MEDIA ALLIANCE OF ZIMBABWE
and
ZENZELE NDEBELE
versus
MINISTER OF JUSTICE, LEGAL AND PARLIAMENTARY AFFAIRS N.O.
and
ATTORNEY GENERAL N.O.

HIGH COURT OF ZIMBABWE
MANYANGADZE J
HARARE, 9 October 2024 & 21 May 2025

Opposed Application

C Kwaramba, for the 1st applicant
G Nyoni, for the 2nd applicant
M Chimombe, for the respondents

MANYANGADZE J:

INTRODUCTION

This is an application for a declaration of constitutional invalidity. It arises from the promulgation of The Criminal Law (Codification and Reform) Amendment Act No. 10 of 2023 ("the Amendment Act"), which introduced, *inter alia*, ss 22 A (2) and 22 A (3) to the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] ("the Criminal Law Code"). The applicants are impugning the constitutionality of the said new sections. They seek an order in the following terms:

> "1. The Definition of "Agents, proxies or entities" of the foreign governments, is overly broad and consequently unconstitutional.
> 2. "Wilfully injuring the sovereignty and national interest of Zimbabwe" is not defined with sufficient clarity and consequently section 22 A (2) is vague and unconstitutional.
> 3. "Subverting, upsetting, overthrowing or overturning the constitutional government in Zimbabwe" is not defined with sufficient clarity, if at all, and consequently section 22A (2) is imprecise, vague, and unconstitutional.
> 4. Section 22 A (2) is broadly worded and consequently unconstitutional.
> 5. Section 22 A (2)(i) is in violation of section 48 (1) as read with section 48 (2) of the Constitution of Zimbabwe which limits the death penalty only on a person convicted of murder committed under aggravating circumstances.

6. Section 22 A (3) of the Criminal Law Code, as amended, is vague and overbroad and infringes
(a) Section 61 of the Constitution of Zimbabwe guaranteeing every person the right to freedom of expression, which include the right to seek, receive, and communicate ideas and other information.
(b) Section 58 of the Constitution on freedom of association and assembly.
(c) Section 67 (3)(a) of the Constitution, being the right to vote, or the right to stand for political office.
(d) Section 39 of the Constitution which provides grounds when citizenship may be revoked.
7. Sections 20 (1) and 23 (1) (c) (v) A, of the Criminal Law Code, are unconstitutional as they violate section 48 (1) and (2) of the Constitution.
8. There shall be no order as to costs."

The first applicant is an alliance of various media support organisations in Zimbabwe. Its legal status is that of a common law *universitas*, and is represented by its National Co-ordinator, Nigel Nyamutumbu, who is the deponent to the founding affidavit.

The first applicant's core activity is advocacy in the areas of freedom of expression, right to information, media law and policy reform.

The second applicant is described in the founding affidavit as a citizen of Zimbabwe, who is "passionate about her constitutional rights and freedom and jealously guards the Chapter 4 bill of rights for the good of Zimbabwe." In her own affidavit, she fully associates herself with the averments in the first applicant's founding affidavit.

The applicants have approached the court in the public interest in terms of s 85 (1) of the Constitution of Zimbabwe Amendment (No. 20) 2013 ("the Constitution"). No issue has been raised on their capacity to bring the application on that basis.

THE IMPUGNED LEGISLATION

It is necessary, from the outset, to set out the legislative provisions the applicants are challenging, being sections 22 A (2) and 22 A (3) of the Criminal Law Code.

Section 22 A (2) reads as follows:

"Any citizen or permanent resident of Zimbabwe (hereinafter in this section called "the accused") who, within or outside Zimbabwe actively partakes (whether himself or herself or through an agent, and whether on his or her own initiative or at the invitation of the foreign government concerned or any of its agents, proxies or entities) in any meeting whose object the accused knows or has reasonable grounds for believing involves the consideration of or the planning for—

(a) military or other armed intervention in Zimbabwe by the foreign government concerned or another foreign government, or by any of their

agents, proxies or entities; or

(b) subverting, upsetting, overthrowing or overturning the constitutional government in Zimbabwe; shall be guilty of wilfully damaging the sovereignty and national interest of Zimbabwe and liable to—

(i) the same penalties as for treason, in a case referred to in paragraph (a); or

(ii) the same penalties as for subverting constitutional government, in a case referred to in paragraph (b)."

Section 22 A (3) provides that:

"Any citizen or permanent resident of Zimbabwe who, within or outside Zimbabwe, intentionally partakes in any meeting whose object or one of whose objects the accused knows or has reasonable grounds for believing involves the consideration of or the planning for the implementation or enlargement of sanctions or a trade boycott against Zimbabwe (whether those sanctions or that boycott is untargeted, or targets any individual or official or class of individuals or officials, but whose effects indiscriminately affect the people of Zimbabwe as a whole or any substantial section thereof) shall be guilty of wilfully damaging the sovereignty and national interest of Zimbabwe and liable to—

(i) a fine not exceeding level 12 or imprisonment for a period not exceeding ten years, or both;

(ii) or alternatively on the motion of the prosecutor, to any one or more of the following, if the offence is attended by aggravating circumstances referred to in subsection

(2) or (6)—

A. termination of the citizenship of the convicted person, if the convicted person is a citizen by registration or a dual citizen:

Provided that the convicting court shall not impose this penalty if it would effectively render the convicted person stateless;

B. cancellation of the permanent resident status of the convicted person, if the convicted person is a permanent resident; or

C. prohibition from being registered as a voter or voting at an election for a period of at least five years but not exceeding fifteen years; or

D. prohibition from filling a public office for a period of at least five years but not exceeding fifteen years, and, if he or she holds any such office, the convicting court may declare that that office shall be vacated by the convicted person from the date of his or her conviction, unless the tenure of the public office in question is regulated exclusively by or in terms of the Constitution—"

APPLICANTS' ARGUMENT

A perusal of the applicants' submissions, both in the founding affidavit and heads of argument, shows that they are impugning the cited legislative provisions mainly on the following grounds:

(a) Section 22 A (2) is broadly worded, and as such has high potential for abuse and misuse. It has the effect of silencing dissenting voices and is therefore unfair, unnecessary and unreasonable in a democratic society.

(b) Section 22 A (3) is equally vague, overbroad, and infringes ss 58, 61 and 67 (3)(a) of the Constitution.

The essence of the applicants' averments is that laws, especially the criminal law, must be formulated with sufficient clarity so as to enable all citizens to regulate their conduct. This is so because the criminal law places limitations on constitutionally protected rights. Failure to craft it with precision amounts to denial of due process and violates the principle of legality. This is a fundamental principle, which requires that a law must enable a person of ordinary intelligence to know in advance what he or she must not do and the consequences of disobedience.

The applicants express mistrust in law enforcement agents such as the police force. They fear that the officers are likely to interpret these sections of the law broadly and arrest innocent citizens. The tendency by law enforcement officers is to widen rather than limit the scope of the provisions of the law they are enforcing. This often results in a dragnet operation in which innocent citizens are lumped together with the guilty ones.

