



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

With the support of Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) GmbH
on behalf of the Federal Ministry for Economic Cooperation and Development (BMZ)



Preface

Across the world, there exist numerous criminal laws which restrict the enjoyment of the right to freedom of expression, as guaranteed by numerous international and regional human rights treaties as well as national constitutions. These laws which are generally relics of colonial times, have nevertheless continued to be used, and in some cases further strengthened by post-colonial governments. In Africa, offences such as sedition, criminal defamation, criminal libel, publication of false news and insult remain on the statute books of most countries. In recent times, anti-terrorism laws are increasingly being utilised to 'criminalise' free speech.

While many governments justify the continued maintenance of these laws on grounds such as protecting national security and the right to privacy, in reality, this is rarely the motivation for their use. Rather, these laws are routinely utilised to stifle public debate and legitimate criticism on issues of national interest such as corruption, lack of respect for the rule of law and poor service delivery. For some, the mere knowledge of the existence of these laws induces self-censorship. For others who remain undeterred, their eventual arrest, charge, conviction or sentencing and the attendant consequences on their professional and personal lives, becomes their lived reality. Inevitably, the existence and use of these laws creates an unfavourable climate for the promotion and protection of all human rights, limits the accountability of elected officials, hinders the effectiveness of democratic institutions and ultimately stunts democratic governance.

The African Commission on Human and Peoples' Rights (African Commission) recognising the important role of freedom of expression in the realisation of other human rights has continuously reiterated that these criminal laws constitute a violation of the right of freedom of expression. Thus, the Declaration of Principles on Freedom of Expression in Africa, adopted by the African Commission in October 2002, in principle 12 states that individuals should not be 'liable for true statements, opinions or statements regarding public figures, which it was reasonable to make in the circumstances'; requires public figures to 'tolerate a greater degree of criticism; and prohibits the imposition of sanctions which are 'so severe as to inhibit the right to freedom of expression'.

Furthermore, in a communication submitted to the African Commission by Kenneth Good against the Republic of Botswana, the African Commission reiterating principle 12 of the Declaration stated that a high level of tolerance is expected when political views are expressed and 'an even higher threshold is required when it is directed towards the government and government officials'. Again, in November 2010, the African Commission adopted a resolution, ACHPR/Res169 (XLVIII) 2010: Resolution on Repealing Criminal Defamation Laws in Africa. This resolution called on states parties to the African Charter to repeal criminal defamation and insult laws and to 'refrain from imposing general restrictions that are in violation of the right to freedom of expression'.

On my part, I have consistently appealed to Member States of the African Union to decriminalise media offences through my Activity Reports, presented to each Ordinary Session of the African Commission, as well as through numerous letters of appeal sent to heads of states, expressing concern about the application of these laws. It was with this in mind that during the 52nd Ordinary Session of the African Commission held in October 2012 in Cote d'Ivoire, I announced the launch of a pan-African campaign for the decriminalisation of laws that restrict freedom of expression, to be implemented under my leadership.

It was thus as part of this this campaign, that a multi-country research into the use and impact effect of laws criminalising freedom of expression in Benin, Burundi, Lesotho, Tanzania, Zambia and Zimbabwe, was commissioned in September 2013, with the principal objective of providing a solid evidence base of the effects of these laws on freedom of expression.

This report on Lesotho, as with all the other 5 country reports, provides empirical evidence of the use and impact of laws criminalising freedom of expression in Lesotho. The findings of this research will most certainly be useful in future engagements by the African Commission and my mandate with the government of the Republic of Lesotho in encouraging the decriminalisation of these laws. It is also my earnest hope that freedom of expression activists in Lesotho and beyond, will find the information provided in this research useful, in championing the cause for the repeal of the relevant criminal laws in Lesotho.

A handwritten signature in black ink, reading "P. Tlakula". The signature is written in a cursive, flowing style.

Pansy Tlakula

Special Rapporteur on Freedom of Expression and Access to Information in Africa

December 2014

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Acronyms and abbreviations

ACHPR	African Commission on Human and People's Rights
AIPPA	Access to Information and Protection of Privacy Act
AMH	Alpha Media Holdings
ANZ	Associated Newspapers of Zimbabwe
AU	African Union
BSA	Broadcasting Services Act
CC	Constitutional Commission
CODE	Criminal Law (Codification and Reform) Act
CCL	Cabinet Committee on Legislation
GPA	Global Political Agreement
ICA	Interception of Communications Act
MAZ	Media Alliance of Zimbabwe
MDC	Movement for Democratic Change
MISA-Zimbabwe	Media Institute of Southern Africa-Zimbabwe
MMPZ	Media Monitoring Project Zimbabwe
NCA	National Constitutional Assembly
NGO	Non-governmental Organisation
OSA	Official Secrets Act
PIRF	Public Information Rights Forum
PLC	Parliamentary Legal Committee
POSA	Public Order and Security Act
POTRAZ	Post and Telecommunications Regulatory Authority of Zimbabwe
PPC	Parliamentary Portfolio Committee
SADC	Southern African Development Community
UN	United Nations
VMCZ	Voluntary Media Council of Zimbabwe
ZAMPS	Zimbabwe All Media Products Survey
ZANU PF	Zimbabwe African National Union – Patriotic Front
ZBC	Zimbabwe Broadcasting Corporation
ZEC	Zimbabwe Electoral Commission
ZLHR	Zimbabwe Lawyers for Human Rights
ZMC	Zimbabwe Media Commission
ZUJ	Zimbabwe Union of Journalists

Introduction: Country Facts

Zimbabwe got its independence from colonial and minority rule in 1980 following a long and bitter war with the then Ian Smith-led white government. As was the case with many African countries that were under colonial subjugation, the liberation struggle was waged mainly to seek democratic rule characterised by non-discriminatory enjoyment of fundamental liberties by all; equality before the law as well as de-racialised political, economic, social and cultural macro environment.

The country has a population of 12.9 million people.¹ Until recently, the country had three official languages, English, Shona and SiNdebele. These have since been increased to 11 following the recognition of smaller minority languages in the new constitution.²

The country's first elections for all, which were held in 1980, saw Zimbabwe African National Union Patriotic Front (ZANU PF) emerge the winner with its leader Robert Mugabe installed as the Prime Minister. In 1985 the party registered an even more favourable result getting about 77% of the vote, up from the 63% it had amassed five years earlier.³ This consolidated the party's dominance of the country's politics, which was further cemented by a five year campaign to crush the opposition party, Patriotic Front- Zimbabwe African People's Union (PF ZAPU), between 1982 and 1987. Thousands of PF ZAPU supporters were murdered during the campaign commonly referred to as *Gukurahundi*.⁴ The two parties united in December 1987 under the Unity Accord.

Up until 1999 when the Movement for Democratic Change (MDC) was launched to give a serious challenge to ZANU PF's hegemony, Zimbabwe was effectively a de-facto one party state as other small parties that emerged after the unity accord hardly registered any meaningful public support. Despite its nine months into the political field, the MDC was narrowly beaten by ZANU PF getting about 47% of the 120 contested parliamentary seats in June 2000. Its popularity continued to grow despite losses to ZANU PF in subsequent elections. Its leader Morgan Tsvangirai finally beat Mugabe in the 2008 elections but his figures fell slightly short of the ballot threshold prescribed by law for one to be declared an outright winner. This precipitated a presidential run-off, which in essence was a non-contest as Tsvangirai withdrew his candidature citing widespread political violence against his supporters. Mugabe was declared the winner of the one man race.

A coalition government was subsequently formed in February 2009 as a means to mitigate the political conflict between the two warring parties and create space for dialogue on transitioning Zimbabwe into a true democracy. Mugabe was appointed the head of that coalition while his rival Tsvangirai was made the Prime Minister.

Under the facilitation of SADC, the coalition government came up with a reform agenda, top of it was the crafting of a new democratic constitution; the reformation of the security sector and the country's repressive legislative framework, including laws that governed media activity in the country. While there was limited success in fulfilling all the items on the reform agenda, the coalition government managed to lead the drafting of the constitution after protracted disagreements over form and content issues. The charter, with relatively democratic provisions that protect freedom of expression and access to information, was finally adopted as the supreme law in May 2013, following President Mugabe's assent.

Despite the new constitution, Zimbabwe is still saddled with laws that impinge on citizens' right to freely express themselves without reprisals; access information held by public bodies; and generally enhance the

¹ *The Herald* article, Census Results – Let's Plan for Prosperity (18/12/2012)

² The new constitution of Zimbabwe now recognises Chewa, Chibarwe, English, Kalanga, Koisan, Nambya, Ndau, Ndebele, Shangani, Shona, sign language, Sotho, Tonga, Tswana, Venda and Xhosa as officially recognised languages of Zimbabwe.

³ Open Society Initiative (2009) Public Broadcasting in Africa Series – Zimbabwe Report

⁴ Catholic Commission for Justice and Peace (March 1997) Report on Atrocities in Midlands and Matabeleland,

enjoyment of basic liberties. All this is a result of deep ideological differences and diametrically opposed views on the nature of reforms mainly hinged on political parties' intense contest for supremacy. It is against this background that this research is conducted.

Section One: Background and context

1.1 International and constitutional legislative framework

1.1.1 International, African Union and sub-regional legal instruments

As part of the global community and a member of various regional and international groupings, Zimbabwe has several obligations under different human rights treaties and protocols of which it is a state party. This tabulates the status of Zimbabwe's compliance with some regional and international instruments.

Table 1: Status of Zimbabwe's compliance with some regional and international instruments⁵

Treaty Title	Ratified	Acceded	Signed	Reservations
African Charter on Human and People's Rights	30/5/1986			-
Protocol on the Pan-African Parliament	7/07/03			-
Constitutive Act of the African Union	3/03/01			-
Treaty Establishing the African Economic Community	6/11/91			-
Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa			5/03/2008	-
SADC Protocol on Culture, Information, and Sport			14/8/2000	-
SADC Principles and Guidelines Governing Elections			17/8/2004	-
SADC Protocol on Politics Defence and Security			14/8/01	

⁵ Adapted from Zimbabwe Lawyers for Human Rights report, Zimbabwe's Status of Compliance with Human Rights Instruments published in 2011 and Pretoria University Law Press Compendium on Key Human Rights Documents of The African Union published in 2007

Convention on the Elimination of All Forms of Discrimination against Women		13/5/91		-
Convention on the Political Rights of Women		5/6/1995		-
Convention on the Rights of the Child	11/09/90			-
International Convention on the Elimination of All Forms of Racial Discrimination		12/6/91		-
International Covenant on Civil and Political Rights		13/05/91		-
Convention on the Prevention and Punishment of the Crime of Genocide		13/5/91		-
International Covenant on Economic Social and Cultural Rights		13/8/91		-
Vienna Convention	3/11/92			-

Zimbabwe is a dualist legal system. Resultantly, international instruments ratified and acceded to do not automatically become part of the domestic law until an act of Parliament is adopted to incorporate them.⁶ However, though the country may not have ratified all international instruments, some norms and standards found in those instruments have become customary law and are thus applicable to all countries even when they have not bound themselves to them.⁷

⁶ Zimbabwe Lawyers for Human Rights (2011) Zimbabwe's Status of Compliance with Human Rights Instruments Volume 1,

⁷ Zimbabwe Layers for Human Rights report (n4 above).

The current constitution however, enjoins the country to domesticate international instruments. Article 34 stipulates:

The State must ensure that all international conventions, treaties and agreements to which Zimbabwe is a party are incorporated into domestic law.

1.1.2 Constitution

When Zimbabwe got its independence it was governed under the Lancaster House constitution, which was basically a compromise charter aimed at bringing to an end the liberation war, pave way for independence and usher peace in a country that had pockets of enduring resistance to majority rule. In fact, the 1980 constitution was established through an act of the British Parliament and imposed on Zimbabwe and was not an outcome of an inclusive participatory process by Zimbabweans.⁸ Consequently, it naturally created a Westminster political system in which parliament was supreme than the executive. In addition, though the constitution was meant to end colonial and undemocratic authority, it still retained undemocratic features such as the retention of disproportionate land ownership between blacks and whites as well as uncontested seats for whites.⁹

Between 1980 and 2012, the Lancaster House constitution was amended 19 times without public participation nor a referendum. Almost all the amendments were initiated by the ruling elite as it sought to give legality to some of its policies such as the fast-track land reform as well as reconfigure arms of the state such as the creation of an executive presidency in 1987 and the formation of a coalition government in 2009.

After yielding to swelling demands for a genuine constitutional reform by civil society, labour unions and political parties under the auspices of the National Constitutional Assembly (NCA), the ZANU PF led government set up a Constitutional Commission (CC) in 1999 to spearhead the drafting of a new Constitution. The move immediately brought the government into conflict with civil society and reform movements under the NCA. The dispute emanated from the selective handpicking of those that sat in the commission, most of whom were directly or indirectly linked to ZANU PF or government. Right from the onset, the NCA criticised the commission as unrepresentative and fronting ZANU PF interests. This conflict worsened following the production of the draft document, which the NCA felt did not capture public views as expressed during the commission's public consultation process. While government, together with the CC vigorously campaigned for a public endorsement of the draft constitution, the NCA mobilised against it. The civil society's position won the day with Zimbabweans rejecting the draft constitution in a referendum held in February 2000.

Following the rejection, President Mugabe accepted the results and announced that his government will revert to the Lancaster House constitution, despite calls for a review of the whole process and an inclusive engagement on the way forward.¹⁰ It can be argued that the 2000 constitutional referendum escalated demands for a new constitution and firmly put the subject on the agenda of civil society and political parties' push for wholesale democratisation of the country.

Cognisant of the fact that many problems plaguing post-independent Zimbabwe were a result of a defective constitution, another attempt – though under the veil of secrecy – was made to redraft the constitution. The country's main parties, ZANU PF and two MDC formations (the party split into two factions in 2005) secretly met in 2007 and crafted a new document known as the Kariba Draft Constitution. The

⁸ Constitutional Net, Constitutional history of Zimbabwe, <http://www.constitutionnet.org/country/constitutional-history-zimbabwe> (accessed 30 July 2013)

⁹ Constitutional Net, (n 6 above)

¹⁰ President Mugabe addressed the nation on February 15, 2000 accepting the results of the referendum and pledging to respect people's will. Media Monitoring Project of Zimbabwe Report, (May 2000) Question of Balance.

document, which was an attempt to merge components of the rejected CC document and that of the NCA, did not see the light of day. When it subsequently filtered through the public domain with coalition government partners pushing it as the basis on which a new constitution could be built on, it was heavily criticized by civil society as an undemocratic document that reflected selfinterests of the parties which drafted it.

In September 2008, ZANU PF and the two MDCs struck a political pact following the disputed June 2008 presidential elections. This agreement commonly referred to as the Global Political Agreement (GPA), paved the way for the formation of a coalition government in February 2009. As part of its mandate, the coalition authority was to rewrite the constitution as a means of creating a democratic dispensation under which general elections to elect a credible government would be held. After protracted disagreements on the process between government and civil society as well as discord over content among political parties in government, the new constitution was endorsed through a referendum in March 2013 and finally signed into law in May 2013.

Before this development Zimbabwean civil society had resorted to approaching regional bodies such as the ACHPR as a means to seek regional intervention on the protection of human rights in the country. For example, in 2005 Media Institute of Southern Africa (MISA-Zimbabwe), Zimbabwe Lawyers for Human Rights (ZLHR) and Independent Journalists Association of Zimbabwe (IJAZ) filed an application with the commission challenging sections 79 and 80 of Access to Information and Protection of Privacy Act (AIPPA), which they argued contravened Article 9 of the African Charter on Human and People's Rights to which Zimbabwe is a signatory. In its ruling delivered in 2009, the commission adjudged that the sections were indeed antithetical to the Charter and urged the Zimbabwean government to align AIPPA with the African Charter. Instead of fully complying with the African Commission on Human and People's Rights ruling that ordered the repeal of section 80 of AIPPA in the IJAZ case as it hindered free journalism enterprise, the authorities merged the section with section 15 of the Public Order and Security Act into section 31 of the CODE thereby retaining criminalisation of communication of falsehoods, albeit under a different act.¹¹

Bodies such as the SADC Tribunal have also been approached by Zimbabweans seeking regional intervention in the protection of their liberties. Although the case was not linked to the enjoyment of freedom of expression, it involved a Zimbabwean white farmer Michael Campbell who in 2007 sought the Tribunal's intervention in blocking the seizure of his farm by the Zimbabwean government. Campbell approached the Tribunal arguing that Zimbabwe's then highest court the Supreme Court had unreasonably delayed hearing his case, arguing that the land reform was chaotic, violent, discriminatory, racist and illegal under the SADC Treaty. In December 2007 the Tribunal, which was established to promote the rule of law in the region ruled in favour of the farmer.¹² However, the government ignored the ruling and other subsequent judgements restating the initial Tribunal findings, with the then Justice Minister Patrick Chinamasa arguing that the Tribunal had no jurisdiction over Zimbabwe.¹³

Following the dissolution of the Tribunal in May 2011 by SADC leaders after government's intensive lobbying, two farmers Luke Tembani and Ben Freeth approached the African Commission to lodge a complaint against the 14 heads of states of SADC countries' decision to dissolve the Tribunal. In November 2012 the Commission ruled that the complaint was admissible before it.¹⁴

¹¹ MISA-Zimbabwe Media Laws in Zimbabwe (2010) An analysis of Amendments to Media Laws in Zimbabwe Since the Year 2005,

¹² *The Mail and Guardian*, SADC Court rules in favour of elderly white Zim farmer, (14/12/07). See <http://www.mg.co.za/article/2007-12-14-sadc-court-rules-in-favour-of-elderly-zim-farmer> (accessed 1 November 2013)

¹³ *Trade News Daily*, Zimbabwe white farmers have had enough, http://www.meattradenewsdaily.co.uk/news/240609/zimbabwe_white_farmers_have_had_enough.aspx (accessed . Also see *The Mail and Guardian* article, Zimbabwe defies land seizure ruling, <http://mg.co.za/article/2008-12-01-zimbabwe-defies-land-seizure-ruling> (accessed 1 November 2013)

¹⁴ OSISA report (22 November, 2012) African Commission to hear SADC Tribunal case); <http://www.osisa.org/law/regional/african-commission-hear-sadc-tribunal-case>. After the African Commission agreed to hear the matter the farmers then filed their papers in

All these efforts, among others, by Zimbabwean citizens were aimed at seeking regional redress after failed local remedies to get promotion and protection of civil liberties by the state.

Equality of all before the law

The new constitution does provide for equality before the law. It expressly does this in Article 56. For example, Article 56 (1) stipulates:

All persons are equal before the law and have the right to equal protection and benefit of the law.

While Article 56 (2) stresses gender equality including the right to equal opportunities in political, economic, cultural and social spheres, Article 56 (3) proscribes discrimination of any citizen under a range of circumstances. It stipulates:

Every person has the right not to be treated in an unfairly discriminatory manner on such grounds as their nationality, race, colour, tribe, place of birth, ethnic or social origin, language, class, religious belief, political affiliation, opinion, custom, culture, sex, gender, marital status, age, pregnancy, disability or economic or social status, or whether they were born in or out of wedlock.

Article 56 (4) then defines what constitutes discrimination while 56 (6) enjoins the State to provide legislative protection of citizens and put other measures against discrimination. It states:

The State must take reasonable legislative and other measures to promote the achievement of equality and to protect or advance people or classes of people who have been disadvantaged by unfair discrimination, and—

- (a) such measures must be taken to redress circumstances of genuine need;
- (b) no such measure is to be regarded as unfair for the purposes of subsection (3).

According to Article 56 (5) discrimination is unacceptable unless it is established that it is fair, reasonable and justifiable in a democratic society, based on openness, justice, human dignity, equality and freedom.

Right to freedom of expression and the media

For the first time in the history of Zimbabwe the new constitution adequately protects freedom of expression and now has explicit guarantees for media freedom and access to information. These are provided for under Articles 60 to 62. These rights were only inferred to under Article 20 of the old Lancaster House constitution, whose limitation clause was overbroad, virtually taking, in one hand, almost all what was given by another.¹⁵

Article 60 (1) of the new constitution, for example, provides for freedom of conscience. This includes freedom of thought, opinion, religion or belief. Most importantly, citizens have a right to practise and propagate and give expression to their thought, opinion and belief in public or in private, alone or together with others.

In securing press freedom, free expression and the media, Article 61 stipulates:

- (1) Every person has the right to freedom of expression, which includes—
 - (a) freedom to seek, receive and communicate ideas and other information;

January 2013. See Commercial Farmers Union of Zimbabwe report, Zim Farmers file 'historic' case at African Commission, <http://www.cfuzim.org/index.php/newspaper-articles-2/the-courts/3351-zim-farmers-file-historic-case-at-african-commission> (Accessed 2 November 2013)

¹⁵ MISA-Zimbabwe position on the new constitution, January 2013

- (b) freedom of artistic expression and scientific research and creativity; and
- (c) academic freedom.

(2) Every person is entitled to freedom of the media, which freedom includes protection of the confidentiality of journalists' sources of information.

Cognisant of the fundamental role of the state run media and broadcasting services in the exercise of freedom of expression and the need to secure that means of communication against political manipulation and abuse, Article 61 (3) and (4) then states:

Broadcasting and other electronic media of communication have freedom of establishment, subject only to State licensing procedures¹⁶ that—

- (a) are necessary to regulate the airwaves and other forms of signal distribution; and
 - (b) are independent of control by government or by political or commercial interests.
- (4) All State-owned media of communication must—
- (a) be free to determine independently the editorial content of their broadcasts or other communications;
 - (b) be impartial; and
 - (c) afford fair opportunity for the presentation of divergent views and dissenting opinions.

Whereas the old constitution had broad and ambiguous claw-back clauses on the exercise of freedom of expression, the new constitution now has narrow and clear basis on which the right could be limited. Article 61 (5) states:

Freedom of expression and freedom of the media do not include—

- (a) incitement to violence;
- (b) advocacy of hatred or hate speech;
- (c) malicious injury to a person's reputation or dignity; or
- (d) malicious or unwarranted breach of a person's right to privacy.

It is standard practice that the exercise of freedom of expression is not absolute. But still the limitations must be reasonable and justifiable. Benchmarking the limitations stated above against regional and international instruments on freedom of expression they appear to be in line with acceptable and reasonable standards. For example, the Declaration of Principles of Freedom of Expression in Africa states that;

Any restrictions on freedom of expression shall be provided by law, serve a legitimate interest and be necessary and in a democratic society.

The limitations as contained in the Zimbabwean constitution also appear to be in line with Article 19 (3) and Article 20 of the International Covenant on Civil and Political Rights (ICCPR). Article 19 (3), for instance, states that freedom of expression is subject to restrictions that shall only be as provided by law and are necessary:

¹⁶ The procedures are gazetted as application regulations when the Broadcasting Authority of Zimbabwe calls for licence applications. Although they are informed by the provisions of the Broadcasting Services Act, they differ per each call that is made as well is accordance with the type of a licence.

- (a) For respect of the rights or reputations of others;
- (b) For the protection of national security or of public order (ordre public), or of public health or morals.

Article 20 of the same instrument further provides for principles against which freedom of expression could be restricted. It states that:

1. Any propaganda for war shall be prohibited by law.
2. Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.

However, although the limitation clauses in the new constitution appear to be in line with regional and international instruments, the State is duty bound to demonstrate the precise nature of the threat of one's exercise to freedom of expression warranting restrictions of that liberty. This is to ensure that the restrictions conform to the strict tests of necessity and proportionality. The UN Human Rights Committee noted as much in its General Comment 34 on Article 19 of the ICCPR.¹⁷ It stated:

When a state party invokes a legitimate ground for restriction of freedom of expression, it must demonstrate in specific and individualized fashion the precise nature of the threat, and the necessity and proportionality of the specific action taken, in particular by establishing a direct and immediate connection between the expression and the threat.

