

**COMMENT ON THE PROPOSED ZIMBABWEAN INTERCEPTION OF  
COMMUNICATION LAW : BY STERNFORD MOYO**

1. The Interception of Communication Bill is a proposal for a law, empowering the Minister of Transport and Telecommunications, following an application by either the Chief of Defence Intelligence or his nominee or the Director General of National Security or his nominee or the Commissioner of Police or his nominee or the Commissioner General of the Zimbabwe Revenue Authority or his nominee, to authorize interception of electronic and postal communications. It is proposed to enjoin the Minister to authorize the interception if there are reasonable grounds for the Minister to believe that:
  - 1.1 A serious offence has been or is being or will probably be committed; or
  - 1.2 The gathering of information concerning an actual threat to national security or any compelling national economic interest is necessary; or
  - 1.3 The gathering of information concerning a potential threat to public safety or national security is necessary; or
  - 1.4 There is a threat to national interest involving the State's international relations or obligations.
  
2. The authorization shall be valid for up to three months and may, on good cause shown, be renewed from month to month thereafter.

3. The interception and monitoring of communication shall be surreptitious and an obligation shall be imposed on service providers to ensure interceptibility and monitoring of all communications they handle. The service providers shall bear the cost of ensuring interceptibility. They shall be required to provide equipment, facilities, personnel, administrative costs, routing and other costs associated with ensuring interceptibility. In reality, the costs will be borne by the consumer of electronic and postal services. In other words, the persons whose communications and postal articles are to be surreptitiously monitored and other consumers of electronic and postal services will ultimately bear the costs of the interception and monitoring.
  
4. The interception and monitoring violate section 20 of the Constitution of Zimbabwe which contains the guarantee for freedom of expression, that is to say, **“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, the freedom to hold opinions and to receive and impart ideas and information without interference and the freedom from interference with correspondence.”**
  
5. Section 20 contains the usual exceptions and relevant in this context is the fact that Section 20 allows the law to make provision in the interests of defence, public safety, public order, the economic interests of the state, public morality and public health. These exceptions would appear to protect the gathering of information concerning an actual threat to national security or compelling national economic interest or the gathering of information concerning potential threat to public safety or national security. National

interest involving the State's international relations and obligations does not appear to be covered by the exception. The other grounds on which the Minister is enjoined to issue a warrant are not covered by any of the exceptions to Section 20. In relation to such grounds which include national interest involving the State's international relations or obligations, there appears to be a contravention of Section 20 of the Constitution which is not protected by any of the exceptions. The regulation of electronic communication referred to in Section 20 is, clearly, technical regulation to ensure efficiency and not the type of regulation envisaged by the Interception of Communication Bill.

6. In relation to those provisions which fall within the area of the exceptions to Section 20, it is imperative that the provision in the law made in terms of the exception or the thing in done in terms of the law promulgated under the cover of the exception be: **“reasonably justifiable in a democratic society.”**
7. Before delving into the issue whether or not the law proposed in the Interception of Communication Bill is justifiable in a democratic society, it is important to examine the role and significance of the right to freedom of expression and the standard to be used when determining whether or not a law is justifiable in a democratic society.
8. Our courts have emphasized that freedom of expression has four broad special objectives to serve namely:

8.1 It helps an individual to obtain self fulfillment;

8.2 It assists in the discovery of the truth, and in promoting political and social participation;

8.3 It strengthens the capacity of the individual to participate in decision making; and

8.4 It provides a mechanism by which it would be possible to establish a reasonable balance between stability and social change [see **CHAVUNDUKA and ANOTHER v MINISTER OF HOME AFFAIRS AND ANOTHER** 2000 Vol. 1 Z.L.R. page 552 at page 558.]

In brief, freedom of expression is a precondition for the existence of and the primary manifestation of a free society.

9. Stringent requirements are placed on any law made under the exception. Not every legislative enactment qualifies as a law authorizing a violation of any of the fundamental rights contained in the Constitution. A law must satisfy two critical requirements. In the first place, it must be adequately accessible. The citizen must be able to have an indication that is adequate of the legal rules applicable to the given case. In the second place, the law cannot be regarded as a law unless it is formulated with sufficient precision to enable the citizen to regulate his conduct. He must be able, if need be with appropriate advice, to foresee, to a degree that is reasonable in the circumstances, the consequences which a given act may entail. [See **THE SUNDAY TIMES v THE UNITED KINGDOM** 1979 to 1980 ECHR page 245 and **CHAVUNDUKA and ANOTHER v MINISTER OF HOME AFFAIRS AND ANOTHER** 2000 Vol. 1 Z.L.R. page 552 at page 561].

10. In regard to the issue of formulation of the law with certainty, the following observations have been made by the courts:

10.1 A statute which is so vague that men of common intelligence must necessarily guess as to its meaning or differ as to its application, violates the first essential of due process of law [**CONNOLLY v GENERAL CONSTRUCTION COMPANY** 269 US page 385 (1925) at page 391].