The applicants point out that an agent may be assigned to attend a meeting in which the proscribed activities are on the agenda, with a mandate to oppose the proposals made. The agent may turn rogue and support the agenda, thus going on a frolic of his own. The applicants contend that the law as currently crafted is so broad and vague that the principal will be held liable for the criminal participation of the agent. The law improperly provides a basis for imputing liability onto the principal.

Thus, the common thread that runs through the applicants' contention is that the legislative provisions in question are too broad, vague, imprecise and unnecessary. They invade constitutionally protected fundamental rights and freedoms.

The applicants also impugn the penalty provisions of ss 22 A (2) and 22 A (3).

In respect of s 22 A (2), the applicants aver that provision for the death penalty violates s 48 (2) of the Constitution, which restricts the death penalty to murder committed in aggravating circumstances.

In s 22 A (3), the applicants aver that the penalties are so draconian they amount to an assault on citizens' rights and freedoms. The penalties include lengthy imprisonment and drastic measures like revocation of citizenship, deprivation of voting rights and prohibition from holding public office.

RESPONDENTS' ARGUMENT

In countering the applicants' averments, the respondents assert that the impugned provisions do not violate any fundamental rights enshrined in the Constitution. They aver that the conduct proscribed is defined with sufficient clarity. One must read ss 22 A (2)(3) together with s 22 A (1), which clearly defines what actively partaking in a meeting entails. The legislature did not create a strict liability offence of merely attending a meeting. The accused attends and participates with the intention to promote or advance the objectives of such a meeting.

The respondents further contend that there is no overlap between s 22 A (2) and s 22 of the Criminal Law Code. They contend that s 22 A (2) expands s 22. It now includes actively partaking in the meetings in question. The respondents also point out that s 22 A (2) can be charged as an alternative to s 22.

On penalty provisions, the respondents aver that these do not take away judicial discretion. The sections impugned do not provide for mandatory sentences. There is a range of possible options the judicial officer considers. The respondents assert that the right to vote or hold public office is not absolute. There is a reciprocity of rights and obligations, as the citizen also has an obligation of loyalty to the State.

Overally, the respondents contend that no citizen has a right to engage in the conduct proscribed in ss 22 A (2) and 22 A (3). Every nation has a right to protect its sovereignty and national interests. To that end, it can enact laws that protect its sovereignty and interests. This position is encapsulated in paras 21-23 of the respondents' heads of argument, wherein is stated:

> "Every sovereign nation has the right to protect its sovereignty and national interest and Zimbabwe is no exception. The rationale behind the introduction of these provisions is based on the need to discourage citizens from undermining the sovereignty and national interests of Zimbabwe. The impugned provisions do not criminalise correspondence between Citizens and Foreign Officers or human rights organisations inside or outside Zimbabwe as is commonly believed.
>
> The Amendment Act criminalises conduct that is a threat to Zimbabwe's Sovereignty, national interest and security. The perpetrator of the crime must have the express intention of causing a threat to national sovereignty, national and security interest of Zimbabwe.
>
> Criticising or challenging the Government is not what is prohibited under the impugned provision. This excludes mere political discussions or criticism of Government that is allowed in a democratic society. The kind of behaviour that is criminalised under Section 22 goes beyond the normally accepted methods of criticising a Government or raising human rights violations. No citizen or resident of a country can claim to have a right to injure the sovereignty, national or security interest of their country. As such, the patriotic provisions do not therefore limit any rights as provided by the Constitution. None of the rights enshrined in the Constitution can be said to permit harming the sovereignty, national or security interests of Zimbabwe."

THE LAW

The approach to be followed in determining the constitutional validity of legislation has been clearly set out in the authorities. It involves the following essential steps:

(1) Interpretation of the constitutional provisions allegedly infringed.

(2) Presumption of the constitutional validity of the impugned legislation.
(3) Examination of the effect of the impugned legislative provision on the fundamental right or freedom in question.
(4) Determination of whether the infringement complained of is permissible under s 86 (2) of the Constitution, if the there is a finding that the impugned legislative provision infringes the right or freedom in issue.

See *Zimbabwe Township Developers (Pvt) Ltd v Louis' Shoes (Pvt) Ltd* 1983 (2) ZLR 376 (S), *In re Munhumeso* 1994 (1) ZLR 49 (S), *Rattigan & Ors* v *The Chief Immigration Officer & Ors* 1994 (2) ZLR 54, *Smythe v Ushewokunze & Anor* 1997 (2) ZLR 544 (S), *James v Zimbabwe Electoral Commission & Ors* 2013 (2) ZLR 659 (CCZ), *Democratic Assembly for Restoration and Empowerment & Ors v Saunyama* CCZ 9/18, *Diana Eunice Kawenda v Minister of Justice, Legal and Parliamentary Affairs & Ors* CCZ 3/22.

In the case of *Diana Eunice Kawenda v Minister of Justice, Legal & Parliamentary Affairs & Ors, supra*, the Constitutional Court dealt with the constitutional validity of s 70 of the Criminal Law (Codification and Reform) Act [Chapter 9:23]. The Constitutional Court set aside a High Court judgment that had dismissed an application for a declaration of constitutional invalidity of the impugned legislation. It emphasized the need to follow the basic principles in determining constitutional challenges. The court should properly identify and confine itself to the constitutional issues raised, and not unnecessarily broaden the enquiry.

In her trademark clarity, MAKARAU JCC set out the logical steps to be followed, elaborating on the rationale underlying this approach. The learned judge of the Constitutional Court made the following succinct and instructive explanation, at pp15-16:

> "There is an expansive body of jurisprudence from this jurisdiction and beyond on the approach that a court must take when determining whether a statute or other law is in conflict with the Constitution. One begins with an interpretation of the relevant provisions of the Constitution. The purpose of interpreting the Constitution first is to set the framework, the backdrop, or the yardstick against which the impugned law will then be examined or measured. One starts with a discernment of the law. (See *Zimbabwe Township Developers (Pvt) Ltd v Lous' Shoes (Pvt) Ltd* 1983 (2) ZLR 376 (SC) at 383 F; and *Democratic Assembly for Restoration and Empowerment & Ors v Suanyama* CCZ 9/18). In interpreting the constitutional provisions, the ordinary rules of interpretation of statutes apply. The

> Constitution is but a statute. It is however settled that in interpreting constitutional provisions, the preferred construction "is one which serves the interest of the Constitution and best carries out its objects and promotes its purpose". (See *Rattigan and Others v The Chief Immigration Officer and Others* 1994(2) ZLR 54. See also *Smythe v Ushewokunze and Another* 1997(2) ZLR 544(S)). In particular, when interpreting provisions that guarantee fundamental rights, the widest possible interpretation is adopted to give each right its fullest measure or scope. After interpreting the appropriate provisions of the Constitution, one then presumes that the impugned law is constitutionally valid. The presumption of constitutional validity serves firstly to place the onus on whoever is alleging invalidity to prove such invalidity and, secondly and, equally important, to guide the court in interpreting the impugned law in favour of validity where the piece of legislation is capable of two meanings. The presumption holds that where a piece of legislation is capable of two meanings, one falling within and the other falling outside the provisions of the Constitution, the court must perforce uphold the one that falls within. The presumption in favour of constitutionality is entrenched in our law. As the next and final logical step, the Court must then examine the effect of the impugned law on the fundamental right or freedom in question. If the effect of the impugned law is to abridge a fundamental right or freedom or is inconsistent with the provisions of the Constitution providing for the right or freedom, the object or subject matter of the impugned law will be less important or irrelevant. (See *In re Mhunhumeso* 1994 (1) ZLR 49 (S)). If the court finds the impugned law to infringe upon a fundamental right or freedom or to be inconsistent with the provisions of the Constitution on a fundamental right or freedom, the court must proceed to determine whether the infringement or inconsistency is permissible in terms of s 86 (2) of the Constitution."