Apart from protecting citizens' right to freedom of expression, the new constitution also has explicit guarantees for the right to access to information. This right is enshrined in Article 62 (1) to (3). Although the constitution has limitation clause for the enjoyment of access to information under Article 62 (4), it enjoins the state to only limit the freedom in a manner that is fair, necessary and justifiable in a democratic society based on openness, justice, human dignity, equality and freedom.

However, while the constitution provides for the above mentioned liberties, Article 248 of the same constitution then establishes a statutory regulatory board, Zimbabwe Media Commission (ZMC), which goes against the dictates of securing free media space and the exercise of the right to freedom of expression. To make matters worse, among a range of its functions, the constitution gives the body authority to take disciplinary measures against the media, journalists and practitioners. According to the Media Alliance of Zimbabwe (MAZ), this contradicts clauses guaranteeing media freedom, especially as it relates to proscribing state interference in the freedom of the media.¹⁸

Judicial independence

The country's constitution does provide for an independent judiciary. This is established under Article 164. While Article 164 (1) secures the independence of the judiciary by making it only subject to the constitution and the law, Article 164 (2) outlines the state's obligations in insulating the judiciary against interference. Article 164 (2)(a) stipulates:

neither the State nor any institution or agency of the government at any level, and no other person, may interfere with the functioning of the courts;

while Article 164 (2)(b) states:

¹⁷ Office of the High Commissioner for Human Rights, UN Human Rights Committee General Comment No. 34 on State parties obligations under Article 19 of the ICCPR adopted on 21 July 2011. <http://bangkok.ohchr.org/programme/documents/general-comment-34.aspx>(accessed 6 October, 2013)

¹⁸ Media Alliance of Zimbabwe (March 2013) Position Statement on the new constitution,

the State, through legislative and other measures, must assist and protect the courts to ensure their independence, impartiality, dignity, accessibility and effectiveness and to ensure that they comply with the principles set out in section 165.

Article 164 (3) then binds the state, including government institutions and agencies, and all citizens to comply with court rulings. In building the integrity of the judiciary, Article 165 outlines seven principles that should guide members of the judiciary in the delivery of justice.

Apart from guaranteeing judicial independence, the new constitution provides for the courts to examine the constitutionality of the laws in the country. That role lies solely with the Constitutional Court. Article 167(2)(a) provides that only the Constitutional Court may advise on the constitutionality of any proposed legislation, but may do so only where the legislation concerned has been referred to it in terms of the Constitution. Further, according to Article 167(3) the Constitutional Court makes the final decision whether an Act of Parliament or conduct of the President or Parliament is constitutional, and must confirm any order of invalidity made by another court before that order has any force.

Taking advantage of this constitutional provision *The Standard* editor Nevanji Madanhire, reporter Patience Nyangove and their publisher's representative Loud Ramakgapola took their case to the Constitutional Court arguing that criminal defamation charges preferred against them under section 96 of the CODE were unconstitutional. This followed their arrest in June 2011 following a story in which they described a senior police officer as "notorious" in a report in which they reported on the arrest of MDC-T senior official Jameson Timba. On 10 October 2013 the Constitutional Court heard the matter in which Madanhire and his co-accused argued that charges they were facing were ultra vires the constitution.¹⁹ Making his arguments the defence lawyer Advocate Eric Morris submitted:²⁰

This is an application for this court to stop the prosecution of my clients on the grounds that the law was at the time of prosecution unconstitutional. I submit that your lordships can make an order in terms of this application that at the time of prosecution criminal defamation was ultra vires the law.

Citing other democratic societies that have revoked criminal defamation laws as an infringement of individuals' right to freedom of expression Morris added:

Criminal defamation is now being used to serve all purposes for which it was not intended. Is the moral fabric of the State threatened when one calls a police officer 'notorious'? Journalists need to go on a course to uncover genuine corruption and if such laws are maintained, investigative journalism would be totally stifled.

Representative of the state Edmore Makoto, who was assisted by Tapiwa Mapfuwa, defended the charges arguing that criminal defamation laws were meant to protect poor members of society who could not afford to protect themselves. He argued:

In our democratic society, the majority of people are poor and cannot afford to institute civil proceedings against perpetrators of criminal defamation.

The Constitutional Court reserved judgement on the matter, indicating that it will make a ruling taking into cognisance both the new and old constitution to assess if the law was violated at the time the journalists were arrested.

Barely three weeks after the case on 30 October 2013, the Constitutional Court made a landmark ruling that found unconstitutional provisions of the Criminal Law (Codification and Reform) Act, which criminalised

¹⁹*Newsday* (10/10/13) report on the court challenge, <http://cc.bingj.com/cache.aspx?q=Madanhire+criminal+defamation+is+unconstitutional&d=4583684787472001&mkt=en-ww&setlang=en-US&w=VTwINTCyzmYka12oaGFOCbYHGzpgqxrl>. (Accessed 4 November 2013)

See also <http://zimbabwееlection.com/2013/10/11/criminal-defamation-law-anti-democratic/> (Accessed 4 November 2013)

²⁰ n14 above

publication or communication of false statements prejudicial to the state, promoting public disorder or violence as well as insulting the President.²¹ The ruling followed two constitutional challenges by Constantine Chimakure, Vincent Kahiya and Zimind Publishers v Attorney General (AG) and Owen Maseko v AG. Chimakure, Kahiya and Zimind Publishers were charged with breaching Section 31(a)(iii) of the Criminal Law (Codification and Reform) Act. The provision criminalises the publishing or communication of false statements prejudicial to the state with the intention or realisation that there is a real risk of undermining confidence in the law enforcement agency, prison services and the defence forces.

The charge arose from a story published by the *Zimbabwe Independent* on 8 May 2009. It alleged that in 2008 law enforcement agencies had abducted human rights activists who included Jestina Mukoko, Kisimusi Dhlamini, Manuel Chinanzvavana, among others.²²

Maseko was charged under Section 31(a)(i) and Section 33(a)(ii) of the same Act. Section 31(a)(i) criminalises the inciting or promotion of public disorder or public violence or endangering public safety, while Section 33(a)(ii) makes it a criminal offence to “cause hatred, contempt, or ridicule of the President or Acting President whether in person or in respect of the President’s Office”.

Maseko charges stemmed from his exhibition of his artistic work on the *Gukurahundi* episode.

The constitutional court found the above mentioned provisions to be inconsistent with the constitution and an infringement of citizens’ right to freedom of expression. It called on the Minister of Justice, Legal and Parliamentary Affairs, if he so wished, to present himself before the same court on November 20 2013 to show cause why the provisions should not be struck off the country’s statutes.

Although the justice ministry initially submitted its appeal on the stipulated date it subsequently conceded to the ruling before the matter could be heard by the court.

In June 2014, the Constitutional Court made another crucial ruling on criminal defamation. This followed a constitutional challenge filed by *The Standard* journalists Nevanji Madanhire and Nqaba Matshazi. The two were arrested and charged under criminal defamation on 6 November 2011. This followed a complaint by businessman Munyaradzi Kereke over the publication of a story stating that his medical aid society was unable to pay its workers and creditors and was on the brink of collapse. In its judgement the Constitutional Court found the charge of criminal defamation under the old constitution to be unconstitutional and antithetical to a democratic society. It then advised the ministry of justice to show cause, if it so wished, why criminal defamation was in sync with the old constitution. This was to be done “on the earliest available date”. In delivering the ruling on behalf of the Constitutional Court Justice Patel concluded²³:

Having regard to all the foregoing, I take the view that the harmful and undesirable consequences of criminalising defamation, viz. the chilling possibilities of arrest, detention and two years imprisonment, are manifestly excessive in their effect. Moreover, there is an appropriate and satisfactory alternative civil remedy that is available to combat the mischief of defamation. Put differently, the offence of criminal defamation constitutes a disproportionate instrument for achieving the intended objective of protecting the reputations, rights and freedoms of other persons. In short, it is not necessary to criminalise defamatory statements. Consequently, I am satisfied that the offence is not reasonably justifiable in a democratic

²¹ Radio VOP report, ConCourt summons Mngangwa As Sacked Journalist Wins Landmark Ruling, (30/10/2013); <http://www.radiovop.com/index.php/national-news/10350-concourt-summons-mngangwa-as-sacked-journalist-wins-landmark-ru.html>. (Accessed 2 November 2013) See also BBC News Africa report, Zimbabwe court says Robert Mugabe “insult law” invalid. <http://www.bbc.co.uk/news/world-africa-24757351>. (Accessed 2 November 2013)

²²The report on the arrest of the then Zimbabwe Independent editor Constantine Chimakure in 2009. <http://www.journalism.co.za/index.php/news-and-insight/news130/165-media-freedom1/2271-zimind-editors-arrested.html>(Accessed 2 November 2013)

²³ The Constitutional Court judgment delivered on 12 June 2014 on a case Nevanji Madanhire, Nqaba Matshazi v Attorney General, Judgement No CCZ 2/14, Constitutional Application No CCZ 78/12.

society within the contemplation of s 20 (2) of the former constitution. Accordingly, it is inconsistent with the freedom of expression guaranteed by s 20 (1) of that Constitution.

But while the ruling was based on the old constitution, it provides legal precedence for potential constitutional challenges that will be brought before the constitutional court in the future. However, in its ruling the court hazarded potential legal hurdles that have to be overcome in the fight against criminal defamation. It observed that while the constitutional court is still to test criminal defamation against the new constitution, the state could still argue for the retention of the law based on Articles 51 and 86 of the constitution. Article 51 provides for the respect and protection of individual dignity while Article 86 stipulates the grounds upon which freedoms granted under the Bill of Rights could be limited.

Justice Patel observed:

Having regard to these provisions, taken together, it is arguable that the freedom of expression conferred by s 61 is to be more narrowly construed as being subordinate to the value of human dignity. It might also be argued that the offence of criminal defamation is a justifiable limitation on the freedom of expression as envisaged by s 86 of the new Constitution. In any event, as I have said, these are matters for argument and consideration as and when an appropriate case is brought for determination before this Court.

Although the new Constitution provides for expansive Bill of Rights it is silent on whether the assessment of laws brought to the Constitutional Court can be benchmarked against regional and international instruments. The presumption is that since Article 34 of the constitution obliges the State to incorporate international conventions, treaties and agreements to which Zimbabwe is a state party into domestic law, such arguments can still be brought before the constitutional court in the assessment of the country's laws.

Despite guarantees of independence, the country's judicial has always been compromised by perceptions of partisanship in the execution of duty. These perceptions were strengthened by what appeared to be forced resignations of the bench during the land occupations that took place between 2000 and 2005. Most senior judges, especially white ones resigned following political interference and threats to their lives by political activists and liberation war veterans.²⁴ They were replaced by those that were viewed to be aligned to ZANU PF or in favour of the party's land reform policies.

1.1.3 Judicial system

Zimbabwe's judicial system is clearly outlined in Part 1 of Chapter 8 of the new constitution. At the apex of the country's judicial system is the Constitutional Court made up of the Chief Justice, Deputy Chief Justice and five other judges of the constitutional court. According to Article 167(1)(a), the Constitutional Court is the highest court in all constitutional matters, and its decisions are binding on all courts. In addition, its jurisdiction also includes deciding on whether an issue is a constitutional matter; advising on the constitutionality of proposed legislation if the matter is brought to it for determination; hear and determine disputes relating to the election of the President as well as disputes relating to qualifications of a person to hold the office of Vice President, among other responsibilities.

Below the Constitutional Court is the Supreme Court. According to Article 169(1), the Supreme Court is the final court of appeal. However, as stipulated under Article 169(2), the Supreme Court does not have any jurisdiction over constitutional matters either as a first court instance or as a court of appeal.

Underneath the Supreme Court in terms of superiority is the High Court. Article 171(1)(a - d) stipulates the High Court's jurisdiction thus:

²⁴ Human Rights Watch report, "Our Hands are Tied": Erosion of rule of law in Zimbabwe, Source; <http://www.hrw.org/reports/2008/11/08/our-hands-are-tied-0> [accessed 2 October 2013].

- (a) has original jurisdiction over all civil and criminal matters throughout Zimbabwe;
- (b) has jurisdiction to supervise magistrates courts and other subordinate courts and to review their decisions;
- (c) may decide constitutional matters except those that only the Constitutional Court may decide; and
- (d) has such appellate jurisdiction as may be conferred on it by an Act of Parliament.

The judicial system also consists of the Labour Court, whose jurisdiction is over matters of labour and employment as may be conferred upon it by an Act of Parliament, and the Administrative Court, which has jurisdiction over administrative matters as may be conferred upon it by an Act of Parliament.

Article 174 (a-d) creates other courts and tribunals. These are:

- (a) magistrates courts, to adjudicate on civil and criminal cases;
- (b) customary law courts whose jurisdiction consists primarily in the application of customary law;
- (c) other courts subordinate to the High Court; and
- (d) tribunals for arbitration, mediation and other forms of alternative dispute resolution.

The appointment and tenure of office for members of the judiciary is clearly stated in detail in Part 2 of Chapter 8 of the Constitution. In the appointment of judges, Article 180 states:

- (1) The Chief Justice, the Deputy Chief Justice, the Judge President of the High Court and all other judges are appointed by the President in accordance with this section.
- (2) Whenever the office of a judge referred to in subsection (1) is vacant or it is otherwise necessary to appoint such a judge, the Judicial Service Commission must—
 - (a) advertise the position and invite applications;
 - (b) invite the President and the public to make nominations;
 - (c) conduct public interviews of prospective candidates;
 - (d) prepare a list of three qualified persons as nominees for the office; and
 - (e) submit the list to the President;

whereupon, subject to subsection (3), the President must appoint one of the nominees to the office concerned.

(3) If the President considers that none of the persons on the list submitted to him in terms of subsection (2)(e) are suitable for appointment to the office, he or she must require the Judicial Service Commission to submit a further list of three qualified persons, whereupon the President must appoint one of the nominees to the office concerned.

(4) The President must cause notice of every appointment under this section to be published in the *Gazette*.

Other members of the judiciary are appointed in terms of Article 182 of the constitution. It states:

An Act of Parliament must provide for the appointment of magistrates and other judicial officers other than judges, but—

- (a) magistrates must be appointed by the Judicial Service Commission;

- (b) judicial officers other than magistrates or judges must be appointed with the approval of the Judicial Service Commission;
- (c) all such appointments must be made transparently and without fear, favour, prejudice or bias.

Key in the appointment of all members of the judiciary is that appointments must reflect broadly the diversity and gender composition of Zimbabwe as stipulated under Article 184.

The new constitution has also established under Article 242 another fundamental arm of justice delivery system in the form of a Human Rights Commission. The Commission is mandated to:

- (a) to promote awareness of and respect for human rights and freedoms at all levels of society;
- (b) to promote the protection, development and attainment of human rights and freedoms;
- (c) to monitor, assess and ensure observance of human rights and freedoms;
- (d) to receive and consider complaints from the public and to take such action in regard to the complaints as the Commission considers appropriate;
- (e) to protect the public against abuse of power and maladministration by State and public institutions and by officers of those institutions;
- (f) to investigate the conduct of any authority or person, where it is alleged that any of the human rights and freedoms set out in the Declaration of Rights has been violated by that authority or person;
- (g) to secure appropriate redress, including recommending the prosecution of offenders, where human rights or freedoms have been violated;
- (h) to direct the Commissioner-General of Police to investigate cases of suspected criminal violations of human rights or freedoms and to report to the Commission on the results of any such investigation;
- (i) to recommend to Parliament effective measures to promote human rights and freedoms;
- (j) to conduct research into issues relating to human rights and freedoms and social justice; and
- (k) to visit and inspect—
 - (i) prisons, places of detention, refugee camps and related facilities; and
 - (ii) places where mentally disordered or intellectually handicapped persons are detained;

in order to ascertain the conditions under which persons are kept there, and to make recommendations regarding those conditions to the Minister responsible for administering the law relating to those places.

1.1.4 Law reform process

Sections 130 and 131 of the Constitution grants powers to enact laws to both houses of Parliament while the Fifth Schedule outlines the procedures of the law making process. For a law to be enacted, it has to pass through two stages. Firstly, it must be endorsed by the requisite majority in both houses of Parliament, the National Assembly and Senate. And then it has to be assented to by the President.²⁵

There are various stages that take place before the President assents to the Bill. These are outlined below:

²⁵ L Madhuku (2010) An introduction to Zimbabwean law

Table 2: Stages of law making in Zimbabwe

1.Pre-bill Stage

This is the stage leading to the finalization of proposals that are contained in the bill that is sent to Parliament. This is exclusively a political process dominated by the executive. Legislative proposals result from a variety of sources such as political party manifestos, government department, commissions of inquiry, parliamentary portfolio committees, pressure groups and responses to disasters. If Cabinet makes a policy decision that a certain law has to be made, the decision is communicated to the relevant government department by the responsible ministry. The department then prepares a set of principles to govern the legislation. The principles are then sent to the Cabinet Committee on Legislation (CCL), which assess the principles sent to it in light of Cabinet resolutions. From the CCL the principles are sent to the Attorney General for drafting in consultation with the government department. After drafting, a draft bill is sent back to the CCL for further assessment in light of Cabinet decision. Once approved, the CCL then sends the draft bill to a full Cabinet or to Parliament, which is made up of the senate and the national assembly.

But this process only relates to bills emanating from Cabinet. Any member of parliament can also introduce a bill directly to Parliament as a private member's bill.

2.Types of bills.

There are public and private bills. Public bills are intended to alter the general law or to deal with public revenue or the administration of justice. Private bills deal with matters of private or local nature such as legislation promoted by local authority or relating to the property of private individuals. Within public bills we have government bills introduced by a government minister and a private member's bill introduced by an individual member of parliament.

3.Gazetting of bills

The *Government Gazette* is the official publication of the government of Zimbabwe. It is the legal medium through which the government informs the public about its legal instruments .except for constitutional bills, the Constitution does not require that the bill be gazetted before it is introduced in Parliament. Constitutional bill must be published in the *Government Gazette* not less than 30 days before it is introduced in Parliament. For all other bills, the standing orders require that they be published in the *Gazette* at least 14 days before being introduced in Parliament. This requirement may be waived and the bill introduced without being gazetted in cases of urgency upon the application of a Vice-President or Minister.

4.Passage of bills in Parliament

According to the Constitution's Fifth Schedule a bill must be introduced and passed by both houses to become law and same stages are followed by each house. A bill may originate in either house, except a money bill which is a public bill providing for all or any of the following; imposition or administration of taxation; the imposition of charges on consolidated revenue fund; the making or raising of any loan by government and the condoning of unauthorised expenditure. The money bill only originates from the National Assembly.

5.Stage 1-First reading

After the bill has been gazetted the member responsible must serve notice of motion that leave be granted by the house to bring in the bill. If the motion is granted, the member must bring a copy of the bill to the clerks at the table, who read the title of the bill. It is the bringing of the copy to the clerks and subsequent reading of the title thereof which is regarded as the first reading.

6.Stage 2-reference to Parliamentary Legal Committee (PLC)

The House in which the bill originates refers it to PLC whose purpose is to examine all bills and statutory instruments and determine whether they are in conformity with the Constitution. If the PLC makes an adverse report the bill is referred back. However, the House of Assembly has the power to reject the opinion of the PLC and proceed with the bill as no adverse report was given. If it agrees with the adverse report then it will not be passed.

7.Stage 3- Second reading

Opened by the Minister or a member of parliament sponsoring the bill who makes a speech outlining the purpose of the bill and principles upon which it is based. This is followed by debates on these principles. Parliamentary Portfolio Committee (appointed for every government department with the purpose of scrutinising proposed bills) will also present its report and contribute on the debate.

8.Stage 4-Consideration by Committee

The bill is then considered clause by clause by the Committee of the whole house. Amendments to individual clauses are proposed and debated. Amendments proposed by the PPC are also discussed at this stage. The committee stage is chaired by the Deputy Speaker.

9.Stage 5-Reporting

Involves making a report of the Bill as amended to the House, which is a mere formality because the Bill will have been considered by the Committee of the house in stage 4.

10.Stage 6-Referral to the PLC

If the Bill is amended at stages 4 & 5 above, it is referred to the PLC, which will scrutinize any amendments according to the procedures outlined in stage 2

11.Stage 7-Third reading

Bill is put to vote for approval or rejection. There is no debate and the quorum is 25 members of the House of Assembly and 11 for Senate. For Constitution to pass there must be at least two-thirds and other legislation there must be majority.

12.Stage 8-Transmission to the other house

If the bill is passed by the House in which it originated, an authenticated copy is sent to the other House which may reject or approve it with amendments. The House of origin may reject, agree or incorporate amendments.

13.Stage 9-Presidential assent

Bill becomes law only after being assented to by the President. However, he is not obliged to assent and he has unlimited discretion in this regard. If the House of Assembly secures two-thirds majority for the bill rejected and returned, it may return the bill to the President who has two options; either to assent to the bill within 21 days or dissolve Parliament and call for fresh elections.

Source: L Madhuku²⁶

1.2 Media landscape

1.2.1 Overview of media landscape

The signing of the Global Political Agreement (GPA), which paved the way for the formation of a coalition government in February 2009 brought some changes to the country's media landscape. Whereas the media space had been severely constricted through the closure of newspapers under the country's controversial media laws, the establishment of the Zimbabwe Media Commission by the coalition government to replace the unpopular Media and Information Commission saw the licensing of more news outlets. As at June 2013, more than 70 media houses had been registered. These included mainstream daily newspapers, entertainment and professional magazines, community newspapers, among other media houses. However, most of the media houses are urban based as they are distributed within and between commercial centres dotted along the highways adjoining the country's major towns. This leaves the majority of Zimbabweans, who live in rural areas outside the information loop. The situation is worsened by the failure by the country's public broadcaster, which is the biggest broadcasting house, to cover the whole country due to dilapidated broadcasting infrastructure. Those living near the country's borders are having to rely on foreign broadcasts from the country's neighbours. The two new private national broadcasters have not helped matters either. They are also accessible in some of the country's main urban centres and do not reach many rural communities.

