

THE INTERCEPTION OF COMMUNICATIONS BILL, 2006

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Introduction

International law has been moving towards an established conception of what are termed communication rights. Especially protected in such rights are the universally accepted rights to privacy and freedom of expression, together with what are termed inclusiveness guarantees, which involve access to information and knowledge, the right to education, the right to protection of the cultural life of communities, and the equal sharing of science and technology, which promote cultural, informational and linguistic diversity. In the respect, protection, promotion and fulfillment of all these universally acknowledged rights, basic means of communication, such as telephones, broadcasting and internet, are integral.

Communication rights are thus crucial to democracy and political participation as well as cultural identity and development, as based on the principles of freedom, inclusiveness, diversity and participation. They are necessary for human beings to live in freedom, justice, peace and dignity. Further participation in political processes by having one's views taken into account is an integral part of equality, which is at the core of fundamental constitutional rights.

The worldwide emerging practice of passing highly repressive "counter-terrorist" legislation in the wake of the US bombing of 9/11 has increasingly been used as an excuse to trample on the rights of ordinary citizens as part of the "war on terror". Even in circumstances where such a "war on terror" is being legitimately fought arbitrariness and unreasonableness remain unacceptable.

The fact that many countries have legislated for the interception of communication is not in dispute. However, this is no excuse to pass legislation which is badly drafted, self-destructive, and disrespectful of the fundamental rights and freedoms of the populace.

These values are enshrined in many international instruments which have become widely accepted and to which Zimbabwe is party. The Constitution of Zimbabwe carries with it the protection of the freedom of expression and the free flow of information to and from persons. Any interception of communication amounts to an interference with communication rights as protected in international law and the Constitution of Zimbabwe. Several jurisdictions have held that the interception of all communications constitutes a serious breach of human rights. The European Court of Human Rights has ruled on numerous occasions, that "tapping and other forms of interception of telephone conversations constitute a serious interference with private life and correspondence and must accordingly be based on a law that is particularly precise".

African States, including Zimbabwe, have unanimously adopted the Declaration of Principles on Freedom of Expression in Africa. These clarify that Freedom of Expression and right to access information includes the right to seek, receive and impart information and ideas, either orally, in writing or in print, in the form of art, or through any other form of communication, including across frontiers. They further seek to protect this freedom as a fundamental and inalienable human right and an indispensable component of democracy, and to ensure that everyone has an equal opportunity to exercise the rights without discrimination.

Analysis of the Bill

1. The Monitoring Centre

1.1 The Interception of Communications Bill ("the Bill") seeks to establish a Monitoring of Interception of Communications Centre, which shall be "manned, controlled and operated by technical experts designated by the agency".

1.2 The identity and qualifications of such “technical experts” is completely undefined. This lends itself to the abuse of the process to install individuals without the requisite expertise and integrity, who will compromise the Centre and release information to unauthorized persons.

1.3 There is a need for clarity as to how such people, who will have access to highly sensitive information, will be recruited, by whom, their qualifications and their integrity.

1.4 One wonders as to the technical implications of such monitoring centre facilities; that is, will it be such that it can only be attuned to intercept particular communications or will it be of broad usage such that, once started, it can and will intercept anything within range? This must be addressed clearly, in the context of the duties on the information service provider and the intercepting authorities.

2. The Warrant of Interception

2.1 The Bill seeks to provide the Minister of Transport and Communications with authority to issue, upon application, a warrant of interception where there is an actual or impending threat to “national security”, “public safety” and/or “national economic interest”. In urgent cases, or where there are “exceptional circumstances”, the Minister may grant such a warrant based on an oral application.

2.2 Of most concern with these provisions, is the unlimited and unchecked power granted to the Minister, and the fact that there is no judicial control and/or oversight in a process which will negatively impact on the fundamental rights of an individual.

2.3 The Constitution of Zimbabwe, in its Declaration of Rights, provides for protection of an individual’s right to due process and protection of the law. Such rights are further enshrined in several regional and international treaties, to which Zimbabwe is a State Party and is therefore bound, most notably the African Charter on Human and Peoples’ Rights.

2.4 Without such judicial protection, not only are the above rights violated, but also there is a real risk of further violations of the freedoms of expression and freedom to receive and impart information, as there is no neutral arbiter to ensure that any limitation of the rights is done in a manner that is acceptable in a democratic society. Failure to provide for judicial scrutiny is a failure to respect the principle of separation of powers, which will only breed arbitrariness.

