

Zimbabwe: Subverting a Constitutional Government A Legal Briefing Note

Introduction

Following protests that occurred in most major cities and towns in Zimbabwe in January 2019, a number of activists, human rights defenders, civil society leaders and opposition leaders have been arrested and charged with 'subverting constitutional government' as provided for under section 22 of the Criminal Law (Codification and Reform) Act [Chapter 9:23] (hereinafter referred to as the Criminal Code).

This legal briefing note seeks to provide an explanation of the elements of the crime and how it has been construed by Zimbabwean courts, and whether and to what the resort to section 22 has accorded with international law and standards, including African regional standards.

The offence of 'Subverting Constitutional Government'

Under Zimbabwe's existing laws, a person may be charged with an offence known as 'subverting constitutional government'. This is a crime akin to but less serious than treason. It is nonetheless an offence which attracts a sentence up to 20 years in prison. Section 22 of the Criminal Law Code which provides for the crime, reads as follows;

"22 Subverting constitutional government

(1) In this section

"coercing" means constraining, compelling or restraining by _

(a) physical force or violence or, if accompanied by physical force or violence or the threat thereof, boycott, civil disobedience or resistance to any law, whether such resistance is active or passive; or

(b) threats to apply or employ any of the means described in paragraph (a);

"unconstitutional means" means any process which is not a process provided for in the Constitution and the law.

(2) Any person who, whether inside or outside Zimbabwe

(a) organizes or sets up, or advocates, urges or suggests the organization or setting up of, any group or body with a view to that group or body

(i) overthrowing or attempting to overthrow the Government by unconstitutional means; or

(ii) taking over or attempting to take over the Government by unconstitutional means or usurping the functions of the Government; or

(iii) coercing or attempting to coerce the Government;

or

(b) supports or assists any group or body in doing or attempting to do any of the things described in subparagraph (i), (ii) or (iii) of paragraph (a);

shall be guilty of subverting constitutional government and liable to imprisonment for a period not exceeding twenty years without the option of a fine."

Various protesters have been arrested on the allegations that their public statements amounted to inciting the commission of this crime. Following the January 2019 protests, more than 5 protesters and MDC opposition members have been charged with this crime.¹ Despite the high number of arrests based on this charge in the past few years, there have been no convictions. Where the basis of the charge are public statements made, the question of what exceeds legitimate exercise of the right to freedom of expression arises. As such, there is need to interrogate where the line is drawn between legitimate and illegitimate exercise of the right to freedom of expression.

¹ The Zimbabwe Situation, "Zimbabwe's Youngest Law Maker Faces Subversion Charges", 4 March 2019, Available at: <https://www.zimbabwesituation.com/news/zimbabwes-youngest-lawmaker-faces-subversion-charge/>

International human rights law, pursuant both universal and African regional standards, protects for the rights of persons to freedom of opinion and expression (Article 9 ACHPR; article 19 ICCPR), freedom of assembly (article 11 ACHPR; 21 ICCPR) article, freedom of association (article 10 ACHPR; article 22 ICCPR), and the right to political participation (article 25 ICCPR). These provisions in these international instruments impose an obligation on all state parties to respect the rights of persons under their jurisdiction. Zimbabwe as a member state is bound by these provisions and similar provision under sections 58 (freedom of assembly and association), section 59 (freedom to demonstrate and petition), section 60 (freedom of conscience) and section 61 (freedom of expression).

These rights and fundamental freedoms, when exercised by human rights defenders, have been accorded heightened protection in international standards in particular through the UN Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms (Declaration on Human Rights Defenders), adopted in 1999 by consensus of the General Assembly

While these freedoms are not absolute, under international law, any restrictions must be (i) legitimate, provided by law which is clear and accessible to everyone and formulated with sufficient precision to enable an individual to regulate his or her conduct; (ii) proven strictly necessary to protect the rights or reputation of others, national security or public order, public health or morals and (iii) proven to be the least restrictive and proportionate means to achieve the purported aim.

An Analysis of Section 22

The wording of section 22 spells out what amounts to subversion of a constitutional government. The section is couched in clear language which makes physical violence and force a pre-requisite to the commission of the crime. However, most of the activists and political opposition officials who have been charged with the offence have been charged with inciting the commission of the crime. Section 187(1) of the Criminal Code defines inciting as anyone who induces, persuades or makes any such communication where there is a real risk that people may be induced. The problematic aspect in respect to subversion is found under sub-section (2) of section 187 which makes it immaterial whether the persons incited acted on the incitement or even knew that they were being incited. This section potentially broadens the scope of section 22 to include actions or statements that may be viewed as incitement and potentially removing the requirement for physical violence or force where the charge is inciting subversion of a constitutional government.