Newspapers

Although Zimbabwe appears to have a diverse print media industry, itself a result of the licensing of new players following the formation of a coalition government in 2009, the print news market is dominated by three main publishing houses. These include the Zimpapers private limited, which has four daily papers and at least three weeklies; Alpha Media House (AMH), which publishes two dailies and three weeklies. The other big player is the Associated Newspapers of Zimbabwe (ANZ), the publishers of the *Daily News*, the *Weekend Post* and *Daily News on Sunday*. The rest of the print media comprise small publications that range from fashion and sport magazines to small private community newspapers circulating in small provincial towns. Below is a list of print publications that have been licensed since 2009:

²⁶ n14 above

Table 3: List of some registered media houses and publications

Name of Publisher	Publications	Reach	Ownership
Ad Infinitum(Pvt) Ltd	1. <i>Property Guide</i> 2. <i>Car Guide</i>	Small Niche Market	Private
Adpoint Services	1. <i>Weekly Gazette</i> 2. <i>Zvishavane News</i> 3. <i>Gokwe Gazette</i> 4. <i>Mash East Star</i>	Provincial Papers	Private
Africa Newspaper Group	1. <i>Midlands News</i> 2. <i>Kadoma News</i> 3. <i>Zim Telegraph</i>	Provincial newspapers distributed in small towns	Private
Alpha Media Holdings	1. <i>Newsday</i> 2. <i>The Standard</i> 3. <i>The Zimbabwe Independent</i>	National newspapers	Private
Associated Newspapers of Zimbabwe	1. <i>Dailynews</i> 2. <i>Weekend Post</i> 3. <i>DailyNews on Sunday</i>	National newspapers	Private
AyaksInvestmests	1. <i>Network Guardian</i> 2. <i>Guardian Star</i> 3. <i>Lowveld Times</i> 4. <i>Gango</i> 5. <i>Kadoma News</i>	Provincial community newsletter	Private
Berimark Enterprises	<i>Zimceleb</i>	National Magazine	Private
Boka Investments	<i>National Daily</i>	A niche market car magazine	Private
Buffalo Communications(Pvt) Ltd	<i>On the Road</i>	A niche market car Magazine	Private
Business Platform	<i>The Business Platform</i>	A niche market publication	Private
Callmode	<i>The Zimbabwean Advertiser</i>	A niche market publication	Private

Chaya Media Services	<i>Gospel Times</i>	A niche market publication	Private
Chrome Media	<i>Domino Magazine</i>	Magazine	Private
Clafron Investments	<i>Football Focus</i>	National Sport Magazine	Private
Danai Africa Media	<i>Masvingo This Week</i>	Provincial community newspaper	Private
Dimension Ten(Pvt) Limited	<i>The Wealth Digest</i>	Niche Magazine	Private
Ekxie Investment(Business Inc Mag)	<i>Business Inc Magazine</i>	Niche Magazine	Private
Fejay Ventures	<i>Sport 24/4</i>	National sport Magazine	Private
Fruit Link Ventures (Pvt) Limited	<i>The Mail</i>	Closed due to viability problems	Private
Future Communications	<i>Zeal Magazine</i>	Magazine	Private
Hair World Pvt Limited	<i>Seasons Magazine</i>	Magazine	Private
Harare News	<i>Harare News</i>	Harare	Private
Hello Zimbabwe Restaurants	<i>Hello Harare</i>	Niche market	Private
Hewkon Publications Pvt Limited	<i>Zimbabwe Mining Mirror</i>	Niche market publication	Private
Intergrated Marketing	<i>Zimbabwe Glamour and styles</i>	Fashion Magazine	Private
Jack Schofi (Dants Media)	<i>Jewel Magazine</i>	Magazine	Private
Jester Media Services	<i>Weekend Post</i>	Weekly publication	Private
Joe's Love	<i>Cars and Parts</i>	A niche market	Private
Jongwe Printing	<i>The Voice</i>	A political party publication	ZANU PF
KeNako Media	1. <i>Business Week</i> 2. <i>The Weekly Advertiser</i> 3. <i>The Parade A Auto</i>	Niche market publication circulating in Harare	Private
Lazonby Private Limited	<i>The Zimbabwean Newspaper</i>	National weekly paper	Private
Lionlink(Pvt) Ltd	<i>Business Credentials</i>	Niche market publication	Private
Maldographixhouse MXG	<i>The Ambassador</i>	A publication targeting diplomatic community	Private
Masvingo Mirror	<i>The Masvingo Mirror</i>	A provincial community newspaper	Private

Media in Comm,Agric,Climate and Environmental Trade	<i>The Farmers Guardian</i>	A niche market newspaper	Private
Mharaphil Investment(Just kids)	<i>Just Kidz</i>	Niche market	Private
Midlands Monitor(Pvt)Limited	1. <i>Midlands Daily</i> 2. <i>Midlaands Monitor</i>	Provincial newspapers	Private
Midlands Printers	1. <i>Midlands Observer</i> 2. <i>The Star</i> 3. <i>Mashonaland West</i> 4. <i>Makonde Star</i>	Provincial newspapers	Private
Modus Publications	<i>The Financial Gazette</i>	National Business weekly	Private
New Ziana	1. <i>Gweru Times</i> 2. <i>Ilanga</i> 3. <i>Indonsakusa</i> 3. <i>Masvingo Star</i> 5. <i>Nehanda Guardian</i> 6. <i>Pungwe</i> 7. <i>Telegraph</i>	Provincial Weeklies	Government controlled/ state run
Odnet Africa (Pvt) Ltd	<i>Pandaro Tourism Magazine</i>	Niche market magazine	Private
Out of Africa Publications	<i>Out of Africa Magazine</i>	Magazine	Private
Paradise Property Group/PNT Investments	<i>The Property Investor</i>	Niche market magazine	Private
Reign Communications	<i>The farming Magazine</i>	Niche market	Private
Rismas Media (Pvt) Limited	<i>Bus Inc(Business Magazine)</i>	Niche market magazine	Private
SNBT Marketing services	<i>The Zimbabwean Advertiser</i>	Niche market publication	Private
Spindletop	<i>The Marketer</i>	Niche market publication	Private
Swim Africa Media	1. <i>Southern Voice</i> 2. <i>Safe Travel</i> 3. <i>Banking,Insurance and Automative</i>	Niche market publication	Private
Texton Investment	1. <i>The Sun</i> 2. <i>The Citizen</i>	Provincial Community Newspapers	Private

United Family International Church	<i>The Family Magazine</i>	Niche marker publication-religious magazine	UFIC Church
Woodberg Advertising	<i>The Observer Newspaper</i>	National Weekly	Private
ZCTU	<i>The worker</i>	National Labour newspaper	Labour Union (ZCTU)
Zimbabwe Heritage Trust	<i>The Patriot</i>	National Weekly	Private
Zimpapers	1. <i>Chronicle</i>	National	Government/state run
	2. <i>H-Metro</i>		
	3. <i>Kwayedza</i>		
	4. <i>Manica Post</i>		
	5. <i>Sunday Mail</i>		
	6. <i>Sunday News</i>		
	7. <i>The Herald</i>		
	8. <i>Umthunywa</i>		
	9. <i>Zimbabwean Travel</i>		

Source; ZMC records of registered media houses

Radio stations

There are six FM stations in the country. Of these, four are run by the state controlled Zimbabwe Broadcasting Corporation (ZBC) while the remaining two are newly established private national stations owned by companies linked to state functionaries. One of the private stations, Star FM, is a subsidiary of the Zimpapers company, which owns the dominant state newspapers. The other station, ZiFM, has a ZANU PF Member of Parliament and Deputy Information Minister as its majority shareholder. There are no licensed community radio stations in the country. Besides the FM stations, ZBC also owns another station broadcasting on shortwave. The station was established to counter exiled radio stations that beam into Zimbabwe from their foreign bases. The stations include Voice of the People, SW Radio Africa and Studio 7, who were all forced to broadcast from outside Zimbabwe by the repressive legislative framework that imposes severe restrictions in establishing a radio station in the country. The exiled stations have become one of the main sources of information for rural Zimbabweans who are either not served by ZBC or trying to get access to information alternative to that broadcast by the state broadcaster. It is due to the popularity of these stations that the police cracked down on citizens who owned short wave radio sets distributed by civil society organisations in a bid to curtail access to the stations' content.²⁷ In trying to expand their reach, the exiled stations and other community radio initiatives that have been broadcasting on a short wave platform are now also broadcasting through a free-to-air satellite platform dubbed ChannelZim, taking advantage of the increased use of the free-to-air decoders by ordinary Zimbabweans.

²⁷ VOA News, February 20 2013 <http://www.voanews.com/content/zimbabwe-police-seize-radios-ahead-of-election/1607553.html> (accessed 14 August 2013)

Table 4: List of radio stations in Zimbabwe

Broadcasting house	Station name	Ownership	Broadcasting platform
ZBC	Spot FM	State/Public	FM
	Radio Zimbabwe		
	Power FM		
	National FM		
	Voice of Zimbabwe		Short Wave
Zimpapers	Star FM	Private with government shares	FM
ABC Communications	ZiFM	Private	FM and Online
ChannelZim	Radio VOP	Private and exiled	Free-to-air satellite
	Corah		
	Zicora		
SW Radio Africa	SW Radio Africa	Private and exiled	Short Wave and online
VOA	Studio 7	Private and exiled	AM and online

TV stations

The country has two terrestrial TV stations. Both are run by the public broadcaster ZBC. While TV1 is accessible in most parts of the country, TV2 is only accessible in the country's main towns. Zimbabwe is yet to license private TV stations. However, the country has witnessed a dramatic increase in the number of people accessing the free-to-air satellite television. According to Zimbabwe All Media Products Survey (ZAMPS), close to three million people have access to satellite TV.²⁸ Of these, about two and half million, have free-to-air decoders mainly purchased from the Middle East. The increase has been attributed to protest against low quality and poor programming by the state controlled ZBC.²⁹

News agencies

Several news agencies and foreign news bureaux operate in Zimbabwe. These include:

- Afro-Media
- AgenceFrancePresse (AFP)
- Al Jazeera International
- Cable News Agency
- China Central
- Reuters
- South African Broadcasting Corporation

²⁸ZAMPS (2012) 4th quarter report,

²⁹ The Financial Gazette report (25/7/13), TV Viewers dump ZBC, <http://www.financialgazette.co.zw/tv-viewers-dump-zbc/> (accessed 29 September 2013).

Online media and bloggers

Bloggging in Zimbabwe has been on the rise with a number of Zimbabweans creating their own blogs to tell their own stories in a country where the dominant voices in the news are those of public and government figures. The most prominent bloggers are as follows:

Table 5: List of some bloggers in Zimbabwe

Blog site/blogger	Subject
100 greatest Zimbabweans	Business
Business Setup	Business
Candid Consumerism	Business
Economic views from Zimbabwe	Business
Gilbert Mponda	Business
Ngoda Business Blog	Business
Shingi's Blog	Business
The QUARTZ effect	Business
Greedy South	Lifestyle
Odette's Recipes from Zimbabwe	Lifestyle
XBC Jumpoff – Radio Kunakirwa	Lifestyle
Zimbabwe Lifestyle	Lifestyle
Zimbojam	Lifestyle
ZoLife	Lifestyle
David Coltart	Politics
Takura Zhangazha	Politics
Kubatana	Politics and Human rights
mavikinduku.blogspot	Politics
A woman's sanctuary	Various
African Moves	Various
Common sense...or is it?	Various
FungaiNeni	Various
Gardening in Zimbabwe	Gardening
Living Zimbabwe	Lifestyle

Nurturing Champions	Life coaching
RabisonShumba	Motivational
Rustygate	Lifestyle
ShonaVixen	Lifestyle
Sir Nigel	Various
Team Zimbabwe	Various
Three Men on a Boat	Human thought
Zimbablog	Various

Source: Techzim Online report on Zimbabwean bloggers (2011), Heroes of Zimbabwe's local internet content (Accessed 10 August, 2013).

Apart from blog sites, there are also several online publications that have become vital sources of alternative information for Zimbabweans, especially those who live in the diaspora. These mainly include *New Zimbabwe.com*; *Zimeye.org*; *Nehanda Radio*; *MyZimbabwe*; *Sokwanele*, *zimdiaspora.com*; *herZimbabwe.com*; *bulawayo24.com*; *thezimbabwemail.net* among a host of other online publications. All the mainstream media also have functional websites which are interlinked with their social media pages.

1.2.2 Internet access

Zimbabwe's mobile and internet penetration rate continues to soar as millions are continuously getting connected. As at end of 2012, local subscriptions for the Internet stood at 4,5 million, representing a 34,4 percent rise from the two million recorded in 2011.³⁰ This growth has largely been catalysed by the increase in the number of people with access to mobile phone technology; introduction of favourable policies by government; duty-free importation of ICT gadgets; increased investment in the communication infrastructure as well as stabilisation of the economy post the GPA, which saw the reduction in the prices of mobile SIM cards. According to Post and Telecommunications Regulatory Authority of Zimbabwe (POTRAZ), statistics for mobile subscribers for the fourth quarter of 2012 indicate that the country's biggest mobile phone service provider, Econet Wireless Zimbabwe is still leading the pack with 8 014 055 registered subscribers. Effectively, the company has slightly above 63 percent of the market share. The figure represents a 14 percent increase from the 7,1 million connected users that the giant mobile telephone operator had at the beginning of October 2012. Telecel Zimbabwe comes second with a subscriber base of 2 582 154 from 1.8 million recorded a quarter earlier, claiming 20 percent market share. NetOne, the government owned telecoms company also increased its market share hitting an all-time high of 2 017 726, representing 16 percent market share. The three mobile operators now share a subscriber base of more than 12.6 million. The growth in mobile phone has seen a drop in the use of fixed landline telephones. TelOne, the only state fixed telephone operator, saw its customers drop by 60000 subscribers from 301650 in the last quarter of 2012.

³⁰ POTRAZ (February 2013) report on the state of the Internet and access in Zimbabwe

Table 6: Mobile telephone service providers' subscriber base³¹

Name of service provider	Subscriber base	Market share
Econet	8 014 055	63%
Telecel	2 582 154	20%
NetOne	2 017 726	16%

1.2.3 Media Standards/Codes of ethics

Media codes of conduct in Zimbabwe mirror the fragmented regulation of the sector. For example, while the law gives ZMC authority to regulate all media activity in Zimbabwe, during elections this role is given to the Zimbabwe Electoral Commission. Both regulatory boards have their own codes of ethics. Besides these statutory regulatory boards, there is also a code developed by the Voluntary Media Council of Zimbabwe (VMCZ), which is a self-regulatory body established by the media and civil society. In developing the code VMCZ widely consulted all media stakeholders across the private and public media divide. The code was then adopted in its annual general meeting held in 2011. However, despite the fact that all key media players and civil society organisations contributed to the formulation of the VMCZ code, the public media subsequently turned a blind eye to the code preferring to abide by their own internally crafted ethics charts. This left the private media the only ones openly subscribing to the VMCZ code, even though the council has adjudicated over cases involving the state media.

The VMCZ Code of Conduct, which has been widely publicised binds media practitioners to professional standards as well as undertakes to provide a remedy to those harmed by the media. It states as follows:³²

1. Interpretation

In this Code: "media institution" means any institution in Zimbabwe, whether in the public or private sector, that disseminates news to the public through the medium of a newspaper and/or other written and electronic publication or through electronic broadcasting "media practitioner" means a reporter, editor, radio and television programme producer and presenter employed by a media institution or a freelance reporter or columnist who is a stringer or writes columns for a media institution.

2. Application

This Code will govern the conduct of media practitioners and media institutions that have agreed to be bound by this Code and to submit to the disciplinary jurisdiction of the Voluntary Media Council of Zimbabwe.

3. General standards

(a) Media practitioners must maintain the highest professional and ethical standards. They must carry out their functions of informing, educating and entertaining the public professionally and responsibly.

(b) Media practitioners must defend the principle of the freedom of the media to freely access, collect and disseminate information and to publish comments and criticisms. They must oppose censorship, suppression of news and the dissemination of propaganda.

³¹ n19 above

³² VMCZ Code of Conduct, source; <http://vmcz.co.zw/index.php/vmcz-news/151-code-of-conduct-for-zimbabwe-media-practioners> (accessed 1 October 2013).

4. Accuracy and fairness

(a) Media practitioners and media institutions must report and interpret the news with scrupulous honesty and must take all reasonable steps to ensure that they disseminate accurate information and that they depict events fairly and without distortions.

(b) Media practitioners and media institutions must never publish information that they know to be false or maliciously make unfounded allegations about others that are intended to harm their reputations.

(c) When compiling reports media practitioners must check their facts and the editors and publishers of newspapers and other media must take proper care not to publish inaccurate material. Before a media institution publishes a report, the reporter and the editor must ensure that all the steps that a reasonable, competent media practitioner would take to check its accuracy have in fact been taken.

(d) Special care must be taken to check the accuracy of stories that may cause harm to individuals or organisations or to the public interest. Before publishing a story of alleged wrongdoing, all reasonable steps must be taken to ascertain the response of the alleged wrongdoer to the allegations. Any response from that person must be published together with the report setting out the allegations where possible.

(e) Media institutions must endeavour to provide full, fair and balanced reports of events and must not suppress essential information pertaining to those events. They must not distort information by exaggeration, by giving only one side of a story, by placing improper emphasis on one aspect of a story, by reporting the facts out of the context in which they occurred or by suppressing relevant available facts. They must avoid using misleading headlines or billboard postings.

5. Correction of inaccuracy or distortion

(a) If a media institution discovers that it has published a report containing a significant inaccuracy or distortion of the facts, it must publish a correction at the earliest possible opportunity and with comparable prominence.

(b) If a media institution discovers that it has published an erroneous report that has caused harm to the reputation of a person or institution reputation, it must publish an apology promptly and with due prominence.

(c) A media institution must report fairly and accurately the outcome of an action for defamation against it.

6. Right of reply

Where a person or organisation believes that a media report contains inaccurate information or has unfairly criticised the person or organisation, the media institution concerned must give the person or organisation a fair opportunity to reply so as to enable that person or organisation to correct any inaccuracies and to respond to the criticism.

7. Comment

(a) A clear separation should be made between comment and opinion.

(b) A comment or expression of opinion must be a genuine and honest comment or expression of opinion relating to established fact.

(c) Comment or conjecture must not be presented in such a way as to create the impression that it is established fact.

8. Bribes and inducements

Media practitioners and media institutions must not publish or suppress a report or omit or alter vital facts in that report in return for payment of money or for any other gift or reward.

9. Pressure or influence

Media practitioners and media institutions must not suppress or distort information which the public has a right to know because of pressure or influence from their advertisers or others who have a corporate, political or advocacy interest in the media institution concerned.

10. Hatred or violence

(a) Media practitioners and media institutions must not publish material that is intended or is likely to engender hostility or hatred towards persons on the grounds of their race, ethnic origin, nationality, gender, sexual orientation, physical disability, religion or political affiliation.

(b) Media institutions must take utmost care to avoid contributing to the spread of ethnic hatred or political violence.

11. Reporting of elections

(a) Media practitioners and media institutions must report on elections in a fair and balanced manner.

(b) Before reporting a damaging allegation made against a candidate or a political party, a media practitioner should obtain, wherever possible, a comment from the candidate or party against whom the allegation has been made especially where the allegation has been made by an opposing candidate or an opposing political party.

(c) A media practitioner or media institution must not accept any gift, reward or inducement from a politician or candidate.

(d) As far as possible, a media practitioner or media institution should report the views of candidates and political parties directly and in their own words, rather than as they are described by others.

(e) A journalist must take care in reporting the findings of opinion polls. Any report should wherever possible include details about the methodology used in conducting the survey and by whom it was conducted.

12. Reporting of police investigations and criminal court cases

(a) In our law a person is presumed to be innocent until proven guilty in a court of law. The media must therefore refrain from publishing articles prejudging the outcome in criminal cases or seeking to influence the outcome of the cases.

(b) Media institutions are entitled to inform the public about the arrest of suspects by the police and the trial of persons accused of crimes. They should not, however, publish the names of suspects until the police have filed formal charges against them, unless it is in the public interest to do so before formal criminal charges are laid.

(c) Where a media institution has begun to report a criminal case, it must follow up and report subsequent developments in the case. For example, it is grossly unfair to report that a person has been charged with murder and then fail to report that the person was acquitted. The report of the subsequent developments must be given due prominence.

13. Privacy

(a) It is normally wrong for a media practitioner to intrude into and to report upon a person's private life without his or her consent.

(b) Reporting on a person's private life can only be justified when it is in the public interest to do so. This would include;

(i) detecting or exposing criminal conduct;

- (ii) detecting or exposing seriously anti-social conduct;
 - (iii) protecting public health and safety;
 - (iv) preventing the public from being misled by some statement or action of that individual, such as where a person is doing something in private which he or she is publicly condemning.
- (c) Media practitioners may probe and publish details about the private moral behaviour of a public official where this conduct has a bearing upon his or her suitability as a public official.

14. Intrusions into grief or shock

- (a) In cases involving personal grief or shock, enquiries should be carried out and approaches made with sympathy and tact.
- (b) Media practitioners or photographers making enquiries at hospitals or similar institutions should normally identify themselves to a responsible official and obtain permission before entering non-public areas.

15. Interviewing or photographing children

- (a) Media practitioners should not interview or photograph children under the age of sixteen in the absence of, or without the consent of, a parent or an adult who is responsible for the children.
- (b) In interviewing and photographing children in difficult circumstances or with disabilities, special sensitivity and sympathy must be used.
- (c) Children should not be approached or photographed while at school, creche or similar institution without the permission of the appropriate authorities.

16. Children in criminal cases

Media institutions must not publish the names of any person under sixteen arrested by the police or tried in the criminal courts.

17. Victims of crime

Media institutions must not identify victims of sexual assaults or publish material likely to contribute to such identification unless the victim has consented to such publication or the law authorised them to do so.

18. Innocent relatives and friends

Media institutions should generally avoid identifying relatives or friends of persons convicted or accused of crime unless the reference to them is necessary for the full, fair and accurate reporting of the crime or the legal proceedings.

19. Surreptitious gathering of information

- (a) Media practitioners should use open methods of gathering information in which they clearly identify themselves as media practitioners. Generally they should not obtain or seek to obtain information or pictures through surreptitious methods such as misrepresentation, deception, subterfuge or undercover techniques.
- (b) Surreptitious methods of information gathering may only be used where open methods have failed to yield information in what is public interest. These methods may thus be employed where, for example, they will help to detect or expose criminal activity or will bring to light information that will protect the public against serious threats to public health or safety.

20. National security

(a) Media institutions must not prejudice the legitimate national security interests of Zimbabwe and place at risk members of the Defence Forces who are on active military duty.

(b) This provision does not prevent the media from exposing corruption in security or defence agencies or from commenting upon levels of expenditure on defence.

21. Plagiarism

Media practitioners must not engage in plagiarism. Plagiarism consists of making use of another person's words, pictures or ideas without permission and without proper acknowledgement and attribution of the source of those words, pictures or ideas.

22. Protection of sources

(a) Where a person has agreed to supply information only on condition that his or her identity remains confidential and the media practitioner agrees to this condition, the media practitioner must respect this undertaking and refuse to reveal the identity of the source.

(b) However, the media practitioner may tell the source that his or her identity might have to be revealed if it becomes clear in court that this information is needed to prevent or expose serious criminal conduct.

To handle public complaints and adjudicate over them, the VMCZ has established a Media Complaints Committee (MCC). The MCC considers a complaint by any individual and/or institution concerning possible breach/es of the Code by any media practitioner, media institution, media owner or publisher in Zimbabwe, whether a member of the Voluntary Media Council of Zimbabwe or not.³³ Where a media practitioner, media house or owner has agreed to be bound by the Code and they have submitted themselves to the adjudication of the MCC, the findings will be final and binding. The MCC puts more emphasis on the need for amicable resolution of matters between the aggrieved party and the media house/owner before they can be brought to it. However, if the parties disagree on the resolution of the matter, the complainant can then approach the MCC within 30 days of the alleged violation of the Code. The complaint form should have the following details:

- the name of the complainant;
- her/his/its full contact details;
- the name of the media practitioner, media institution, media owner or publisher against whom the complaint is directed;
- the date/s of publication and/or broadcast;
- the page number of the publication, together with the edition (in the case of a major metropolitan newspapers), or the time of broadcast;
- the main points of complaint;
- the provision/s of the Code which is/are alleged to have been violated.

Enclosed with the complaint form should be cuttings or clear photocopy or a recording of the material which is alleged to have violated the Code. The complaint is then sent to the VMCZ Executive Director by post, facsimile or electronic mail. In instances where the complaint is lodged more than 30 days of the violation of the Code, the complainant must give reasons for the delays in reporting and the Executive Director will use their discretion on whether to accept or reject the complaint.