2.5 The Judiciary must issue a warrant of interception. This is the position in various other jurisdictions, including South Africa, the USA, the United Kingdom, New Zealand and Australia. Allegations made by an applicant for communication interception must be examined in a court of law to ensure that they raise genuine concerns as to the “national security”, “public safety” and “national economic interest”. The Minister is a member of the Legislature, implementing the policy of the Executive, and therefore is clearly an interested party who should play no role in the interception process.

2.6 The provision allowing for an oral warrant is particularly toxic, in that the Minister is given free rein and is completely immune to checks and balances. In the context of Zimbabwe today, and the anarchy characterizing what should be lawful processes and oversight, it is a virtual certainty that there will be a higher amount of oral applications than written ones, and there will not be any confirmation thereof. One need only look at how law enforcement agents randomly implement search and seizure to appreciate how the Minister and his “employees” will implement oral warrants.

2.7 The exercise of such a far-reaching and potentially damaging power should always have its justification committed to paper before any decision is taken. Zimbabweans with urgent matters have always been able to approach the courts in writing; there is nothing strangely long and unacceptable in that. Indeed, Zimbabwean courts have dealt with ex parte applications in situations of extreme urgency.

2.8 Further to this, court-obtained warrants must determine the limits of interception much more closely. This should be an element of court orders in relation to any keys under section 11 of the Bill; without this, the provisions of section 11 in particular will merely result in persons being compelled to reveal anything and everything in a manner obviously in contravention of the fundamental rights asserted earlier. In this situation persons run the risk of self-incrimination and there is a breach of the person's right to remain silent, which right has come to be internationally accepted under any questioning especially police questioning. Notably, section 11 provides for supervision of the person when they are decrypting the information obtained from the person holding the security key. The cases of *Kruslin v. France* and *Having v. France* state that there is need to set minimum standards to avoid abuse of power.

2.9 It is imperative that any person affected by the issuing of a warrant of interception have a say in how such a warrant is obtained, why, and the scope of the warrant requested before such a warrant is issued, as an affected person.

2.10 The information service providers who have duties cast upon them within the Bill certainly must also have the opportunity to make their points when a warrant is sought. It is also important for the protection of the public from continued unlawful scrutiny that information service providers be bound to disconnect any interception equipment if a warrant has expired and no new one has been obtained.

2.11 One must also take issue with the vague definition offered in the Bill for "national security" and the complete lack of definition of "public security" and "national economic interest". It is trite that laws need to be clear and well defined in order for people to be able to moderate their behavior accordingly.

2.12 This is especially important in that there is no clarity as to what this Bill seeks to achieve under section 6. Section 6 is extremely wide and does not even require that the communication sought to be intercepted is in any way reprehensible at law. Someone exercising his rights well within the law is at risk of having information intercepted depending on what the Minister's own interpretation of these situations. Surely criminal sanctionability should be a precondition that the courts use to define the threats to national security. Indeed, it is notable that the USA response vis-à-vis interception of communications after 9/11 was to widen the scope of existing crimes for which interception warrants could be sought from the courts; this was the response of the country directly affected. It is thus unclear why Zimbabwe must intercept its own people's communications on the spurious grounds listed in section 6.

3. The Impact of the Bill on Service Providers and Postal and Telecommunications Providers

3.1 Sections 9, 10, and 12 of the Bill impose the harshest of obligations on service providers and telecommunications providers. The equipment, technical systems, hardware and software facilities that they are required to install and support will amount to a financial burden which is astronomical and which is likely to put several, if not all, such providers out of business. If this does not put them out of business, the fact that they will be required to "consort" with state authorities in the interception of private communications in contravention of contractual obligations with clients, will lead to a loss of business which will hammer the last nail into their productivity and sustainability coffins.

3.2 Section 13 purports to provide for "Compensation on [sic] payable to service provider or protected information key holder". It is clear from what this provision stipulates, that the State will not provide compensation for the costs incurred in obtaining and setting up the equipment and systems required for monitoring and interception. It will only be for the "execution of a warrant or directive", "the making available of a facility, device or telecommunication system" (whatever that means, as it is so vague as to be indefinable), and "only for direct costs incurred in respect of personnel and administration services which are required for the purpose of providing [these] forms of assistance". Any compensation is to be "reasonable".

3.3 The State clearly wishes to shirk its obligation to foot the bill for such a far-reaching and costly exercise. It is further unlikely that it will be able to pay out any compensation in light of the dire financial situation in which it finds itself, the mounting inflation and economic hardships, and the simple fact that it has not budgeted for such expenditure or received the funds to cover the exercise.

3.4 Also worrisome is section 6(3), which allows the Minister to issue “any other directive” to a service provider (beyond the issues of interception, which is, in itself, an excessive power). This is clearly an unnecessary power, and one that mandates abuse of authority.

