STATE VS. WELLINGTON TAYLOR CHIBEBE CRB 3097/06

This is an application for a referral of the matter to the Supreme Court in terms of section 24(2) of the Constitution of Zimbabwe.

It is submitted that the accused has not committed any offence and his arrest and subsequent detention in Police custody was unlawful.

Accused's rights in terms of fundamental rights have been violated.

In particular we submit that accused person's rights in terms of

Sections 13(1)(2)(e) of the Constitution of Zimbabwe
&

Sections 18 (1) of the Constitution of Zimbabwe have been breached.

We request that these questions be referred to the Supreme Court for determination in terms of Section 24(2) of the Constitution.

Applications of this nature are now well-known see for example

a) **MARTIN VS. ATTORNEY GENERAL AND ANOTHER** 1993 (1) ZLR 153(S).

b) **ATTORNEY GENERAL VS. BLUMEARS AND ANOR** 1991 (1) ZLR 118(S).

c) **BULL VS. ATTORNEY GENERAL AND ANOR** 1987 (1) ZLR 36(S).

d) **IN RE MLAMBO** 1991 (2) ZLR 339 (S).

Three main submissions are made

1. The Act under which accused was arrested and charged is unlawful.
   Refer to the Criminal Law (Codification & Reform) Act (Chapter 9:23). (The Act)

   Alternatively

   Section 3 of the Criminal Law (Codification and Reform) Act (chapter 9:23) is unlawful.

2.Even if the Act was lawful the section under which the

accused were charged is unlawful.

1ST SUBMISSION

- The Act in terms of section 3 says Roman-Dutch law no longer to apply. Section 3 provides that "Roman-Dutch criminal law no longer to apply

    - "The non-statutory Roman-Dutch criminal law in force in the Colony of the Cape of Good Hope on the 10th June, 1891, as subsequently modified in Zimbabwe, shall no longer apply within Zimbabwe to the extent that this Code expressly or impliedly enacts, re-enacts, amends, modifies or repeals that law.

    - Subsection (1) shall not prevent a court, when interpreting any provision of this Code, from obtaining guidance from judicial decisions and legal writings on relevant aspects of:-

        a) The criminal law referred to in subsection (1); or
        b) The criminal law that is or was in force in any country other than Zimbabwe"

- Section 89 of the Constitution as amended by Section 13 of the second amendment of the Constitution (Act 25 of 1981) specifies that, the common law of Zimbabwe shall be Roman-Dutch Law.

- Section 89 stipulates the laws to be administered by the Supreme Court and the High Court shall be Roman Dutch Law as modified by subsequent legislation. Section 89 provides as follows:-

    - **'Law to be administered**

      Subject to the provisions of any law for the time being in force in Zimbabwe relating to the application of African customary law, the law to be administered by the Supreme Court, the High Court and by any courts in Zimbabwe subordinate to the High Court shall be the law in force in the Colony of the Cape of Good Hope on 10th June, 1891 as modified by subsequent legislation having in Zimbabwe the force of law.'

- It is submitted that in order to codify criminal law you need a constitutional amendment to the constitution and in particular to Section 89 thereof.

- The purpose or objective underlying the amendment was to replace the existing common-law based system recognized by the constitution with a codified system of criminal law.

- Section 89 only allowed Parliament to 'modify' and not to re-enact or repeal existing Roman-Dutch Law.

- So, to introduce a criminal code and not just to modify the Roman-Dutch Law the legislature needed to amend Section 89 of the Constitution and its failure to do so rendered the codification process invalid.

- Section 3 of the Constitution provides that the constitution shall be the Supreme Law of Zimbabwe and the codification falls foul of Section 3.

- To modify is not to completely do away with.

- Webster's **New International Dictionary of the English Language**, 2nd edition defines "modify" or "modification" as connoting the power to limit something, to reduce it in extent or degree or to limit or restrict its meaning i.e. in general a diminution of something.

- The code certainly does not limit or reduce our criminal law.

