

ADVERSE REPORT

OF THE

PARLIAMENTARY LEGAL COMMITTEE

ON THE

ZIMBABWE ELECTORAL COMMISSION

BILL [H.B.18, 2004]

DRAFT ADVERSE REPORT ON THE ZIMBABWE ELECTORAL COMMISSION BILL [H.B. 18, 2004]

1. INTRODUCTION

- 1.1 Mr Speaker Sir, the Parliamentary Legal Committee considered the Zimbabwe Electoral Commission Bill [H.B.18, 2004] within the framework of its mandate and regrets to report that in the opinion of your committee, the provisions of paragraphs (a), (b), and (c) of clause 11 and clause 12 of the Bill would, if enacted, be in violation of section 20 of the Constitution, while the provisions of clause 11(3) are in violation of section 18 of the constitution.

2. CLAUSE 11(1) OF THE BILL

- A. clause 11 of the Bill falls under PART IV which seeks to regulate the conduct of voter education in Zimbabwe. Voter education is defined in clause 9 as:
“any course or programme of instruction on electoral law and procedure aimed at voters generally and not offered as part of a course in law, civics or other subject for students at an educational institution”
- A. In terms of clause 10 of the Bill, only the following categories of people may freely provide voter education: the Electoral Commission itself, persons appointed by the Commission for that purpose and political parties.
- B. Ordinary people in Zimbabwe are prohibited from carrying out voter education unless they meet the following conditions which are provided for in paragraphs (a) to (g) of clause 11(1) of the Bill and which are summarized below.
- C. Any ordinary person wishing to conduct voter education must:
- a. be a citizen or permanent resident of Zimbabwe domiciled in Zimbabwe, or
 - b. be an association of persons consisting exclusively of citizens or permanent residents of Zimbabwe domiciled in Zimbabwe, and
 - c. employ individuals who are citizens or permanent residents of Zimbabwe, and
 - d. conduct voter education in accordance with a course or programme of instruction furnished or approved by the Commission
 - e. be funded solely by local contributions or donations
 - f. not charge a fee for the provision of voter education

1. CLAUSE 11(3) OF THE BILL

- 3.1 Clause 11(3) of the Bill imposes criminal liability on any person, other than a political party, who having the authority to conduct voter education in terms of clause 11(1) or proposes to conduct voter education, fails to comply with a requirement by the commission to do any of the following:
- 1. *furnish the commission with copies of all the voter education materials proposed*

to be used and particulars of the course or programme of instruction in accordance with which the voter education will be conducted:

- 2. furnish the commission with all the names, addresses, citizenship or residence status and qualifications of the individuals who will conduct voter education*
 - 3. disclose the manner and sources of funding of its proposed voter education activities; and*
 - 4. satisfy the Commission that he is not otherwise disqualified in terms of subsection (1) from providing voter education*
- 3.2 The penalty imposed is a fine not exceeding level fourteen or imprisonment not exceeding two years, or both

4. CLAUSE 12

- 0.1. Clause 12 of the Bill prohibits the contribution of foreign funds to voter education unless such contribution is made to the Commission, which is, in turn, empowered to allocate the funds to any person who is allowed to carry out voter education in terms of PART IV of the Bill.

5. SECTION 20 OF THE CONSTITUTION

- 0.1. Section 20 of the Constitution protects the right of freedom of expression in the following terms:

20 (1) except with his own consent, or by way of parental discipline, no person shall be hindered in the enjoyment of his freedom of expression, that is to say, freedom to hold opinions and to receive and impart ideas and information without interference, and freedom from interference with his correspondence

- 0.1. Section 20 (2) permits the enactment of laws which derogate from the right of freedom of expression but only to the extent that such a law makes provision in the interests of defence, public safety, public order, the economic interests of the state, public morality or public health among others.

- 0.1. The section further qualifies the right of the State to make derogations from this right by providing in the concluding provision of section 20 (2) (b) that *"the provision or, as the case may be, the thing done under the authority thereof, is shown not to be reasonably justifiable in a democratic society"*.

- 0.1. Thus, Mr Speaker the test to which legislation must be subjected to in order to meet the requirements of section 20(2) is, to our mind two runged. First, the proposed law must be shown to be necessary to protect any of the interests listed in paragraphs (a) to (c)

of section 20 (2) and secondly, the measures adopted by the law to protect those interest must be shown to be reasonably justifiable in a democratic society.

