

Discussion paper on Constitutional Amendment No 17 from the lenses of the Law Society of Zimbabwe, the SADC Lawyers Association and the Zimbabwe Lawyers for Human Rights. Presented at a FAO organized Discussion on 25 November 2005 by A Tsunga¹

1. The Law Society of Zimbabwe (LSZ) is a statutory body regulating the practice of law by legal practitioners in Zimbabwe and is established under Section 53 of the Legal Practitioners Act. It is an autonomous, self regulating body. The LSZ is mandated to represent the views of the legal profession, to maintain its integrity and status, to safeguard the operating space of the Judiciary and the legal profession, as well as to consider and deal with all matters affecting the professional interests of legal practitioners. The LSZ is also involved in the monitoring of the independence of the Judiciary and the provision of the necessary support in instances where judges come under threat or attack and are rendered ineffective. This would include a situation where jurisdiction of the courts in which they operate is ousted.
2. Zimbabwe Lawyers for Human Rights (ZLHR) is a membership organisation of lawyers and law students whose primary objective is to foster a culture of human rights in Zimbabwe through the promotion and protection of human rights as enshrined in the Constitution of Zimbabwe and the regional and international human rights instruments to which Zimbabwe is a State Party. ZLHR has observer status with the African Commission and affiliate status with the International Commission of Jurists.
3. The Southern African Development Community Lawyers Association (SADC LA) is an independent voluntary association of Law Societies and Bar Associations within the SADC Region, whose objectives are to maintain and promote the rule of law throughout the SADC, to promote human rights, including the rights of people with

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disabilities, women and children, and to ensure that the people of the region are served by an independent judiciary and legal profession. SADC LA also has observer status with the African Commission.

Background

4. On 15 July 2005 the Constitutional Amendment (No.17) Bill was introduced in Parliament. This Bill marked the seventeenth occasion that the Constitution of Zimbabwe has been amended since the Lancaster House Constitution was introduced at Independence in 1980. This 17th Amendment *inter alia* sought to insert the following section into the Declaration of Rights:

16B Agricultural land acquired for resettlement and other purposes

- (1) In this section-

“acquiring authority” means the Minister responsible for lands or any other Minister whom the President may appoint as an acquiring authority for the purposes of this section;

“appointed day” means the date of commencement of the Constitution of Zimbabwe Amendment (No. 17) Act, 2005.

- (2) Notwithstanding anything contained in this Chapter-

- (a) all agricultural land-

(i) that was identified on or before the 8th July, 2005, in the Gazette or Gazette Extraordinary under section 5(1) of the Land Acquisition Act [Chapter 20:10], and which is itemised in Schedule 7, being agricultural land required for resettlement purposes; or

(ii) that is identified after the 8th July, 2005, but before the appointed day, in the Gazette or Gazette Extraordinary under section 5(1) of the Land Acquisition Act [Chapter 20:10], being agricultural land required for resettlement purposes; or

(iii) that is identified in terms of this section by the acquiring authority after the appointed day in the Gazette or Gazette Extraordinary for whatever purpose, including, but not limited to-

A. settlement for agricultural or other purposes; or

B. the purposes of land reorganisation, forestry, environmental conservation or the utilization of wild life or other natural resources; or

C. the relocation of persons dispossessed in consequence of the utilization of land for a purpose referred to in subparagraph A or B;

is acquired by and vested in the State with full title therein with effect from the appointed day or, in the case of land referred to in subparagraph (iii), with effect from the date it is identified in the manner specified in that paragraph; and

- (b) no compensation shall be payable for land referred to in paragraph (a) except for any improvements effected on such land before it was acquired.

- (3) The provisions of any law referred to in section 16(1) regulating the compulsory acquisition of land that is in force on the appointed day, and the provisions of section 18(1) and (9), shall not apply in relation to land referred to in subsection (2)(a) except for the purpose of determining any question related to the payment of compensation referred to in subsection (2)(b), that is to say, a person having any right or interest in the land-

(a) shall not apply to a court to challenge the acquisition of the land by the State, and no court shall entertain any such challenge:

may, in accordance with the provisions of any law referred to in section 16(1) regulating the compulsory acquisition of land that is in force on the appointed day, challenge the amount of compensation payable for any improvements effected on the land before it was acquired...

