

IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(Constitutional Jurisdiction)

2021/HP/0358

IN THE MATTER OF ARTICLE 28 (1) OF THE CONSTITUTION OF ZAMBIA

AND

IN THE MATTER OF THE CYBER SECURITY AND CYBERCRIMES ACT NO 2 OF
2021

AND

IN THE MATTER OF ARTICLE 1(1) AND ARTICLE 2 OF THE CONSTITUTION OF
ZAMBIA

AND

IN THE MATTER OF THE CONTRAVENTION OF ARTICLES 16, 17, 18, 19 AND 20
OF THE CONSTITUTION OF ZAMBIA

AND

BETWEEN:

CHAPTER ONE FOUNDATION LIMITED 1ST PETITIONER

BLOGGERS OF ZAMBIA LIMITED 2ND PETITIONER

GOVERNANCE, ELECTIONS, ADVOCACY,
RESEARCH SERVICES (GEARS) INITIATIVE 3RD PETITIONER

PEOPLE'S ACTION FOR ACCOUNTABILITY
AND GOOD GOVERNANCE IN ZAMBIA 4TH PETITIONER

ALLIANCE FOR COMMUNITY ACTION 5TH PETITIONER

AND

THE ATTORNEY-GENERAL 1ST RESPONDENT

THE DIRECTOR OF PUBLIC PROSECUTIONS 2ND RESPONDENT

PETITION

TO: THE HIGH COURT FOR ZAMBIA

The Petition of **CHAPTER ONE FOUNDATION LIMITED, BLOGGERS OF ZAMBIA LIMITED, GOVERNANCE, ELECTIONS, ADVOCACY, RESEARCH SERVICES (GEARS) INITIATIVE, PEOPLE'S ACTION FOR ACCOUNTABILITY AND GOOD GOVERNANCE IN ZAMBIA** and **ALLIANCE FOR COMMUNITY ACTION** of No.1 Plot 6941 Suez Road, D12 Lonrho Lane, Agricultural and Commercial Show Grounds, Plot 11059 Mikwala House and D12 Lonrho Lane, Agricultural and Commercial Show Grounds, No 3 Danny Kanengoki Road PHI in the District and Province of Lusaka in the Republic of Zambia shows as follows:

1. The 1st Petitioner is a Non-Governmental Organization incorporated as a Company Limited by Guarantee under the Companies Act No 10 of 2017, and is established to promote and protect human rights, human rights defenders, constitutionalism and the rule of law in Zambia.
2. 2nd Petitioner is a Non-Governmental Organization incorporated as a Company Limited by Guarantee under the Companies Act No 10 of 2017, and is established to promote and protect media freedoms, digital rights and raise awareness and education around internet law and policy.
3. The 3rd Petitioner is a Non-Governmental Organisation registered in accordance with the Non-Governmental Organisations Act No 16 of 2009 and is established to protect and promote democracy, electoral integrity and the rule of law.
4. The 4th Petitioner is a Non-Governmental Organization incorporated as a Company Limited by Guarantee under the Companies Act No 10 of 2017 and is established to promote accountability in governance.
5. The 5th Petitioner is a Non-Governmental Organisation registered in accordance with the Non-Governmental Organisations Act No 16 of 2009 and is established to promote community participation and accountability in development.
6. The 1st Respondent is a Constitutional office holder and chief legal advisor to the Government as designated by Articles 177 and Article 266 of the Constitution of Zambia. Further, the Respondent is legally mandated to represent the Government of the Republic of Zambia in all civil proceedings.

7. The 2nd Respondent is a Constitutional office holder and chief prosecutor for the Government as designated by Articles 180 of the Constitution of Zambia. Further, the 2nd Respondent the head of the National Prosecutions Authority.
8. The Petitioner brings this action pursuant to Article 28 of the Constitution of Zambia which provides as follows:

28. (1) Subject to clause (5), if any person alleges that any of the provisions of Articles 11 to 26 inclusive has been, is being or is likely to be contravened in relation to him, then, without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply for redress to the High Court which shall-

(a) hear and determine any such application;

(b) determine any question arising in the case of any person which is referred to it in pursuance of clause (2);

and which may, make such order, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing, or securing the enforcement of, any of the provisions of Articles 11 to 26 inclusive.