6. PROVISION OF VOTER EDUCATION AS THE EXERCISE OF THE RIGHT OF FREEDOM OF EXPRESSION

0.1. The provision of voter education involves holding opinions, receiving and imparting ideas and information. It therefore involves the exercise of the freedom of expression.

0.1. The provisions of clauses 11 and 12 of the Bill limit the free conduct of voter education by providing numerous restrictions in paragraphs (a) to (g) of clause 11(1), creating a criminal offence for non compliance with certain orders of the commission in section 11(3) and by prohibiting foreign donations which would make it possible for people to fund and therefore conduct voter education.

0.1. The provisions of clauses 11(1) 11(3) and 12 must therefore be tested against the principles of permissible derogations provided for in section 20 (2) of the Constitution.

0.1. In other words, Mr Speaker, the limitations to the right of freedom of expression that are provided for in clauses 11 and 12 of the Bill can only be constitutional if it can be shown that these limitations are necessary:

- (1) in the interests of defence, public safety, public order, the economic interests of the State, public morality or public health.
- (2) for the purpose of protecting the reputations, rights and freedoms of other persons or the private lives of persons concerned in legal proceedings; preventing the disclosure of information received in confidence; maintaining the authority and independence of the courts or tribunals or parliament; regulating the technical administration, technical operation or general efficiency of telephony, telegraphy, posts, wireless, broadcasting or television or creating or regulating any monopoly in these fields; in the case of correspondence preventing the unlawful dispatch therewith of other matter.
- (3) for imposing restrictions upon public officers.

0.1. Mr Speaker Sir, save to state briefly in the opening paragraph of the memorandum that the Bill seeks to establish an independent authority to administer all elections and referendums, the policy considerations underlying the Bill and in particular the provisions relating to the regulation of voter education are not apparent from the text of the Bill. Your committee however proceeded on the reasonable assumption that the provisions relating to the regulation of voter education are meant to give effect to the desire of the Government to ensure that the electorate receives accurate and

unbiased information relating to the law and procedure of elections in Zimbabwe.

0.1. Mr. speaker sir, given the lack of sophistication amongst particularly rural folk who constitute the majority of the population of Zimbabwe and the parochial culture of the citizenry in general, the state has a legitimate interest in regulating the conduct of voter education with the objective of ensuring that the people are not unduly misled thereby negating their democratic right to freely choose their leaders. Derogations from the right of freedom of expression which are inherent in the measures taken to regulate voter education for the purpose outlined above can therefore be justified on the grounds that they are necessary in the interests of public order. The term “public order” used in the context of the fundamental rights discourse has been defined as referring to the conditions that assure the normal and harmonious functioning of institutions based on a coherent system of values and principles.

0.1. For this reason your committee did not find anything amiss in the regulation of voter education as an idea. What we did find to be unjustifiable was the manner in which the Bill seeks to achieve its objectives.

0.1. Clause 11(1)(a), 11(1)(b) and 11(1)(c)

The provisions of all these clauses absolutely prohibit citizens of Zimbabwe domiciled outside Zimbabwe from conducting voter education either as the principals or as employees. “Domicile” is a legal concept that is used to denote the country that is to be considered a person’s permanent home. This concept is particularly useful in the area of private law to determine which country’s law is applicable in the determination of the parties rights in such cases as divorce, custody of minor children. It is also used, less extensively, in the field of public law to determine such issues as for example an individual’s tax liability. The concept of domicile is not normally used as a criterion for extending or denying fundamental rights to citizens. This is because citizens still owe their allegiance to the state regardless of the location of their domicile. Indeed the provisions relating to the qualification to voters provided for in schedule 3 of our constitution do not discriminate against citizens domiciled outside the country. Indeed your committee failed to find any justification in terms of section 20(2) of the constitution for the denial of the right of the freedom of expression to citizens of Zimbabwe domiciled say for example, in Mozambique, Malaysia or Brazil

6.9 Consequently your committee came to the conclusion that the nature and level of voter education regulation required to achieve the legitimate objective of ensuring accurate and unbiased voter education can be achieved through the provisions of clause 11(d), 11(e), 11(f) and 11(g).