However, the potential danger highlighted above has been at least partly averted by the interpretation of section 22 as read with section 187(1) and (2) of the Criminal Code in recent case by the High Court of Zimbabwe sitting in Harare. The case of **S v Mawarire HH802/17**, is most instructive in understanding how the courts have previously approached this crime, as it is one of the only available judgements on this crime from a Zimbabwe court whose judgements are strictly binding on inferior Zimbabwean Courts that might adjudicate this crime. In this case, Evan Mawarire, a local clergyman, was charged with subverting constitutional government. The allegations as outlined in the **S v Mawarire** judgement were that during the period April to June 2016, through social media and the internet, he unlawfully and with the intention of overthrowing the government of Zimbabwe, organized or set up or advocated or suggested the organization or setting up of various internet accounts styled hashtag "This Flag" on twitter, Instagram, Facebook and WhatsApp platforms. Through these platforms he allegedly communicated subversive ideas and incited persons' unknown with the intention of overthrowing or attempting to overthrow the government by unconstitutional means. Alternatively, it was alleged that his intention was to or attempt to usurp the functions of government or coerce the government through boycotts, civil

disobedience or passive resistance to law, realizing that there was a real risk or possibility that his actions might subvert the constitutional government of Zimbabwe”.

In the **Mawarire case**, Justice Chigumba J rightly noted that section 22 relates to an offence of ‘overthrowing or attempting to overthrow a government by unconstitutional means’. The court took occasion to interpret aspects of the crime so as to shed light on what constitutes actions upon which a person may be charged and convicted of this crime.

In order to fully understand the nature of this crime it is important to analyse its key elements which are prerequisite for a conviction. There are three essential elements as follows;

(a) To organise, set up, suggest or advocate for a group or body

Section 22 of the Criminal Law expressly provides a requirement that the prosecution prove that the accused person tried to organize, set up or advocate for a group or body to overthrow or attempt to overthrow a government through unconstitutional means. Alex Magaisa² therefore argued that there must be evidence that a specific identifiable group had been set up or organized or the target of advocacy by him. Whether the general public can be considered a group for the purposes of this section had not been established, but unlikely, given the language referring to a “group or body”. In the case of **S v Mawarire HH 802/17**, the defense did not make submissions on this particular aspect, and as a result the court did not make pronouncements on what would constitute ‘a group or body’ for the purposes of section 22 of the Criminal Code.

(b) Attempting to or Inciting overthrow of the government using unconstitutional means

Continuing with the plain reading of section 22 of the Criminal Law will arguably require as a second step, that the group or body that is alleged to have been organized or set up in the first step should have been so done with a view to overthrow or attempt the overthrow of the government. In **S v Mawarire**, Justice Chigumba relied on section 22(1) of the Criminal Code, which defines unconstitutional means as “any process which is not provided for in the Constitution and the law” to provide a basis to discharge the accused. From this definition she argued that it is possible for a government to be removed using Constitutional means. This entails assessing whether the elements of the crime have been fulfilled where one is charged with the crime; it must be shown that the means that were used or sought to be used are against the Constitution and the law. The court emphasized that there is a clear distinction between the exercise of constitutional rights and unconstitutional actions that amount to subversion of a constitutional government. The rights identified by the court include

- a) freedom of assembly,
- b) freedom of expression and freedom to petition and;
- c) freedom to demonstrate and petition

Further, the court held that where an accused person is charged with inciting subversion of a constitutional government there must be a sufficient link or nexus between the unconstitutional or unlawful words or actions of the accused person and the actions of those he/she allegedly incited. In this case, the court held that there was “no evidence that the perpetrators of violence acted on the strength of any urging by the accused person”. The refusal of any of the perpetrators of violence to testify against the accused person further pointed to the absence of any evidence to corroborate the allegations of inciting subversion of constitutional government. It is important to note that in making pronouncements on the availability of witnesses testifying to being incited, the court did not suggest that the

² Alex Magaisa, “Subverting Constitutional Government: A Legal Note on the New Charge Against Evan Mawarire, PaZimbabwe, 13 July 2016, Available at: <https://www.pazimbabwe.com/opinion-columnist-22323-subverting-constitutional-government-legal-note-new-charge-evan-mawarire.html>

testimony of such witnesses in itself would be sufficient in establishing the required nexus. The court placed a high burden of proof on the State by stating as follows; "It is imperative that the State, in bringing such charges against an accused person, carefully substantiate, by way of cogent evidence, which 'unconstitutional means' will have been used in the commission of the offence".