9. This Petition is in respect of various sections of the Cyber Security and Cyber Crimes Act No 2 of 2021. The Act contains several provisions which threaten the right to protection from deprivation of property guaranteed by Article 16, the right to privacy guaranteed by Article 17, the right to protection of the law guaranteed by Article 18, the freedom of conscience guaranteed by Article 19, the freedom of expression guaranteed by Article 20 (1) and the freedom of the press guaranteed by Article 20 (2).
10. The Cyber Security and Cyber Crimes Act seeks to provide penal legislative control over the digital space by criminalising several acts in broad and vaguely defined terms. In addition, the Act seeks to facilitate wide scale surveillance and interception of private communications with insufficient safeguards for constitutionally guaranteed rights and freedoms.
11. Digital communications and technologies have undoubtedly improved access to information and real-time communication. In so doing, they have fostered democratic participation by expanding the freedom of expression, facilitating informative exchanges, amplifying and spreading the messages of human rights defenders and allowing them to expose human rights abuses. The Cyber Security and Cyber Crimes Act threatens this.

Provisions of the Constitution which are likely to be contravened

12. Article 16 (1) of the Constitution guarantees the protection of all persons from the deprivation of their property. It provides as follows:

(1) Except as provided in this Article, property of any description shall not be compulsorily taken possession of, and interest in or right over property of any description shall not be compulsorily acquired, unless by or under the authority of an Act of Parliament which provides for payment of adequate compensation for the property or interest or right to be taken possession of or acquired.

13. Derogation of the right is only allowed where it is pursuant to any of the grounds enumerated in Article 16 (2) of the Constitution.

14. Article 17 of the Constitution guarantees the right to privacy in the following terms:

Except with his own consent, a person shall not be subjected to the search of his person or his property or the entry by others on his premises.

15. The Petitioner recognises that this right is limited to anything that is reasonably required in the interest of defence, public safety, order and anything that is required for the purposes of protecting the rights or freedoms of other persons.

16. Article 18 of the Constitution provides as follows:

18. (1) If any person is charged with a criminal offence, then, unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law.

(2) Every person who is charged with a criminal offence-

(a) shall be presumed to be innocent until he is proved or has pleaded guilty; ...

(8) A person shall not be convicted of a criminal offence unless that offence is defined and the penalty is prescribed in a written law:

17. Article 19 (1) of the Constitution protects the freedom of conscience in the following terms:

Except with his own consent, a person shall not be hindered in the enjoyment of his freedom of conscience, and for the purposes of this Article the said freedom includes freedom of thought and religion, freedom to change his religion or belief, and freedom, either alone or in community with others, and both in public and in private, to manifest and propagate his religion or belief in worship, teaching, practice and observance.

18. The only limitations to this freedom are those that are necessary for public safety, to protect the rights of others and such as are justifiable in a democratic society.

19. In addition, Article 20 (1) and (2) of the Constitution guarantee the freedom of expression and the freedom of the press in the following terms:

(1) Except with his own consent, a person shall not be hindered in the enjoyment of his freedom of expression, that is to say, freedom to hold opinions without interference, freedom to receive ideas and information without interference, freedom to impart and communicate ideas and information without interference, whether the communication be to the public generally or to any person or class of persons, and freedom from interference with his correspondence.

(2) Subject to the provisions of this Constitution, a law shall not make any provision that derogates from freedom of the press.

20. The Petitioner recognises that the rights guaranteed by Article 20 are subject to laws that make provision for the interests of public safety and for the protection of the reputations, rights and freedoms of other people.