10.2 A law is void for vagueness if it fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by statute or because it encourages arbitrary and erratic arrests and convictions. Living under a rule of law entails various suppositions one of which is that all persons are entitled to be informed of what the State commands or forbids [See **PAPACHRISTOU v CITY OF JACKSONVILLE** 405 US 156 (1972) at 162.

11. The proposed law either leaves critical terms undefined or defines them in a circuitous and unhelpful manner or defines them in such broad terms that no specific guidance can be drawn from the definitions. What for an example, is meant by: **“matters related to the existence or independence of the State”** in the definition of national security. Furthermore, the definition makes it clear that these are issues included. They do not exhaustively define national security. Accordingly, national security is in fact only partly defined in the proposed law. “Compelling national economic interest” or “national interest involving the State’s international relations or obligations” are not at all defined. “Serious offence” is defined in a manner that includes any offence in respect of which one can be sentenced to as little to 2U.S. cents (ZW\$20

000,00). That is at the official exchange rate. At the unofficial rate, it is defined to include any offence in respect of which one may be sentenced to as little as 40% of a cent. What is the purpose of the definition? What is excluded by the definition?

12. The burden of this submission is that even those matters which, *prima facie*, appear to fall within the ambit of the exceptions, do not qualify to fall within the derogation to the right to freedom of expression in that the relevant exceptions are void for vagueness. They lack sufficient precision. They allow for public officials to exercise what may be termed unlimited discretion. Both the lack of precision and the excessive discretion place the law outside the derogation to freedom of expression.
13. Consequently, the proposed law is unconstitutional in that it violates the right to freedom of expression in a manner not covered by the exception to freedom of expression. Those aspects which appear to be covered by the exception to freedom of expression do not qualify for derogation by reason of lack of precision and giving room for exercise of excessive discretion. The exercise of excessive discretion by the executive and/or public officials lie at the heart of the antithesis to enjoyment of the rule of law.
14. Even if the law had been covered by the exception and even if it had fallen within the requirements for derogation from freedom of expression, the law would still be unconstitutional on account of violation of fundamental human rights particularly the right to protection of freedom of expression in that it is not necessary in a democratic society. Human rights jurisprudence has

established a three stage test for determination of necessity in a democratic society namely:

14.1 The legislative objective which the limitation is designed to promote must be sufficiently important to warrant overriding a fundamental right;

14.2 The measures designed by meet the legislative objective are rationally connected to it and are not arbitrary, unfair or based on irrational considerations and the means used to impair the right or freedom are no more than is necessary to accomplish the objective. [See **NYAMBIRAI v NSSA AND ANOTHER** 1995 Vol. 2 Z.L.R. page 1 at page 13 and **RETROFIT (PRIVATE) LIMITED v P.T.C. AND ANOTHER** 1995 Vol. Z.L.R. page 199 at page 220.

15. It may be argued that modern human rights jurisprudence generally accepts that the fight against serious and violent crime, corruption and money laundering raise matters which are sufficiently important for any country to consider strictly limited and supervised derogations to the right to freedom of expression as was recognized in South Africa, United Kingdom, France, The Netherlands, Belgium, Germany, United State of America, Hong Kong, Canada and other jurisdictions which can be said to be democratic. However, measures proposed in the legislation are arbitrary, unfair and disproportionate to the objective of containing serious crime particularly in that:

15.1 The scope of interception and monitoring is so wide as to include virtually any offence. This substantially departs from the focus on serious and violent crime, particularly terrorism, money laundering and drug trafficking. The indiscriminate inclusion of any offence is an abuse of the worldwide campaign against terrorism, money laundering and drug trafficking.

15.2 The law imposes an unreasonable and burdensome obligation on service providers and consumers of electronic and postal services who are required to carry the cost of ensuring interceptibility and monitoring, installation of necessary equipment and facilities, provision of personnel, administrative, recording and routing services. In circumstances of poverty prevailing in present day Zimbabwe and indeed in most developing countries, the burden will render communication and postal services unaffordable.

15.3 Due to limited resources, network operators and service providers in virtually all forms of electronic and postal services, are already burdened by lack of foreign currency to import adequate equipment, resultant congestion and lack of expansion capacity, failure to provide services outside urban centres, failure to support business services to ensure wealth creation and development and other problems associated with being hopelessly behind our competitors in the developed world. The focus on burdening the operators and service providers with surveillance and monitoring capabilities will retard or indeed retrogress development of communication and postal services without adding any value to economic, social and cultural development. It will have the effect of pushing us further behind the developed world.