3.5 The imposition of such burdensome obligations on service providers clearly derogates from fundamental human rights and cannot be left to the discretion of executive functionaries. It is in fact odd that failures to respect these orders from an executive rather than judicial functionary should be cause for a criminal sanction that the same excluded courts will inevitably be expected to adjudicate upon. Indeed, a leaf can be taken from other jurisdictions here. In New Zealand, if an information service provider fails to ensure that their set-ups have interception capacity (this has nothing to do with financial implications, in which the state plays a large part), the state must seek a compliance order from the court. This is so under the Telecommunications (Interception Capability) Act that deals only with the duties of the service providers vis-à-vis interception.

4. The Powers of the Minister and the Ouster of the Jurisdiction of the Courts

4.1 The problematic nature of the powers granted to the Minister has already been canvassed above. Suffice to say that such powers are unrestricted, unchecked and allow an individual who is not impartial to preside over a process with far-reaching consequences to personal liberties. This Bill is yet another example of the Executive’s contempt for the courts of this land, and their willingness to oust the jurisdiction of the courts in contravention of the Constitution of Zimbabwe and the African Charter on Human and Peoples’ Rights.

4.2 Apart from his/her powers to issue a warrant of interception, the Bill seeks to empower the Minister alone to decide if surveillance is still necessary, perpetuating the grave anomaly of his being the person responsible for giving the order and reviewing it.

4.3 The Bill also provides that an appeal is to be made before the Minister. S/he is the person responsible for granting the warrant that is now being challenged, and any elementary drafter and/or legal practitioner and/or layperson is well aware that s/he cannot be the implementer and the adjudicator in the same matter. Further, there is not even a stipulated time frame within which a decision must be made, which allows for severe delays and further violations of fundamental rights. This merely creates an administrative merry-go-round especially as the same Minister who made the decision is expected to adjudicate over it on appeal.

4.4 The irony in section 8 is that the Bill also seeks to ensure that the court is forced to use information obtained under this legislation when it never had a stake in deciding whether the collection of information was reasonable and necessary. There is complete usurpation of the court’s powers and it risks being constrained to use information that was quite clearly obtained unfairly and unreasonably.

4.5 Section 8 seeks to justify the use of illegally obtained evidence in a court of law when section 3 of the Bill makes unlawful interception of communications a criminal offence. This gives rise to a peculiarity where the interceptor is prosecuted while the intercepted information can be used against some other persons in a court of law. The inconsistency is symptomatic of bad drafting.

5. The Information to Be Intercepted, Its Use and Disposal, and the Purpose of Interception

5.1 There are no provisions in the Bill seeking to exclude information that is protected under privilege; namely lawyer-client confidentiality, doctor-client privilege, religious relationships,

familial relationships and those relating to the business relationship between the information service provider and the clients. These need to be clearly protected.

5.2 The lack of clarity also makes accountability for interception powers difficult. In the USA in particular, the Attorney-General is responsible for and aware of the use of interception powers to the extent that he is the one who eventually must give a 6-month report to the Parliamentary Committees as to how the powers have been used. Here, state prosecution authorities have no stake and there is no accountability to Parliament. This should be immediately corrected if this Bill is to retain its functionality in line with international human rights standards. Anything besides a clear group of offences for which interception warrants can be sought from the courts mandates arbitrariness and functions outside the rule of law.

5.3 In this context, we see the possibility of destruction of information that is irrelevant for any criminal prosecution; what then would justify its destruction? Information obtained can be destroyed without the Judiciary having a say in the matter yet again. The possible destruction of the information without the setting of very stringent standards is a further infraction. There is absolutely no reason to allow this if the idea is to deal with illegal activities. If something is illegal then all the more reason to either then act upon it and use the illegal information as evidence (in which case the decision as to destruction or otherwise would then be in the hands of the court).

5.4 The legislation does not even provide for how information will be used after collection and who can use it as such. This must be addressed.

Conclusion

This Bill, in its current form, is clearly badly drafted, ignores human rights concerns, fails to comply with Constitutional and international standards, and seeks to overturn a lawful existing judgment of the Constitutional Court of Zimbabwe in which similar provisions in the Post and Telecommunications Act were found to be unconstitutional. Such legislation will turn us into George Orwell's England in the book 1984, leading to the destruction of the country's economic, social and intellectual infrastructure merely so that 'big brother' can 'have a look'. The bill is fraught with injustice and irregularity. It is recommended that the Bill be withdrawn and redrafted, after the core question of the purpose of such a Bill and its sustainability under the current economic climate is adequately addressed. There is also need to ensure that all stakeholders are involved in such debate and drafting of an alternative law. In all circumstances, the rights of the individual must remain central in such a debate.