21. Articles 1 (1) and 2 of the Constitution provide as follows:

(1) This Constitution is the supreme law of the Republic of Zambia and any other written law, customary law and customary practice that is inconsistent with its provisions is void to the extent of the inconsistency.

...

2. Every person has the right and duty to –

(a) defend this Constitution; and

(b) resist or prevent a person from overthrowing, suspending or illegally abrogating this Constitution.

22. The Petitioner submits that various provisions of the Cyber Security and Cyber Crimes Act are inconsistent with the aforementioned rights and freedoms guaranteed by the Constitution.

Offending provisions of the Cyber Security and Cyber Crimes Act

The Petitioner is aggrieved by the following provisions of the Act:

Sections 11 and 12 – Searches and Seizures contrary to Articles 16, 17, 18 and 19 of the Constitution

23. Section 11 of the Act outlines in very broad terms the wide powers of cyber inspectors to access, search and seize equipment, books, documents, records, data, communications and information. Under the provision, cyber inspectors have powers to search a person or property, inspect any premises related to an information system, take extracts from any book or document in the premises, access and inspect the operation of any computer or equipment forming part of an operation system and require a person (whom they “reasonably believe” to be involved with the operation of the information system) to provide them with such “reasonable assistance” as they may require.

24. Section 12 of the Act provides that a person who obstructs a cyber inspector from conducting a search and seizure commits an offence and is liable to a fine or a term of imprisonment. However, the offence of obstruction is neither defined nor does it require any degree of intention. The determination of what amounts to obstruction is open to interpretation by the cyber inspector. As such, a range of actions, including legally protecting one's information by use of a password or encryption may be construed as obstruction.
25. Although a cyber inspector must obtain a warrant prior to such a search and/or seizure, there is no minimum requirement for a cyber inspector to substantiate their application for a warrant. In addition, the Act provides no limits as to the nature, scope or duration of warrants.
26. The Petitioner avers that the powers bestowed on cyber inspectors in this provision are broad and threaten to limit to the very essence of right to property, the right to privacy, the right to a fair trial and the freedom of conscience as guaranteed by Articles 16, 17, 18 and 19 of the Constitution.

Section 29 – Interceptions without leave of court contrary to Articles 18 and 20 of the Constitution

27. Section 29 of the Act empowers a law enforcement officer to intercept any communication and orally request a service provider to route duplicate signals of indirect communication to the Central Monitoring and Coordination Centre without the leave of court. The purpose of the provision is to prevent bodily harm, loss of life or damage to property in circumstances where it is not reasonable or practical to apply for leave as a delay may result in infliction of bodily harm, death or destruction of property. However, there is no safeguard to ensure that the fear of impending danger is legitimate and/or that the information obtained as a result of the interception will be used for lawful purposes.
28. The power bestowed upon law enforcement officers to orally request an interception with no proof and no accountability is unfettered and overly broad. The Petitioner avers that the provision is an unjustifiable threat to the freedom of expression and the right to protection from self-incrimination under Articles 20 and 18 of the Constitution.

Sections 38 and 40 – Interception of communications by service providers contrary to Article 17 of the Constitution

29. Sections 38 and 40 of the Act require in mandatory terms that electronic communication service providers ensure that they use systems that are capable of supporting interceptions in accordance with the Act, install hardware and software to enable such interception, provide call-related information in real time as soon as possible, store call related information, provide more than one interface from which intercepted communication will be transmitted to the Central Monitoring and Coordination Centre and access calls diverted to other service providers or terminal equipment. Service providers are also required in mandatory terms to provide services that are capable of being intercepted. In essence, the Act seeks to make it mandatory that any entity providing an electronic communication service must be able to intercept its users' communications at all times. In order to facilitate this requirement, the Minister is to prescribe the features, facilities and devices that every service provider will be required to have to enable this interception to be performed at the service providers expense.
30. The right to privacy is premised on the principle that individual citizens ought to be free from state intervention and intrusion. Sections 38 and 40 threaten to limit the enjoyment of the right to privacy under Article 19 of the Constitution on a wide scale by requiring that service providers deliberately provide services that are capable of being compromised for purposes of interception.