- Instead, it seeks to introduce a whole range of new crimes and hence does not modify the Roman-Dutch Law of the Cape within that ordinary or primary meaning of modifying.

A power to modify does not include a power to extinguish anything.

See Lord Justice Lindlay's remarks in **Mechanic Investment & General Trade Company vs. International Company of Mexico** (1891) TLR 616.

All authorities are clear that a power to modify does not include a power to do any more than make partial changes. See Butterworths **Words and Phrases Legally Defined** 3rd edition and cases cited therein.

- Webster op cit – '4 to change somewhat the form or qualities or to alter somewhat.

- The code thus falls outside the type of changes to the country's basic law – the grundnorm as permitted by Section 89.

Willies **Principles of SA Law** 2nd edition says that the natural law of SA is founded almost entirely upon a system or law known as Roman-Dutch Law, a fact which is usually referred to by simply saying that Roman-Dutch Law is the common law of SA. On page 41 the author adds that the national law of SA, like that of all other States, is divided into two branches, the Civil Law and Criminal Law.

It is beyond dispute that:

- What the code seeks to do is not to modify but to replace the legal system recognized by the constitution for one of the two above branches.

- In enacting the code, the legislature should not have ignored the fact that it had earlier on decided to specifically protect this system by incorporating its recognition into the constitution.

- Accordingly, the legislature needed to amend the constitution in a manner provided for under Section 52 of the Constitution and its failure to do so *prima facie* is fatal to its attempt to codify the criminal law, i.e. to its enactment of the code only by normal legislative process.

- Accused's right to the protection of the law has been violated. (refer to Section 18(1)(2)and (5)).

See also - **CLAUDIUS MARIMO AND ANOTHER VS MINISTER OF JUSTICE LEGAL AND PARLIAMENTARY AFFAIRS AND OTHERS** SC 25/06.

It is also submitted that the section under which the accused was charged is unlawful.

S176 says that… "any person who assaults or by violent means resists a peace officer acting in the course of his or her duty…… shall be guilty of assaulting or resisting a peace officer and……".

This section does not allege that the person must intentionally and unlawfully assault or resist that peace officer.

To the extent that there is no requirement of intention and unlawfulness, the section creates an absolute liability for the alleged offence and no-one will be able to escape once the charges are levelled.

In this case accused's defence is a complete denial. In fact he was the one who was being assaulted and throttled. Suppose a peace officer is assaulting and throttling someone unlawfully and that someone assaults him, will that someone have committed an offence? In my submission **NO**.

Intention and unlawfulness formed an integral part of Roman and Roman-Dutch law. The cases developed over the years ruled that strict liability is not part of the Zimbabwean law. The codification now seeks to smuggle strict liability back as part of our law.

Strict liability is directly contrary to the basic principle of our law, commonly referred in Latin as *nulla Poena Sine culpa* (there should be no liability without fault). It cannot be justified in terms of general social and legal policy liability, without fault is not demanded by the general good.

See Burchel & Hunt, South African Criminal Law & Procedure, Volume 1, 2nd Edition, Juta Co Ltd 1983, page 65-66 and 216-17

Even the penal provisions is also retrogressive. It stipulates a prison term of up to ten years. It is submitted that such a threateningly rigorous sentence is too high for the offence contemplated.

Even community service which was now well known is not covered section as it stands restricts the court's discretion. The penal to pass progress sentences such as community service.

Section 176 appears to be a different version of section 20 of the Public Order and Security Act (POSA)(chapter 11:17). That section has since been replaced. However section 20 (a) of POSA at least had intention as a requirement (compare also 177 of the code and section 21 of POSA now repealed).

It is also submitted that there were no widespread consultations before the Act was promulgated.

The functions of Parliament in terms of section 50 of the constitution of Zimbabwe are to make laws for peace, order and good governance of the country.