And since the procedure is designed to ensure an affordable and amicable means to seek redress for violations of the Code, the MCC does not accept legal representation of complainants or the attendance of

³³VMCZ complaints procedure. Source: <http://vmcz.co.zw/index.php/complaints-procedure>. (Accessed 5 November 2013).

any lawyer in its complaints proceedings. However, there are exemptions to cases where the legal practitioner is representing a child complainant.

Among a host of functions conferred to the ZMC under chapter 249 of the new constitution, the regulatory board is supposed:

- to promote and enforce good practices and ethics in the media;
- to monitor broadcasting in the public interest and, in particular, to ensure fairness and diversity of views broadly representing Zimbabwean society;
- to encourage the formulation of codes of conduct for persons employed in the media and, where no such code exists, to formulate and enforce one;
- to receive and consider complaints from the public and, where appropriate, to take appropriate action against journalists and other persons employed in the media or broadcasting who are found to have breached any law or any code of conduct applicable to them;

Under AIPPA, which the ZMC is using to regulate the media, the above stated functions are delegated to the commission's subordinate arm the Media Council of Zimbabwe. It was not until 2012 that the Council was finally established to formulate a code of conduct and adjudicate over complaints relating to media conduct. But despite this development the Council suffered a credibility crisis from the onset as the majority of key media stakeholders refused to take part in its formation, forcing the ZMC to appoint less known figures to the council just to fulfil its legal obligations. One of the key reasons media stakeholders snubbed ZMC was that the council was another bureaucratic layer meant to bolster statutory regulation, which was antithetical to the principle of self-regulation the media preferred. The Council is still in the process of drafting its code of conduct.

Another set of code of conduct was developed by the Zimbabwe Electoral Commission (ZEC) to regulate and guide media conduct during elections. According to ZEC, the code was developed in consultations with some editors from the mainstream media in the country.³⁴ However, despite this, the media have disowned the code on the basis that it was simply imposed on them without requisite stakeholder consultations. Besides, there has been little knowledge of the code as ZEC has failed to conduct publicity campaigns on the provisions of the code, which as journalists have pointed out is yearning for thorough revision to align it with regional benchmarks.³⁵

Despite all the codes of conduct that exist, some crafted by the media houses themselves as exemplified by the establishment of an internal Ombudsman by the Alpha Media Holdings, there is general consensus that journalism in Zimbabwe is going down an unethical path.³⁶ Various reasons have been proffered for the decline in journalism standards, which has dented the credibility of the media. These include state interference in media activity; poor working conditions; absence of moral and thought leadership; political polarisation of society and the emergence of the new media.³⁷

³⁴ ZEC spokesman ShupikaiMashereni presenting a paper on the role of the EMB to Zimbabwean journalists at a workshop on Media and Reporting Elections held in Nyanga, Zimbabwe as a first step to publicise and domesticate the SADC Guidelines on Reporting Elections adopted by civil society, EMBs and the media in South Africa September 2012. The meeting was organised by MISA-Zimbabwe and Fredrick Ebert Stiftung.

³⁵ Journalists' observations (n18 above)

³⁶ VMCZ report (August 2013) The State of journalism ethics in Zimbabwe,

³⁷ VMCZ report (n20 above).

Section Two: Overview of legislation that criminalises expression

2.1 Overview of laws in place

Since independence in 1980, Zimbabwe has always enshrined freedom of expression in the constitution. Both the old Lancaster House constitution and the new constitution explicitly guarantee this civil liberty. However, despite the constitutional recognition of the centrality of freedom of expression, the country inherited as well as enacted laws that either threaten the full enjoyment or completely take away that right. The increased use of the laws to erode free expression was witnessed post 2000 following rising political contestation between the ruling ZANU PF and the MDC. However, the law that has been used the most to criminalise expression in Zimbabwe is the Criminal Law (Codification and Reform) Act.

This law was enacted in June 2005 to consolidate and reform the common criminal law of Zimbabwe in conformity with the fundamental principles of the constitution as well as set out concise proscriptions, punishments and defences that could be raised to criminal charges. Since its promulgation, the law has become the most used instrument to restrict freedom of expression among journalists and ordinary citizens. All the provisions that relate to subverting constitutional government, criminal defamation, criminal insult and publication of falsehoods, among other undemocratic provisions are found within this Act. It criminalises:

- (i) Breach of peace
- (ii) Causing disaffection among Police Force or Defence Forces
- (iii) Publishing or communicating false statements prejudicial to the state
- (iv) Actions or communication of messages that threaten peace and public violence
- (v) Undermining authority of or insulting President
- (vi) Insult
- (vii) Criminal defamation
- (viii) Undermining of police authority

Other laws that contain provisions, which also grossly erode the right to freedom of expression include:

2.1.1 Access to Information and Protection of Privacy Act [AIPPA]

The law is anchored on two pillars. These include procedural steps in accessing information held by public boards and regulating media activity and penalties for offenders. Although the law was amended under Amendment Act 20 of 2007, sections that criminalise the practice of journalism and by extension freedom of expression remained intact.

2.1.2 Official Secrets Act

This is an old colonial law initially promulgated in February 1970 to prohibit the obtaining and disclosure of information or official secrets deemed prejudicial to the safety or interests of Zimbabwe.

2.1.3 Public Order and Security Act

This is a relic of the colonial Law and order Maintenance Act, which was repackaged and renamed to provide for the maintenance of public order and security in Zimbabwe. Although the law is cast as aimed at promoting public security it has far reaching effects on Zimbabweans' fundamental freedoms of expression, movement and assembly.

2.1.4 Censorship and Entertainment Controls Act

The Act was enacted in December 1967 to regulate and control public exhibition, importation, possession and dissemination of undesirable artistic material, publications, pictures, statues and records in the interests of safety.

2.2 Detailed description of each law and whether and how they have been used

2.2.1 Criminal Law (Codification and Reform) Act (CODE)

Causing disaffection among Police Force or Defence Forces

Section 30 of the CODE stipulates:

If any person induces, or attempts to induce, or does any act with the intention or realising that there is a real risk or possibility of inducing or causing any member of the Police Force or Defence Forces to withhold his or her services, loyalty or allegiance or to commit breaches of discipline, he or she shall be guilty of causing disaffection among the Police Force or Defence Forces and liable to a fine not exceeding level seven or imprisonment for a period not exceeding two years or both.

This provision can be used against journalist or members of the public whose comments or statements are deemed to cause disaffection among members of the police or army. This includes seemingly harmless comments about the welfare of members of the security force, especially as it relates to their unfair treatment by the state. There are no precise definitions of what constitutes inducing a police officer or a member of the army to withhold their allegiance. Security agents are part of the state and their conduct is clearly of public interest and the media is duty bound to subject them to examination. Principle 10 of the Global Principles on National Security and the Right to Information (Tshwane Principles) states as much. It stipulates that unless for exceptional circumstances, information that is sufficient to enable the public to understand security sector, including internal accountability mechanisms and the names of the officials who head such authorities, among other pieces of information, is of public interest and their disclosure should never be punished.³⁸

Publishing or communicating false statements prejudicial to the state

Section 31 states:

Any person who, whether inside or outside Zimbabwe—

- (a) publishes or communicates to any other person a statement which is wholly or materially false with the intention or realising that there is a real risk or possibility of—
 - (i) inciting or promoting public disorder or public violence or endangering public safety; or
 - (ii) adversely affecting the defence or economic interests of Zimbabwe; or
 - (iii) undermining public confidence in a law enforcement agency, the Prison Service or the Defence Forces of Zimbabwe; or
 - (iv) interfering with, disrupting or interrupting any essential service;

³⁸Global Principles on National Security and the Right to Information were launched on 12 June 2013 in Tshwane South Africa by 22 organisations that included five academic centres. The Principles were developed to provide guidance to those engaged in drafting, revising or implementing laws or provisions relating to the state's authority to withhold information on national security grounds or to punish the disclosure of such information. They are based on international and regional law and standards.

shall, whether or not the publication or communication results in a consequence referred to in subparagraph (i), (ii), (iii) or (iv); or

(b) with or without the intention or realisation referred to in paragraph (a), publishes or communicates to any other person a statement which is wholly or materially false and which—

(i) he or she knows to be false; or

(ii) he or she does not have reasonable grounds for believing to be true;

shall, if the publication or communication of the statement—

A. promotes public disorder or public violence or endangers public safety; or

B. adversely affects the defence or economic interests of Zimbabwe; or

C. undermines public confidence in a law enforcement agency, the Prison Service or the Defence Forces of Zimbabwe; or

D. interferes with, disrupts or interrupts any essential service;

be guilty of publishing or communicating a false statement prejudicial to the state and liable to a fine up to or exceeding level fourteen or imprisonment for a period not exceeding twenty years or both.

This provision was originally contained as section 15 of POSA (discussed below). However, it was repealed from that Act and merged with section 80 of AIPPA to make up section 31 of the CODE. This followed a ruling by the ACHPR that found section 80 of AIPPA to be undemocratic and antithetical to the African Charter on Human and People's Rights. In its ruling the ACHPR noted that section 80, which dealt with publication of falsehoods, imposed an excessive burden on journalists and restricted their effective exercise to freedom of expression. But apart from perpetuating the erosion of such liberties by retaining the provision under a different law, the state also introduced a heavier penalty for the breach of the provision making it even more lethal. It replaced the maximum five year imprisonment stipulated under the old AIPPA provision with a twenty year jail sentence. Such heavy penalties send a chilling effect on journalists, who are then deterred from reporting certain issues for fear of long jail sentences. Zimbabwe has other civil remedies that can be pursued should the state feel it has been prejudiced by a news report. For instance, the publisher can be asked to retract and give the retraction the same prominence as the original story. This principle is grounded on the fact that no newspaper or media house would want to deliberately churn out falsehoods and then be seen to be retracting its stories as that erodes their credibility and diminishes their readers' confidence in that media's reliability as a source of credible information. More importantly, there has to be a clear and precise definition of what amounts to threats or prejudicial to state interests. Without such clarity, the provision will remain susceptible to abuse aimed at blocking matters of public interest from flowing into the public domain on the pretext of protecting state interests.

Undermining authority of or insulting President

Like section 31 of the CODE cited above, section 33 is another transplant from the Public Order and Security Act. Subsection 2 of the section stipulates:

(2) Any person who publicly, unlawfully and intentionally—

(a) makes any statement about or concerning the President or an acting President with the knowledge or realising that there is a real risk or possibility that the statement is false and that it may—

(i) engender feelings of hostility towards; or

(ii) cause hatred, contempt or ridicule of;

the President or an acting President, whether in person or in respect of the President's office; or

(b) makes any abusive, indecent or obscene statement about or concerning the President or an acting President, whether in respect of the President personally or the President's office;

shall be guilty of undermining the authority of or insulting the President and liable to a fine not exceeding level six or imprisonment for a period not exceeding one year or both.³⁹

Section 33 (1) interprets the meaning of "publicly" and "statement" as thus:

"publicly", in relation to making a statement, means—

(a) making the statement in a public place or any place to which the public or any section of the public have access;

(b) publishing it in any printed or electronic medium for reception by the public;

"statement" includes any act or gesture.

The inclusion of this provision elicited sharp criticism from the Parliamentary Legal Committee which reviews bills to assess their conformity to the country's constitution before they are debated and passed into law. The committee noted that criminalising comments on the office of the President was a violation of the country's constitution. The committee stated:

It is your committee's finding that, given the nature of the Presidency in Zimbabwe, which is a public elected political office, to ring-fence that office against criticism amounts to derogation from fundamental freedoms protected by the Constitution, particularly with respect to the freedom of expression. Your Committee finds that an abusive statement should not be criminalised in the political context; it goes with the nature of the office. Indecent and obscene statements can be properly criminalised. Accordingly, we find clause 33(2)(b) to the extent that it criminalizes "abusive" statements to be unconstitutional.⁴⁰

Participating in gathering with intent to promote public violence, breaches of the peace or bigotry

Section 37 of the CODE makes it a criminal offence for any individual to perform any action or communicate messages that are deemed to threaten peace and promote public violence. It states:

(1) Any person who—

(a) actstogether with one or more other persons present with him or her in any place or at any meeting with the intention or realising that there is a real risk or possibility of forcibly—

(i) disturbing the peace, security or order of the public or any section of the public; or

(ii) invading the rights of other people;

or

(b) acting together with one or more other persons present with him or her in any place or at any meeting performs any action, utters any words or distributes or displays any writing, sign or other visible representation that is obscene, threatening, abusive or insulting, intending thereby to provoke a breach of the peace or realising that there is a risk or possibility that a breach of the peace may be provoked; or

(c) actingtogether with one or more other persons present with him or her in any place or at any meeting utters any words or distributes or displays any writing, sign or other visible representation—

³⁹Level six fine is equivalent to US\$300.

⁴⁰Parliamentary Legal Committee (December 2004) report on Criminal Law Codification and Reform Bill, VeritasBillwatch 42

(i) with the intention to engender, promote or expose to hatred, contempt or ridicule any group, section or class of persons in Zimbabwe solely on account of the race, tribe, nationality, place of origin, national or ethnic origin, colour, religion or gender of such group, section or class of persons; or

(ii) realising that there is a risk or possibility that such behaviour might have an effect referred to in subparagraph (i);

shall be guilty of participating in a gathering with intent to promote public violence, a breach of the peace or bigotry, as the case may be, and be liable to a fine not exceeding level ten or imprisonment for a period not exceeding five years or both.⁴¹

(2) The crime of participating in a gathering with intent to promote public violence, a breach of the peace or bigotry is committed whether the action constituting it is spontaneous or planned in advance, and whether the place or meeting where it occurred is public or private.

(3) For the avoidance of doubt it is declared that where a person would be liable for contravening—

(a) paragraph (a) or (b); or

(b) paragraph (c);

of subsection (1), but for the fact that the person acted alone in a public place, the competent charge is disorderly conduct in a public place or causing offence to persons of a particular race, tribe, place of origin, colour, creed or religion, as the case may be, and not a contravention of a provision referred to in paragraph (a) or (b).

This is yet another provision in the CODE that criminalises expression on grounds of protecting public order. Similar provisions are also found in POSA discussed below. While it is the duty of every government to ensure peace and protect its citizens, there is no clear definition of what constitutes breach of peace. The provision is over-broad and lives the definition at the discretion of law enforcement agents. That is problematic as the law can be used to curtail citizens' right to express themselves as well as assemble to discuss matters pertinent to their livelihoods, which liberties are guaranteed in Chapter 4 of the country's constitution, African Charter on Human and People's rights and the ICCPR.

Criminal insult

The CODE provides for offences of criminal insult, which also threatens the right to freedom of expression. According to section 95 a crime of criminal insult is committed when:

(1) Any person who, by words or conduct—

(a) seriously impairs the dignity of another person; or

(b) seriously invades the privacy of another person;

shall be guilty of criminal insult if he or she intended his or her words or conduct to have an effect referred to in paragraph (a) or (b) or if he or she realised that there was a real risk or possibility that his or her words or conduct might have such an effect, and shall be liable to a fine not exceeding level six or imprisonment for a period not exceeding one year or both.

(2) In deciding whether an impairment of dignity or invasion of privacy is sufficiently serious to constitute the crime of criminal insult, a court shall take into account the following factors in addition to any others that are relevant in the particular case—

(a) the nature of the words or conduct;

⁴¹ Level 10 fine is equivalent to \$700.

- (b) the extent to which the words were repeated or the conduct was persisted in, as the case may be;
- (c) the age and sex of the person whose dignity was impaired or privacy was invaded;
- (d) any previous relationship between the parties;
- (e) the degree of offence caused to the person whose dignity was impaired or privacy was invaded by the words or conduct.

(3) In order to establish a charge of criminal insult based upon an impairment of dignity, it shall be necessary to prove that the complainant felt insulted or degraded as a result of the words or conduct that form the subject of the charge:

Provided that, where the complainant was, at the time of the commission of the crime—

- (a) a child or mentally disordered or intellectually handicapped, as defined in section 2 of the Mental Health Act [*Chapter 15:12*] (No. 15 of 1996); or
- (b) unable, through physical disability, to hear the words or see the conduct, as the case may be;

he or she shall be deemed to have felt insulted or degraded if a reasonable person would have felt insulted or degraded by the words or conduct concerned.

(4) In order to establish a charge of criminal insult based upon an invasion of privacy, in that the accused observed the complainant while the complainant was in a state of partial or complete undress, it shall not be necessary to prove that the complainant was aware of the invasion of privacy when it took place, if it is proved that when the complainant did become aware of it he or she felt insulted or degraded by it.

(5) It shall be a defence to a charge of criminal insult based upon an invasion of privacy for the person charged to prove that his or her conduct was motivated solely by the desire to obtain evidence of the commission of adultery by his or her spouse and that—

- (a) he or she had reasonable grounds for believing that his or her spouse was committing or about to commit adultery; and
- (b) he or she had reasonable grounds for believing that he or she was not invading the privacy of innocent persons; and
- (c) the invasion of privacy that occurred was no more than was reasonably necessary for the purpose of obtaining evidence of his or her spouse's adultery.

(6) The defence referred to in subsection (5) shall avail a person who is—

- (a) licensed as a private investigator in terms of the Private Investigators and Security Guards (Control) Act [*Chapter 27:10*]; and
- (b) engaged by a person to obtain evidence of the commission of adultery by the spouse of that person.

(7) For the avoidance of doubt it is declared that no person in Zimbabwe is devoid of dignity, whatever his or her occupation or mode of life, and that the dignity of all persons is entitled to the protection of the law.

Criminal defamation

One of the unsavoury provisions of the CODE is the criminalisation of defamation under section 96. While other democracies have taken steps to decriminalise expression, the section states:

- (1) Any person who, intending to harm the reputation of another person, publishes a statement which—

(a) when he or she published it, he or she knew was false in a material particular or realised that there was a real risk or possibility that it might be false in a material particular; and

(b) causes serious harm to the reputation of that other person or creates a real risk or possibility of causing serious harm to that other person's reputation;

shall be guilty of criminal defamation and liable to a fine up to or exceeding level fourteen or imprisonment for a period not exceeding two years or both.

In determining if the statement has caused harm to a person's reputation, which is sufficient to constitute a crime of criminal defamation, subsections 2, 3, 4 state the following:

(2) In deciding whether the publication of a statement has caused harm to a person's reputation that is sufficiently serious to constitute the crime of criminal defamation, a court shall take into account the following factors in addition to any others that are relevant to the particular case—

(a) the extent to which the accused has persisted with the allegations made in the statement;

(b) the extravagance of any allegations made in the statement;

(c) the nature and extent of publication of the statement;

(d) whether and to what extent the interests of the State or any community have been detrimentally affected by the publication.

(3) Subject to subsection (4), a person accused of criminal defamation arising out of the publication of a statement shall be entitled to avail himself or herself of any defence that would be available to him or her in civil proceedings for defamation arising out of the same publication of the same statement.

(4) If it is proved in a prosecution for criminal defamation that the defamatory statement was made known to any person, it shall be presumed, unless the contrary is proved, that the person understood its defamatory significance.

The undemocratic nature of this provision is its granting of authority to the State to pass harsh sentences, including imprisonment, against citizens for simply expressing themselves. This on its own sends a chilling effect on citizens in the exercise of their right to freely express themselves on matters that concern them. Not only does it affect ordinary citizens, but it also acts as an unwarranted deterrent to media practitioners in their duty to scrutinise those in office and foster accountability. The problem is not only related to harsh sentences. As Article XIX notes:

Even if the maximum penalties are low, criminal defamation can still cast a long shadow: individuals prosecuted under it face the possibility of being arrested by the police, held in pre-trial detention and subjected to a criminal trial. Even if the court imposes only a minor fine, they may be saddled with a criminal record and face the social stigma associated with this.⁴²

The law can thus never be justifiable in a democratic society such as Zimbabwe, where civil remedies are available for those that feel aggrieved by one's expression. Further notes Article XIX:

The clear view of both international jurisprudence and of the international bodies that have considered the matter is that the imposition of custodial sanctions through criminal defamation laws is disproportionate and unnecessary to protect individual reputations, particularly when alternative measures – including apologies, corrections and the use of the right of reply – can effectively address any harm to reputation without exerting a chilling effect on freedom of expression.⁴³

⁴² Article XIX (November 2009) Brief note on Criminal Defamation

⁴³ n29 above

The Minister of Information, Media and Broadcasting Services Jonathan Moyo appeared to concur with this observation, when he announced that government will soon strike off criminal defamation from the country's statutes.⁴⁴ He said:

Although we are not the authority with the power to interpret the law, we nevertheless believe that the constitutionality of criminal defamation under our country's new constitutional dispensation is questionable, especially given the inherent vagueness of the criteria which are supposed to be used to decide whether the defamation was sufficiently serious to justify the invocation of the criminal sanction.

He argued that while there have been arguments for the retention of criminal defamation hinged on the need to protect government from scurrilous attacks deliberately designed to stir up public opinion as well as the need to maintain decency in public discourse and to prevent corruption of public peace law and order;

...The justifications should also be balanced with the fact that there's a strong view, especially from media practitioners, that criminal defamation has been abused by some powerful or vested and well connected political interests in society who have taken advantage of the wide scope of criminal defamation to either advance personal interest or seek to fix perceived personal enemies under the convenient but false if not corrupt cover of the State.

As a solution to decriminalising defamation he proposed:

We should enact needful legislation to get the courts to take defamation more seriously in civil litigation in line with our new Constitution which entrenches the protection of personal reputation and the inherent dignity and worth of a human being. Equally important, there should be statutory measures to prompt the court to ward exemplary damages in civil litigation involving criminal defamation. But make no mistake the time for criminal defamation to go has come.

Undermining of police authority

Section 177 of the CODE criminalises passing of comments that are deemed likely to undermine members of law enforcement agents. It stipulates:

Any person who—

(a) in a public place and in the presence of—

(i) a police officer who is present on duty; or

(ii) a police officer who is off duty, knowing that he or she is a police officer or realising that there is a risk or possibility that he or she is a police officer;

makes any statement that is false in a material particular or does any act or thing whatsoever;

or

(b) in a public place and whether or not in the presence of a police officer referred to in subparagraph (i) or (ii) of paragraph (a), makes any statement that is false in a material particular or does any act or thing whatsoever;

with the intention or realising that there is a risk or possibility of engendering feelings of hostility towards such officer or the Police Force or exposing such officer or the Police Force to contempt, ridicule or disesteem, shall be guilty of undermining police authority and liable to a fine not exceeding level seven or imprisonment for a period not exceeding two years or both.

⁴⁴The *Sunday Mail* article Criminal defamation to go: Prof Moyo Minister published on 27 October 2013. See http://www.sundaymail.co.zw/index.php?option=com_content&id=39259:criminal-defamation-to-go-prof-moyo#.UndcWnBU9Xc (accessed 2 November 2013)

In essence, any individual who makes comments about the conduct of the police or a member of the police force risks being imprisoned should their expression be viewed as unpalatable by those in their presence. Most importantly, the presence of the officer(s) referred to is immaterial at the time the comments are made. This provision applies to ordinary members of the public and the media.⁴⁵ Such a provision grossly erodes the public's right to hold law enforcement agents to account and disables the media to robustly scrutinise the application of rule of law in the country.

