



Decriminalisation of Laws Limiting Freedom of Expression in Africa: Zimbabwe Country Report

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EXECUTIVE SUMMARY: ZIMBABWE

1. INTRODUCTION

This report into the use of laws that criminalise freedom of expression in Zimbabwe is one of six country research projects into the impact of these laws conducted by the University of Pretoria on behalf of the Freedom of Expression Rapporteur of the African Commission on Human and Peoples Rights. The objective of the study is to assess whether or not the existence of such laws does limit freedom of expression in practice – and if so, the impact these laws have on this.

1.1 KEY FINDINGS

In two more recent cases (in 2013 and 2014), the constitutional court in Zimbabwe has ruled that provisions that among other things criminalise defamation are unconstitutional. While these rulings have rigorously opposed provisions that according to the court limit freedom of expression, the laws have yet to be changed.

A range of laws in Zimbabwe currently impinge on freedom of expression – including provisions relation to criminal defamation and prohibitions on insulting the office of the President or impugning the security forces. These laws have been widely used and many people have been charged under the provisions. According to those interviewed however very few cases are ever concluded – and the majority of those that are brought to court are thrown out. The threat of litigation over years though is used to intimidate people and those interviewed for the study all stated that this has had a chilling effect on freedom of expression and stops them from freely expressing their views.

A new Constitution introduced in 2013 however has strengthened the right to freedom of expression and information, though several more cases challenging the laws under the new Constitution are still awaiting judgement.

2. BACKGROUND

2.1 COUNTRY FACTS

Zimbabwe gained its independence in 1980. The country has a population of 12.9 million people, and has 11 official languages.

Robert Mugabe, head of the Zimbabwe African National Union-Patriotic Front (ZANU-PF) has been the president of the country since independence. After 2008 elections resulted in a coalition government being formed (between ZANU-PF and the Movement for Democratic Change (MDC)), a new constitution was signed into law following a public referendum in May 2013. The finalisation of the Constitution was one of the conditions set for the holding of elections. In the 2013 national elections that followed the signing of the new constitution, ZANU-PF again won the elections resulting in the end of the coalition.

Many of the provisions of the 2013 constitution still need to be codified in law, including those relating to freedom of expression. It includes clauses stipulating that everyone has the right to freedom of the expression and information (Article 61). This includes the right to a free media including the protection of confidentiality of journalist sources. It also provides for regulation of an independent broadcasting sector and for the editorial independence of state-owned media.

These rights do not cover incitement to violence, hate speech, “malicious injury” to a person’s reputation or dignity or “malicious or unwarranted breach of a person’s right to privacy”. Article 62 covers the right to access to information.

A separate clause provides for the establishment of a statutory regulatory board – the Zimbabwe Media Commission. Concerns have been raised by media and other groups in Zimbabwe about the effect such a Commission could have on undermining the freedom of expression clauses in the Constitution. Among other things, the Constitution empowers the Commission to take disciplinary action against journalists and the media.

2.2 OVERVIEW OF MEDIA

The print media in Zimbabwe is dominated by three media companies (one of which is State owned) which between them publish most of the major national daily newspapers and the largest national weekly papers. There are a range of other independent, regional and community papers. Distribution of newspapers is mainly around the major towns and road networks and those living outside these areas have limited access to print media.

Radio is the main source of information, though due to a lack of maintenance of transmitter networks, it too does not reach all of the population. The state-owned Zimbabwe Broadcasting Corporation (ZBC) airs four FM radio stations (plus Short Wave radio service). There are two licensed commercial radio stations – one of which is owned by Zimpapers, the state owned newspaper company, and the other whose shareholding includes the Zanu-PF deputy minister of information. Another three radio stations broadcast into Zimbabwe from outside of the country.

The ZBC also broadcasts two television channels. There are no licensed private television services, though satellite television (both free-to-air and subscription) is also available.

Access to online media (including online publications and blogs) is limited by access to the internet. Internet access is however growing, predominantly because of an increase in mobile phones.

Regulation of the media includes both statutory (the Zimbabwe Media Commission) and self-regulatory (the Voluntary Media Council of Zimbabwe set up by private media groups and civil society) structures.

2.3 LAWS THAT IMPACT ON FREEDOM OF EXPRESSION

The table below summarises some of the key legal provisions that criminalise freedom of expression.