Further to that, any law establishing criminal conduct must be clear, unambiguous, concise and precise. This significant requirement was dealt with extensively in the case of *Mark Gova Chavunduka & Anor v Minister of Home Affairs* SC 36/2000. GUBBAY CJ stated, at pp 12-13:

> "It is crucial, therefore, that the law must be adequately accessible and formulated with sufficient precision to enable a person to regulate his conduct. He or she must know, with reasonable certainty, what the law is and what actions are in danger of breaching the law. See *Barthold v Germany* (1985) 7 EHRR 383 at 399 (para 47). It is the guidance of conduct, and not the absolute direction of conduct, which is the appropriate objective of legislation. A provision will be too vague if it fails to provide a foundation for legal debate and discussion. An inadequate demarcation of an area of risk affords neither notice to a person of conduct which is potentially criminal, nor an appropriate limitation upon the discretion of the authorities seeking to enforce the provision. It offers no basis for the court to define limits of conduct. See *R v Butler* (1992) 8 CRR (2d) 1 (Can. SC) at 28-29; *R v Nova Scotia Pharmaceutical Society* (1992) 10 CRR (2d) 34 (Can. SC) at 58-59. Expectedly, it was the submission of counsel for the applicants that when dealing with the permissible limitation upon constitutionally protected rights, a court must ensure that if human conduct is to be subjected to the authority of any criminal law, the terms of such law must not be vague; for otherwise there will be a denial of due process."

The learned Chief Justice went on to refer to some American authorities on the need for precision, clarity and certainty in the law. These references are at p 13 and are captured as follows:

> "In this context useful reference may be made to three opinions of the United States Supreme Court –
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> In *Connolly v General Construction Co* 269 US 385 (1925) at 391 it was pointed out that:
>
> "… a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law." (emphasis added).

Then, in *Cline v Frank Dairy Co* 274 US 445 (1927) at 465 the first essential of due process of law was identified as being that:

> "… it will not do to hold an average man to the peril of an indictment for the unwise exercise of his … knowledge involving so many factors of varying effect that neither the person to decide in advance, nor the jury to try him after the fact, can safely and certainly judge the result."
>
> Finally, in *Papachristou v City of Jacksonville* 405 US 156 (1972) at 162 it was said;
>
> "This Ordinance is void for vagueness, both in the sense that it 'fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the Statute' … and 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'. *Langetta v New Jersey* 306 US 451 at 453."

APPLICATION OF THE LAW

Guided by this approach, I now proceed to consider the issues raised. It is noted that the offences created by the impugned provisions relate to participation in meetings with foreign governments or their agents. The applicants' gripe with these provisions stems from this aspect. It is in this regard that Mr *Kwaramba*, counsel for the first applicant, told the court during oral submissions:

> "At the heart of this application is the principle that legislation which affects freedoms, especially bill of rights, must be crafted with precision, so as to avoid gratuitous limitation on those freedoms."

The freedoms in question are enshrined in ss 58 (1) and 61 (1) of the Constitution, being "freedom of assembly and association" and "freedom of expression". They both fall under the rubric of fundamental human rights and freedoms that constitute PART 2

of the Constitution. The crisp issue for determination is whether ss 22 A (2) and 22 A (3) constitute an intrusion into or infringement of those rights and freedoms. If it is found that the said sections indeed infringe the rights concerned, it must further be determined whether such infringement is justifiable under the limitations permitted by law.

Section 58 (1) provides that;

> "Every person has the right to freedom of assembly and association, and the right not to assemble or associate with others."

Section 61(1) provides that;

> "Every person has the right to freedom of expression, which includes –
> (a) freedom to seek, receive and communicate ideas and other information."

As stated in numerous authorities, there is no magic to interpretation. Words in a statute must be given their ordinary grammatical meaning. It is only when the ordinary grammatical meaning yields an absurdity or is at variance with the context of the statute concerned that a departure therefrom may be justified. The Constitution is no exception to this and other basic canons of interpretation, it being a statute, notwithstanding its status as the supreme law of the land. As MAKARAU JCC pointed out in *Eunice Kawema, supra*, at pp 15 and 16:

> "The issue is neither novel nor complex. It is an issue that involves an interpretation of the relevant provisions of the Constitution and comparing the effect of the impugned law on such provisions…….
> In interpreting the constitutional provisions, the ordinary rules of interpretation of statutes apply. The Constitution is but a statute. It is however settled that in interpreting constitutional provisions, the preferred construction "is one which serves the interest of the Constitution and best carries out its objects and promotes its purpose". (See *Rattigan and Others v The Chief Immigration Officer and Others* 1994(2) ZLR 54. See also *Smythe v Ushewokunze and Another* 1997(2) ZLR 544(S)). In particular, when interpreting provisions that guarantee fundamental rights, the widest possible interpretation is adopted to give each right its fullest measure or scope."

Giving s 58 (1) its widest possible interpretation and its fullest measure or scope, it means a person has the right to belong to a political party of his or her own choice,

religious faith or movement, business or educational organisation, civic pressure group, trade union etc. The organisation or association can be local or international. The list is endless. Government is generally not expected to regulate an individual to such an extent that it determines which persons or organisations he or she should relate with. Doing so would result in severe curtailment of the freedom of association and would be in violation of the right protected by s 58 (1).

Alongside freedom of association, the other sacrosanct right that is protected by the Constitution is that of freedom of expression, in s 61(1). This is a fundamental right in any democratic society. It guarantees the freedom to express, receive or exchange ideas or other information on any subject of interest. It includes the right to engage in academic discourse on various topics. That way, society develops both in its technological and social spheres, taking pride of place among advanced civilisations.