Other laws that impinge on freedom of expression

2.2.1 AIPPA

Although the Zimbabwean media has always faced challenges with regards the operating environment since the country's independence, the enactment of AIPPA in March 2002 worsened the situation.⁴⁶ While the Act purports to facilitate the enjoyment of citizens' right to access to information, it imposes cumbersome procedures for accessing information, which makes it practically impossible for timely access. However, provisions that are relevant to this research, which criminalise expression are as follows:

Abuse of journalistic privilege

Section 80 of the Act criminalises abuse of journalism privilege. It states that a journalist may be deemed to have abused their privilege by publishing:

- (a) information which he or she intentionally or recklessly falsified in a manner which—
 - (i) threatens the interests of defence, public safety, public order, the economic interests of the State, public morality or public health; or
 - (ii) is injurious to the reputation, rights and freedoms of other persons;
 - or
 - (b) information which he or she maliciously or fraudulently fabricated; or
 - (c) any statement—
 - (i) threatening the interests of defence, public safety, public order, the economic interests of the State, public morality or public health; or
 - (ii) injurious to the reputation, rights and freedoms of other persons;
- in the following circumstances—
- A. knowing the statement to be false or without having reasonable grounds for believing it to be true; and
 - B. recklessly, or with malicious or fraudulent intent, representing the statement as a true statement;

⁴⁵*The Daily News* report (7/8/2013), MDC activist arrested for "cops stole vote" slur: the newspaper reported an incident exposing the harsh nature of section 177 of the CODE. It reported that a man in the Zimbabwean village of Chivi for telling police officers he met in a shop that they will wallow in poverty and hunger and would run short of ARVs and uniforms following ZANU PF and President Mugabe's victory in the July 31 2013 elections. He was immediately arrested and charged under section 177 of the CODE as well as section 88 of the Electoral Act for allegedly obstructing the election process. He was remanded in custody awaiting bail application.

⁴⁶ MISA Zimbabwe Media Law Handbook (May 2010) An Analysis of Amendments Made to Media Laws in Zimbabwe Since 2005: Their Impact on Access To Information, Freedom of Expression and Media Freedom.

According to the law any journalist charged with the above shall be guilty of an offence and liable to a fine not exceeding level seven or to imprisonment for a period not exceeding two years.⁴⁷

It is against this background that some members of ZANU PF, the proponent of the law expressed concern at the undemocratic nature of the law when it was presented in Parliament. For example, the late head of the Parliamentary Legal Committee, Dr Eddison Zvobgo, strongly condemned the law:

... this bill, in its original form was the most calculated and determined assault on our liberties guaranteed by the Constitution... what is worse, the bill was badly drafted in that several provisions were 'obscure, vague, overbroad in scope, ill-conceived and dangerous...'⁴⁸

With regards its impact on media freedom he added:

... freedom of expression is the same thing as "freedom of speech". The two phrases mean exactly the same thing. Ask yourself whether it is rational for a government in a democratic and free society to require registration, licences and ministerial certificates in order for people to speak. It is a sobering thought!⁴⁹

2.2.2 Official Secrets Act

This is one of the laws that post colonial Zimbabwe has retained since independence, 33 years ago. The Act seeks to prohibit the disclosure for any purpose prejudicial to the safety or interests of Zimbabwe of information which might be useful to an enemy; to make provision for the purpose of preventing persons from obtaining or disclosing official secrets in Zimbabwe; to prevent unauthorized persons from making sketches, plans or models of and to prevent trespass upon defence works, fortifications, military reserves and other prohibited places; and to provide for matters incidental to the foregoing.

Prohibition of communication of certain information

What is more critical to the exercise of freedom of expression is section 4 of the Act. It embargoes communication of a wide range of information held by government bodies. Those prohibited from disseminating or sharing such information include government officials, a person who holds or has held a contract made on behalf of the State or a contract the performance of which in whole or in part is carried out in a prohibited place; and a person who is or has been employed under a person who holds or has held such an office of contract.

Such persons are likely to commit a crime should they:

- (i) communicates such code, password, model, article, document or information to any person, other than a person to whom he is authorized to communicate it or a person to whom it is in the interests of Zimbabwe his duty to communicate it; or
- (ii) uses such information in any manner or for any purpose prejudicial to the safety or interests of Zimbabwe; or
- (iii) retains such model, article or document in his possession or under his control when he has no right to retain it or when it is contrary to his duty to retain it, or fails to comply with any directions issued by lawful authority with regard to the return or disposal thereof; or
- (iv) fails to take proper care of or so conducts himself as to endanger the safety of such model, article, document, code, password or information;

⁴⁷ Level 7 fine is equivalent to US\$400.

⁴⁸ Minutes of the ninth meeting of the Parliamentary Legal Committee held on Wednesday 23 January 2002 at 0930 hours in room 305.

⁴⁹ n 13 above

Upon conviction such individuals are liable to a fine of \$20000 or to imprisonment for a period not exceeding twenty years or to both such fine and such imprisonment.

A similar penalty is also slapped on any person who publishes or communicates model, article, document or information in their possession, which relates to military matters, security of Zimbabwe, maintenance of law and order or anybody established to assist in the preservation of security of Zimbabwe.

The Act does not only criminalise whistleblowers working for and within the State. It also criminalises receiving information leaked by state officials. Section 4(3) stipulates:

Any person who receives any secret official code or password or any model, article, document or information, knowing or having reasonable grounds to believe, at the time when he receives it, that the code, password, model, article, document or information is communicated to him in contravention of this Act, shall, unless he proves that the communication thereof to him was against his wish, be guilty of an offence and liable to a fine not exceeding twenty thousand dollars or to imprisonment for a period not exceeding twenty years or to both such fine and such imprisonment.

Section 8 prohibits communicating with 'foreign agents'. According to section 8(2) if any prosecution proves that one has been communicating with or attempted to communicate with a foreign agent in Zimbabwe or elsewhere, it shall, unless the contrary is proved, be presumed that he has for a purpose prejudicial to the safety or interests of Zimbabwe obtained or attempted to obtain information which is calculated to be or which might or is intended to be, directly or indirectly, useful to an enemy.

The Act provides for extra-territorial jurisdiction. According to Section 12 of the Act the law shall apply also in respect of any act which constitutes an offence in terms of this Act and is committed outside Zimbabwe by a person who is a citizen or resident of Zimbabwe. And as stated in section 12(3) in any proceedings for any offence referred to in the Act shall be presumed, unless the contrary is proved, that the person accused was at all times a citizen or resident of Zimbabwe.

While it is crucial that the state classifies sensitive information in the national interest, it is important that the definition of what constitutes such interest should be narrow and precise. This is to avoid the general abuse of the law to embargo information that is public interest from filtering into the public domain on the guise that the state was protecting national interest. For example, it is important that citizens are informed on Cabinet deliberations and policy direction which has a bearing on their livelihoods. Criminalising the communication or publication of all that transpires during government meetings is bound to insulate those elected into public office from robust public scrutiny and entrench unaccountability.

2.2.3 Public Order and Security Act (POSA)

This law is a public security Act, which was enacted to enforce public order and the maintenance of peace. However, it contains provisions that criminalise expression through demonstrations, procession and public gatherings.

Section 25 of the Act, for example, provides for conditions and procedures that a convener of a public gathering should abide by for them to assemble and express themselves. It states:

- (1) The convener shall not later than—
 - (a) seven days before the date on which a procession or public demonstration is to be held, give notice of the procession or public demonstration in writing signed by him or her to the regulating authority for the district in which the procession or public demonstration is to be held;
 - (b) five days before the date on which a public meeting is to be held, give notice of the public meeting in writing signed by him or her to the regulating authority for the district in which the public meeting is to be held:

Provided that—

- (i) if the convener is not able to reduce a proposed convening notice to writing a regulating authority shall at his or her request do it for him or her;
 - (ii) during an election period the period of notice referred to in paragraph (b) shall be three days.
- (2) The convening notice shall contain at least the following information—
- (a) the name, address and telephone and facsimile numbers, if any, of the convener and his or her deputy;
 - (b) the name of the organisation on whose behalf the gathering is convened or, if it is not so convened, a statement that it is convened by the convener;
 - (c) the purpose of the gathering;
 - (d) the time, duration and date of the gathering;
 - (e) the place where the gathering is to be held;
 - (f) the anticipated number of participants;
 - (g) the proposed number and, where possible, the names of the marshals who will be appointed by the convener, and how the marshals will be distinguished from the other participants in the gathering;
 - (h) in the case of a procession or public demonstration—
 - (i) the exact and complete route of the procession or public demonstration;
 - (ii) the time when and the place at which participants in the procession or public demonstration are to assemble, and the time when and the place from which the procession or public demonstration is to commence;
 - (iii) the time when and the place where the procession or public demonstration is to end and the participants are to disperse;
 - (iv) the manner in which the participants will be transported to the place of assembly and from the point of dispersal;
 - (v) the number and types of vehicles, if any, which are to form part of the procession;
 - (vi) if a petition or any other document is to be handed over to any person, the place where and the person to whom it is to be handed over.

Subsection 4 then stipulates:

If a gathering is cancelled or called off, the convener shall forthwith notify the regulating authority thereof and the notice given in terms of subsection (1) shall lapse.

Subsection 5 outlines the sanctions for breaching the provisions. It states:

Any person who knowingly fails to give notice of a gathering in terms of this section, shall be guilty of an offence and liable to a fine not exceeding level twelve or to imprisonment for a period not exceeding one year or to both such fine and such imprisonment.

Section 27 provides for temporary prohibition of holding processions or public demonstrations within particular police districts. Sub section 1 states:

If a regulating authority for any area believes on reasonable grounds that the powers conferred by section 26 will not be sufficient to prevent public disorder being occasioned by the holding of processions or public

demonstrations or any class thereof, he may issue an order prohibiting, for a specified period not exceeding one month, the holding of all public demonstrations or any class of public demonstrations in the area or part thereof concerned.

The prohibition is supposed to be publicised through a government Gazette, newspapers or other means that a regulating authority shall see fit.

According to section 27(5):

Any person who organises or assists in organising or takes part in or attends any procession or public demonstration held in contravention of an order under subsection (1) shall be guilty of an offence and liable to a fine not exceeding level six or to imprisonment for a period not exceeding one year or to both such fine and such imprisonment.

The law also bars processions and demonstration within prescribed distance of some public institutions unless permission has been granted by the respective body. According to section 27A;

(1) Subject to subsection (2), all gatherings within a radius of—

- (a) twenty metres of the vicinity of the Parliament;
- (b) one hundred metres of the vicinity of the Supreme Court, the High Court, a Magistrates Court or any other court;
- (c) one hundred metres of any protected place or area declared as such in terms of the Protected Areas and Places Act are prohibited.

(2) Subsection (1) does not apply to any gathering for which permission has, on written application to the Speaker of the House of Assembly, the Chief Justice, the Judge President or the responsible authority of a place referred to in subsection(1)(c), as the case may be, been granted in writing to the convener thereof:

Provided that the convener shall give prior notice of such gathering in writing, together with the appropriate permission attached thereto, to the regulating authority.

(3) For the avoidance of doubt it is declared that a “gathering” in subsection (1) does not refer to a gathering of any persons who are employed in, or concerned in any business conducted at, Parliament or a court or other place referred to in subsection (1).

While it is important for any government to ensure peace and public order as part of its obligations to protect its citizens, the definition of terms under the Act is broad to the extent of covering virtually pertinent congregations in which citizens could build consensus on the exercise of the liberties. According to the Act a public gathering is defined as a public meeting or public demonstration while a public demonstration means a procession, gathering or assembly in a public place of persons and additionally, or alternatively of vehicles where the gathering is in pursuit of a common purpose of demonstrating support for, or opposition to, any person, matter or thing, whether or not the gathering is spontaneous or is confined to persons who are members of a particular organisation, association or other body or to persons who have been invited to attend.

A public meeting is defined as any meeting of more than 15 persons in a public place or meeting which the public or any section of the public is permitted to attend, whether on payment or otherwise.

Although according to the law a public meeting does not include a meeting of any organ or structure of a political party or other organisation held in any private place whether or not is wholly or partly in the open and any public place that is not wholly open, the police have in the past abused the law to bar meetings or gatherings by parties and civil society organisations critical of government. They have often based their conduct on section 25 of the Act, which enjoins the convener of any gathering to first give notice to the

police before holding such an event. And though the Act does not give authorities powers to prohibit the holding of a public meeting or procession upon receipt of the notice, the police have often misinterpreted notifications for applications for permission to hold public events resulting in them selectively barring some processions or public meetings.

Such police conduct is illegal as the Act only grants them powers under section 27 to issue temporary prohibition of holding procession or public demonstrations within particular districts if they believe on reasonable grounds that there would be public disorder or demonstrations during a public meeting or procession.

Following the ruling by the ACHPR on the *Ijaz vs Government of Zimbabwe case*,⁵⁰ which found undemocratic the country's criminalisation of publication of statements prejudicial to the state, the government of Zimbabwe repealed provisions in POSA that hindered freedom of expression. As noted above, they then sneaked the provisions under the CODE. Resultantly, POSA no longer directly infringe on freedom of expression as was the case in its original state.

However, despite the amendments the recent of which was in January 2008, the law still poses threats to citizens' enjoyment of fundamental freedoms by curtailing their liberties to assembly and freedom of movement, protected under Chapter 4 of the new constitution as well as Article 21 of the ICCPR and Article 11 of the African Charter on Human and People's Rights.

2.2.4 Censorship and Entertainment Controls Act

The Act, which was crafted in 1967, seeks to regulate and control the public exhibition of films, the importation, production, dissemination and possession of undesirable or prohibited video and film material, publications, pictures, statues and records and the giving of public entertainments, to regulate theatres and like places of public entertainment in the interests of safety; and to provide for matters incidental to the foregoing.

To enforce provisions of the Act, the law establishes a Board of Censors under its Section 3. The functions of the Board are stipulated under section 4 as thus;

- (a) to examine any article or public entertainment submitted to it;
- (b) to make such inquiries as it may consider necessary in regard to any publication, picture, statue, record or public entertainment which is alleged to be or which the Board has reason to believe is of a nature contemplated in section seventeen;
- (c) to advise the Minister in regard to any matter arising out of the application of any provision of this Act which the Minister may refer to the Board;
- (d) to perform any other function assigned to it by this Act or any other enactment.

Section 13 of the Act, then gives authority to the censorship board to prohibit the importation, printing, publishing, manufacturing, making or producing, distributing, displaying, selling, offering or keeping for sale any publication, statue or record or publicly play any record which is undesirable or has been declared undesirable by the board.

It states:

- (1) No person shall—

⁵⁰ n 18 above

- (a) import, print, publish, manufacture, make or produce, distribute, display, exhibit or sell or offer or keep for sale any publication, picture, statue or record; or
- (b) publicly play any record;

which is undesirable or which has, under section *fourteen* or *fifteen*, been declared by the Board to be undesirable:

Provided that, where a person has imported such a publication, picture, statue or record, nothing in paragraph (a) shall prevent him from re-exporting it to the source from which he imported it or to such other place as the Board may approve.

Section 13(1a) outlines the sentence for the breach of the above. It states;

Any person who contravenes subsection (1) shall be guilty of an offence punishable by both a fine or a maximum imprisonment of two years or both fine and imprisonment.

The Act then defines what constitutes an undesirable material. Section 13(2) states:

A publication, picture, statue or record shall be deemed to be undesirable if it or any part thereof—

- (a) is indecent or obscene or is offensive or harmful to public morals; or
- (b) is likely to be contrary to the interests of defence, public safety, public order, the economic interests of the State or public health; or
- (c) discloses, with reference to any judicial proceedings—
 - (i) any matter which is indecent or obscene or is offensive or harmful to public morals or any indecent or obscene medical, surgical or physiological details the disclosure of which is likely to be offensive or harmful to public morals; or
 - (ii) for the dissolution or a declaration of nullity of a marriage or for judicial separation or for restitution of conjugal rights, any particulars other than—
 - A. the names and occupations of the parties and witnesses;
 - B. a concise statement of the allegations, defences and counter-allegations in support of which evidence has been given;
 - C. submissions on any point of law arising in the course of the proceedings, and the decision of the court thereon;
 - D. the judgment and the verdict of the court and any observations made by the judge in giving judgment.
- (3) Subparagraph (ii) of paragraph (c) of subsection (2) shall not be construed so as to permit the disclosure of anything contrary to subparagraph (i) of that paragraph.

However, according to section 13(4) such provisions do not apply to:

- (a) the printing of any pleading, transcript of evidence or other document for use in connection with any judicial proceedings or the communication thereof to persons concerned in the proceedings;
- (b) the printing, publishing or distribution of any notice or report in pursuance of the directions of any court;
- (c) any separate volume or part of any *bona fide* series of law reports which does not form part of any other publication and consists solely of reports of proceedings in any court;

- (d) any publication of a technical, scientific or professional nature *bona fide* intended for the advancement of or for use in any particular profession or branch of arts, literature or science;
- (e) any publication of a *bona fide* religious character.

According to section 14 of the Act, the censorship board has the sole mandate to determine the undesirability of the material. It states:

- (1) The Board shall have power to examine any publication, picture, statue or record and to declare whether or not it is, in the opinion of the Board, undesirable.
- (2) The Board may, if it considers it necessary or expedient in the public interest to do so, declare any publication, picture, statue or record which has been declared undesirable under subsection (1) or section 13 to be prohibited.
- (3) When the Board has given any decision under subsection (1) or (2) declaring any publication, picture, statue or record to be undesirable or prohibited, it shall, without delay, cause such decision to be made known by notice published in the *Gazette*.

Under the Act, the Censorship Board can ban the continued production of a publication, completely usurping the powers of the Zimbabwe Media Commission (ZMC), which is constitutionally granted such authority. According to section 15 of the Act, where four or more consecutive editions of any publication, which is published periodically have been declared undesirable by the Board and in its opinion the publication is likely to continue producing undesirable material in its subsequent editions; the Board may declare all editions of that publication subsequent to the date of the declaration to be undesirable.

Part 5 of the Act then proscribes the provision of public entertainment without prior Board approval. According to the law entertainment includes:

any stage play, tragedy, comedy, farce, opera, burlesque, interlude, melodrama, strip-tease, pantomime, dialogue, prologue, epilogue, concert, cabaret, circus or other dramatic or musical entertainment or any part thereof

According to section 16(6)(b) the Board shall not approve any public entertainment which in its opinion does not meet the standards of desirability as stated in the Act or when:

after consultation with the Secretary of the Ministry responsible for home affairs, is likely to be associated with breaches of the peace, disorderly or immoral behaviour or abuses relating to the consumption of alcohol or drugs.

Section 16(7) states that no person shall without Board approval perform in any public entertainment or give or permit the giving of any entertainment, which after having been approved by the Board has in any way been altered or modified. Sub-section 7(b) also prohibits performance in any public entertainment or giving or permitting the giving of any public entertainment in contravention of any condition imposed by the Board with regards the performance. Those found guilty are liable to a fine or a maximum imprisonment of one year or both jail term and a fine. Section 17 imposes a similar penalty for those that do artistic exhibitions that the Board would have deemed undesirable prior their display.

Given the overly broad and vague clauses noted above, the Act remains susceptible to arbitrary application on the guise of protecting public morality and national interest. There is no precision in the definition of issues that form the basis on which the Censorship Board prohibits communication or public display of an opinion. For instance, there are no clearly defined parameters for what constitutes threats to interests of defence, public order, economic interest of the State or public health. Nor is there clarity what

amounts to obscene material, leaving the law open to abuse in eroding citizens' right to express themselves through various forms of communication including art. In addition the powers of the Board as set out under section 14 are rather broad and over-arching without clear checks and balances on the exercise of the same power, a situation that may militate against the dictates of justice. As the provisions of the law stand, they are in conflict with section 61(1)(b), which provides for freedom of artistic expression as well as Article 19 paragraph 2 of the ICCPR.

2.3 Use of laws

One of the main criticisms of the State's use of the above discussed laws has been their selective application, which strengthens the perception that the pieces of legislation were crafted to target voices critical of government and some arms of the State.⁵¹ This perception is grounded on the fact that out of 48 cases of arrests of journalists using the laws MISA-Zimbabwe recorded between January 2008 and May 2013, only one (2%) was on reporters from the state media and the rest (98%) were of journalists working for the private news outlets, freelance journalists and foreign correspondents.⁵² In almost all the cases, it is either public figures or members of the security who would have instituted the arrests of journalists mainly on allegations that they would have been criminally defamed.

One such case is that of *The Standard* Editor Nevanji Madanhire, reporter Patience Nyangove and manager Loud Ramakgapola who were arrested on 29 June 2011 and charged under section 96 of the CODE, which criminalises defamation. The charges arose from a story the paper published highlighting the MDC-T's fears over the safety of the party's senior official Jameson Timba who was arrested on charges of undermining the office of the President.⁵³

During trial (*State v the Standard Newspaper, Nevanji Madanhire and Patience Nyangove*), the accused defended their action and argued that criminalisation of defamation was itself unconstitutional. Having brought the constitutionality of the charge they were facing into question, the trio applied for a stay of proceedings at the level of the Magistrate court so as to enable them to approach the Supreme Court sitting as a constitutional court in a bid to seek redress from a higher court. However, this application was dismissed by the magistrate who ruled that the issues that formed the basis of the applicants' application for referral to the Supreme Court were issues that could be tried before the same court. They then made a Supreme Court chamber application for an interim relief order seeking postponement of the trial at the lower court pending the determination of the main action made in terms of section 24(1) of the old constitution in the Supreme Court, which was then granted. As noted above [section 1.1.2], the Constitutional Court has since heard the matter and is yet to deliver its judgement.

In another case (*State v Nqobani Ndlovu, Nevanji Madanhire and The Standard*), Madanhire and Ndlovu were arrested in November 2010 and charged under section 31 of the CODE, which criminalises publication of false statements prejudicial to the State following an article they had published alleging that police promotional exams had been cancelled and that war veterans had been called to take up vacant posts within the police service so that they could direct operations during the 2008 elections. The matter

⁵¹ Almost all those that were interviewed for this research viewed the laws that criminalise expression in Zimbabwe as targeted at the private media and the main ZANU PF opponents, the MDCs and their supporters. This was despite the fact that some of the laws were inherited from the colonial administration.

⁵² MISA-Zimbabwe catalogue of cases of arrests, harassment and beatings of individuals affected by the media and expression laws between January 2008 and May 2013.

⁵³ MDC-T official Jameson Timba was arrested following a report by the South African-based *Sunday Times* newspaper in which he was reported as having said President Mugabe and his ministers were "liars" following their comments at what transpired during a SADC meeting in Sandton South Africa. Although Timba is quoted in the article he does not mention Mugabe by name nor does he use the word "liars", which it appeared was the paper's interpretation of his comments. Source; <http://www.newzimbabwe.com/news/news.aspx?newsID=5424> (accessed 3 October 2013). The story that got the journalists arrested appeared on 26 June in *The Standard newspaper*. Source; <http://allafrica.com/stories/201106260004.html> (accessed 3 October 2013).

subsequently went before the Magistrate court where the two challenged the constitutionality of the charge preferred as well as their continued placement on remand. The matter was subsequently referred to the Supreme Court (now the constitutional court) and removed from remand. The matter is still to be adjudicated upon by the Constitutional Court.

In his ruling removing from remand *The Standard* Editor Nevanji Madanhire and reporter Nqobani Ndlovu and their publisher's representative Loud Ramagkapola, the magistrate Don Ndirowei noted that the three had a very strong case in challenging the constitutionality of section 31 of the Act.⁵⁴ He noted:

It is this court's finding that this application is not merely frivolous or vexatious... There is indeed a question of contravention of the Declaration of Rights and there is need to refer the question to the Supreme Court.

The Constitutional Court's 30 October 2013 ruling in the case *Constantine Chimakure, Vincent Kahiya and ZimInd Publishers v Attorney General (AG)*, cited above, is likely to provide a legal precedence for similar charges of publication of falsehoods as provided for under section 31 of the CODE. This is of cause if the Ministry of Justice does not mount a successful argument against the Court's judgement that provisions criminalising communication or publication of falsehoods should be struck of the country's statutes.