Offence	Detail	Law	Penalties
Causing “disaffection” among the police or defence force.	No person may induce or “attempt to induce”, or commit any act with the intention, or real risk or possibility” of causing disaffection among the police or defence forces	Section 30, Criminal Law (Codification and Reform) Act, 2005 - “CODE”	Fine not exceeding US\$400 And/or up to two year imprisonment
Publishing false statements prejudicial to the state.	No person may publish or communicate a statement prejudicial to the state which is “wholly or materially false” if s/he knows it is false or does not “have reasonable grounds” for believing it to be true.	Section 31, Criminal Law (Codification and Reform) Act, 2005	Fine up to US\$5 000 and/or up to 20 years imprisonment

	Communication prejudicial to the state includes anything which “adversely affects the economic interests” of Zimbabwe, of undermines public confidence in a law enforcement agency		
Undermining the authority of or insulting the President	Any person who publishes a statement, realising that there is a real risk of it being false that will create feelings of hostility or cause “hatred, contempt or ridicule” of the President is guilty of an offence. It is also an offence to make an “abusive, indecent or obscene” statement about the President – whether about him personally or about his office.	Section 33(2) Criminal Law (Codification and Reform) Act, 2005	Fine up to US\$300 and/or imprisonment for up to 12 months
Criminal insult	Any person who by words or actions “seriously” impairs the dignity or invades the privacy of another person is guilty of criminal insult if s/he “realised that his/her words or conduct might have such effect”. It is necessary for the person to feel insulted or degraded.	Section 95 Criminal Law (Codification and Reform) Act, 2005	Fine of up to US\$300 and/or up to one year imprisonment
Criminal defamation	Any person who “intending to harm the reputation of another” publishes a statement that he or she knew was false or partly false, or which faces a real risk of being false, or causes serious harm to someone’s reputation “or creates a possibility” of damaging someone’s reputation is guilty of criminal defamation.	Section 95 Criminal Law (Codification and Reform) Act, 2005	Fine of up to US\$5 000 and/or up to two years imprisonment
Undermining police authority	Any person who makes a statement or takes any action which creates hostility or causes “hatred, contempt or ridicule: towards law enforcement officers is guilty of an offence.	Section 177 Criminal Law (Codification and Reform) Act, 2005	Fine of up to US\$400 and/or imprisonment for up to two years
Abuse of journalistic privilege	A journalist is guilty of abuse of journalistic privilege if he or she publishes information s/he “intentionally or recklessly” or a statement which threatens the interests of “defence, public safety, public order, the economic interests of the State, public morality or public health”	Section 80, Access to Information and Protection of Privacy Act, 2002	Fine of up to US\$400 and/or imprisonment for up to two years

A journalist earns an average of between US\$400 and US\$1 500 per month depending on seniority and the individual media house. Thus the least onerous fine (US\$300) is equal to close to one month’s salary for the lowest paid journalists and the most onerous fine almost 400 per cent of such a media worker’s monthly pay. The majority of Zimbabweans earn between US\$100 and US\$150.

Other laws which potentially negatively impact on the right to freedom of expression include the Official Secrets Act (a relic from the colonial era) which criminalises passing on of and possession of a wide range of information held by government, the Public Order and Security Act which places a number of limitations on calling of public meetings and the Censorship and Entertainment Controls Act which, apart from barring pornography, also allows for the bans publications or films which are “likely to be contrary to the interests of defence, public order, the economic interests of the state or public health”.

3. LAWS IN PRACTICE

There is a widespread perception among interviewees for the research project that the laws are selectively used against those that are critical of government – including independent media and journalists. The Media Institute of Southern Africa (MISA) Zimbabwe Chapter reinforced this perception in research published in 2013 noting that there had been 48 cases of journalists arrested with some being charged under the different laws between January 2008 and May

2013 (five years), but only one of these was from one of the state owned media outlets. Almost all of the charges linked to these cases were laid by public officials or members of the security forces according to MISA.

3.1 SUMMARY OF KEY CASES CHALLENGING THE LAWS

There have been a number of challenges to the constitutionality of laws or their compliance with African instruments such as the African Charter on Human and Peoples' Rights.