It is submitted that the principles of a good law are as follows:-

1) Is Constitutional
2) Complies with all elements of the Rule of Law
3) Is in accordance with the Separation of Powers
4) Provides for implementation and enforcement in accordance with all elements of Due Process
5) Is implemented and enforced in accordance with Good Governance principles, including adequate human and non-human capacity (resources, skills, budgets, etc), and management and administrative structures and procedures ("institutions") that are fair, accountable, reasonable and (where appropriate) transparent
6) Has effective Access to Justice for all affected by it, namely justice that is independent, fair, expeditious and affordable (preferably free)
7) Is drafted according to all the elements of Good Drafting: clarity, objective criteria, unambiguous objectives, consistency with other laws, proper delineation of departmental functions, etc.
8) Is preceded by adequate opportunity for Public Participation consultation with targeted interest groups, and inputs by experts-which process must not be merely cosmetic in the sense of *bona fide* attention must be given to substantive inputs
9) Is preceded by independent and accurate Impact Assessment which quantifies

It is submitted that for the majority of Zimbabwean's the code came as a bolt from the blue.

The Act has far-reaching consequences for the laws of Zimbabwe and to pass it without widespread consultations is unlawful. This is not reasonably expected in a democratic society.

a) Compare Mataitiele Municipality and 10 Others vs. President of the Republic of South Africa and 17 Others Case No. CCT 73/05 handed down on 18 August 2006 see for example pages 25 and 27 of the cyclostyled judgment.
b) See also Doctors for Life International VS. The Speaker for the National Assembly and others Case No. CCT 12/05 handed down on 17/08/06.

The history of the Act shows that there is a lot of mystery over the creation, adoption and commencement of the Act/Bill. The process of its creation, drafting and its consolidation of crimes was obscure.

The Bill was fast tracked (contrary to parliament's own adopted reforms), the Bill was not referred to the Parliamentary Portfolio Committees. Parliament did not call for public hearings or for evidence and input of the multi-sectoral representatives of society. The house ignored the advice of its own legal committee on the Bill's constitutionality and Members of Parliament had little time to debate such complex and length piece of legislation.

The ideal situation would have been that parliament and the Ministry of Justice, as sponsors of the Codification Bill, present a **Green Paper** on the Codification Bill for scrutiny and debate by the public. Tentatively, a program of public awareness on the Criminal Law Code should have carried out by both Civic Society and Government.

The Codification Bill reached its final reading stage in the year 2004, and was voted for by parliament in that same period. It was assented to by the president 21days after. However, it could not take effect from then on since a date stating its commencement had not been published by the president in a statutory instrument as per the requirements of section 1(3). It only commenced operation on 1 June 2006, more than a year after it became legislation.

In light of the above it is submitted that the matter be referred to the Supreme Court so that it decides on the issues raised. Among other aspects we will be seeking the Supreme Court to declare the Criminal Law (Codification and Reform) Act (chapter 9:23) unlawful to the extent that it seeks to completely oust Roman-Dutch law and in particular that section 3 of the said Act is unlawful.

We will also ask the court to declare that section 176 of the Act is unlawful to the extent that it creates a strict liability offence.

And because the Act and section 176 thereof are unlawful, we want the Supreme Court to declare the arrest and detention of the accused to be unlawful and that his rights in terms of section 13 and 18 of the constitution were violated.

We will also seek to have the Supreme Court declare that the Act was unlawfully enacted to the extent that no wide- spread consultations were made before the Act was promulgated. This is important because the Act seeks to amend the law in a very fundamental way and with far-reaching consequences.

It is submitted that it is just and proper that the matter be referred to the Supreme Court.

It is also submitted that the application is not frivolous and vexatious, a ground upon which the court can refuse the referral.

THUS DONE AT HARARE THIS 6TH DAY OF SEPTEMBER 2006

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TO: THE AREA PUBLIC PROSECUTOR
Mbare Magistrate's Court
Mbare
HARARE

AND

TO: THE CLERK OF CRIMINAL COURT
Mbare Magistrate's Court
Mbare
HARARE