Passing judgement on the matter, the Court noted:

Not every publication or communication of a false statement about a security service institution is prohibited. It is only when the prohibited expression and dissemination of ideas and information are done with the specific intention or realisation that there is a real risk or possibility of undermining public confidence in a security service institution that the crime is committed.⁵⁵

It added:

The fact of making the publication of falsehoods with the requisite state of mind a punishable crime was a material interference by the State on the right to freedom of expression.⁵⁶

It was also noted that it is not the mere falsity of the story alone that ought to be considered but the motive/state of mind, degree of falsity, that is whether the report is partially or wholly materially false. Under the circumstances of the case it was noted that the applicants had acquitted themselves of any falsity that may have been alleged as they had furnished the court with sufficient evidence to corroborate their story. As a result, the Court pointed out that it was highly persuaded by the applicant's argument that "the means employed by section 31(a)(iii) of the Criminal Code to restrict freedom of expression are not proportionate to the objective pursued" of protecting public order or safety.⁵⁷

It further observed:⁵⁸

The concept of free and uninhibited expression and dissemination of opinion on the functioning of public institutions permeates all free and democratic societies. Not only does the media have the duty to impart such ideas and information concerning the activities of security service institutions relating to the security and maintenance of public order or the preservation of public safety, the public have a right to receive the ideas and information.

Although the country's courts are still to try several accused persons arrested under the country's media and expression laws, there has been very few convictions. Most of these have been under the CODE, particularly

⁵⁴ *The Standard* (7/3/2011), Ruling gives journalists a ray of hope <http://www.cfuzim.org/index.php/newspaper-articles-2/the-courts/1373-ruling-gives-journalists-a-ray-of-hope> (accessed 10 September 2013)

⁵⁵ Judgment No. SC 14/2013 delivered on 30 October by the Constitutional Court

⁵⁶ n54 above

⁵⁷ n54 above

⁵⁸ n54 above

crimes relating to section 33 of the Act, which criminalises passing comments deemed to denigrate the office of the President.

The very low rate of prosecution and later on conviction strengthens the perception that the laws cannot withstand the legal test and were simply meant to be used as a tool to harass journalists as well as intimidate Zimbabweans from critically examining those in office. This view was shared by almost all those that were interviewed for this research. All the journalists contended that while the authorities were swift to use an array of laws at their disposal to arrest journalists whose stories they didn't like, they barely took their cases for trial. In most instances a reporter would be arrested; spend hours at a police station being quizzed on the source of their story; then released on condition that the police will proceed by way of summons. Some journalists have waited for more than eight years without getting/receiving those summons, which bolsters the view that the laws are used as a deterrent to intimidate journalists from unravelling uncomplimentary transgressions of those in office.

While it is difficult to identify the political affiliation of some members of the public that have fallen victims to the laws, all those affected have been arrested for expressing unflattering remarks about ZANU PF leader President Mugabe or critically exposed the party's undemocratic traits. This has often been interpreted to mean that the laws are aimed at suppressing expression of thought through all forms of communication by those opposed to ZANU PF.

According to ZLHR statistics, since 2010 Zimbabwe has witnessed a rise in the arbitrary application of the CODE, especially Section 33 under which scores of individuals have been charged with "insulting or undermining the authority of the President".⁵⁹ Since the beginning of 2010 the organisation has attended to about 80 cases reported across the country. However, due to delays in the justice delivery system, most of the cases are still to go for trial. By the time of conducting this research, less than 10 had been finalised, with most of the accused being acquitted. In other instances, the accused have been removed from remand due to the State's failure to timely prosecute.

Also, the fact that the arrests are solely based on the authorities' interpretation of what constitutes an insult, has made the net can easily be cast wider to nab anyone who innocuously mentions the President by name or describes him in an unflattering manner, even in jest.

In a recent case, on 14 October 2013, the magistrates courts acquitted Nicholas Manditsera who was on trial on charges of undermining the office of the President, a crime under section 33 of the CODE.⁶⁰ Manditsera was accused of insulting the President and his family. In his defense Manditsera denied uttering the offensive words saying Ronzerai Murenje, his supervisor at work, who had reported him to the police had a grudge against him which was related to their place of employment. In the ruling, Magistrate Chiwundura noted that there were inconsistencies between the two State witnesses who testified during the trial adding that it was glaring that the witness' statements were only recorded from Murenje and his unidentified relative and not any other persons present at the Njanji Bottle Store where the offense was allegedly committed. As a result, the magistrate noted, what was before the court was Manditsera's word against that of the State witnesses and the court was left unsure who to believe. Because of the discrepancies of testimonies by the State witnesses the court found Manditsera's defence likely to be true and acquitted him. This is one of the few cases that have gone to trial and concluded.

In another matter, Richmore Mashinga Jazi, a carpenter, was arrested in Mutare on 27 February 2012 and charged under section 33 of the CODE after he asked those around him who helped 88 year old President Mugabe to blow up his birthday balloons, querying whether he still had the energy to do it alone. In another case, on 30 June 2011 another Oliver Chikumba was arrested and charged with undermining the authority of

⁵⁹ ZLHR schedule of individuals arrested and charged under the CODE between 2010 and June 2013.

⁶⁰ See <http://www.dailynews.co.zw/articles/2013/10/16/man-acquitted-of-insulting-mugabe> (Accessed 3 November 2013).

the President for refusing to sign anti-sanctions petitions sponsored by ZANU PF saying it was “Zanu PF rubbish” and he would rather see Mugabe in person to tell him the same thing.

Even sending images or pictures deemed to be offensive or tempering with pictures of President Mugabe constitutes an offense under the CODE. On 14 October 2010, a Kezi resident Pilate Tshuma was arrested for insulting or undermining the authority of the President for wearing a ZANU PF T-shirt with Mugabe’s picture removed. He reportedly said he hates Mugabe. He was fined \$50 or 10 days imprisonment. The ZLHR intervened and was granted an application for review. The court ruled that the trial had to commence de novo.

Scores of other Zimbabweans face charges under the CODE for such seemingly harmless expression of their opinion and thought.

But in a ruling that is likely to provide legal precedence for the majority of cases that are still before the courts, on 30 October 2013 the Constitutional Court queried the application and constitutionality of section 33(2)(a)(ii) of the CODE which criminalises comments deemed to undermine the office of the President or insult him. This followed a constitutional challenge by Tendai Danga (*Tendai Danga v AG*) on the constitutionality of the provision under which he was being charged. The charges arose following his arrest on 21 May 2011 for allegedly hurling insults at a police officer’s wife who refused to share with him a pie she was eating. Danga allegedly denigrated the police’s poor welfare, boasting that he was untouchable, even if she phoned Mugabe.⁶¹

Reading out the judgment constitutional court judge Justice Luke Malaba said while the police might feel strongly about cases in which the President is deemed to have been “insulted”, it was not legally sound for the National Prosecuting Authority to prosecute cases where remarks would have been made in social places such as beer halls.⁶²

He observed:

I think it is important that the name of the President is not just dragged here to the court unnecessarily. The Attorney General should be careful not to allow prosecution when a person says something in a bar, where people are just making statements while drunk.⁶³

Like the Constitutional Court’s ruling on the Constantine Chimakure, *Vincent Kahiya and Zimind Publishers v Attorney General (AG)*, cited above, the court then ordered the Justice Minister to appear before the court on 20 November 2013 and show cause why the insult law should not be repealed from the country’s statutes.

Although the Constitutional Court’s ruling provides a significant legal precedence against which scores of similar cases could be handled, an analysis of the judgement does not indicate an unequivocal revocation of the provision. Instead, besides providing the State with the opportunity to justify why the law should be retained, it also called on the prosecuting authority to thoroughly look at cases before bringing them to court to avoid prosecuting on legally weak cases.

It is yet to be seen if government will concur and comply with that ruling, repeal the offensive sections and substitute them for those that will protect citizens’ right to free expression and prevent the arbitrary arrest of those that rightfully comment on the Presidency. Artists have also fallen foul of the laws. Although there is usually no public confirmation or pronouncement as regards the canning of some songs on the

⁶¹Newsday report on Tendai Danga’s arrest and charges.<https://www.newsday.co.zw/2012/04/20/2012-04-20-mugabe-insult-law-challenged/> (Accessed 3 November 2013).

⁶²ZLHR (4 November 2013) *The Legal Monitor*

⁶³n55 above

dominant state broadcaster, artists have complained that some of their music productions have been removed from the playlists of state-controlled broadcasters who dominate the broadcasting sector. A typical example is that of Thomas Mapfumo, whose songs are considered protest music by many Zimbabweans. After years of producing critical songs, some of which never found airspace on state radio, the musician was forced into exile alleging threats on his life due to his stance on the governance of the country.

But it is not only on the state broadcaster that such censorship of artistic expression takes place. On 28 February 2011, RadioVOP reported the barring of Mapfumo's song on police and soldiers at a bar in Hwange by law enforcement agents. The police reportedly ordered the barman to stop playing the song as they deemed it an attempt to try and incite security forces and the public to revolt against government as happened in Egypt and Tunisia.⁶⁴

Although the Censorship Board has sparingly used the censorship Act since the banning of the 1984 play "Workshop Negative" by Amakhosi Theatre Productions, it appeared to intensify the use of the Act between 2011 and 2012. In August 2012, for example, the Board used its powers to ban another stage play, "No Voice, No choice". The play sought to engender peaceful co-existence and reconciliation among communities following the political violence that characterised 2008 elections. In its letter barring the play the Board noted:

Please be advised that the Board of Censors read your play script and observed that the play is about discouraging the youths participating in political violence in particular and against political violence in general. The play is too direct and people can easily read into it the insinuation of the words and messages and associate them with certain individuals and institutions and the vulgar and obscene language used... The play is ...against the spirit of national healing and reconciliation. The Board recommended that the play be banned and prohibited.⁶⁵

ZLHR sought a court interdict to unban the staging of the performance. . Following ZLHR's application for an interdict at the magistrates' courts, the court referred the applicant Muzondo back to the Board of Appeal under the Censorship Board arguing that they needed to exhaust internal remedies first. However, the Board of Appeal did not respond, prompting the applicant to approach the High Court seeking an order for the lifting of the ban. Judgment is yet to be passed. The ZLHR's intervention on the play was the fourth time in two years the organisation had intervened in similar circumstances.

In February 2011, the ZLHR intervened on behalf of Rooftop Promotions when it was barred from showcasing its play "Rituals" in Bulawayo. The police through Chief Superintendent R.N Masina had banned the performance on the grounds that government was already attending to issues of national healing and reconciliation, a subject of the play, through a relevant ministry. An interdict was granted and Rooftop Promotions staged the play.

In another incident, in March 2010 the police used sections 31(a)(i) and 33(a)(ii) of the CODE to arrest visual artist Owen Maseko for exhibiting the *Gukurahundi* atrocities through his paintings.⁶⁶ Section 31(a)(i) criminalises the inciting or promotion of public disorder or public violence or endangering public safety, while Section 33(a)(ii) makes it a criminal offence to "cause hatred, contempt, or ridicule of the President or Acting President whether in person or in respect of the President's Office".

⁶⁴ Zimbabwe News Online, Hwange barman barred from playing Thomas Mapfumo's song in his bar, February 28, 2011 <http://zimbabwenewsonline.com/leisure/1998.html> [accessed 6 September 2013]

⁶⁵ Excerpts of the letter written to theatre playwright and actor Tafadzwa Muzondo who wrote and produced "No Voice, No choice", by the Censorship Board. This was reported by Radio VOP (31 August 2012), <http://www.radiovop.com/index.php/entertainment/9518-censorship-board-bans-theatre-play.html> [accessed 6 September, 2013]

⁶⁶ Report on the arrest of Maseko <http://www.creativeafricanetwork.com/page/16428/en> (accessed 2 October 2013)

However, in a development that is bound to set yet another legal precedence, on 30 October 2013 the Constitutional Court found the above provisions to be inconsistent with constitutional provisions safeguarding freedom of expression. Like in the other judgements on matters brought before it delivered on the same day (*Constantine Chimakure, Vincent Kahiya and Zimind Publishers v Attorney General (AG) and TendaiDanga*), the court asked the ministry of justice to show why the provisions should not be repealed.

Cases of extra-legal hindrances in the enjoyment of freedom of expression have also been recorded, with most of those affected being journalists from the private media even though there were also incidents of harassment of state media journalists ahead of the 31 July elections. Such cases are largely perpetrated by political party activists who deem media stories to be unpalatable and exposing their preferred political parties in bad light. In such cases, not a single arrest has been made despite the fact the crimes would have been committed in the presence of the police. A typical case is that involving the beating of independent journalists Nqaba Matshazi, Levi Mukarati and Aaron Ufumeli inside Parliament in July 2011.

The reporters had gone to Parliament to report on a public hearing of the Human Rights Bill. Upon their arrival, there was a long queue of rowdy people who were trying to push their way into a room where the hearing was to be conducted, disregarding the police's advice that the place was already full. When inside, Matshazi⁶⁷ recalls, a section of the crowd demanded that a prayer be said. However, the prayer turned out to be an opportunity for ZANU PF sloganeering and expression of death wish for media that criticised the party and President Robert Mugabe. Following the singing of the national anthem, the same group of ZANU PF supporters then demanded the ejection of MDC-T MP Brian Tshuma who they accused of not singing the anthem. When Tshuma resisted, the mob assaulted him before forcibly removing him from Parliament.

They then turned their attention towards Matshazi, who they also accused of not singing the anthem and writing falsehoods about ZANU PF. He was slapped and kicked forcing him to flee the room and seek refuge behind three police officers. They pursued him and continued assaulting him in front of police officers, who simply watched without taking any action. When he fled to the main door he noticed that there was a mob waiting for him outside and waiting to further assault him. The late MDC-T MP Gladys Gombami then came to his rescue and took him to some parliamentary rooms where he hid till the fracas was over. In the meanwhile, the police did nothing to save him or the other journalists who were also assaulted for writing for the private media. Although the police witnessed the beatings and identified the culprits, no one was arrested, later on charged under a raft of laws they could have used to deter such violent acts against the media.

The incident is not isolated. It simply demonstrates the culture of impunity enjoyed by those implicated in cases of extra-legal media freedom violations journalists have encountered in Zimbabwe. Since the home-made bomb explosion at the offices of one of the country's daily newspapers, *The Daily Newson* 22 April 2000; the bombing of its printing press on 28 January 2001; the bombing of exiled RadioVOP premises in August 2002 as well as several cases of harassment of newspaper vendors and banishment and destruction of papers in certain areas by suspected political activists; no single arrest has been made to stem such extra-legal obstructions to freedom of expression. Nor have the authorities updated Zimbabweans on progress of their investigations into the attacks.

2.4 Analysis of proportionality of sentences/fines

Fines and sentences are in accordance with the standard scale of fines that the state reviews regularly in line with the prevailing economic environment. The last review was in March 2010 following the country's adoption of the multi-currency system. There are other offences such as murder, cattle rustling and robbery,

⁶⁷NqabaMatshazi is one of the victims of both legal and extra-legal hindrances to free journalism enterprise in Zimbabwe. Apart from the assault by suspected ZANU PF activists he faces other charges criminal defamation charges under the CODE. He gave an account of what happened on 16 September 2013.

among others, where there is no option of a fine. The proportionality of redress in cases relating to civil defamation is determined by the presiding magistrate or judge. Below is a table highlighting sentences and fines as stipulated under the current standard scale of fines.⁶⁸

Table 7: Imprisonment terms and fines for violating expression laws

Legal basis	Fine	Maximum Prison term	Additional option
Causing disaffection among police force/defence	\$400	2 years	Both
Publishing/communicating falsehoods prejudicial to the state	\$5000	20 years	Both
Undermining authority of/insulting the President	\$300	1 year	Both
Participating in gathering to promote public violence	\$700	5 years	Both
Criminal Insult	\$300	1 year	Both
Criminal defamation	\$5000	2 years	Both
Undermining police authority	\$400	2 years	Both
Abuse of journalistic privilege	\$400	2 years	
Prohibition of communication of certain information	\$20000	20 years	Both
Holding an unsanctioned gathering	\$2000	1 year	Both
Participating in an unsanctioned procession	\$300	1 year	Both
Publication/display of material prohibited by Censorship Board	unspecified	2 years	Both

Although the quantum of fines may appear reasonable for a number of offences, the amounts are exorbitant for ordinary Zimbabweans, who constitute the highest percentage of citizens facing various offences cited above. This is particularly so considering that besides lack of means for income due to high levels of unemployment, the basic monthly income for the majority of ordinary Zimbabweans is between a \$100 and \$150. And when one considers that the minimum fine according to the scale is equivalent to a two-month salary, the fines are thus severe and an unjustifiable sanction for the exercise of one's freedom of expression. Also, the \$5000 fine for criminal defamation and publication of falsehoods is too steep for journalists who on average earn between \$400 and \$1500 per month depending on seniority and the media house they work for. This coupled with jail terms ranging from a minimum 1 year to 20 years for merely exercising one's right to express themselves makes the proportionality of sentences an excessive and terrifying deterrent for the enjoyment of this fundamental liberty in Zimbabwe. It is worth noting that serious crimes such as culpable homicide, robbery, fraud attract far lesser years than the 20 year jail term imposed on some cases rising from exercising free expression.

2.5 Conclusion

Most of the laws that criminalise freedom of expression are inherited from the Colonial era. In addition, the laws appear to be selective in application, thus strengthening the perception that, the pieces of legislation were crafted to target voices critical to government and some arms of state. This view, is evidenced from

⁶⁸Veritas (2009)Scale of fines in Zimbabwe as Extracted from the Criminal Law Code as substituted by the Finance Act, with effect from 23April 2009.

arrests that were made between 2008-2013 in which 2% of the arrested were state reporters and the remaining 98% constituted private reporters. These arrests were through public figures and security forces claiming they had been criminally defamed. Moreover, the fines imposed are not reasonable as they go far beyond the average income that an ordinary citizen makes in a month of a 100 dollars and the sentencing period of a year to twenty years appears unjustifiable for just committing an offence in a bid to promote freedom of expression. Based on the above, there is an urgent need to reform the outdated laws that criminalise freedom of expression or press freedom in order to align them with the trend towards decriminalisation and the aspirations enshrined in the Declaration of Principles on Freedom of Expression in Africa. In the meantime, it should be pointed out that freedom of expression is criminalised by the laws in force, which is likely to impact negatively on the enjoyment of the right thereto, in the same way as the fear of legal entanglements may cause a major shift towards self-censorship.

Section Three: Research into Impact of laws on expression

This section qualitatively assesses the impact of laws on Zimbabweans. The assessment is based on the interviews conducted with various interest groups ranging from journalists, media practitioners, civil society representatives, lawyers and other state players.

3.1 Interviews with key political, advocacy and civil society leaders

3.1.1 Settlement Chikwinya

Mr Settlement Chikwinya⁶⁹ cited AIPPA, POSA, CODE as the laws that criminalise freedom of expression in Zimbabwe. He cited the CODE as the most harmful of the laws adding that the information he has indicate that more than 66 people have been arrested under the law, including his party's youth leader Solomon Madzore. He noted that Madzore was not the only MDC official who has fallen victim to the laws criminalising expression, noting that even the party leader has been affected by the laws both in his capacity as the country's Prime Minister during the days of the coalition government as well as the President of the MDC. He noted:

(Morgan Tsvangirai) in his capacity as the prime minister and leader of the MDC was denied the opportunity to speak to the public. These incidents happened in Bindura, in Highfeild.⁷⁰ Even when the co-minister of home affairs wanted to intervene, the police refused to take instructions from the minister saying they will only listen to instructions from the commissioner general (of the police). The laws continued to be applied selectively against the MDC even if it was in the inclusive government. Now it's even worse that we are again in the opposition and ZANU PF wants to suppress any opposition...

Like some of his colleagues in the MDC, Chikwinya has also been arrested under the laws governing the exercise of freedom of expression in Zimbabwe. According to Chikwinya, that followed an interview he had with SW Radio Africa in which he exposed the violent conduct of a militant group that is affiliated to ZANU PF in his constituency in Kwekwe.⁷¹ Chikwinya was arrested on charges of having communicated falsehoods, a crime under section 31 of the Code. He spent close to a day in detention before he was released on

⁶⁹ Interview October 17, 2013. Mr Settlement Chikwinya is a National Executive Member of the MDC-T and is the former chairman of the Parliamentary Committee on Media and Information, which exercise oversight over media policy implementation by the relevant ministry of information. He is the MP for Mbizo, in Kwekwe and remains with the committee as a member.

⁷⁰ Chikwinya was referring to several incidents in which MDC leader was denied the right to address gathering by the police on grounds that the meetings had not been cleared. In the case of the Highfeild incident that Chikwinya made reference to, Tsvangirai had scheduled a rally to urge his supporters to vote for the endorsement of the draft constitution during a constitutional referendum held in March 2013. Source; <http://allafrica.com/stories/201303070054.html>, (accessed 17/10/13). In another similar incident the police dispersed a crowd in defiance of a court order granting Tsvangirai permission to address a rally in Nkayi. See <http://allafrica.com/stories/201110230145.html> (accessed 17/10/13).

⁷¹ See <http://allafrica.com/stories/201210160990.html> (accessed 17/10/13)

grounds that the police would then proceed by way of summons which are still to be issued, almost a year after the incident.

Asked on his treatment at the hands of the police he said:

The treatment of opposition members before police officers especially members of the law and order section is almost the same everywhere. They bombard you with several questions. You have about six to eight members of the police asking different and various questions at the same time. Some of which are not even relevant to the charge they are laying before you. It was on a Friday evening, I didn't get access to a lawyer, they even denied me access to food saying I was arrested after food had been served, therefore I had to wait for food the next morning.

He was suspicious of the intentions of the arresting officer given the timing of his arrest:

The arrest on a Friday after the case had been reported on Tuesday, three days earlier, was actually going to make me serve some three days or so in detention. The...senior commanding officer at the station saw it prudent that they will proceed by way of summons. I was just lucky, normally if you are arrested on a Friday you then go to court the next Wednesday because the weekend is not counted (in the maximum 48 hours detention before an individual is taken to court permissible under the law).

Chikwinya argued that the laws were unjustifiable in Zimbabwe, noting that for the country to entrench accountable and transparent governance, those elected into office should be subjected to scrutiny by members of the public, including the media. He further contended that while every country needed laws to regulate media activity, such laws must not suppress freedom of expression but actually promote it.

As a former chairperson of a parliamentary committee tasked with taking the executive to task over such laws and a victim of the laws himself, Chikwinya highlighted the difficulties that parliament faces in influencing reforms. He pointed out that the main hindrance was a domineering executive:

My experience with parliament in the previous session and now is that the executive treats parliament as its second cousin. We are supposed to be equal arms of the state but literally we are not. The executive does not respect parliament. Instead of parliament making laws, laws pass through parliament after they have been made by the executive. Therefore, all our recommendations fell on deaf ear because the minister responsible for media in the inclusive government was from ZANU PF and didn't even want to hear our recommendation. Our recommendations still lie idle and we hope someone might retrieve the recommendations from the shelf because (they) were in line with the intention of creating an environment with media freedom in Zimbabwe.