(c) Coercing or attempting to coerce the government

Where it is established that the aim of an action was not to overthrow the government, an accused person may still be guilty of subverting constitutional government where the aim is to coerce or attempt to coerce the government. Section 22(1) of the Criminal Code defines 'coercing' as follows;

constraining, compelling or restraining by _

(a) physical force or violence or, if accompanied by physical force or violence or the threat thereof, boycott, civil disobedience or resistance to any law, whether such resistance is active or passive; or

(b) threats to apply or employ any of the means described in paragraph (a);

Physical violence or force is a key factor in determining what constitutes coercion of a government. Physical force accompanying the coercion does not have to have been exercised by the accused person. It is sufficient to show that the accused incited physical violence or force in an attempt to coerce the government. In the *Mawarire* case, the State argued that Mawarire through his videos created a subversive environment and that while he expressed non-violence, the messages could be said to be coded and therefore actually advocating for the opposite. This argument was firmly rejected by the court which stated that "passive resistance cannot be said to be a precursor to violence. It is the opposite of violence". By so stating, the court rightly narrowed down instances in which passive resistance may result in a conviction for the crime of subverting constitutional government. Further, it narrowed down the scope of incitement as defined in section 187 read with section 22 of the Criminal Code, as it firmly rejected the idea that incitement could include words or statements which do not point to an urging of the commission of a crime. In essence the court restricted 'inciting' statements to statements which directly urge the commission of the crime.

The decision in the case of ***S v Mawarire*** followed the prescriptions of the Human Rights Council's Working Group on Arbitrary Detention in its Opinion no. 82/2017 concerning Evan Mawarire (Zimbabwe).³ In this opinion, the Working Group noted that the arrest of Evan Mawarire amounted to a violation of his right to freedom of expression, and that the Government had not presented any information to indicate that the arrest constituted a permissible restriction pursuant, for example, to article 19 of the ICCPR.. The High Court's decision in the *Mawarire* appears consistent Working Group's decision in that emphasizes the need to distinguish between the exercise of basic human rights such as freedom of expression and actions that fall outside the protected ambit and are criminalized.

In this respect the Working Group noted:

"The Working Group considers that this conduct falls clearly within the boundaries of the freedom of opinion and expression protected by article 19 of the Universal Declaration of Human Rights and article 19 of the Covenant. The Working Group recalls that the value placed by the Covenant upon uninhibited expression in debate concerning public institutions is particularly high. This includes comment on public figures, including those exercising the highest authority, such as Heads of State and Government, who are legitimate objects of criticism and political opposition."⁴

In light of this decision and the wording of section 22 of the Criminal Code it is clear that the provisions of section 22 are clear and fall within the ambit of justified and necessary

³ A/HRC/WGAD/2017/82 at para 40, partly dealing with the question of subverting constitutional government as a crime under the laws of Zimbabwe.

⁴ A/HRC/WGAD/2017/82 Supra note 3, para 37

restrictions to the right to freedom of expression and other related rights.

“The Government made no claim that any of the permitted restrictions on the freedom of expression and peaceful assembly found in articles 19 (3) and 21 of the Covenant applied in the present case. In any event, in paragraph 5 (p) of its resolution 12/16, the Human Rights Council calls on States to refrain from imposing restrictions that are not consistent with international human rights law, including restrictions on discussion of government policies and political debate; reporting on human rights, government activities and corruption in government; peaceful demonstrations or political activities; and expression of opinion and dissent.”⁵

However, as was noted by the Working Group in opinion 82/2017, arrests not based on actions that constitute elements of the crime will generally amount to arbitrary deprivation of liberty.

Law Enforcement’s Approach to Subverting Constitutional Government

In *S v Mawarire*, the High Court’s pronouncements shed light as to the constituent elements of this crime. Law enforcement authorities are bound to follow the prescriptions of the Court in this respect. Unfortunately, protesters, continue to be charged with this offence, despite the alleged conduct generally, falling outside what would constitute elements of this crime. Further, the same actions which were rightly declared to be justified constitutional exercise of basic rights continue to be subject to criminal sanction by law enforcement officials. For example, Evan Mawarire is currently being charged with subversion of a constitutional government. The allegations against him are based on the same actions that were declared constitutional in *S v Mawarire*. A report by Amnesty International released on 8 February 2019⁶ highlights four cases involving prominent activists and opposition leaders charged under section 22 of the Criminal Code. From this report, a striking trend of arrest, denial of bail at the Magistrates Court then granting of bail on appeal at the High Court is manifest. This has led to allegations that the crime of subversion of constitutional government is being used to cripple the opposition and to harass activists.⁷

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⁵ Ibid, para 39

⁶ Amnesty International, “Zimbabwe: ‘Open for Business’, Closed For Dissent: Crackdown in Zimbabwe During the National Stay-Away 14-16 January”, 8 February 2019, p.15-16, Available at: <https://www.amnesty.org/en/documents/afr46/9824/2019/en/>

⁷ The Zimbabwe Situation, “Subversion Charge Used to Cripple Opposition”, March 10 2019, available at: <https://www.zimbabwesituation.com/news/subversion-charge-used-to-cripple-opposition/>