menace that is proposed for enactment in the Draft Bill.

Irked by the asinine nature of the Act, the Law Society of Zimbabwe then challenged the Minister of Transport and Communication, and the Attorney General⁴ at the Supreme Court. The Society successfully argued that the two sections were repugnant to s20 of the Constitution of Zimbabwe, i.e. the right to freedom of expression.

The Supreme Court made the following key points in the Law Society case:

- i) the definition of "postal services" as given in the Act, and in light of s98 (2), was very broad. Yet the Act did not impose any restrictions on the manner in which the adventure of interception would be carried out
- ii) freedom of expression as enshrined in s 20 (1) of the Constitution, includes freedom from interference with correspondence
- iii) The statutory provisions in the Act conferred wide and unfettered powers to the President, to intercept correspondence and communications. The only limitation to the exercise of that power was that the president had to hold some "opinion". Yet it was not a legal requirement that the holding of the opinion be based on reason or good cause
- iv) The issue was not about whether the powers had been abused, or were likely to be abused, but rather that the Act did not offer any mechanisms to prevent such abuse.
- v) The impugned sections gave no guidance as to what a citizen should not do to avoid the interception of his/ her mail, if he/ she does not wish to have mail intercepted
- vi) The provisions were too vague, and they bestowed extremely broad and unfettered powers to an individual without the necessary checks and balances – to degrees that were not reasonable in a democratic society.
- vii) It was quite clear from a reading of the two sets of provisions (i.e those of the Constitution, and those of the Act), that the sections in the Act amounted to a derogation of the relevant constitutional provisions

The subject sections were, therefore, declared unconstitutional and were struck down. This Draft Bill, therefore, cannot escape the damnation of unconstitutionality, for three specific reasons:

First, it yields the same effects as those that arose from the debunked s98 (2) and s103 of the Act. It follows that this Draft Bill is unconstitutional in as far as it violates s20 of the Constitution.

³ (Chapter 12:05)

⁴ S.C 59/2003

Second, although powers and capacities have been shifted from the president, to the Chief of Defence Intelligence and others, many of the provisions in the Draft Bill remain broad, vague, embarrassing and erosional in nature. For instance, the definition of “postal services” is retained in the Draft Bill⁵.

Third, its unconstitutionality is compounded by its incompatibility with the other above listed fundamental rights.

Fourth, its vagueness, lack of any sound justification, and wanton invasion into the private lives of citizens, makes the Draft unreasonable in a democratic society, and therefore unconstitutional.

The Answers: What is about to be grabbed now are the fundamental rights and freedoms, or civil liberties of ordinary citizens, including the right to free communication. There clearly is no fresh mischief to be combated in Zimbabwe. Interference with the communications of its citizens is, therefore, patently unnecessary and therefore unreasonable.

The move comes now because it is inspired by no reason or by Anglo-American ambitions within certain ‘more equal comrades. Or it could possibly and probably be an attempt to overturn the 2003 Supreme Court determination, in typical patriotic fashion (PF).

The provisions of the Draft Bill are unconstitutional!

⁵ see section 2 (2) of the Draft.