3.1.2 Media Centre

Mr Ernest Mudzengi⁷² displayed general knowledge of the media legislative environment in Zimbabwe. He cited AIPPA, POSA, CODE, ICA and BSA as the laws that criminalise freedom of expression. He identified all these laws as the most offensive pieces of legislation that impinged on citizens' rights to freely express themselves and access information. To buttress his argument, he noted that AIPPA imposed a lot of restrictions for journalists to practice such as barring those unregistered from covering public state functions. And while the BSA purports to open up the broadcasting sector, it actually does the opposite. He also observed the snooping on citizens' correspondence by the state as an indicator of the repressive nature of ICA. While Mudzengi wasn't completely against interception of communications, he argued that that should be done to protect national interests and should be done within clearly defined parameters and should be transparent and should not be applied to spy on the private lives of citizens who are not a threat to national security.

⁷² Interview on August 20, 2013. Mr Mudzengi is the Director of the Media Centre, an organisation that provides services to journalists to conduct their work.

As a human rights activist, Mudzengi has fallen victim to POSA on numerous occasions. He recalled one particular case when his organisation had organised a public meeting, which the police had sanctioned as per legal requirement. However, due to unforeseen logistical problems the meeting couldn't proceed as planned. The Media Centre then went back to the police to inform them on the postponement and they agreed on the new date. But on the very new date that the police had sanctioned, they barred the meeting using POSA arguing that the Media Centre had to re-apply for permission to hold the gathering.

In another case, Mudzengi recalled that his organisation had a programme they had sponsored scratched off air by one of the newly licensed radio stations, Star FM, on the eve of the July 31, 2013 elections. The station is one of the two licenses that were controversially licensed by the Broadcasting Authority of Zimbabwe and is perceived to be an extension of the state media empire as it is owned by the state run Zimpapers limited. According to Mudzengi, his organisation was simply told that the programme had been removed from the schedule following instructions from undisclosed authorities. Although Mudzengi couldn't specify under which law the station took that decision, he argues that the failure to insulate the broadcasting sector from political manipulation through pieces of legislation that will establish an independent regulatory body and curtail executive interference in programming was the main reason behind the scrapping of the programme. He suspects that the instruction was from the minister responsible for broadcasting.

As a media freedom advocate he has had to temper his speech at various occasions. He noted that as one of the prominent analysts used by the mainstream media, he has often carefully chosen what to say during the interviews, especially when the issue is about the President. This is because there is a law (CODE) that can be used against those deemed to have undermined or insulted the office of the President in the speech. And because of such laws, he argues, journalists are having to self-censor themselves for fear of arrests and being charged under the legal instruments. It is against the frequent use of the media laws against the media and civil society that Mudzengi strongly believes that the laws were targeted at particular sections of Zimbabweans suspected of propping up the opposition, MDC. He added:

We have laws in this country that criminalise free expression and these laws have really affected the way journalism is functioning in Zimbabwe. People are no longer free to say whatever they want to say because where they might be freedom of expression they might be no freedom after expression.

3.1.3 Media Alliance of Zimbabwe

Ms Patience Zirima⁷³ cited AIPPA and sections 31 and 96 of the CODE, which criminalises publication of falsehoods and defamation respectively. Although AIPPA imposes restrictions on media operations in the country, Zirima contended that its application has been reduced, leaving criminal defamation and insult laws under the CODE the most regularly used to curtail media freedom. Zirima noted that while there was nothing wrong with having laws to regulate the media, it becomes a problem when legislation criminalises journalists or can be used to jail media practitioners and ordinary citizens for expressing themselves when civil remedies would suffice. This is because, she added, a person who is insulted or defamed may not get recourse for their damaged reputation by having someone arrested. She contended:

Freedom of expression is a basic right that people have and we really need to find that balance between protecting people's reputation and allowing for freedom of expression and ensuring that that right is protected... I think that balance is best served through civil means and not criminalising. Because criminalisation takes away that right which is guaranteed in the new constitution.

Although Zirima has not been directly affected by media and expression laws in the country, she is aware of several cases where they have been used. However, one common trend typifying the

⁷³ Interview August 20, 2013. Patience Zirima is Coordinator of the Media Alliance of Zimbabwe (MAZ), which is a network of media freedom lobby groups in Zimbabwe.

application of the laws was the tendency to arrest people and then subsequently drop the charges. She noted that there has been hardly any conviction of accused media practitioners vindicating observations that the laws are a means to try and silence the media and blunt their critical slants through threats of jailing. She added that a number of ordinary people have fallen foul of the laws, citing the arrest of Vikaz Mavhudzi who was arrested in 2011 for posting a comment on the Egyptian uprising on MDC leader Morgan Tsvangirai's facebook page.⁷⁴ She also pointed to the use of provisions of the CODE to arrest individuals deemed to have insulted the President and his family. This, she noted, has been worsened by statements made by former Information Minister Webster Shamu in 2012 threatening those that were deemed to insult the President with arrest⁷⁵. Resultantly, she argued, the law has created a situation in which people are not able speak their mind or criticise or write anything that is perceived to be critical or insulting to the first family. This is because one is not really sure whether what they are saying would be considered criminal or misconstrued in a certain way. She observed that the laws have actually struck fear in the newsroom as was revealed to her by an editor of one of the country's main daily newspapers who noted that there are some stories that they stayed away from to avoid arrests.

But while there are real threats against freedom of speech, Zirima does not recall any incident where she had to temper her speech for fear of reprisals. However, she feels the laws were mostly targeted at the mass media, specifically the privately owned news outlets, because of their reach. Her organisation has been involved in lobbying authorities around the reformation of these laws. She also cited MISA-Zimbabwe's efforts to draft alternative media policy framework and model laws to try and influence the reformation of the legislative framework.

3.1.4 Irene Petras

Ms Irene Petras⁷⁶ demonstrated her knowledge of the laws that criminalised freedom of expression in Zimbabwe. She cited AIPPA, POSA, the CODE, Criminal Procedure and Evidence Act, OSA, Censorship and Entertainment Controls Act as the laws that impinge on freedom of expression. She noted that these laws are used to target different sectors of Zimbabwe. For example, AIPPA is largely used on media houses while the CODE is mostly used to target ordinary citizens, especially those that criticise the President. She condemned the use of the law against ordinary citizens arguing that the President is a public figure and people should hold the office to higher level of scrutiny and criticism. In many instances, she pointed out, the law has been used arbitrarily for very minor offenses where people would have made comments in a social setting such as a pub. Its application has made people fearful of expressing themselves. She revealed that it was not only those in power that have used the laws, but ordinary citizens who have complained against their counterparts leading to arrests. Such cases, she observed, largely involves political activists. In her own analysis and based on her organisation's records most of those affected are men. This is because the cases arise from a social setting such as someone making comments among colleagues at a beer-hall or watching football.

⁷⁴VikaziMavhudzi was arrested in March 16 2011 after expressing his views on the Egypt demonstrations on Morgan Tsvangirai'sfacebook page. His comments were deemed to contribute to efforts to overthrow the government. He had said,"I am overwhelmed, I don't want to say Mr or PM what happened in Egypt is sending shockwaves to dictators around the world. No weapon but unity of purpose worth emulating, hey."

⁷⁵ Former Information Minister Webster Shamu was reported as having told mourners at a burial of a ZANU PF official in Harare in September 2012, threatening to revoke licenses of privately owned newspapers for criticising President Robert Mugabe. He described the criticism as "Anti-African and anti-Zimbabwean" saying the "gloves may soon be off" as the media had been warned twice before. [NewZimbabwe.com 12/09/2012, <http://www.newzimbabwe.com/news-9029-Shamu%20threatens%20to%20close%20newspapers/news.aspx> – accessed August 22,2013]

⁷⁶ Interview September 3, 2013. Irene Petras is a lawyer and the Executive Director of the Zimbabwe Lawyers for Human Rights. Here organisation has defended scores of journalists and ordinary Zimbabwean citizens who have fallen victims of the country's media and expression laws.

To illustrate her point she cited one case in which a Harare man was arrested and charged with insulting the President after he had told a colleague that they were having juice and eating biscuit because of the then Prime Minister Morgan Tsvangirai's efforts in the coalition government. She revealed that such cases have been referred to the Constitutional Court. (By the time of conducting this research, the constitutional court had adjudged on only one of the cases, which it is hoped will create a legal precedent for all the other cases Petras referred to) She observed:

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 problems.

Asked on whether seeking the courts' intervention mitigated the use of laws to erode citizens' rights, she contended that it varied from one place to another. While in some areas court challenges helped reduce the abuse of the laws, in other instances the cases continued. This, she opined, also depended on the prosecution. She noted:

It also depends on the type of the person who is prosecuting the case or investigating because you get some who understand... and others who believe that it's their chance to show that they are powerful and can prosecute anyone and do anything just to please the people that they report to.

Despite her organisation's well documented work in defending those victimised by the state, which could easily invite problems for her, Petras noted that she has not been directly affected by the laws. She has felt the impact of the laws through dealing with a number of cases brought to her organisation. Also, she has to think about the choice of words when expressing herself at some platforms because of the laws:

There are certain topics that you know that you have to temper your speech especially when you talk about certain individuals. And lawyers do modify their language when they talk about the judiciary as a whole. But if I am talking about my own subject matter, things that I know, work that the organisation does, I don't self-censor because I rely on information that we have and anything that I say can be substantiate, Petras said.

In some instances, Petras revealed, she has had to immediately draft an imaginary charge sheet in her mind by merely listening to individuals speak at various fora as she is now so accustomed to what sort of words the state can use to press charges against individuals. And because of the country's repressive laws and a number of arrests on criminal defamation, she feels the media are not as robust in exposing corruption. She contends that it is not only the laws that have compromised robust coverage of issues, but lack of state's firm response to matters exposed by the media that has tended to de-motivate the media. But while the laws are supposed to be applied on every media house, she feels the public media gets away with a lot of transgressions as they insult people without any repercussions to them.

In terms of advocacy campaigns and her organisation's involvement, Petras recalled efforts made during the tenure of the coalition government to challenge the constitutionality of criminal defamation by some of the victims. Three cases have been finalised (Constantine Chimakure, Vincent Kahiya and Zimind Publishers v Attorney General (AG), Owen Maseko v AG and Tendain Danga v AG) while some are still to be heard.. Her organisation has also taken some cases to the African Commission on Human and People's Rights using regional and international protocols as the basis for their submissions. These included the African Charter on Human Rights, Windhoek Declaration and the Table Mountain Declaration, among others.

In her own view the laws are irrelevant and should be struck off the country's statutes. She contended:

The criminal defamation, we can do without that. We have a civil remedy which is available, we have your VMCZ and if we can get a critical mass of media practitioners to subscribe to that then you should be able to deal with... issues without going the criminal route ... Even the insult laws, you don't need them. what you need is a better legislation on hate speech and speech that incite violence. Once you have that in place people will be able to be robustly criticised.

3.1.5 Chester Samba

Mr Chester Samba⁷⁷ identified the CODE and POSA as the laws that criminalises expression in Zimbabwe. He pointed out that while he has not been affected as an individual, his organisation representing gays and lesbians has fallen victim to section 33 of CODE, which criminalises undermining the authority of the President due to material that his organisation produces. He recalled one incident in which his organisation was in trouble with the police in May 2010.⁷⁸ This followed the organisation's decision to hang a plaque from the San Francisco Mayor Willie Lewis Brown, which was a congratulatory message honouring GALZ and the work that it was doing. And when the police raided the organisation they found plaque hanging on the wall at the GALZ offices and they used that to bring up charges against of undermining the office of the President against employees Ellen Chademana and Ignatius Muhambi. This is because Mayor Brown referred to the President, particularly denouncing his stance on homosexuality in the country.⁷⁹ Asked on the progress prosecution of the matter, Mr Samba noted:

It has become the norm with most of our cases that charges are brought up but they are never brought to trial. That has been the trend so far. The charges that we are facing are not yet before the courts.

Members of the organisation were taken to the police and detained for more than four nights in custody. One of the staff members was being pressured to release more information on the organisation and not being questioned on the case.

Mr Samba said because of such cases there is a lot of self censorship around what one wants to say. He is now cautious when he expresses himself. He contends:

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.

He pointed out that members of his organisation found it difficult to even express themselves because it's not about what they are doing or saying but who they are. And this is due to homophobia that is prevalent in Zimbabwe. Resultantly, Mr Samba pointed out it has become difficult for his organisation to enjoy basic freedoms due to them because they are fighting for LGBTI rights. To illustrate his argument he cited a case in which they reported a break in into their office by unidentified five men. When the police detected that the distress call was coming from GALZ, they did not act on the matter.

3.2 Interviews with laws enforcement agencies

Mr Wilbert Mandinde⁸⁰ identified AIPPA, POSA and the CODE. Mandinde pointed out that criminalising making comments about the President was unjustifiable as he was a public figure who should be subjected

⁷⁷ Interview October 7, 2013. Mr Chester Samba is in the Executive Director of Gays and Lesbians Association of Zimbabwe. His organisation advocates LGBTI rights in Zimbabwe. Despite public rebuke of gays and lesbians by the President and other government officials as well as raids by law enforcement agents, his organisations has continued to exist in the country.

⁷⁸ GALZ employees Ellen Chademana and Ignatius Muhambi were initially arrested in May 2010 when the police raided GALZ offices looking for dangerous drugs and pornographic material. When the police saw a plaque from San Fransisco Mayor Willie Lewis Brown denouncing President Mugabe's homophobic stance hanging on the wall, they pressed further charges against the employees. See report www.radiovop.com/index.php/national-news/3890-galz-employees-were-arrested-for-undermining-mugabe.html [accessed 7/10/2013].

⁷⁹ President Mugabe has publicly made it clear that he does not tolerate homosexuality in the country. This was part of his message throughout the campaign period in the run up to July 31 elections. He reiterated his dislike of the practice in his inauguration on August 22, 2013 during which he described same sex marriage as a "filthy, filthy, filthy disease". See report on www.galz.co.zw/?p=1008 [accesses 7/10/2013].

⁸⁰ Interview October 19, 2013. Mr Wilbert Mandinde is a former magistrate and is now working as a senior officer of the Law Society of Zimbabwe. As a magistrate he president over some initial court appearances of some of those brought before the courts accused of breaching expression laws, particularly POSA. He however didn't preside over any trial of the accused.

to scrutiny. He argued that once an individual vies for public office, they should be prepared for public scrutiny. He noted:

They should not feel insulted. Remember anyone who vies for public office opens himself up to members of the public. Therefore, you cannot, for example, want to say I have my right to privacy because you are no longer that private individual you become a public official.

While Mandinde has not been directly affected by the law, as someone who is a former member of the judiciary as well a lawyer he has been involved in some of the cases in which journalists have been accused of breaching provisions of the law. And as a member of the judiciary he had no choice but to execute his duty. He stated:

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 in 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 its 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.

However, Mandinde contended, despite the fact that the judiciary's mandate is to interpret the law, there have been some brave decisions where some people have been acquitted. Calling such decisions as "judicial activism", Mandinde noted that such acquittals are a result of members of the bench who have interpreted some of the laws in a manner that gave effect to the rights of the people. He bemoaned delays in the hearing of some of the cases that have been referred to the constitutional court for determination of the constitutionality of some of the laws that criminalise expression. He said while the courts were still to rule on those cases, the best lawyers can do in defending the accused is refer to those cases and argue for their deferment until the constitutional court makes a ruling.

Suggesting means in which the judiciary could protect citizens' right to freedom of expression, he said:

I think the right to freedom of expression is not a narrow right. It's a right which has to be interpreted widely so as to give maximum effect to it. Really, at the end of the day it will be necessary for members of the judiciary, among other things, to give a wide interpretation to the right to freedom of expression and not to limit it... We have examples of the developed world, especially the western countries where some of things we criminalise in our country is not criminalised there... to ensure that our leaders are accountable to us.

3.3 Interviews with media practitioners

3.3.1 Stanley Kwenda August 20, 2013

Mr Stanley Kwenda⁸¹ identified AIPPA, the CODE and POSA as the laws that criminalise freedom of expression in Zimbabwe. As one of the country's senior journalists, he expressed his concerns on the negative provisions contained in AIPPA. These related to measures and procedures on accessing information stipulated in the Act, which he argued were a negation of what the law purports to do. To illustrate his point he cited his experience working for *The Daily News*, when he and his colleagues were doing a story on Cabinet expenses, which was a matter of public interest. He noted that it was practically impossible to get this kind of information through the official route and they had to resort to "other journalistic means" to get

⁸¹ Interview August 20, 2013. Mr Stanley Kwenda is a journalist and Director of Artist for Democracy Trust in Zimbabwe, an organisation that works with artists to campaign for the protection and promotion of human rights and democracy.

details on government expenditure on foreign travels, purchases of vehicles and ministers' utility bills among other government expenses. He stated:

When we published stories around these issues after we got information through other means we were threatened with arrest... We were also threatened with criminal defamation laws by the ministers involved.

It is because of the criminalisation of journalism through the use of the CODE that Kwenda viewed the Act as the worst in Zimbabwe. The Act, according to Kwenda, is an "all catching kind of law" that criminalises "every move of a journalist".

Kwenda has not only been affected by difficulties in accessing information, but has also received threats of law suits as well as death. His investigations into ministers' expenses saw his paper getting threatened with "big law suit" by some implicated government ministers which could have resulted in the closure of *The Daily News* had it been filed and the complainant won. In another case, which highlights the extra-legal obstructions facing journalists working for the private media, Kwenda recalled his unpleasant experience in 2010. This followed a story that he wrote exposing the alleged involvement of a senior police officer in the violence that marred the 2008 elections. Following the publication of the story, Kwenda got death threats through his mobile phone from an anonymous caller, which forced him to flee Zimbabwe. He lived out of the country for a year. It was only after the intervention of human rights organisations and media freedom lobby groups, who put pressure on the individual Kwenda had exposed to guarantee his safety, that he returned. The strain of such threats also traumatised relatives, family and friends. As a bread winner, Kwenda pointed out, he had to leave his employment and a source of livelihood for his immediate family. Even though he is back in Zimbabwe, he has been living apart from his family that remained outside the country so they are not targeted should his critical stories offend the authorities. He noted that there is a precedent in Zimbabwe where state security agents actually harass or hold relatives of those they are looking for as ransom to force the targeted to hand themselves into police custody. He cited examples of human rights activists who have fallen victims to this illegal practice. With such risks facing journalists who write critical stories, Kwenda openly admitted that there is self-censorship in the newsrooms as journalists tend to think of the consequences before they publish their stories. So fearful of reprisals are journalists that in some instances, they tend to dilute the substance of their stories.

Kwenda noted that his experiences were not isolated. He cited other journalists who have also been threatened for doing their work such as those that correspond for foreign media like Frank Chikowore who have allegedly been visited at their homes by unknown state operatives. He seemed to be aware of advocacy campaigns on the de-criminalisation of expression being conducted by organisations such as MISA-Zimbabwe, Media Monitoring Project and MAZ. His organisation was involved in some of the campaigns through partnering the media lobby groups in the use of art to spread the message on the need for media reforms. Such campaigns have culminated in the explicit guarantees for freedom of expression, media freedom and access to information in the new constitution. His fears were that this incremental gain may be eroded if ZANU PF, which now controls a two thirds majority in Parliament, amends the new constitution as it had indicated before the July 31 election.

3.3.2 Faith Zaba

Ms Faith Zaba⁸² also cited the criminal defamation law and the Official Secrets Act (OSA), which she noted affected journalists every time. She particularly bemoaned the criminal defamation law, which she said could be used to jail a journalist for an offence that could be dealt with on a civil platform. And because of OSA, journalists had to be cautious when writing stories relating to Cabinet because everytime they do such stories, they are not sure if they will be picked up or not. Although she noted that criminal defamation was

⁸²interview on September 3, 2013. Faith Zaba is the News Editor of the Zimbabwe Independent newspaper publishing from Harare.

the law most used against journalists, the authorities could still use other pieces of legislation against individuals they want to silence. In her opinion, the laws are targeted at those opposed to ZANU PF or seen as a threat, which is why they have hardly been applied to the state media and frequently used against the independent media.

And while Zaba has not been arrested under the laws, she has received threats from anonymous individuals she suspects are members of the state security agents and government officials. This usually follows her stories on Cabinet. The other threats she has received also from unknown callers warning her of unspecified consequences of her stories that are related to her reports on the military, all of which force her to self-censor herself due to fear. She revealed that at some point the threats saw her paper taking a temporary decision not to publish stories on the military. She revealed:

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. You find that in the end you get very few fearless journalists, and you end up writing the stories yourselves because everyone is afraid of being arrested or being picked up on a Friday⁸³.

To illustrate her point, she cited several cases of arrests of journalists including her reporter Wongai Zhangazha who was picked up over a story she had written on Cabinet; the arrest of journalist Patience Nyangove and her editor Nevanji Madanhire charged with criminally defaming a former senior central bank employee Munyaradzi Kereke. In her view such laws have adversely affected news gathering and dissemination as journalists are scared of covering certain stories, especially those to do with the military. She narrated her ordeal when she wrote a critical story on the military and was anonymously threatened over the phone, reminded that she had two children to worry about, with the caller describing details of the car she drove. She said:

That got me worried, I started thinking more about my kids and my life and I thought there was no story worth dying for or risking my life for. So for a while I actually stopped writing stories on the military. Then on Cabinet, you do write but you have to be very careful. I make sure that when I do such stories I want to see the story before it goes to print. I don't want to wake up Friday morning and see somebody coming to my gate. The fear is there, you got kids and stuff, you worry. Even my daughter was saying why do you write stories that get you arrested.

The threats have made her so fearful of the head of the military, General Constantine Chiwenga, to the extent that she avoids meeting him face-to-face. And though she has tried to avoid him when she covers state functions, she recalls an incident where she bumped into him and was shaken by fear. That, she adds, was worsened by the general remarks when he allegedly angrily asked her; *"How can you wake up in the morning and go to work to attack the president, who do you think you are?"*

It also emerged from the discussion with Zaba that the laws and the environment affected female journalists differently from male reporters. According to Zaba women journalists are more vulnerable:

I think they attack us as individuals, on a personal level not a professional level. When you are a very courageous journalist, they don't look at you like that. There is always some sexual connotation around our work which makes me very angry. I feel if we were to compete for a story we all compete, we all face the same problems, but when it comes to females there is a lot of sexual connotation, there is more degrading. They try to degrade a female journalist more than they do the male. If it's a male they say or that is good he is brave, but for a female its totally different. Normally, they attack you they start calling you names, personally I have been called a bitch, they start saying you get this story because you are female or this person is attracted to you, you have slept with

⁸³ The fear of being arrested on a Friday is grounded on past experiences where the police arrest individuals, especially private media journalists and human rights activists on Friday afternoon so they can detain them over the weekend, which does not count in the maximum 48 hour detention period permissible under the law. With the country's condemned detention cells, spending a weekend in custody is a hard enough experience for any suspect and can be used as a deterrent against reporting on hard stories.

so and so. It's not about professionalism, but about us opening our legs to people to get what you want, which is very sad.

Besides, female journalists are more afraid of being arrested than their male counterparts and try to avoid difficult stories. But despite this, she still tries to encourage her female reporters to also go for hard bits just like their male counterparts so they can realise their potential.

Zaba also revealed that journalists also face unwarranted pressures from politicians who try to influence coverage of issues by making personal attacks on reporters. And she noted that there have been few cases where certain individuals connected to the publisher also try to influence their coverage. However, that has largely been resisted as she writes whatever she has so long she has sufficient evidence for the story. She also cited law suits as another threat to the sustainability of the media in Zimbabwe, saying some individuals tended to sue the media not because their stories are malicious but simply to drain them financially.

She cited interventions by organisations such as MISA-Zimbabwe to try and influence the democratisation of the media environment and bemoaned her media house's failure to proactively come up with visible initiatives around media freedom.