- In 2005, media freedom lobby organisations challenged clauses of the Access to Information and Protection of Privacy Act (AIPPA) on the basis that they contravened the Charter. The clauses challenged related to accreditation of journalists and the publication of falsehoods and injurious statements. The African Commission ruled in 2009 that the clauses did breach the freedom of expression clauses in the African Charter and recommended that they be repealed. However, the clauses were not removed completely but, for example, the provision barring publication of falsehoods was rather incorporated into a new Act.
- More recently, a number of journalists and media houses have challenged the constitutionality of clauses in the Criminal Law (Codification and Reform) Act. These cases have focused on the constitutionality of particular charges journalists or publications have faced under the law. At the time of finalising the research several of the cases were still awaiting judgement in this regard, though in October 2013 the Constitutional Court ruled in one of the cases that provisions in that Act dealing with criminalisation of the communication of false statements prejudicial to the State, promoting public disorder or violence and insulting the President were unconstitutional. However, the ruling, which the ministry of justice initially challenged but subsequently concurred with, was made in terms of the old constitution leaving the constitutionality of insult and criminal defamation laws under the new constitutional dispensation untested.
- In June 2014, the constitutional court in a separate matter ruled again that criminal defamation is unconstitutional and that the effects of the threat of arrest, detention and two years' imprisonment are "excessive" – particularly given that there are civil alternative remedies in place to counter defamation. The Constitutional Court called on the Justice Minister in Zimbabwe to reform the Codification and Reform Act. The Court granted the Minister the right to appeal the judgement.

3.2 SUMMARY OF KEY CASES WHERE LAW HAS BEEN USED

While there have been a number of charges or threatened prosecution in terms of these laws (and in particular relating to insulting the office of the President or criminal defamation), many of the cases have not been decided on or have not resulted in actual prosecution or therefore conviction. Some journalists have waited up to eight years since initial investigations and threats of prosecution without being summoned. The threat of prosecutions is however seen as having a chilling effect on freedom of expression.

According to Zimbabwe Lawyers for Human Rights (ZLHR), since 2010 there has been a rise in the number of people charged with insulting or undermining the authority of the President. The organisation has reported that between January 2010 and June 2013 it has attended to 80 such cases though less than ten of these had actually been brought to trial due to delays in the justice system. Most of those charged according to the organisation had been acquitted.

The Censorship Board has also in more recent times seemingly banned more artistic works in terms of the Censorship and Entertainment Control Act. In August 2012, for example, it banned a play from being seen (“No Voice No Choice”) stating that it is “against the spirit of healing and national reconciliation”. The ZLHR acted on behalf of the producers to challenge the ruling in court but was told by the court to first lodge an appeal to the Censorship Board itself. After it had received no response from the Censorship Board, the ZLHR again approached the High Court. The matter was still to be settled in court by the time the research was conducted in September 2013.

There have also been instances of intimidation, harassment and assault of journalists by crowds angry at what they allege is media bias. Such intimidation seems to increase close to national elections.

3.3 ADVOCACY INITIATIVES IN THE COUNTRY

While there have been many campaigns around freedom of expression broadly in Zimbabwe, the research states that it is clear from interviews conducted that there has not been coordinated action specifically on decriminalisation of freedom of expression. The general campaigns have in many ways been successful – and for example the clauses on freedom of expression and access to information in the new Constitution are as a result of concerted advocacy around this.

While there are a range of media focused lobby groups in the country, there is a need for a more concerted public awareness campaign as it was clear from the interviews conducted that there was limited knowledge of the specific actions or initiatives taken by other groups. Media and legal groups have also challenged existing limitations in law (through constitutional court challenges) and highlighted outside the country the failure of Zimbabwe to apply African protocols agreed to (through lodging challenges to the laws with the ACHPR

4. IMPACT OF LAWS

Fifteen people were interviewed for the research, including journalists, editors and publishers, members of media and other human rights advocacy groups, a former magistrate and an opposition MP. One of those interviewed, a representative of a publisher that owns a number of titles, requested anonymity for fear of retribution for being interviewed. A supporter of the ruling ZANU-PF initially agreed to an interview but subsequently declined this, though his views are captured based on public pronouncements he has made. Unfortunately, journalists from the state owned media declined to be interviewed for this research and thus the views represented are those of media personal in the independent sector. Journalists in the independent sector have been most targeted by the laws.

A full list of interviewees is included in an appendix to this summary.

All of those interviewed were aware of the laws – with the AIPPA, POSA and CODE cited most regularly as the most insidious in terms of criminalisation of freedom of expression. It was highlighted by the representative of Zimbabwe Lawyers for Human Rights that clauses that criminalised expression under AIPPA tend to be used against media houses and journalists, while the clauses in CODE, particularly those that outlaw insulting the presidency and undermining the security forces, are mainly used against ordinary citizens. Complaints

regarding alleged breaches of the laws have been laid by members of the state as well as ordinary citizens.

Political analyst and ZANU-PF supporter, Gabriel Chaibvu, however stated in a speech given to a media conference cited in the report that the Zimbabwean media is freer than that in Europe and that there is a genuine free flow of information.