6.10 Clause 11(3)

Your committee's objection to the provisions of clause 11(3) arises from the fact that its provisions can lead to the punishment of a person who has not actually committed any crime. This possibility arises from the wording of section 11(2) which empowers the commission to "require any person other than a political party, providing **or proposing to provide** voter education" to submit certain information. Failure to comply with such request amounts to a criminal offence in terms of clause 11(3). This means that a person who has not actually provided voter education but who merely proposes or intends to do so, may be jailed or fined for failing to furnish the commission with the requested information in the same manner as a person who has actually conducted voter education in violation of section 11(1).

- 0.1. Not only is this scenario unjust and bizarre, it also goes against the fundamental principles of criminal law which sets out the two indispensable elements of a crime as the intention to commit the crime and the physical act or omission constituting the crime. In this case, the law provides for a criminal offence based on intention alone. This is in contravention of section 18(1) of the constitution which guarantees secure protection of the law.

0.1. Clause 12

The grounds on which your committee found the provisions of Clause 12 to be in contravention of the constitution are based on the definition of foreign contribution as "*a contribution or donation made by a person who is not a permanent resident or citizen of Zimbabwe domiciled in Zimbabwe*" The right of freedom of expression should be understood to encompass the right to employ ones resources available for disseminating the ideas that one subscribes to. In that regard, our observations with regard to the provisions of paragraphs (a),(b) and (c) of section 11 *mutatis mutandis* apply here as well.

7. ARE THE MEASURES ADOPTED JUSTIFIABLE IN A DEMOCRATIC SOCIETY?

- 0.1. Having failed to justify the provisions of paragraphs (a), (b) and (c) of clause 11(1), clause 11(3) and clause 12 on the test for permitted derogations provided for in section 20 (2) of the Constitution; it may not be necessary to move to the next stage of the inquiry which is, whether, these provisions are reasonably justifiable in a democratic society, your committee nevertheless went on to make that inquiry and found as follows:

- 0.1. The test for determining whether or not any provision is reasonably justifiable in a democratic society was set out in the case of *Nyambirai v. NSSA and Another* (2) ZLR 1 (S) as

follows:

- a. Is the legislative objective sufficiently important to justify limiting a fundamental right?
- b. Are the measures designed to meet the legislative objective rationally connected to it?
- c. Are the means used impair the right or freedom any more than is necessary to accomplish the objective.

A. Is the legislative objective of the provisions relating to the regulation of voter education sufficiently important to justify limiting the right?

The legislative objective of the Zimbabwe Electoral Commission Bill as stated in the memorandum of the Bill is to establish an independent authority to administer all elections and referendums in Zimbabwe.

7.4 Mr. Speaker Sir, as stated earlier in this report, there are important policy considerations (which I shall not repeat), which warrant the regulation of voter education. These important policy considerations do justify limiting to some extent the right of freedom of expression

A. Are the Measures Designed to Meet the Legislative Objective Rationally Connected to it?

Mr. Speaker Sir, having agreed that the Government has a legitimate interest in regulating the conduct of voter education to ensure that the education material is not misleading or biased, the next question is whether the measures embodied in paragraphs (a) to (g) of clause 11, which restrict the right of freedom of expression are rationally connected to the objective.

We have already indicated that in view of the policy considerations, some measure of regulation of voter education is acceptable. We also indicated that in our view, the provisions of paragraphs (d) to (g) represent an adequate limitation of the right of freedom of expression as the exigency of the circumstances require.

7.5 We therefore came to the conclusion that while the provisions of paragraphs (d) to (g) of section 11(1) are designed to meet the legislative objective and are rationally connected to it, those of paragraphs (a) to (c) of clause 11, clause 11(3) and clause 12 are not

7.6 Do The Measures Contained In Sections 11 And 12 Limit The Right Of Freedom Of Expression Any More Than Is Necessary To Accomplish The Objective?

Mr. Speaker Sir, your Committee was of the opinion that the measures contained in paragraphs (d) to (g) of clause 11(1) constitute a limitation of the rights of freedom of

expression which is necessary for the accomplishment of the legislative objective of ensuring the dissemination of voter education that is accurate and unbiased while the measures contained in paragraphs (a) to (c) of clause 11, clause 11(3) and clause 12 do not.

8.. **CONCLUSION**

It is therefore our conclusion Mr. Speaker that the provisions of paragraphs (a),(b) and (c) of clause 11(1) and clause 12 would, if enacted, be in violation of section 20(1) of the Constitution while we also found the provisions of clause 11(3) to be in violation of section 18 of the Constitution.

[Signed By]

PROF W NCUBE

ACTING CHAIRMAN – PARLIAMENTARY LEGAL COMMITTEE