(our emphasis)

5. The lawyers are primarily concerned with subsection 16(3)(a) above, and its effect of ousting the jurisdiction of the Courts of Zimbabwe to entertain challenges against executive decisions to compulsorily acquire certain properties as described therein, in particular land. Other than ousting and removing the jurisdiction of the courts to deal with matters relating to acquisition of properties, the Act will and has been retrospectively applied contrary to principles of international human rights law.
6. The promulgation of this intended amendment was vehemently opposed by the legal profession both within Zimbabwe (the full complement of Councilors of the LSZ and at least 120 Zimbabwean legal practitioners presented separate petitions to Parliament and the Chief Justice of Zimbabwe), and within the region (two further petitions were submitted by the SADC LA and the East African Law, to Parliament and the Chief Justice, and the President of Zimbabwe respectively). Despite these interventions, the Bill was passed and the President assented to it on 14 September 2005. The Constitutional Amendment (No.17) Act (“the Constitutional Amendment”) is now law.
7. The principle of constitutionalism holds that the rule of law is sacrosanct and that limits must be placed on government action to prevent the arbitrary application of power and execution of decisions to the detriment of individuals and their fundamental rights and freedoms. Constitutionalism, then, must be viewed as strengthening government so that it remains responsible, accountable, just and more effective.
8. It is the role of a competent, effective and independent judiciary to act as a check on the actions of government and to ensure that government conduct is consistent with

the principles enunciated in the constitution. The African Conference, in defining the Rule of Law, noted that the state is subject to the law, and that legislative organisation is part of the framework of a freely accepted constitution, recognition of fundamental rights in the constitution, and the existence of an independent judiciary and bar.²

9. The importance of the existence of the judiciary as an independent and separate arm of government is therefore unquestionable in society. The judiciary is the guarantor of the enjoyment and protection of fundamental rights and freedoms. The ousting of the jurisdiction of the courts to interrogate executive acts and decisions which impact on such rights and freedoms allows executive and legislative excesses to go unmitigated and unchallenged, and contribute to the breakdown of the Rule of Law.
10. In Zimbabwe, the Constitution has, for some time now, been used as a tool by the executive to condone its excesses in the form of behaviour which has the effect of encroaching on the fundamental rights and freedoms of individuals, communities and vulnerable groups. Constitutional amendments become incontrovertible and not subject to judicial scrutiny at a time when the changing social and economic circumstances should be guiding their positive evolution.
11. Specifically, in ousting the jurisdiction of the Courts to hear pending and future cases contesting the acquisition of property by the State, the Government of Zimbabwe grants to itself the ability to exert unchecked power. Such an ouster removes the aspects of accountability and transparency from the manner in which government acts and officials conduct themselves. The separation of powers becomes indiscriminate – the Executive is initiating, implementing and adjudicating of its own volition, without fear of scrutiny by an independent and impartial tribunal.

² African Conference on the Rule of Law – Lagos (Nigeria), 3-7 January 1961: Report on the Proceedings of the Conference, International Commission of Jurists, Geneva, 1961, at pages 9-11, cited at page 134 of *The African Charter on Human and Peoples' Rights – A Comprehensive Agenda for Human Dignity and Sustainable Democracy in Africa*, by F. Ouguergouz (“Ouguergouz”).

12. The effects of ousting the jurisdiction of the courts go beyond the question of removing effective remedies from those whose fundamental rights have been violated. Such emasculating of the Courts will cause individuals to have a lack of confidence in the justice delivery process and will discourage litigation, which will have a serious impact on the protection of individual rights.
13. The Constitutional Amendment sets a dangerous precedent which has the effect of condoning future ousters of the jurisdiction of the Courts by the Executive in other areas; this could eventually lead to a complete removal of the jurisdiction of the Courts of Zimbabwe, causing a complete breakdown of the rule of law and an absence of legal protection for all Zimbabweans.

**No 17 Measured Against the African Charter on Human and Peoples Rights
(The African Charter)**

14. The enactment of the Constitutional Amendment has violated several rights as provided in the African Charter on Human and Peoples Rights which Zimbabwe ratified in 1986.

15. **Article 1** of the Charter reads:

The member states of the Organisation of African Unity parties to the present Charter shall recognize the rights, duties and freedoms enshrined in this present Charter and shall undertake to adopt legislative or other measures to give effect to them.

