

HUMAN RIGHTS COMMISSION BILL, HB 2/2011

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INTRODUCTORY REMARKS

- ◉ Human rights have since WWII become a critical issue in international discourse
- ◉ With the advent of globalisation it has become critical in international relations
- ◉ States have an obligation to ensure that human rights are protected in their territories
- ◉ Independent commissions are seen as a way of ensuring the promotion and protection of human rights
- ◉ It is the State/its organs that can be accused of human rights abuses

HUMAN RIGHTS IN THE CONSTITUTION

○ Members to familiarize themselves with Sections 11-26 of the Constitution:-

- Section 11 preamble
- Section 12 right to life
- Section 13 right to personal liberty
- Section 14 protection from slavery and forced labour
- Section 15 protection from inhuman treatment
- Section 16 protection from deprivation of property
- Section 17 protection from arbitrary search and entry
- Section 18 secure protection of the law
- Section 19 freedom of conscience
- Section 20 freedom of expression
- Section 21 freedom of assembly and association
- Section 22 freedom of movement
- Section 23 freedom from discrimination on the specified grounds
- Section 23A political rights

INTERNATIONAL HUMAN RIGHTS INSTRUMENTS

- ◉ The International Convention on Civil and Political Rights (ICCPR)
- ◉ The International Convention on Economic Social and Cultural Rights (ICESC)
- ◉ African Charter on Human and Peoples Rights
- ◉ The Convention on Rights of the Child (CRC)
- ◉ The African Charter on the Rights and Welfare of the Child (ACRWC)
- ◉ The Convention on Elimination of all Forms of Discrimination Against Women (CEDAW)
- ◉ Convention Against Torture
- ◉ Statelessness Convention
- ◉ Convention on the Rights of Migrant Workers and their Families
- ◉ Convention on the Rights of the Disabled

ESTABLISHMENT & APPOINTMENT OF HRC (S100R)

- ◉ The current Commission is a product of Constitutional Amendment 19 (Act 1/2009)
- ◉ Consists of a chairman, qualified for at least 5 years to practise as a legal practitioner and 8 others appointed from a list of nominees
- ◉ The chairman is appointed by the President after consultation with the JSC and the SROC
- ◉ The SROC submits a list of the nominees
- ◉ Should recommendations of the JSC not be followed on the appointment of the chairman, the Senate shall be informed

APPOINTMENT (CONT)

- ◉ Persons shall be chosen for their knowledge of and experience in the promotion of social justice or the protection of human rights & freedoms
- ◉ Current Membership:
 - Prof Reg Austin (Chairperson)
 - Dr Ellen Sithole (Deputy Chairperson)
 - Joseph Kurebwa
 - Jacob Mudenda
 - Elasto Mugwadi
 - Dr Japhet Ndabeni-Ncube
 - Nomathemba Nesen
 - Prof Carrol Khombe
 - Dr Kwanele Jirira

INDEPENDENT COMMISSIONS IN ZIMBABWE (S109)

- ◉ They are independent & not subject to the direction/control of anyone; and
- ◉ They must exercise their functions without fear, favour or prejudice
- ◉ Majority decisions shall carry the day
- ◉ The salaries of commissioners shall not be reduced during their tenure
- ◉ An MP or member of a local authority shall be ineligible for appointment as a commissioner
- ◉ These provisions are meant to safeguard the independence of commissions

FUNCTIONS OF THE COMMISSION (S100R(5))

- ◉ To promote awareness of and respect for human rights and freedoms at all levels of society;
- ◉ To promote the development of human rights and freedoms;
- ◉ To monitor and assess the observance of human rights;
- ◉ To recommend to Parliament effective measures to promote human rights and freedoms;
- ◉ To investigate the conduct of any authority or person in respect of any allegation of human rights violation
- ◉ To assist in the preparation of State Party reports

POWERS OF THE COMMISSION (S100R(6))

- ◉ To call for information from any person or body necessary for the preparation of State Party reports
- ◉ To take over & continue any investigation instituted by the Public Protector where the dominant issue relates to the Commission's functions
- ◉ To refer to the Public Protector for investigation any matter whose dominant issue relates to the functions of the Public Protector

FURTHER POWERS (REQUIRING AN ACT) (S100R(8))

- ◉ To conduct investigations on its own initiative or on receipt of complaints
- ◉ To visit and inspect prisons, places of detention, refugee camps etc
- ◉ To inspect places where mentally disordered persons are detained
- ◉ To secure or provide appropriate redress for violations of human rights and for injustice

MAIN CLAUSES OF THE HRC BILL, 2011

- ◉ The long title of the Bill reflects legislative intention:

AN ACT to provide for the procedure of the Zimbabwe Human Rights Commission; to provide for the appointment of the Deputy Chairperson, Executive Secretary and staff of the Commission; and to provide for matters incidental to or connected with the foregoing.