15.4 It is cheaper and more desirable to spend our resources removing causes of disaffection which create threats to national security, removing policies which create distortions and promote corruption and addressing the lack of confidence which makes Zimbabwean nationals prefer to externalize their wealth as opposed to growing it in their own country. To do so, we require, as a matter of urgency, a full restoration of the rule of law, protection of property rights, removal of restrictions which serve no purpose but promoting corruption and generally focusing on those measures which promote the creation of a free, democratic and prosperous society. Legislation such as the proposed legislation is the very antithesis of what Zimbabwe needs today.

15.5 There is no provision for judicial supervision. In a democratic society, every person is entitled to a fair hearing by an independent adjudicating tribunal established by law in the determination of the existence or extent of his or her rights and obligations. The Bill provides for judicial intervention after the right has been violated and the loss has occurred. In fact, it is clear that judicial review was meant to be entirely circumvented. In an aggrieved person is given a right to appeal to the Minister, who is neither independent nor impartial. He authorizes the interception and monitoring in the first place. He is, therefore, not an independent and impartial adjudicating authority established by law as is required by Section 18 subsection 9 of the Constitution. Although an aggrieved person given a right to appeal to the administrative court from the Minister's decision, long after the harm will have occurred, there is no mechanism for him becoming aware that his rights are being interfered with. The interception is, by law, required to be conducted surreptitiously.

- 15.6 There is no provision for reporting to Parliament or other agency regarding intercepted parcels and communications to ensure accountability and to limit abuse. There is nothing in the legislation to ensure that highly intrusive powers provided for in the legislation will not be abused.
- 15.7 There is no mechanism for discriminating or for ensuring that communications that are not relevant to detection or investigation of crime are excluded.
- 15.8 Provision for the Minister granting authorization allows usurpation of judicial authority by the executive in violation of the concept of separation of powers and the checks and balances which form part of that concept.
- 15.9 The legislation will allow for fishing expeditions by law enforcement authorities.
- 15.10 The information collected will not be sufficiently cogent and no measures are contained in the Bill to ensure cogency and integrity of the information intercepted and monitored for the purposes of being used in judicial proceedings. No safeguards to ensure cogency have been inbuilt into the legislation.
- 15.11 The legislation creates an environment for passive law enforcement. The law enforcer's office is reduced to a clearing house for information passively collected. Unwilling ordinary people such as service providers are compulsorily conscripted into law enforcement. There is a danger of the law enforcer being overwhelmed by irrelevant and large quantities of material. Accordingly, instead of promoting effective law enforcement, the proposed legislation may have a negative

impact on effecting law enforcement. Furthermore, the Bill allows for imposition of the consequences of a search without the positive act of a search by a law enforcement agent. The traditional safeguards against the negative effects of a search and the traditional protection of privacy have not been incorporated into the legislation.

16. The weaknesses identified above namely, absence of judicial supervision, absence of a clear definition of the type of offences which may be monitored, the absence of any reporting mechanism on monitored communication to ensure accountability, the absence of provisions for compensation where communication is unlawfully monitored distinguish our proposed legislation from legislation in other democratic countries. However, the situation in our jurisdiction is made worse by the fact that there is already in place legislation such Public Order and Security Act, Access to Information and Protection of Privacy Act and others which severely restrict democratic space. A further factor is that the repressive legislation has tended to be applied in a manner inimical to the exercise of individual rights and liberties or the observance of democratic values. Journalists and other human rights defenders have been arrested, newspapers have been closed and private property has been acquired in circumstances which violate human rights. Against such a background, it is difficult to strike a balance between legitimate law enforcement objectives and individual liberties such as freedom of expression and the right to privacy. Our past experiences and the obvious deficiencies of the proposed legislation, are such that it is not overly pessimistic to conclude that this is an addition to a large pile of repressive legislation aimed at shrinking democratic space. It should be resisted before it becomes law.

As soon as it becomes law, under Section 5 of the Public Order and Security Act, it become unlawful to resist it even by peaceful means such as passive resistance.

17. Another aspect which does not appear to have been taken into account is the negative impact of the legislation on the administration of justice. The administration of justice demands full disclosure by clients to their lawyers. The interception of communications between clients and lawyers is injurious to attorney and client privilege and confidentiality. It discourages full disclosure. Accordingly, in addition to interfering with freedom of communication, the proposed legislation will have negative effects on the right to a fair trial. It is this aspect which motivated lawyers to challenge similar provisions in the Postal and Telecommunications Act in **LAW SOCIETY OF ZIMBABWE v MINISTER OF TRANSPORT AND COMMUNICATIONS** S.C. No. 59/2003. The Supreme Court in that matter found the legislation to be unconstitutional in that it interfered with freedom of expression in a manner which could not be justified in a democratic society. Furthermore, it observed that the legislation could have been found unconstitutional on the basis that it interfered with the right to a fair trial. The critical factor was the absence of judicial supervision and other safeguards. The absence of judicial supervision and other safeguards continues to be a concern as far as the proposed law is concerned.

## **REFERENCES**

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