Article 1 of the Charter is the *raison d'être* of the rights as enshrined in the Charter. It is prescriptive and without it all other rights in the Charter cannot be realized. The failure to adopt legislative or other measures to give effect to the rights in the Charter is inexcusable and an affront to the notion of upholding the provisions of the Charter. Article 1 requires State Parties to recognize the rights, duties and freedoms enshrined in the Charter: plainly interpreted, State Parties have an obligation to fulfill, respect, promote and protect the rights as stipulated in the Charter. The realization of the rights in the Charter can be made possible through the enactment of laws which

further the enjoyment of these rights. It is our submission that the enactment of the Constitutional Amendment, rather than ensuring that such rights will be protected, is clear evidence of legislative measures taken to **violate** the rights and freedoms guaranteed by the Charter, and is therefore inimical to the furtherance and enjoyment of the rights in the Charter. It is, in fact, an intentional attack against the founding principles of such organisations as the African Union and its related organs.

16. **Article 3** of the Charter states that:

1. Every individual shall be equal before the law,
2. Every individual shall be entitled to equal protection of the law.

Article 3 of the Charter can be read with Article 2 of the Charter which stipulates that State Parties to the Charter shall not discriminate the enjoyment of rights on the basis of any distinction such as race, ethnic group, colour, sex, religion or any other opinion, national and social origin, fortune, birth or other status. The right to protection of the law and equality before the law simply makes the right to approach the courts an unlimited right and no restrictions should be placed through national laws to undermine the right to equal protection of the law. Enactment of laws which make the enjoyment of the right to protection of the law selective can be deemed to be contrary to the rights as enshrined in the Charter. The Constitutional Amendment prevents a certain section of Zimbabwean society – namely landowners or those with title to land (which includes individuals and communities dispossessed of their land during the colonial era) – from approaching the Courts for protection where they feel that their fundamental right to property has been violated.

17. The Constitutional Amendment violates **Article 7** of the Charter, which reads:

Every individual should have the right to have his cause heard. This comprises:

- (a) The right to an appeal to competent national organs against acts violating his fundamental rights as recognized and guaranteed by convention laws, regulations and customs in force....

18. The right to be heard, as provided for under Article 7 of the Charter, is arguably the most important of all fundamental rights, as it is a precondition for the achievement

and monitoring of all other rights. It is the Courts, ostensibly established and maintained as a third branch of government, which act as the enforcement mechanism in the justice delivery system. Indeed, a 1970 judgment of the International Court of Justice noted that *“human rights [...] also include protection against denial of justice”*.³

19. After numerous resolutions⁴ were passed by the Commission reiterating the importance of the right to free and fair trial under the Charter, the Commission then developed the **Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa**. These guidelines make specific and concrete elaborations on the interpretation of Article 7 of the Charter and its varied implications if not enforced by State Parties.
20. The essence of approaching the courts denotes the fact that a claimant seeks to have her/his rights enforced or be granted an effective remedy. Once the jurisdiction of the courts to entertain violations has been removed by executive decisions then the right to a fair trial and right to an effective remedy will have been expunged contrary the abovementioned resolutions, the African Charter and other international human rights instruments.
21. The preamble to the Principles and Guidelines contains a reference to Articles 5, 6, 7 and 26 of the Charter – those provisions which are relevant to the right to a fair trial. Several of the Principles and Guidelines have been breached by virtue of the ouster clause in the Constitutional Amendment as detailed and highlighted below:

Article A1: In the determination of any criminal charge against a person, or of a person's rights and obligations, **everyone shall be entitled to a fair and public hearing** by a legally constituted competent, independent and impartial judicial body.

³ *Barcelona Traction*, cited at page 136 of Ouguergouz.

⁴ **Resolution on the Right to Recourse and Fair Trial** adopted 11th Session, March 1992; **Resolution on the Respect and Strengthening of the Independence of Judiciary** adopted 19th Session, March 1996, **Resolution Urging States to Envisage a Moratorium on Death Penalty** adopted 26th Session in November 1999, **Resolution on the Right to Fair Trial and Legal Assistance** adopted at 26th Session, November 1999

Article A4c: The judiciary shall have jurisdiction over all issues of a judicial nature and shall have exclusive authority to decide whether an issue submitted for decision is within the competence of a judicial body as defined by law;

Article A4f: There shall not be any inappropriate or unwarranted interference with the judicial process nor shall decisions by judicial bodies be subject to revision except through judicial review, or the mitigation or commutation of sentence by competent authorities, in accordance with the law;

Article A4g: All judicial bodies shall be independent from the executive branch.

Article Ca: Everyone has the right to an effective remedy by competent national tribunals for acts violating the rights granted by the constitution, by law or by the Charter, notwithstanding that the acts were committed by persons in an official capacity.