GUBBAY CJ dealt extensively with this right in *Chavunduka v Minister of Justice, supra,* highlighting its importance. The learned Chief Justice made the following insightful remarks, at p 8:

> "This Court has held that s 20(1) of the Constitution is to be given a benevolent and purposive interpretation. It has repeatedly declared the importance of freedom of expression to the Zimbabwean democracy – one of the most recent judgments being that of *United Parties v Minister of Justice, Legal and Parliamentary Affairs & Ors* 1997 (2) ZLR 254 (S) at 268 C-F, 1998 (2) BCLR 224 (ZS) at 235 I-J. Furthermore, what has been emphasised is that freedom of expression has four broad special objectives to serve: (i) it helps an individual to obtain self-fulfilment; (ii) it assists in the discovery of truth, and in promoting political and social participation; (iii) it strengthens the capacity of an individual to participate in decision-making; and, (iv) it provides a mechanism by which it would be possible to establish a reasonable balance between stability and social change. See, to the same effect, *Thomson Newspapers Co v Canada* (1998) 51 CRR (2d) 189 (Can. SC) at 237."

The learned judge went as far as pointing out that the ideas and thoughts expressed need not be those we agree with. The protection extends to the exchange of ideas that may not be popular. In this regard, the learned Chief Justice cited with approval the

remarks of Canadian Judge MacLACHLIN in the case of *R v Zundel* (1992) 10 CRR (2d) 193, @ 206:

> "(The) guarantee of freedom of expression serves to protect the right of the minority to express its view, however unpopular it may be; adapted to this context, it serves to preclude the majority's perception of 'truth' or 'public interest' from smothering the minority's perception. The view of the majority has no need of constitutional protection; it is tolerated in any event. Viewed thus, a law which forbids expression of a minority or 'false' view on pain of criminal prosecution and imprisonment, on its face, offends the purpose of the guarantee of free expression."

Reference was also made to the European Court of Human Rights in *Hanlyside v The United Kingdom* (1979-80) 1 EHRR 737 at 754:

> "not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no democratic society."

What all this goes to show is that that the provisions protecting freedom of association and expression should be given the widest possible scope in their interpretation. Derogation therefrom must only be in justifiable circumstances provided for by law.

Our law does provide a basis for such derogation, in s 86 of the Constitution. This section, which is a standard limitation provision in most constitutions, reads as follows:

> "(1) The fundamental rights and freedoms set out in this Chapter must be exercised reasonably and with due regard for the rights and freedoms of other persons.
> (2) The fundamental rights and freedoms set out in this Chapter may be limited only in terms of a law of general application and to the extent that the limitation is fair, reasonable, necessary and justifiable in a democratic society based on openness, justice, human dignity, equality and freedom, taking into account all relevant factors, including—
> (a) the nature of the right or freedom concerned;
>
> (b) the purpose of the limitation, in particular whether it is necessary in the interests of defence, public safety, public order, public morality, public health, regional or town planning or the general public interest;
> (c) the nature and extent of the limitation;
> (d) the need to ensure that the enjoyment of rights and freedoms by any person does not prejudice the rights and freedoms of others;

(e) the relationship between the limitation and its purpose, in particular whether it imposes greater restrictions on the right or freedom concerned than are necessary to achieve its purpose; and

(f) whether there are any less restrictive means of achieving the purpose of the limitation.

(3) No law may limit the following rights enshrined in this Chapter, and no person may violate them—

(a) the right to life, except to the extent specified in section 48;

(b) the right to human dignity;

(c) the right not to be tortured or subjected to cruel, inhuman or degrading treatment or punishment;

(d) the right not to be placed in slavery or servitude;

(e) the right to a fair trial;

(f) the right to obtain an order of *habeas corpus* as provided in section 50(7)(a)."

As I have pointed out, following the approach in the *Kawenda case*, *supra*, the limitation provision will be invoked only when it is found that the impugned law infringes the fundamental rights in issue.

Having regard to the presumption of constitutional validity, as clarified in the *Kawenda* case, *supra*, the applicants bear the onus of establishing that the impugned provisions infringe the fundamental rights in question. As already indicated, the impugned provisions create criminal offences. The offences consist of participation in meetings involving foreign governments, whose nature and purpose are described in the provisions.

ANALYSIS OF SECTION 22 A (2)

In s 22 A (2)(a), the object of the meeting is considering or planning military or armed intervention in Zimbabwe by a foreign government. I did not hear the applicants take issue with the impropriety, illegality, unlawfulness or criminality of such a meeting. Indeed, the object or purpose of the meeting would be clearly inimical to the interests of Zimbabwe as a nation. Military intervention by a foreign government would be a threat not only to the peace and security of any nation, but its very existence as an independent and sovereign State. If this drastic measure is to be taken against any nation, it would be in extremely rare and exceptional circumstances and only within the framework of United Nations resolutions.

In my view, s 22 A (2)(a) is clear and unambiguous. A citizen cannot, under the protection of fundamental rights and freedoms in ss 58 and 61 of the Constitution, seek to promote military intervention by a foreign government in Zimbabwe. It would be

taking the rights and freedoms too far by any stretch of the imagination. I find it difficult to envisage how the criminalised conduct violates the fundamental rights protected under the Constitution.

The focus of the applicants' submissions, it seems to me, is on s 22 A (2) (b). This particular provision talks of subverting, upsetting, overthrowing or overturning the constitutional government of Zimbabwe as the purpose of the meeting concerned. The applicants argue that the terms used are too broad and vague. They may result in citizens being arrested for attending legitimate meetings. The applicants contend that the meeting may very well be discussing overthrowing or overturning the government through constitutional means. They particularly take issue with the use of the word "upsetting". They assert that it simply means offending or making someone uncomfortable. It cannot be the basis for the criminal conduct of unconstitutionally overturning a government.

The applicants further contend that there is a serious omission in these provisions. There should have been words such as "through unconstitutional means" after the words "subverting, upsetting, overthrowing or overturning the constitutional government of Zimbabwe." In the absence of these words or other words to the same effect, the provision is vague, ambiguous and imprecise. It makes it difficult for the ordinary citizen to demarcate permissible conduct from that which is impermissible. In this regard, Mr *Kwaramba* remarked during oral argument:

> "Can a government be upset or overthrown lawfully? This provision can criminalise legitimate conduct of lawfully overturning a government….Citizens cannot tell the parameters of what they can or cannot say. You cannot say, "This Government must go because it has failed. You cannot associate with a foreigner and freely express your view that the Government must go."

The context and import of these provisions is the prohibition of removing a government through means other than constitutional. Paragraph (a) proscribes armed intervention. Paragraph (b) proscribes other means, short of military intervention, but equally unlawful. Both scenarios constitute a threat to national peace and security. To remove any doubt as to what is proscribed, the preceding section, i.e. s 22, uses the words "by unconstitutional means". It goes on to define what is meant by unconstitutional means as "any process which is not provided for in the Constitution and the law". This removes any vagueness or ambiguity as to what conduct has been criminalised. This, in my opinion, is clearly *the context within which s 22 A (2) was enacted*. It cannot be reasonably

read otherwise. It would be improper to excise it from that context and interpret it in isolation.