- ◉ Clauses 1 & 2 are the short title and interpretation provisions, respectively

CLAUSES OF THE BILL (CONT)

- ◉ “Human rights violation” is defined to mean a violation of-
 - The Declaration of Rights in the Constitution, or
 - Any domesticated international human rights instrument
- ◉ Those instruments that have been signed &/or ratified but not domesticated not covered
- ◉ Domesticated instruments must expressly confer jurisdiction on the Commission

CLAUSES (CONT)

- ◉ Clause 3 gives the Commission its corporate status as a legal *persona*
- ◉ It also provides for tenure of office:
Commissioners shall hold office for a term of five years & are eligible for re-appointment
- ◉ The Zambian provision provides for a term of three years which is subject to renewal

FUNCTIONS OF THE COMMISSION (CL4)

- ◉ To promote awareness of and respect for human rights and freedom at all levels of society.
- ◉ To promote the development of human rights and freedoms.
- ◉ To monitor and assess the observance of human rights in Zimbabwe.
- ◉ To recommend to Parliament the effective measures to promote human rights and freedoms. While there is nothing wrong with this, given the constitutional mandate of the Executive, should that role not be extended to making recommendations to the Executive as well? Sight should not be lost of the role of Parliament in our constitutional order/dispensation. The Paris Principles, discussed below, provide for the competence of such a body to advise government.

FUNCTIONS (CONT)

- ◉ To investigate any alleged violations of the Declaration of Rights in the Constitution by any authority or person.
- ◉ To assist the Minister to prepare reports required to be submitted to any regional or international body appointed for the purpose of receiving such reports under any human rights convention, treaty or agreement to which Zimbabwe is a party. Should it ideally be the role of an independent commission to “assist” a member of the Executive?

CLAUSES 5 & 6: D/CHAIRPERSON & S/G

- ◉ The President shall appoint a Deputy Chairperson from amongst the Commissioners after consultation with the SROC
- ◉ The Commission shall appoint an Executive Secretary and any other necessary staff
- ◉ The Commission shall consult the ministers responsible for the administration of the Act and of finance in that respect

INDEPENDENCE & IMPARTIALITY

- ◉ Clause 7 enjoins commissioners and staff to be impartial
- ◉ It prohibits interference from the State, its agencies or institutions or officials
- ◉ State institutions and officials are enjoined to render the Commission such assistance as it may require
- ◉ Section 109 of the Constitution protects all commissions from the control or direction of any person or authority
- ◉ What are the sanctions for breaches?

CLAUSE 8: REPORTS OF COMMISSION

- ◉ The Commission is enjoined to submit a report on its operations to the Minister within a prescribed period
- ◉ It shall also submit other reports and information the Minister may require
- ◉ Does this not amount to the Commission being subjected to the control of the Minister
- ◉ Should the Commission not ideally report to Parliament?

CLAUSE 9: JURISDICTION OF THE COMMISSION

- ◉ The Commission may initiate investigations of its own initiative
- ◉ Should the Commission be empowered to initiate investigations at the instance of a person other than the victim as in Zambia?
- ◉ An aggrieved party may in writing cause the Commission to start the process
- ◉ Should the aggrieved party always have to submit a written complaint?
- ◉ Should an aggrieved party die, their legal representative may pursue the matter
- ◉ Why should a living complainant not be entitled the same right of representation?

JURISDICTION (CONT)

- ◉ The Commission is not entitled to investigate complaints by non-Zimbabweans save where they are residents or visitors (Clause 9(4))
- ◉ This may conflict with the principles of State Responsibility under international law, and section 23 of the Constitution
- ◉ Clause 9(4) also provides that the Commission shall not investigate issues that arose before 13th February 2009

CLAUSE 10: MANNER OF MAKING COMPLAINTS

- ◉ The Commission shall through regulations (subsidiary legislation) set out the general manner in which complaints should be made
- ◉ The Commission may require a complaint to be supported by evidence
- ◉ It shall not refuse to investigate a complaint simply because it is not in the proper form

CLAUSE 11: REFUSAL TO INVESTIGATE

- ◉ Where the Commission is not authorised by the Constitution, it shall refuse to investigate
- ◉ Where the evidence adduced is not authorised by the Constitution, the Commission shall discontinue the investigation
- ◉ The aggrieved party shall in either event be advised

CLAUSE 12: MANNER OF CONDUCTING INVESTIGATIONS

- ◉ The Commission has a wide discretion on the conduct of its investigations
- ◉ It may use open public hearings or closed hearings
- ◉ The Minister may by notice prohibit the disclosure of evidence or documentation that in his/her opinion may be prejudicial to the public interest
- ◉ The Minister is the sole decider on this matter
- ◉ This provision is potentially open to abuse and may prejudice the very objectives the Act is intended to achieve