4.1 EXPERIENCES OF LAWS

Many of those interviewed have personally been charged or threatened with litigation under laws that criminalise freedom of expression. Those that had not been charged or threatened with litigation themselves, all knew of others that had faced legal action under the laws.

The editor of the Standard newspaper, for example, noted that he had been separately arrested and charged on criminal defamation three times for three different stories in the six month period between June and November 2011. The first time (in relation to a story about an MDC member's fears for his safety), he had been held overnight. He was charged but the case has yet to be heard and is challenging the charges in the constitutional court. Another time he was charged for a piece his newspaper ran about the alleged financial problems facing a medical aid scheme. He is accused of prejudicing the members of the medical aid scheme as doctors require them to pay up front reportedly due to the story.¹ The third time (on a story on allegations of nepotism surrounding one of the Ministers) he was not charged but cautioned.

All cases mentioned by those interviewed were still pending – with some stating that they have been waiting for years for finalisation and others saying that they had never been formally charged but warned that a summons would be sent once investigations are completed. A representative of Zimbabwe Lawyers for Human Rights said this was standard practice – to keep cases hanging over those accused for years as this alone served the purpose of cautioning people against publishing or making statements critical of the government or individuals in power. Editors and publishers interviewed said that concerns around the legal costs associated with such cases are a major concern as they threaten media businesses.

The arrests and ongoing threat of prosecution have a range of consequences for those accused. Several of those interviewed talked about being intimidated and even assaulted while in jail. A representative of the Media Monitoring Project of Zimbabwe (MMPZ) detailed her arrest for distributing a video at a public meeting on hate speech. After being held for more than ten days, she said she experienced sleeping problems and was so traumatised that she could not conduct her outreach public meetings for a long time thereby affecting her organisation's campaigns around freedom of expression. She said the incident also resulted in the resignation of colleagues she worked with who feared action against themselves.

All of those interviewed stated that they did temper their speech and carefully consider what they stated or wrote for fear of prosecution. All noted that the clauses in the law were vague and open to interpretation, and thus, for example, they tried to avoid making statements about the

¹ This case was challenged in the constitutional court and in June 2014 the court determined that the laws on criminal defamation should be struck down as they violated freedom of expression clauses in the Constitution.

Presidency, his/her family, corruption in government and/or information on the security forces for fear that these could be interpreted as undermining the state or the office of the President.

The deputy editor of the Daily News, Guthrie Munyuki, for example highlighted that his paper had not carried three stories on alleged sexual harassment involving prominent ZANU-PF Ministers because of fear of prosecution. He stated that the evidence was sound and met all journalistic standards, but that the newspaper avoided such stories to limit the number of charges hanging over the paper and its staff for numerous years.

According to those interviewed, it is not only formal prosecution that they fear. Two of the journalists stated that they were forced to leave Zimbabwe for lengthy periods after having received anonymous death threats. This had affected their families as they were the principal bread winners. Another senior journalist told the researcher that one anonymous caller had mentioned that she should be wary of writing about the military as they were aware that she had two children and that they knew what car she drove. She said that after this call she has self-censored herself and that for a period her newspaper had not run stories on the military at all. Media representatives interviewed said that they particularly feared members of the security forces and therefore avoided stories about them.

A female news editor, who has faced harassment, said that women in the media are particularly vulnerable as they also face personal attacks. She said that she had been called “a bitch” and it was insinuated that she must have had sexual relationships with interviewees.

4.2 GENERAL VIEWS ON THE LAWS

All of those interviewed stated that the laws needed to be reformed as they violated the new rights to freedom of expression and information introduced in the constitution. They stated that those in power needed to be subjected to scrutiny by the public, including the media, and that laws should focus on promoting rather than suppressing freedom of expression.

5. RECOMMENDATIONS

- All laws cited need to be repealed or substantially amended to be brought in line with the new Constitution and regional and African protocols and treaties relating to freedom of expression.
- The African Commission Special Rapporteur on Freedom of Expression should engage with the government to assist in aligning laws with these rights. She should also interact in this process with media groups and civil society.
- Pending this, constitutional challenges to the laws should continue and others initiated to force alignment with the new Constitution.
- Strengthening of alliances around decriminalisation of freedom of expression across the region and continent are also critical to reinforce internal campaigns.
- Alongside the above actions, it is important that there is ongoing advocacy within Zimbabwe about the implications of the laws on citizen rights to information and to participate fully in society.