Section 54 – Publication of information contrary to Articles 19 and 20 of the Constitution

31. Section 54 of the Act prohibits the publication of any information that is intended to “compromise the safety and security of any other person.” The Act does not state how this intention is determined or what amounts to publication “in a computer system.”
32. The Petitioner submits that this provision is incompatible with the constitutionally guaranteed freedom of conscience, the freedom of expression, the freedom to freely communicate ideas and the freedom of the press as guaranteed by Articles 19 and 20 of the Constitution as the determination of what is information is “published” what amounts to “intent to compromise the safety and security of another person” is left to the determination of law enforcement officers.

Section 59 – Obscene matters or things contrary to Article 20 of the Constitution

33. Section 59 of the Act criminalises possession of material of a nature that “tends to corrupt morals” including, but not limited to, drawings, paintings and pictures. The provision further criminalises the act of advertising or making known by whatever means how or

from whom any of the “matters or things” referred to in the section can be procured either directly or indirectly. There is no definition of what amounts to “corruption” of morals. The broad framing of the offence gives wide discretion to those charged with its enforcement to determine what conduct is offending. The overly broad framing of the provision is a threat to the enjoyment of the freedom of expression.

Section 65 – Hate Speech contrary to Article 18

34. The provision criminalises the use of a computer system to disseminate “hate speech” which is defined by section 2 as “verbal or non-verbal communication, action, material whether video, audio, streaming or written, that involves hostility or segregation directed towards an individual or particular social groups on grounds of race, ethnicity, antisemitism, tribalism, sex, age, disability, colour, marital status, pregnancy, health status and economic status, culture, religion, belief, conscience, origin.”
35. The definition of hate speech provided by the Act is overly broad and does not precisely define the prohibited conduct contrary to Article 18 (8) of the Constitution. This permits too wide a margin for subjective interpretations and abuse of the provision.

Section 69 - Harassment contrary to Article 18

36. Section 69 criminalizes “intentionally” initiating any “electronic communication” with “intent to coerce, intimidate, harass, or cause emotional distress to a person”. The Act does not, however, define what amounts to harassment. An accused person will therefore have to wait until the court interprets the provision before they can know what is and is not prohibited conduct in the manner in which section 69 is framed and the terms used therein do not precisely define it. The failure of the provision to define the prohibited conduct contravenes Article 18 (8) of the Constitution.

Section 72 – Cognisable Offences contrary to Article 18 Constitution

37. Section 72 of the Act provides that offences under the Act are to be deemed cognisable offences under the Criminal Procedure Code. This entails that a police officer may arrest a person for any of the offences set out in the Bill without a warrant where they have grounds to believe that they have committed such an offence which grounds may be mere suspicions. Given the nature of cyber offences and the sphere in which they take place,

there are very few if any circumstances under which a law enforcement officer could validly suspect a particular individual of a cybercrime so as to justify their arrest without warrant.

38. This provision therefore threatens the right to protection against self-incrimination and the right to a fair trial as guaranteed by Article 18 of the Constitution.

Section 74 – Appeal procedure contrary to Article 18

39. Section 74 of the Act provides a right of appeal. However, it does not provide precise time limits within such appeals ought to be made to the Minister and to the court. The failure to prescribe a precise time frame is contrary to Article 18 of the Constitution.

YOUR PETITIONER THEREFORE PRAYS THAT:

1. The Court make a declaration that sections 11, 12, 29, 38, 40, 54, 59, 65, 69, 72 and 74 of the Cyber Security and Cyber Crimes Act are unconstitutional and should be struck off from the statute books; and
2. The Court make an order that each party bears their own costs.

Dated thisday of2021

DRAWN & FILED BY:



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