Article Cb1: The right to an effective remedy includes: access to justice.

Article Cc1: Every State has an obligation to ensure that: any person whose rights have been violated...has an effective remedy by a competent judicial body.

Article E: States must ensure, through adoption of national legislation, that in regard to human rights violations, which are matters of public concern, any individual, group of individuals or non-governmental organization is entitled to bring an issue before judicial bodies for determination.

Article Ka: States shall ensure that judicial bodies are accessible to everyone within their territory and jurisdiction, without distinction of any kind, such as discrimination based on race, colour, disability, ethnic origin, sex, gender, language, religion, political or other opinion, national or social origin, property, birth, economic or other status.

(our emphasis)

22. The state has an obligation to maintain an independent and competent judiciary. Independent and competent presupposes that the court will have jurisdiction over all matters which fall within the domain of judicial adjudication. **Article 26** of the Charter is more explicit about the obligations of signatories:

States parties to the present Charter shall have the duty to guarantee the independence of the Courts and shall allow the establishment and improvement of the appropriate national institutions entrusted with the promotion and protection of the rights and freedoms guaranteed by the present Charter.

23. According to the Commission, Article 26 of the Charter reiterates the right enshrined in Article 7 but is even more explicit about a State Party's obligations to guarantee the independence of the Courts and allow the establishment and improvement of appropriate national institutions entrusted with the promotion and protection of the rights and freedoms guaranteed by the Charter. While Article 7 focuses on an

individual's right to be heard, Article 26 speaks of the institutions which are essential to give meaning and content to that right and all other rights in the Charter. This Article clearly envisions the protection of the courts which have traditionally been the bastion of protection of the individuals' rights against the abuses of State power⁵. Effectively the ouster clause in section 16(3)(a) of the Constitutional Amendment prevents the judicial institution from promoting and protecting constitutional rights and rights guaranteed under the Charter and therefore is in violation of Article 26 of the Charter.

In Summary:

24. The Constitutional Amendment is at odds with the letter and spirit of the Charter. Section 16(3)(a) is far from meeting the hallmark of a constitution which respects rights as proscribed in international and regional covenants to which Zimbabwe is party. Without question, the Zimbabwean government has denied certain individuals the opportunity to be heard before the Courts, and has failed to support the function of the judiciary as the proper vehicle to hear grievances and decide on alleged individual rights violations.
25. In ousting the jurisdiction of the Courts, the government of Zimbabwe deprives individuals of their right to appeal to independent and competent judicial institutions to seek redress and remedies for alleged infringements to their fundamental rights as guaranteed by the Charter and other international instruments.
26. The state party of Zimbabwe has failed to fulfil its obligation in respect of Article 1 of the Charter, which makes it mandatory for Member States to recognise the right, duties and freedoms enshrined in this Charter and to undertake to adopt legislative or other measures to giving effect to them. Enacting laws which undermine and oust the jurisdiction of the courts to entertain allegations of violations to individuals rights and freedoms cannot be deemed to be furthering the rights and freedoms as enshrined in

⁵Fatsah Ouguergouz, page 150

the Charter, but is at complete paradigms and tangents with the *grundnorm* of the Charter.

27. Noting the fact that Commission is enjoined under **Article 60 and 61** of the Charter to draw inspiration from international law from other universally acclaimed instruments, the Commission is encouraged to note that Zimbabwe is party to the International Covenant on Civil and Political Rights. Article 14 of the International Covenant on Civil and Political Rights and as further elaborated in the General Comment 13 states that: ⁶

“All persons shall be equal before the courts and tribunals...”.

Some Human Rights Case Law On Ouster Of Jurisdiction Of The Courts

28. In recent memory, the Commission has entertained several cases on the ousting of the jurisdiction of the courts by State Parties. In the case involving the *Civil Liberties Organisation v Nigeria*⁷ the Nigerian government's enacted certain decrees, including the Constitution (Suspension and Modification) Decree no 107 of 1993, which suspended the Constitution of that country and deprived the judiciary of the right to examine any decree promulgated after a certain date. This Commission held that the impugned decrees constituted an infringement of Article 7 of the Charter: the right to be heard. Further, it decided that the ouster of the courts' jurisdiction breached Article 26: the obligation to establish and protect the courts. The Commission stated that:

“the ousting of the jurisdiction of the courts of Nigeria over any decree enacted... and those to be subsequently enacted, constitutes an attack of incalculable proportions on Article 7. [...] An attack of this sort on the jurisdiction of the courts is especially invidious, because while it is a violation of human rights itself, it permits other violations to go unredressed”

29. On the issue of admissibility, the Commission commented (at paragraph 8 supra):

⁶ Twenty-first session, 13 April 1984

⁷ (2000) AHRLR 188 (ACHPR 1995)

“...[S]ince the decrees complained of oust the jurisdiction of the courts to adjudicate their validity, ‘it is reasonable to presume that domestic remedies will not only be prolonged but are certain to yield no results’.”