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“We have laws in this country that criminalise free expression and these laws have really affected the way journalism is functioning in Zimbabwe. ..” Ernest Mudzengi Director the Media Centre

“We have some cases that have been pending that have not been set down for hearing for three to four years. The longer the time passes the more people are falling victims to the laws that are being challenged. But until such time the courts hear those matters cases and finalise them we will continue having such problem .” – Irene Petra ZLHR

“As a news editor, when I give stories to reporters there are certain stories that they are afraid to touch. Even when they hear juicy stories about Cabinet, and we try and find a way of putting the story, the fear is there.”– Faith Zaba news editor

“In all cases I was picked up from the newsroom by detectives the detectives were always eerily polite but did not disclose their names. I later learnt that this was because they knew they were being monitored by international justice organizations. It was clear most of the time they were not enjoying what they were being forced to do. They tried very hard to make me as comfortable as possible and made sure I was detained at fairly clean cells. I was allowed access to my lawyers, food and visitors. I was never detained for more than 36 hours. One could see there were two forces at work, a shadowy political one that dictated the issues and a set of reluctant officers forced to implement.” – Standard Editor

“What I find disgusting about certain media organisations in this country is that they advocate that which the Europeans don’t do in their own country... And also importantly, freedom of the Press is limited when it comes to matters of national state security and the defence of the realm. It’s there (in the Swedish constitution). But you come here and try to teach us full lessons. That’s the tragedy... The independent newspapers in Zimbabwe (are) not in any way associated with the aspirations of the people of Zimbabwe.” – Gabriel Chaibvu ZANU-PF loyalist and political analyst.

“I was arrested in the morning at 9am on a Friday and released at 7pm into the custody of my lawyer on the pretext that we will go to court on a Monday. Unfortunately, there was no court until today, the case is still pending... The first thing they asked me was my background, my connection to the story, the person within the story, they interrogated me on the role of the organisation I work for and who funds it, my personal vendetta with the person.... So even if I wasn’t physically tortured but is it’s an emotional and mental torture because they subject you to a lot of questioning they interrogate you wanting to know more about you.” – Xolani Ncube journalist Daily Mail

“There is a lot of self-censorship particularly when you look at the issue of LGBTI rights. It’s impossible to talk about the issue without talking about the President. So you have to be cautious on how you bring about the issue of the President in that conversation.” – Chester Samba Executive Director GALZ

“As a member of the bench, whilst you might not even like the law, your duty is to interpret it and to give meaning to the intention of the legislature. As such, mine was just to read to ensure that if a person were to be placed on remand that the charge has been laid out well and is line with what the Act is saying. So at the end of the day, the problem is not with the judiciary but with the law. As judges we were required to interpret the law and give effect to the law... Regrettably, I am aware of some convictions of people who are said to have insulted the President, (which is) something that I really feel bad about. I believe some of the magistrates will share the same sentiments with me to say their hands were tied, they couldn't do anything. But once the essential elements of a crime are established and it's proved beyond any reasonable doubt that the person committed an offence then you have to convict even if you don't believe that that person should have been charged in the first place.” Wilbert Mandinde Member of the Law Society of Zimbabwe and former magistrate

List of organisations interviewed if want to include it

Media Centre (journalists service and training organisation and advocacy for media)

The Media Alliance of Zimbabwe (Network of media freedom lobby groups) – Patience Zirima

Zimbabwe Lawyers for Human rights – exec director Irene Petras

Senior Journalist and director of artists for Democracy Trust - Stanley Kwenda

News editor of the Zimbabwe Independent newspaper – Faith Zaba

Editor of the Zimbabwe Independent newspaper – Dumisani Muleya

Editor of the Standard newspaper – Nevanji Madanhire

Deputy editor of the Daily News – Guthrie Munyuki

Voice of the People Communications Trust – John Masuku

Media Monitoring Project Zimbabwe (MMPZ)- advocacy officer Molly Chimhanda –

One publisher of popular titles who agreed to be interviewed on condition of anonymity as was concerned about repercussions on their publications.

Xolisani Ncube – journalist Daily News Publisher

Chester Samba – executive director gays and lesbians association of Zimbabwe

Virginia Muwanigwa – Chairperson of the Women’s Coalition of Zimbabwe – a coalition of women’s organisations from throughout the country.

Settlement Chikwinya – MDC-T MP and NEC member. Former head of Parliamentary Committee on Media and Information

Wilbert Mandinde – former magistrate and member of the Law Society of Zimbabwe.

Gabriel Chaibva – political analyst and ZANU-PF loyalist – was not interviewed. Initially accepted but then declined. Agreed a speech he made at a conference on media could be quoted.