The importance of interpreting statutory provisions within the context of the whole statute was emphasised in *Chimakure & Ors v The Attorney General of Zimbabwe* SC 14/13. MALABA DCJ (as he then was) stated, at p 60:

> "It is indeed a principle of statutory interpretation that the true meaning of the words used and the intention of the legislature in any statute can be properly understood if the statute is considered as a whole. Every part of a section must be considered as far as it is relevant to do so in order to get the true meaning and intent of any particular portion of the enactment."

I am therefore not persuaded that s 22 A (2) is so vague or ambiguous that it creates the danger of criminalising legitimate opposition to government. Legitimate criticism is not what is envisaged in those provisions. The criminal conduct is clearly defined. It is collaboration with a foreign government in planning the treasonous acts described. A government acts through its officials or agents. The definition of agents, proxies or entities falIs within that context, being the criminalised collaboration described. It is in my view clear what kind of conduct has been criminalised.

It is that conduct which constitutes harming the sovereignty and national interests of Zimbabwe. It is not clear what further definition the applicants want. The acts constituting the offence are set out in the provision.

I therefore find no basis for constitutional invalidity in the said provisions.

The other line of argument forcefully advanced by the applicants is that the provision criminalises mere attendance at the meetings in question. In advancing this argument, the applicants seem to have overlooked the definition of actively partaking in a meeting provided in s 22 A (1) of the Criminal Law Code. The definition is couched in the following terms:

> (1) In this section—
>
> "actively partake", in relation to any meeting, means partake therein with the intention of, or in the role of, promoting, advancing, encouraging, instigating or advocating for the object for which the meeting is convened (for the avoidance of doubt, no person contravenes this section who, at the meeting concerned, discourages or repudiates any object the promotion, advancement, encouragement or instigation of which, or advocacy for which, would have rendered that person liable to prosecution under this section);

This definition is clear and comprehensive. Attendance at the meeting is accompanied by clearly defined *mens rea*. It is not mere attendance as averred by the applicants. This is not a strict liability offence. One wonders where the applicants got lost in advancing such a contention. The provision even goes on to exempt from criminal liability anyone who attends the meeting concerned and discourages or opposes the object for which it has been convened.

That line of argument, in my view, again fails as a basis for attacking the constitutional validity of s 22 A (2) of the Criminal Law Code.

Closely linked to the argument on strict liability is the applicants' contention that the provisions impute criminal liability to the principal over the agent's actions. This is reflected in paragraph 20.3 of the applicants' heads of argument, in which they submit:

> "The section makes the principal criminally liable for the act of the agent, regardless of whether the agent committed the offence without the knowledge or consent of the principal. Attaching liability to an individual through an agent offends the overbreadth principle. One imagines a situation where a person who sends a representative or agent to a meeting with strict instructions to discourage the promotion, advancement, encouragement, instigation or advocating for the overthrow of the government, when the subject is raised, and the agent or representative turns rogue and acts against the instructions of the principal and supports instead of discouraging the intended action. Making the principal liable fort the acts of the agent on a frolic of his would offend natural justice and would be equally unconstitutional."

Indeed, any law that imputes criminal liability on a person other than the individual who perpetrates the proscribed act or acts violates the other person's right to protection of the law. This is especially so where the actual perpetrator, in the context of the right to freedom of expression, makes harmful utterances or publications that transgress the law and renders him or her liable to prosecution. In this respect, the remarks of MALABA DCJ (as he then was) in *Chimakure & Ors v The Attorney General* SC 14/13, at p 56 are apposite:

> "Fundamental human rights are personal rights. Freedom of expression belongs to the individual. Any restriction must be based on the concept of personal responsibility constituted from personal conduct accompanied by a subjective state of mind. Where it has been necessary to restrict the exercise of freedom of expression by means of criminal law the individual must be the unit of analysis in the determination of the question whether the law is constitutionally valid or not.

> The principle that criminal liability should be based on personal responsibility is the justification for the requirement that there ought to have been in existence before the imposition of restrictions on the exercise of freedom of expression a causal link between the prohibited acts, the accompanying state of mind of the speaker, writer or publisher or actor and actual or potential harm to the public interest the protection of which is the object pursued."

The remarks I have made above in respect of strict liability are equally applicable. I do not read the provision as imputing strict liability on anyone, even the principal. These are grave crimes against the State. A conviction is followed by very lengthy terms of imprisonment, including life imprisonment. The legislature could not have intended a conviction to be based on strict liability, be it for principal or agent. The law on the liability of a principal, accomplice or co-perpetrator in the commission of crime is comprehensively set out in CHAPTER III of the Criminal Law Code, which runs from s 195 to s 204. Section 22 A (2), being an integral part of the Criminal Law Code, must be read in that context. It does not abrogate the basic requirements for criminal liability provided for in the Criminal Law Code.

As shown in the summary of the parties' arguments, the applicants also impugn s 22 A (2) of the Criminal Law Code on the ground that it carries with it the ultimate penalty, death, in violation of s 48 (2) of the Constitution. Section 48 (2) is the only derogation the Constitution permits from the fundamental right to life, enshrined in s 48 (1). It provides for the imposition of the death penalty only for the crime of murder committed in aggravating circumstances. To the extent that the impugned provision contains a penalty provision that retains the death penalty for an offence other than murder, it infringes s 48 (2) of the Constitution.

This contention need not detain the court. It has been overtaken by events. The Zimbabwean Legislature recently passed a law that completely abolishes the death penalty. The landmark legislation was signed into law by the President of the Republic of Zimbabwe on 31 December, 2024, and is cited as The Death Penalty Abolition Act [*Chapter 9:26*]. Section 2 of this Act reads as follows:

> "Notwithstanding any other law—
>
> (a) no court shall impose sentence of death upon a person for any offence, whenever committed, but instead shall impose whatever other competent sentence is appropriate in the circumstances of the case;

(b) the Supreme Court shall not confirm a sentence of death imposed upon an appellant, whenever that sentence may have been imposed, but instead shall substitute whatever other competent sentence is appropriate in the circumstances of the case;

(c) no sentence of death, whenever imposed, shall be carried out."

In view of this development, which took place subsequent to the filing of submissions by both parties, the argument for or against imposition of the death penalty, for any offence, falls away. Consequently, it cannot be a basis for impugning the constitutional validity of s 22 A (2) of the Criminal Law Code.

The applicants further aver that there is an overlap of provisions between s 22 A (2) and the original ss 20 and 22 of the Criminal Law Code. Section 22 A (2) creates the crimes of participating in planning armed intervention and acts of subversion of a constitutional government. This overlaps with the existing crimes of treason and subverting a constitutional government provided for in ss 20 and 22. The applicants contend that this new law is unnecessary and must therefore be struck down. The applicants remark, in paragraph 53 of their heads of argument:

"So great is the overlap that the new crime is really superfluous."