30. In *Constitutional Rights Project and Another v Nigeria*⁸, the Commission noted that:

“The ouster clauses create a legal situation in which the judiciary can provide no check on the executive branch of government.”

31. In respect of *Constitutional Rights Project, Civil Liberties Organisation and Media Rights Agenda v Nigeria* the Commission stated:

“A civil case in process is itself an asset, one into which the litigants invest resources in the hope of an eventual finding in their favour. The risk of losing the case is one that every litigant accepts, but the risk of having the suit abruptly nullified will seriously discourage litigation, with serious consequences for the protection of individual rights. Citizens who cannot have recourse to the courts of their country are highly vulnerable to violation of their rights.”⁹

32. The enactment of the Constitutional Amendment No.17 has recently caused the withdrawal of over 4000 cases relating to land disputes from the Administrative Courts alone. It must be emphasised from the onset that the lawyers are not concerned about the merits or demerits of these cases which were before the Zimbabwean courts. That, we feel, is and should be the mandate of the courts to decide after the application of the principles relating to fair trial. However, now that their jurisdiction has been ousted, it remains unknown whether the claims were merited or not. The executive has effectively put the matters to rest without giving the judiciary the opportunity to exercise its jurisdiction and resolve the cases upon the evidence before them and in conformity with international human rights norms and standards. Such actions have the effect of discouraging litigation, with serious consequences for the protection of individual rights, as people will become more vulnerable and exposed to human rights violations. It is therefore a violation of Article 7(1)(a) of the Charter.

⁸ (2000) AHRLR 235 (ACHPR 1999) at paragraph 18

⁹ Thirteenth Annual Report of the Commission – 1999/2000, cited in Ouguergouz.

Similar cases holding Nigeria as State Party accountable for breaching Article 7 of the Charter have been heard by the Commission¹⁰.

33. Further, the Commission, hearing *Sir Dawda K. Jawara v The Gambia* on 11 May 2000, stated:

“The rights and freedoms of individuals enshrined in the Charter can only be fully realised if governments provide structures which enable them to seek redress if they are violated. By ousting the competence of the ordinary courts to handle human rights cases, and ignoring court judgments, the Gambian military government demonstrated clearly that the courts were not independent.”¹¹

Conclusions of Lawyers on No 17

34. The Lawyers find that the Zimbabwean Government, in promulgating Constitutional Amendment (No. 17) Act, has violated Articles 1, 3, 7 and 26 of the Charter, as read with various resolutions on the right to a fair trial and as more fully elaborated under the Principles and Guidelines on the Right to Fair Trial and Legal Assistance in Africa.

35. Further, the Lawyers continue to recommend to the Zimbabwean Government that it immediately repeals the Constitutional Amendment and publicly reaffirms its support for the judiciary and its independence as an effective check on the power and authority of the state to infringe on the rights of the public, and as a necessary and integral institution in the democratic process.

¹⁰ Constitutional Rights Project (in respect of Lekwot and Others) v Nigeria (2000) AHRLR 183 (ACHPR 1995); Civil Liberties Organisation (in respect of Bar Association) v Nigeria (2000) AHRLR186 (ACHPR 1995); Constitutional Rights Project and Others v Nigeria (2000) AHRLR 227 (ACHPR 1999); and Centre for Free Speech v Nigeria (2000) AHRLR 250 (ACHPR 1999).

¹¹ See also: *Malawi African Association, Amnesty International, Ms Sarr Diop, Union Inter africaine des Droits de l'Homme and RADDHo, Collectif des Veuves et Ayants-Droits, and Association Mauritanienne des Droits de l'Homme v Mauritania*. Thirteenth Annual Report of the Commission – 1999/2000, cited in Ouguergouz.

36. The same arguments above apply with equal force as regards to violation of other international instruments but since Nana Busia from the UNDP is a co-presenter I do not propose to delve into this area.