CLAUSES 13, 14, 15, & 16

- ◉ If there is direct or indirect interest, a commissioner must recuse himself or herself on pain of criminal punishment
- ◉ The Commission shall report its opinion and recommendations where it makes a finding of human rights violations
- ◉ The Commission may institute action for redress in any court; the State Liabilities Act shall apply to litigation against the State or related authority
- ◉ The Commission may state a special case on jurisdiction to the High Court for determination

CLAUSE 17: FUNDS OF THE COMMISSION

- These shall consist of:
 - moneys appropriated by Act of Parliament;
 - any other moneys that may be payable to the Commission from moneys appropriated for the purpose by Act of Parliament;
 - any donations, grants, bequests or loans made by any person or organisation or any government of any country to the Commission with the approval of the Minister; and
 - any other moneys that may vest in or accrue to the Commission, whether in terms of this Act or otherwise.
- The Minister is again given powers over the Commission in terms of choosing who can be its friends. Can the Commission not handle this competently?

CLAUSES 20 & 21: REMOVAL & IMMUNITY

- ◉ A commissioner may be removed from office for inability to discharge his/her functions
- ◉ The process is similar to that for the removal of a judge from office
- ◉ This is meant to guarantee the independence of the institution
- ◉ The Commission & its personnel are immune from liability while acting under the direction of the Commission
- ◉ This is critical for the discharge of the Commission's mandate

CLAUSE 22: PROVINCIAL, DISTRICT & OTHER OFFICES

- ◉ The Commission is entitled to set up offices at the various administrative levels of governance in Zimbabwe as the circumstances may require:
 - Province
 - District
 - Other

CLAUSE 23: REGULATIONS

- ◉ The Commission is entitled to make regulations on specified areas
- ◉ Regulations made by the Commission can only take effect after approval by the Minister & publication in the Gazette
- ◉ Again the overarching power of the Minister over the Commission is apparent

OTHER ISSUES FOR CONSIDERATION

- ◉ Should it carry out rehabilitation of victims of human rights abuses (Zambia)?
- ◉ Should the Commission make proposals to the Executive for the protection of, and improvements to human rights?
- ◉ Should it investigate maladministration of justice? (Zambia)
- ◉ Should the Commission comment publicly as it deems fit on any general or specific situation of violation of human rights (Malawi)?
- ◉ Should the Commission visit places of detention without notice (Malawi)?
- ◉ How will it relate to the ZEC in relation to human rights violations during, or linked to, election periods?
- ◉ There may be need to clarify as to which institution will prevail between the Commission and the Public Protector to avoid future conflict.

CURRENT CRITICISMS OF PROPOSALS

- ⦿ That the Act will disallow the Commission from looking at the past, (Zimbabwe has since 1980 had a justiciable Bill of Rights),
- ⦿ The Bill thus narrows the parameters for the work of the Commission
- ⦿ Powers of the Minister administering the Act may impact on the independence of the Commission

PARIS PRINCIPLES ON HUMAN RIGHTS COMMISSIONS

- These were adopted by the Office of the United Nations High Commissioner for Human Rights in 1992
- They were approved by the UN General Assembly in 1993
- In terms of these principles, a properly set out and structured national institution must reflect these:

PARIS PRINCIPLES (CONT)

- Be vested with competence to promote & protect human rights
- Have as a broad mandate as possible, clearly set out in a constitutional or legislative instrument ;
- Have independent appointment procedures with terms of office specified by law;
- Have pluralist representation on its membership, that is, they shall incorporate all social forces involved in human rights protection and advancement including NGOs, trade unions, universities, as well as social and professional bodies;

PARIS PRINCIPLES (CONT)

- Function effectively;
- Have independence from the Executive;
- Have adequate funding & infrastructure to enable it to discharge its mandate. It must not be subject to financial control that affects its independence;
- Have the competence to advise government, parliament and any other competent bodies on human rights issues, including on proposed legislation with an impact on human rights;

PARIS PRINCIPLES (CONT)

- Be responsible for the preparation of its reports, and reports on the national situation on human rights;
- Promote the harmonisation of national legislation and practices with international human rights legal instruments to which the state is party, and to ensure their effective implementation;
- Encourage the ratification of international human rights legal instruments, and to ensure their effective implementation;
- Contribute to the reports which States are required to submit to United Nations bodies and committees, and to regional institutions, pursuant to their treaty obligations and, where necessary, to express an opinion on the subject, with due respect for their independence;

PARIS PRINCIPLES (CONT)

- Co-operate with the United Nations and other international and regional bodies on human rights issues;
- Participate in the development of human rights curriculum, research and execution of human rights programmes for schools and tertiary institutions;
- Address public opinion directly or through any press organ, particularly in order to publicize its opinions and recommendations;

CONCLUSION

- ◉ The Bill is a positive development to the extent that it seeks to give life to a constitutional creature
- ◉ It is in sync with international practice to establish human rights bodies
- ◉ There appear to be some gaps in the Bill, and clauses that cause discomfort

THE END

Thank You