In this regard, the applicants refer to the case of *Chimakure & Ors v The Attorney General, supra*. MALABA DCJ (as he then was) noted that s 31 (a)(iii) of the Criminal Law Code prohibited the same conduct as s 31 (a)(i) or (ii), thus rendering s 31 (a)(iii) unnecessary. The learned judge observed, at p 61, that;

"If public confidence is viewed in the light of the role it plays in influencing the efficient and effective performance of the functions of maintaining public order and preserving public safety, the conduct prohibited by s 31(a)(iii) of the Criminal Code is covered by s 31(a)(i) or (ii) of the Criminal Code. Section 31(a)(iii) of the Criminal Code would be an unnecessary enlargement of the provisions of the preceding subparagraphs."

It is noted that the applicants refer to these remarks in paragraph 53 of their heads of argument, but wrongly attribute them to the case of *Mark Chavunduka & Anor v Minister of Home Affairs, supra*, which was dealt with by GUBBAY CJ. Be that as it may, the significant point to note is that it was observed that provisions within the same statute

were basically dealing with the same offence, making the subsequent provisions superfluous.

A reading of the case relied upon i.e. *Chimakure*, shows that the remarks on overlapping of provisions were made *obiter*. They were not the basis of the court's decision in the matter. It appears the applicants were aware of that. I say so because this is not a point they argued forcefully in oral submissions. Even in their heads of argument, it is noted that only a very portion thereof dwells on the subject.

Overlapping, *pe se*, would not be a basis for declaring statutory provisions unconstitutional. The impugned provisions create offences that fall under the category of crimes against the State. These are listed and defined in CHAPTER III of the Criminal Law Code, which runs from s 19 to s 34. They include treason, subverting constitutional government, insurgency, banditry, sabotage and terrorism.

Section 20, which establishes the crime of treason, provides:

(1) "Any person who is a citizen of or ordinarily resident in Zimbabwe and who–
   (a) does any act, whether inside or outside Zimbabwe, with the intention of overthrowing the Government; or
   (b) incites, conspires with or assists any other person to do any act, whether inside or outside Zimbabwe, with the intention of overthrowing the Government; shall be guilty of treason and liable to be sentenced to imprisonment for life.

(2) Without limiting subsection (1), the following may constitute acts of treason–
   (a) preparing or endeavouring to carry out by force any enterprise which usurps the executive power of the President or the State in any matter;
   (b) in time of war or during a period of public emergency, doing anything which assists any other State to engage in hostile or belligerent action against Zimbabwe;
   (c) instigating any other State or foreign person to invade Zimbabwe.

(3) For the avoidance of doubt, it is declared that nothing in this section shall prevent the doing of anything by lawful constitutional means directed at–
   (a) the correction of errors or defects in the system of Government or Constitution of Zimbabwe or the administration of justice in Zimbabwe; or
   (b) the replacement of the Government or President of Zimbabwe; or
   (c) the adoption or abandonment of policies or legislation; or
   (d) the alteration of any matter established by law in Zimbabwe."

Section 22, which establishes the crime of subverting constitutional government, provides:

> (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) organises or sets up, or advocates, urges or suggests the organisation 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."

It is the right of any government to enact laws that protect its territorial integrity and security interests. These laws are meant to ensure peace and stability, which are vital to economic growth. Sections 20 and 22, and indeed all the other offences in Chapter III of the Criminal Law Code, seek to achieve that. The Chapter defines offences that relate to national peace and security. The offences are clearly and comprehensively defined. The ordinary citizen is left in no doubt as to what constitutes treason or subversion of constitutional government.

These provisions i.e. ss 20 and 22, go further to indicate that the conduct proscribed is that which seeks to overthrow the government through unconstitutional means.

I have already dealt with the question of context when interpreting statutory provisions. The provisions in the whole of CHAPTER III of the Criminal Law Code cover treasonous conduct in its various forms. There is obviously some overlapping, to varying degrees. That does not necessarily mean the provisions are invalid or unconstitutional.

ANALYSIS OF SECTION 22 A (3)

I now turn to a consideration of s 22 A (3). The arguments the applicants have advanced in respect of s 22 A (2) are largely the same with those relating to s 22 A (3). These have already been highlighted. In the main, they impugn s 22 A (3) on the basis that it is vague, overbroad and imprecise, just like they have done in attacking s 22 A (2).

In particular, the applicants impugn the use of the words "intentionally partake" in s 22 A (3). They point out that unlike the term "actively partake" in s 22 A (2), it is not defined. As such, it is vague and ambiguous. It means that mere attendance at the meeting concerned may lead to arrest and prosecution. In other words, it imposes strict liability.

It seems to me there is considerable merit in this argument. It is not clear why different terms were used. It is unlikely that the legislature will use different terms to convey the same meaning. "Intentionally partake", as opposed to "actively partake", appears to be giving a different complexion to s 22 A (3). It is no longer as clear and precise as to the nature, scope or extent of participation envisaged under s 22 A (3).

"Intentionally" connotes deliberately, willingly or voluntarily. This may refer to the act or decision to attend the meeting concerned out of one's volition as opposed to being coerced. It may also refer to knowingly, consciously or premeditatively proceeding to the meeting in question, well aware of the subject matter and in readiness to promote or support it. The former connotation relates to simply deciding, without any undue influence, to attend the meeting. It does not necessarily refer to the level or extent of participation in the meeting. The latter implies malice aforethought, that is, one is clear on the agenda of the meeting and is raring to go and advance it. There is therefore, in my opinion, some ambiguity that required a clear definition to remove it.

Mr *Chimombe* , for the respondents, was at pains to explain this vague terminology. He suggested that it must have been a "typo" and must simply be taken in the same context as in s 22 A (2). I find this explanation hardly convincing or persuasive. This is a phrase that is at the heart of the essential elements of the offence, being attendance at the meeting and the state of mind accompanying such attendance.

This is a serious offence that has been placed under the genus of acts of treason in CHAPTER III of the Criminal Law Code, which attract severe penalties. There was therefore need for precision in its description. A mistake such as the one highlighted, if it was a mistake at all, creates confusion. It goes beyond mere semantics. It goes to the very

essence of what it is that is being criminalised. Is it mere attendance or participation? What level, scope or extent of participation? A journalist wishing to cover such a meeting is likely to think twice before proceeding to the meeting. That hesitation does not augur well for the rights enshrined in s 58 and 61 of the Constitution.

The confusion, vagueness, imprecision or ambiguity could have been cleared by a separate definition of the term "intentionally partake" along the same lines as that for "actively partake". If a separate definition was considered to be unnecessary, then the same expression i.e. "actively partake" should have been used. It would then be easily covered by the definition in s 22 A (1), which, as the provision currently stands, only relates to s 22 A (2).

I must hasten to add that these are mere observations and suggestions I am making. It is not my intention to perform a legislative function. That is the preserve of Parliament. In performing its function however, the legislature takes note of the interpretation done by the Judiciary.

The reference to contextual interpretation I have made in respect of s 22 A (2) does not, in my opinion, automatically apply to s 22 A (3). The offence described in s 22 A (3) is different from the offences described in ss 20, 22 and 22 A (2). The principles invoked in interpreting those sections will not easily clear the ambiguity created in s 22 (3).

This vagueness, imprecision or ambiguity, in my opinion, provides a reasonable basis for the constitutional invalidity of s 22 A (3).

The matter is compounded by the additional penalties provided for under s 22 A (3).The applicants have also taken issue with these penalty provisions. The section prescribes a wide range of penalties. Its penalty provision reads as follows:

(i) a fine not exceeding level 12 or imprisonment for a period not exceeding ten years, or both; or

(ii) alternatively on the motion of the prosecutor, to any one or more of the following, if the offence is attended by aggravating circumstances referred to in subsection (4)or (6)—

A. termination of the citizenship of the convicted person, if the convicted person is a citizen by registration or a dual citizen:
Provided that the convicting court shall not impose this penalty if it would effectively render the convicted person stateless;
B. cancellation of the permanent resident status of the convicted person, if the convicted person is a permanent resident; or
C. prohibition from being registered as a voter or voting at an election for a period of

at least five years but not exceeding fifteen years; or

D. prohibition from filling a public office for a period of at least five years but not exceeding fifteen years, and, if he or she holds any such office, the convicting court may declare that that office shall be vacated by the convicted person from the date of his or her conviction, unless the tenure of the public office in question is regulated exclusively by or in terms of the Constitution"

Having regard to the nature of the case, the provision of drastic and draconian penalties can be a ground for the constitutional invalidity of legislation. This was underscored in *Chimakure & Ors v The Attorney General, supra*, where MALABA DCJ (as he then was) stated, at p 76:

> "Section 31(a)(iii) of the Criminal Code is particularly invasive because of the level of the maximum penalty by which it has chosen to effect its end. A penalty of imprisonment up to twenty years for publishing or communicating a false statement with the intention or realising that there is a real risk or possibility of undermining public confidence in a security service institution is draconian. In the "Commentary on the Criminal Law (Codification and Reform) Act 2004" published by the Legal Resources Foundation Professor G. Feltoe at p 28 expresses the view that the penalty "can only be described as savage". It is also disproportionate to the harm against which the public interest in the ability of the institution to efficiently and effectively perform its functions is protected.
> The legislature having constitutional powers to set out punishments and the severity of those punishments when laying down the constitutive elements of a particular criminal offence has a duty to set the maximum limits on the punishments for the particular criminal offence. The constitutional principles of justice and a State governed by the rule of law presuppose that every penalty imposable in this sphere must be proportionate to the legitimate aim pursued and the seriousness of the offence. The maximum penalty of imprisonment to which a person convicted of the offence is made liable does not meet this test.
> The establishment is not permitted of punishments, the severity of which are obviously inappropriate for the criminal offence and the purposes of the punishment for which maximus penalties are ordinarily fixed. No relevant and sufficient reasons were advanced by the State for the decision to fix the maximum penalty of imprisonment at twenty years. It is very hard to see in the circumstances the justification for the use of such a maximum sentence on the principle of general deterrence of commission of similar offences.
>
> The only inference that can be drawn from the maximum penalty of imprisonment to which the offender may be subjected is that the punishment is intended to have a chilling effect on the exercise of freedom of expression as opposed to merely deterring the occurrence of the prohibited acts."

In the provisions *in casu*, paragraph (i) prescribes a maximum of a level 12 fine or a maximum term of 10 years imprisonment. In assessing sentence, courts have wide discretion. Where there is an option of a fine, courts generally lean in favour of that option. It is only in the last resort that they impose effective imprisonment. Even where

they impose a custodial sentence, it is only in extremely aggravating circumstances that the term of imprisonment reaches the maximum prescribed.

It is noted that there is no provision for a minimum mandatory sentence of imprisonment, which would have taken away much of the court's discretion.

In the exercise of their discretion, judicial officers are well trained to take a rational and dispassionate approach to the often difficult and delicate task of assessing sentence. They judiciously consider all the relevant factors, and only resort to severe penalties in the most deserving cases. See *S v Mukome* 2008 (2) ZLR 83 (H), *S v Harrington* 1988 (2) ZLR 344 (S), *S v Ngulube* 2002 (1) ZLR 316 (H), *S v Shoriwa* 2003 (1) ZLR 314 (H), *S v Mpofu* 2011(1) ZLR 188 (H).

It must also be noted that in the *Mark Chavunduka* case, *supra*, the court was dealing with a very different crime from the one in the instant case. It considered that 20 years imprisonment was draconian, even if it was pegged as the maximum permissible sentence. It was grossly disproportionate to the nature of the offence, which was the publishing of false information.

In the circumstances, I am of the view that the sentence in paragraph (i) does not provide a sufficient basis for impugning the constitutional validity of s 22 A (3).

It is the penalties under paragraph (ii) that raise material constitutional issues. Revocation of citizenship is provided for in s 39 of the Constitution, which reads as follows:

> "(1) Zimbabwean citizenship by registration may be revoked if—
> (a) the person concerned acquired the citizenship by fraud, false representation or concealment of a material fact; or
> (b) during a war in which Zimbabwe was engaged, the person concerned unlawfully traded or communicated with an enemy or was engaged in or associated with any business that was knowingly carried on so as to assist an enemy in that war.
>
> (2) Zimbabwean citizenship by birth may be revoked if—
> (a) the citizenship was acquired by fraud, false representation or concealment of a material fact by any person; or
>
> (b) in the case of a person referred to in section 36(3), the person's nationality or parentage becomes known, and reveals that the person was a citizen of another country.
>
> (3) Zimbabwean citizenship must not be revoked under this section if the person would be rendered stateless."

Revocation of citizenship is clearly a drastic measure which the Constitution permits in very limited circumstances. The impugned provisions do not fall within the purview of the permissible circumstances for revocation of citizenship. They are therefore an infringement of the constitutional provisions relating to citizenship.

In *Mutumwa Mawere* v *Registrar General & Others* CCZ 4/15, GARWE JA (as he then was), dealt with the question of the right of citizenship and its revocation. After referring to numerous authorities on the supremacy of the Constitution, the learned judge remarked, at p 6:

> "(26) Section 39 deals with the circumstances in which citizenship may be revoked. Such revocation is limited to citizenship by registration and citizenship by birth in cases where such citizenship was acquired by false representation or where it is established that, a child below fifteen years of age, who is presumed in terms of s 36(3) of the Constitution to be a citizen by birth, is a citizen of another country.
> (27) What is significant about s 39 is that it does not provide for the revocation of the citizenship of a person who is born in Zimbabwe to a Zimbabwean parent as provided in s 36 (1) of the Constitution.
> Read against s 39, the necessary corollary is that citizenship acquired in terms of s 36(1) cannot be revoked by the State under any circumstances."

The right to vote and to be elected to public office is enshrined in s 67 (3) of the Constitution, which reads:

> "Subject to the Constitution, every Zimbabwean citizen who is of or over eighteen years of age has the right –
> a. to vote in all elections and referendums to which this Constitution or any other law applies, and to do so in secret; and
> b. to stand for election for public office and, if elected, to hold such office."

This provision is clear and unambiguous. It contains no basis on which the impugned provisions can abrogate the right to vote and to hold public office. It is not being suggested that a person can seek and hold public office regardless of any misconduct he or she may have committed. Generally, there are procedures, under applicable subsidiary legislation or even the Constitution itself, providing for the removal from public office on specified grounds, including misconduct. There is no reason why that process should be made part of criminal penalty provisions.

I find this portion of s 22 (3) of the Criminal Law Code to be at variance with the provisions in ss 39 and 67 (3) of the Constitution.

In considering an application of this nature, the court is mindful of the need to strike a balance between the Legislature's power to make law, and the Judiciary's power to interpret such law. It is also mindful of the Executive's power to formulate policies, which policies are executed by means of laws enacted through the Legislature. This balance is the hallmark of a constitutional democracy, which provides for checks and balances between the various arms of government. In the book "*Selected Aspects of the 2013 Zimbawean Constitution and the Declaration of Rights*", 2nd Ed, edited by Admark Moyo, at pp 30-31, this important aspect is highlighted in the following terms:

> "For purposes of this chapter, it is imperative to underscore that the separation of powers creates a system of checks and balances amongst the three branches of government, which protects democracy by making sure that public power is not concentrated in one institution or one person but is distributed across the government.
> The checks and balances lead to greater accountability between the three arms of government, and such accountability helps check against abuse of power. There are provisions which give power to a body to check on the decisions of another body and these are judicial review, legislative oversight over the executive and the creation of institutions such as auditor general and constitutional commissions to execute control over legislative and executive power."

The learned author makes a significant observation that the judiciary, in exercising its function, does not itself make arbitrary decisions. It is guided by the Constitution, being the supreme law of the land. In this regard, he states, *op cit*, p18:

> "From the onset, the Constitution itself sets out as the fundamental law to which all other laws must be aligned. In *Mudzuru & Another v Minister of Justice, Legal & Parliamentary Affairs & Others*, CCZ 12/14, the court commented on the nexus between the supremacy clause and the court's powers to issue a declaration of constitutional invalidity. It held as follows:
> The rule of invalidity of a law or conduct is derived from the fundamental principle of the Supremacy of the Constitution… A court does not create constitutional invalidity. It merely declares the position in law at the time the constitutional provision came into force or at the time the impugned statute was enacted. The principle of constitutionalism requires that all laws be consistent with the fundamental law to enjoy the legitimacy necessary for force and effect. It is for this Court to give a final and binding decision on the validity of legislation.
> Of colossal significance is the court's observation that not even itself is above the Constitution and that constitutionalism mandates that all laws be subject to and compliant with the supreme law. More compellingly, the court portrayed itself as a 'servant' of sorts, whose duty is to merely declare the position of the law and not to 'create' constitutional invalidity. As such, a law does not become constitutionally invalid when the court so declares, but instead, it becomes invalid the moment it, or the supreme law, is enacted. The Court's is a confirmatory role where all it does is confirm that a law is inconsistent with the Constitution."

DISPOSITION

In the instant case, the court has carefully considered the averments by the applicants on the broadness, vagueness, and ambiguity in the impugned legislative provisions. It has considered the allegations of infringement of fundamental rights enshrined in the Constitution, emanating from such vagueness and ambiguity. It was the court's finding that there was no vagueness, ambiguity or imprecision in the impugned provisions, in relation to s 22 A (2). Consequently, alleged infringement of the fundamental rights in question was not satisfactorily substantiated. It is therefore my considered view that the applicants have failed to discharge the onus resting on them to rebut the presumption of constitutional validity in order, in respect of ss 22 A (2).

However, the same cannot be said in respect of s 22 A (3). For the reasons I have stated, I find that the applicants have substantiated constitutional invalidity in respect of s 22 (3). I must state that it is open to the Minister who administers the Criminal Law Code, if he so wishes, to attend to the amendment of the impugned provisions, and submit them to the Legislature. I have only highlighted the ambiguity and constitutional infractions in the legislative provisions concerned. It is not the Judiciary's function to make or amend legislative provisions. It is the function of the Legislature. In this regard, I refer to the remarks of MCNALLY JA in *Mark Chavunduka v Minister of Home Affairs*, *supra*, at p 27:

> "We are not saying that freedom of expression is limitless. We are not saying that people may publish anything they wish, however pornographic, however untruthfully subversive, however race-hatred inspiring.
>
> It is not the Court's function to re-draft legislation. That is the function of Parliament and the State's draftsmen and women. All we are saying is that the section is unacceptable as it stands.
>
> These remarks are necessary because, after our judgment in *In re Munhumeso & Ors* 1994 (1) ZLR 49 (S), 1995 (2) BCLR 125 (ZS), about the control of demonstrations and street processions in terms of the same Act, it was said, by persons who do not seem to understand these things, that the Supreme Court had made the work of the police impossible, because we had tied their hands.
>
> That is simply untrue. We struck down a section which was too wide and thus too oppressive. It was for the Government to rewrite the section in a more acceptable form. We said so explicitly. We went so far as to suggest that s 12 of the English Public Order Act, 1986 might provide a useful starting point. But nothing has been done. It was simpler to say "the courts have tied our hands. If there are disturbances, blame the courts, not us".

> It is the urgent duty of the relevant Ministry to re-write the Act in proper form and to steer it through the necessary constitutional processes."

Similarly, *in casu,* it is not suggested that the freedoms of association and expression are limitless. It is not suggested that persons who enjoy the rights and privileges of citizenship conferred upon them by the Constitution may, with impunity, conspire with foreign governments in calling for measures that harm the security and economic interests of the country. It is not suggested that the Government should abdicate its prerogative to enact laws that deal with this and other forms of mischief. However, such laws must meet the threshold of constitutional validity in order, to balance constitutionally protected rights and the equally important imperatives of national peace, security and economic stability.

For the reasons stated above, the application partially succeeds.

I am unable to uphold it in respect of s 22 A (2). The applicants have failed to discharge the onus resting on them to substantiate the alleged constitutional invalidity of this provision.

I however, find that the applicants have satisfactorily discharged this onus in respect of s 22 A (3).

In the circumstances, it is ordered that:-

1. The application for a declaration of constitutional invalidity in respect of section 22 A (2) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*], as amended by the Criminal Law (Codification and Reform) Amendment Act No. 10 of 2023, ("the Criminal Law Code") be and is hereby dismissed.
2. (a) The application for a declaration of constitutional invalidity in respect of section 22 A (3) of the Criminal Law Code be and is hereby granted.

   (b) Section 22 A (3) of the Criminal Law Code be and is hereby declared to be constitutionally invalid as it infringes sections 39, 58, 61(1) and 67 (3) of the Constitution.

3. There is no order as to costs.

MANYANGADZE J: …….

Mbidzo, Muchadehama & Makoni, applicants' legal practitioners.

Civil Division, respondents' legal practitioners