3.3.3 Nevanji Madanhire

Mr Nevanji Madanhire⁸⁴ cited provisions of AIPPA, POSA, CODE, Official Secrets Act as some of the laws that criminalise expression in Zimbabwe. In his own assessment, the CODE was the most harmful of the laws as it criminalised defamation, which he noted has no place in a democracy as defamation is adequately protected in civil law. Asked on his own experiences as a senior journalist practicing in Zimbabwe, he recalled three incidents in which he has been arrested. One of those was his arrest on 26 June 2011 together with his reporter Patience Nyangove and a representative of *The Standard* publishers Loud Ramakgapola. This followed a story they published raising MDC fears over the security of the party senior official Jameson Timba. He was detained overnight in police custody while the other two were released on the day. They however, all appeared in court the following day facing charges of criminal defamation as defined in section 96 (1) of the CODE. According to Madanhire, the state alleged that the story contained falsehoods as it claimed that one "notorious" Crispin Makedenge a senior police officer had taken part in the arrest of Mr Timba.

In another incident, Madanhire was arrested together with his reporter Nqaba Matshazi on 15 November 2011. They were charged with theft, unlawful entry and criminal defamation over a story published in *The Standard* stating that former central bank senior employee Munyaradzi Kereke's medical aid firm was in the red and prejudicing its members who were no longer accepted by medical practitioners because the society consistently defaulted on payments.⁸⁵

In the third incident on 18 November 2011, just about two days after their arrest over Kereke story, Madanhire and Matshazi were summoned to the police to give a warned and cautioned statement over another criminal defamation charge. This followed a story they published alleging that Home Affairs Minister

⁸⁴ Mr Nevanji Madanhire is the editor of *The Standard* newspaper, one of the private weeklies publishing in Zimbabwe. He has been arrested on at least three occasions charged with violating provisions of the CODE. He has challenged the constitutionality of his charges at the constitutional court. The matter is still to be determined by the court.

⁸⁵ The *Standard* report published on 6 November 2011 alleging that Munyaradzi Kereke's medical aid firm was facing problems. Source; <http://allafrica.com/stories/201111070252.html> (accessed October 17, 2013)

Kembo Mohadi had muscled out resettled farmers in Beitbridge to create room for his son and nephew.⁸⁶ They were however not detained over the matter in which Mohadi was the complainant.

On his experiences in detention he recalled:

In all cases I was picked up from the newsroom by detectives from the Law and Order Section of the ZRP based at Harare Central Police Station, 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.

But despite the civil manner in which the police treated him, the incidents did affect his family and relatives. He noted:

The events obviously shook my family to the core, particularly my septuagenarian mother who lives in the rural areas and heard the stories second hand from people who had listened to Studio 7 of the Voice of America. Because she knew the extent to which Zanu PF violence could go she had this real feeling that I would be killed. Many of my relatives thought likewise. My mother wished I could quit. My wife and children were more encouraging. My daughter who was studying abroad was very worried and wanted me to quit. Lots of my close friends tried to persuade me to quit journalism.

Asked on his view on the application of the laws, Madanhire opined that the laws were targeted at journalists working for the private media and those corresponding for foreign media adding that no one in the public media has been indicted on the same laws though they on a daily basis write and publish defamatory stories on politicians against ZANU PF. Consequently, as a journalist working for the private media there are times when he has wondered if what he was doing was worth the trouble. While the temptation to conform is sometimes overwhelming, that has changed him as an editor even though he is now more cautious of his movements. And he avoids the newsroom on Friday when they tend to want to pick up someone and lock them up over the weekend.

On the impact of the laws on his journalists he contended:

The effect on journalists is the same regardless of their gender; they all fear incarceration and torture. Of course, the fear will be more pronounced on the female journalists who fear they may be sexually abused or raped by investigating officers. That is why they are only too ready to comply with what detectives demand in terms of information.

While Madanhire pointed out that there are no particular individuals that his paper now avoids because of the laws, he like other journalists interviewed for the research, noted that military and security issues were always tricky to cover because the military and intelligence services can deal with journalist in an extrajudicial manner and journalists tend to avoid reporting on these sectors. Like Munyuki, also interviewed for the research (see below), he cited the abduction and torture in 1999 of former Standard journalists Mark Chavunduka and Ray Choto by the military for reporting on an alleged failed military coup.

3.3.4 Dumisani Muleya,

Mr Dumisani Muleya⁸⁷ was very critical of the existing media laws such as POSA, which he said was a relic of colonial laws the Zimbabwean government retained after independence and repacked after 20 years to

⁸⁶Madanhire and Matshazi's second arrest in less than three days after another arrest. The arrest followed an unflattering report on the alleged conduct of home affairs minister. Source; <http://www.radiovop.com/index.php/national-news/7550-minister-mohadi-targets-journalists.html>

restrict the media and protect the President. He also cited AIPPA as another law designed to license people to speak under the guise of accreditation of journalists. To buttress his views he made reference to Parliamentary Legal Committee's unflattering observations during parliament's debate of the law when it was presented in 2002.⁸⁸ Mr Muleya was equally unimpressed with the CODE, which he described as very lethal to the exercise of freedom of expression. Like Kwenda, he described the Act as a "catch-all" kind of law because anything that the media write could be deemed an offence if the authorities so wished adding that the sanctions for the breach of the law if found guilty were heavy with a maximum of 20 years in jail for writing a basic story. He cited an example of a case in which his paper is facing charges under the CODE for reporting in April 2013 an MDC senior official Giles Mutsekwa confirming his party's engagement with the military ahead of elections as a way of eliminating mistrust between the party and senior members of the army. According to Muleya, the paper quoted the minister on record saying he had meetings with some members of the security sector. But, he added, the military denied the story though not the fact that the MDC official met them. They picked up the editor and the reporter and charged them with spreading falsehoods and information that is prejudicial to the state.⁸⁹

Coupled with this section 31 of the CODE, Muleya also cited section 96 of the Act, which criminalises defamation as another provision that severely affected the work of journalists. He recalled yet another incident when he fell foul of the provision. This was when he reported the displacement of farm workers in Wedza at the height of farm invasions. The police arrested him and questioned him for eight hours on the source of his story. His lawyer tried to get the police to explain how the exposure of farm workers' displacement amounted to criminal defamation, but he could not get any useful or meaningful response. In his own analysis his arrest followed the embarrassment the report caused the state given that it was published ahead of a SADC meeting Zimbabwe was to host. According to him, government wanted to intimidate journalists from reporting such cases as most farm workers were of Malawian, Zambian and Mozambican origin, some of the SADC countries Zimbabwe was hosting for the meeting. With such stories filtering through to the public domain, regional governments were bound to seek answers from Zimbabwe on its land reform programme. Typical of such criminal defamation cases, Muleya contended, the police simply charged him but the matter did not go for trial. He was told the authorities would proceed by way of summons. Those summons are still to be issued to date.

His analysis is that the authorities don't normally proceed with such cases because of lack of sufficient evidence to mount successful prosecution, which makes the arrests under criminal defamation an act of harassment and intimidation to instil fear among journalists so they stay away from hard stories. In that sense, Muleya notes, the authorities use the arrests as a deterrent. Because of that, journalists now tend to self-censor themselves and avoid certain stories, especially those to do with President Mugabe and his family. This fear is not grounded on the imagined but real experiences.

Eight years ago (2005) Muleya recalls writing a story on the brother of President Mugabe's wife, Grace. The story exposed Grace's brother attempts to use his relationship with Grace to threaten his employers with seizure of their company if they resisted awarding employees a salary hike. When the story was published, Muleya was arrested on the grounds that the article had put Grace Mugabe's name into disrepute and damaged her reputation criminally. Although Grace was supposed to be the complainant, it was not clear from the court papers who was aggrieved. Again, the police said they will proceed by way of summons and to date nothing has come off it.

⁸⁷ Interview September 3, 2013. Mr Dumisani Muleya is the Editor of the Zimbabwe Independent and a member of the Zimbabwe National Editors' Forum executive committee. He has fallen victim to the country's media laws several times.

⁸⁸ n31 above

⁸⁹ The Zimbabwe Independent reported that the MDC was engaged in sensitive talks with some members of the military top brass as a way of ensuring a smooth transition should the party win the July 31 elections. This followed reports that some sections of the military would not accept an MDC victory. It carried the story on April 26, 2013 under the title; MDC-T engages army chiefs, <http://www.theindependent.co.zw/2013/04/26/mdc-t-engages-army-chiefs/> [accessed October 6, 2013].

Besides, this story Muleya also cited the media's reluctance to publish the names of multiple farms that Mugabe and his family own for fear of reprisals. He noted:

We have been hearing for a long time that Mugabe has 10 farms and names of those farms have been given. People can go there and confirm one or two but to get up to 10 is a problem. You are just told that this is one of his farms... In the absence of documentation you can't authoritatively write that story because they will pick up you up. They will pick you and say where is your evidence. Yes evidence must be there but the quest for evidence must not be an obstruction or the prevention of writing stories to the extent that if you are able to confirm, test your information one way or another without written evidence you must still progress. Otherwise there will be no journalism in the world if the idea was that you can only write stories on the basis of something that is documented or on the basis of evidence that is documented. Big stories around the world were never written on the basis of evidence that is documented. You start getting information bit by bit. But that can only happen in an environment, which allows that kind of latitude to investigate in that kind of way. So there are sensitive subjects that we end up saying sometimes this is not worth it. Let's stay away from Mugabe family stories and move on with life.

Apart from stories to do with Mugabe's family, Muleya identified the military or the security sector as another area that they treat with caution. He noted that most cases of harassment were recorded in the private media though he recalled a case where the then editor of the state run Chronicle, Brezhnev Malaba, his reporter Nduduzo Tshuma were charged under criminal defamation in March 2009 for exposing alleged corrupt involvement of senior police officers in grain scandal in Matabeleland North province.⁹⁰ That case, according to Muleya, shows that the authorities are very sensitive to journalists exposing corruption and anybody putting them on the spotlight can be a target. He advised state media journalists who sometimes labour under the false assumption that these laws are just for the private media to disabuse themselves of that notion.

The laws have thus affected news gathering in a big way. Apart from self-censorship, female journalists are now more fearful of some stories and would avoid them. Also, Muleya cited huge legal costs they incur through the provision of legal aid to journalists as another threat to media's operations. This is worsened by the protracted legal processes which lawyers bill every step of the way. But despite these problems, Muleya points out that they have tried to resist pressures from commercial interests and other sectors that may seek to influence the editorial slant of the paper.

But all the resilience has come with a price on his personal security in some cases. He cites the aftermath of his publication of stories on the intelligence's clandestine takeover of private media in 2005. He said his contacts in the central intelligence organisation warned him of the potential dangers to his security following the publication of the stories. According to Muleya, the then security minister Didymus Mutasa said to him *"we are seeing your stories, we are very worried. Don't take us for cowards for being quite. We are going to deal with you if you continue writing these stories"*.

Muleya could not ignore such warnings and he had to go to South Africa and worked from his paper sister publication the *Mail and Guardian*. All this has affected his family who normally panic when he is arrested and charged fearing that he may be imprisoned for 20 years, the maximum sentence under the CODE.

⁹⁰Malaba and Tshuma were arrested in 2009 and charged with criminal defamation and breaches of the Criminal Law (Codification and Reform) Act. They were arrested for a news article published in the Chronicle that exposed top police officers for their alleged involvement in a major maize scandal at the Grain Marketing Board (GMB). They subsequently successfully applied to have their case referred to the Supreme Court after they challenged the constitutionality of criminal defamation at the magistrates court. <http://www.journalism.co.za/news-and-insight/83/3404-editor-of-state-owned-newspaper-challenges-defamation-laws.html> [accessed October 3, 2013]

3.3.5 Guthrie Munyuki

Like his colleagues in the media, Mr Guthrie Munyuki⁹¹ also cited AIPPA, POSA, OSA and the CODE as the laws that criminalise and inhibit freedom of expression in Zimbabwe. According to Munyuki, POSA was crafted to restrict free expression by human rights groups, non-state actors, including civil society groups and journalists as well as political parties. This he based on the fact that the police reserved the right to sanction a gathering of events before it could be held. Although the OSA was also a repressive law which the state conveniently uses to intimidate the media from scrutinising arms of state such as the security sectors, Munyuki contends that section 31 of the CODE, which criminalised publication of information deemed to be prejudicial to the state was the worst. He argued:

For me it's the worst piece of legislation in Zimbabwe because the state can decide what is prejudicial to the state, what is a falsehood. Yet when we look at it it's never a falsehood because there is no one who has ever been convicted under the piece of legislation but there have been so many arrests in the past.

He also identified section 96 of the CODE, which criminalises defamation as another provision that politicians abuse to try and silence the media. Like other arrests under provisions of the CODE, Munyuki points out, no one has been convicted for criminal defamation. In fact, he noted, most cases die a natural death after the police say they will proceed by way of summons, a strategy Munyuki believes is used to cover up insufficient evidence against the accused.

Munyuki recalled one incident in which he fell victim to the repressive media environment while covering the quashing of a public gathering by the police as a *Daily News* reporter. In June 2002 Munyuki, together with a photographer Virginia Mauluka and their driver Shadreck Mukwesheni, set to cover MDC commemorations of World Youth Day in Harare. This followed reports that the police had actually broken the event and were arresting participants. When they got to the event the police allowed them to cover what was happening. However, things changed when the anti-riot police arrived at the scene. When requested to explain why they were there, Munyuki recalls, they produced their accreditation cards to prove that they were journalists. This did not help. Munyuki recalls:

They said we are actually looking for you people from The Daily News. You write falsehoods so we will deal with you. It had nothing to do with the MDC gathering... It was an opportunity that they had got to deal with us. We were arrested, assaulted and detained for three days. When we appeared in court there were so many charges. All the others were dropped except that of public violence. It was quiet surprising because we had accreditation cards and we had told them that we were journalists but they could have none of it.

Munyuki suffered a broken arm as a result of the assault and he and his colleagues were charged with public violence for allegedly stoning a police vehicle. But his ordeal is not isolated. He cited other cases involving the assault of human rights activist and lawyer Munyaradzi Gwisayi, who was arrested and assaulted for trying to render legal aid to MDC youths on the same day he was also picked up; the beatings of human rights lawyers Beatrice Mtetwa and Gugulethu Khumalo for trying to defend those arrested as well as the beating of photographer Tsvangirai Mukwazhi by the former wife of the commander of the military Jocylene Chiwenga in the course of duty. He notes that such beatings took place during the escalation of the state security agents' intolerance of divergent views between 2002 and 2008. Although incidents of beatings and such forms of harassment have gone down arrests and threats of arrest by the police to intimidate journalists continue.

It is such problems that has made news gathering a difficult task, especially those stories that involve politicians. Munyuki notes that every time they do such a story, they have to think of the ramifications of the article once its published because the fact that one is on a sound footing with regards evidence has not

⁹¹ Interview September 5, 2013. Guthrie Munyuki is the deputy editor of The Daily News and a victim of violent repression of media freedom by the police.

counted for much in the past. To illustrate his point he recalls that his paper had shied away from three stories on alleged sexual harassment that involved prominent ZANU PF ministers. This was despite the fact that they had evidence including a letter of complaint written to the President by a husband of one of the complainants. Munyuki stated:

We are afraid to run the story with what we think is the evidence, which may not necessarily prove to be evidence once the heat is applied on us. In other words, you tend to be indecisive on dealing with such matters... Whereas in the past, looking at it and applying journalistic ethics and balance we could easily run the story. But now it's difficult, it's like an axe hanging over your head. So ultimately you look for the easy way out, (and that is) not to run the story.

The laws have created a group of people that the media would rather avoid for fear of inviting legal problems upon themselves. Munyuki cited ZANU PF official and minister Jonathan Moyo, businessman and ZANU PF loyalist Munyaradzi Kereke and army senior officer Douglas Nyikayaramba as some of the individuals *The Daily News* treat with caution. This is because they don't waste time to go to courts once stories about them are published. Munyuki also cited the security sector in general as one area that his paper almost ignores for fear of reprisals using the law as well as extra-legal reactions such as abductions and threats they have made to journalists in the past. He demonstrated his point by recalling the experiences of the then Standard Editor Mark Chavunduka and reporter Ray Choto⁹² who in 1999 were detained and tortured by the army for reporting on an alleged coup plot by the army. The two's ordeal, Munyuki observed, was still alive in the minds of journalists to the extent that even if they have something that they think is credible they don't proceed with the story. Resultantly, there is less coverage of issues relating to corruption in the security sector. Like at the *Zimbabwe Independent*, the fear of reprisals appears to terrify female journalists from covering hot subjects, leaving their male counterparts to go for those bits, which the Daily News newsroom terms "Kunonyudza", the deep end.

The cost of legal suits is another major hindrance to free journalism enterprise according to Munyuki. He argued that the amounts that are demanded by plaintiffs, some of which amount to US\$3 million would cripple media houses if they were to be awarded. Thus, when they look at the potential consequences of publishing a particular story, they end up spiking it. It is against this background that *The Daily News* also pays serious attention to opinion pieces to avoid publishing defamatory material that may cost the publication. According to Munyuki, once the editorial team decides that an opinion piece is defamatory and malicious, they don't publish it. Although the laws are projected as aimed at all Zimbabweans, Munyuki believes they were crafted to silence the independent media and civil society in order to cripple ZANU PF's main political rival, the MDC. He signed off:

Surely, where we have self-regulation, the VMCZ, which promotes dialogue in society and dispute resolution without going to court, we then have a law, which has negated so many gains that we have made since independence, recognising a body that has the prerogative of withdrawing a publishers' licence where it thinks that there has been a violation of certain ethical principles or guidelines. I think it's a danger because you are at the mercy of the one implementing that... So for journalists in Zimbabwe it's a very, very serious thing that causes trepidation and jittery among journalists.

3.3.6 Voice of the People Communications Trust

Mr John Masuku⁹³ cited AIPPA and the Broadcasting Services Act as the laws that impacted most on freedom of expression. Masuku was arrested in December 2005 for allegedly running a radio station without

⁹² Mark Chavunduka and Ray Choto were arrested in January 1999 for reporting on an alleged failed coup plot by some members of the military. Chavunduka was arrested on January 12, 1999 and kept incommunicado for six days at Cranborne military barracks in defiance of a High Court judgement ordering his release. Choto subsequently handed himself over to the police on January 19, 1999 after they had sought to arrest him over the story. The two were severely tortured in custody.

⁹³ Interview August 22, 2013. John Masuku is former head of radio services at the public broadcaster, ZBC. He was retrenched from under the reforms ushered by the then Information Minister Jonathan Moyo after the 2002 elections. He has worked as a journalism

a license despite the fact that he only ran an office in Harare with the station located outside Zimbabwe. The police raided his offices taking with them the organisation's documents and staff members who the police used as ransom to ensure Masuku surrendered himself to the police. Masuku spent five days in detention and was released on bail. In January 2006, his board members were also arrested on the same charges. Like other journalists interviewed for this research, Masuku conceded that correspondents reporting for his exiled radio station practiced self-censorship for fear of falling victims to the country's expression laws. This is in instances when the news team is not "too sure about what will happen next". While contending that there have been relatively fewer incidents of arrests and harassment of journalists compared to more than four years ago, Masuku still believes there is need to repeal the laws that hinder freedom of expression. He noted:

Criminalisation of expression should come to an end. All media reforms that have been called for with the advocacy that has come from our media bodies as well as in the political front... I think that (media reforms) should be concluded, it will make the media scene a much admirable space that it is now.

3.3.7 Molly Chimhanda

Ms Molly Chimhanda⁹⁴ like other media freedom lobbyists, she is aware of the laws that hinder freedom of expression in Zimbabwe. She cited the CODE as the most repressive as it criminalised commenting negatively about the office of the President and security forces. Ms Chimhanda is one of civil society activists that have been affected by the laws. In December 2011 she was arrested together with her fellow MMPZ workmate Fadzai December and the chairperson of the Public Information Rights Forum (PIRF) Gilbert Mabusa in Gwanda. They were charged with contravening section 33 of the CODE. This was after they had distributed a DVD on responsible journalism during public a meeting they facilitated in Gwanda. According to Chimhanda, initially the police accused them of violating POSA for allegedly holding an unsanctioned public gathering as well as distributing material which was likely to provoke the breach of peace. Narrating the circumstances leading to the arrest, Chimhanda said they held a public meeting during which they distributed a recorded DVD that summarised legal provisions aimed at curtailing hate speech as a way of educating members of the public on the adverse effects of hate language. The DVD contained excerpts of politicians' public speeches. When they were taken to Gwanda police, two charges were filed against them. The first one being that of holding a meeting without a clearance and the second being that of distributing material that is likely to provoke the breach of peace. Asked whether they had notified the police in accordance with the law, she said their PIRF Gwanda committee did so. But it appeared the police wanted a written notice which they didn't have upon request of proof by the police. She believes their arrest was largely prompted by the politics of the time more than a violation of any crime. She recalled that when they were arrested Gwanda was a high security zone as it was to host the annual ZANU PF conference.

Chimhanda and her colleagues were detained for the mandatory maximum 48 hours before they were taken to court. They were granted bail at their first appearance but the state invoked section 121 of the Criminal Procedures Act, which granted the state powers to further detain suspects for a further seven days regardless of the court rulings granting bail. In invoking the section, the state argued that Chimhanda and her co-accused could not be granted bail because they were young and had potential to flee the country if granted bail.

lecturer at a journalism college he helped found in Bulawayo. He is the current Director of Voice of the People Communications Trust, which runs an exiled radio stations RadioVOP. He was arrested in 2005 together with his two senior staff members and his board for allegedly operating a radio station without a license. The courts rejected the state's efforts to keep the arrested on bail because of insufficient evidence. The state said it will proceed by way of summons.

⁹⁴ Interview August 29, 2013. Molly Chimhanda is the Advocacy officer at MMPZ. She was arrested in 2011 while conducting outreach work for her organisation. She was charged under the CODE and detained for two weeks. She is awaiting trial.

They were then taken to Gwanda Remand Prison where they spent another 10 days in custody. The conditions in detention were unbearable, recalls Chimhanda. The police cells were filthy and urine infested; there was no running water and resultantly the toilet was never flushed. However, the remand prison conditions were relatively better. Chimhanda and December shared a cell with seven other women. They cell had no door, leaving them vulnerable to possible attacked by male inmates who were in a cell just opposite theirs. Consequently, Chimhanda and her female inmates could not lived in fear of possible attacks. She believes the prison authorities put them in such a cell for psychologically torture and traumatise them. Access to their legal representative was another battle they had to contend with. According to Chimhanda, their lawyer was initially denied access to them the first day they were arrested and they only met him for less than 40 minutes on the second day. However, the treatment they got was no different from other inmates accused of separate crimes. As an example, Chimhanda cites another lady who was arrested for driving without a driver's license was also taken to court after the mandatory 48 hours, just like it happened to them. All the inmates experienced the same jail conditions.

The experience has had an effect on Chimhanda and her colleagues. For example, after their release after close to two weeks in detention, she experienced sleeping problems and traumatised that she could not conduct her outreach public meetings for a long time thereby affecting her organisation's campaigns around freedom of expression. Also, the incident struck fear in the PIRF Gwanda committee, which Chimhanda worked with. Three of the five members that made up the committee decided to resign their membership and disengage from the committee's activities. Her family was also affected as they had to travel for about 400 km to and from Gwanda daily to visit her for the duration of their detention. December's mother had to move from Harare to live in Bulawayo, which is 120km from Gwanda while her father also had to move from South Africa where he is based and temporarily lived in Bulawayo too so as to be closer to their child. All this was at a huge cost to their parents. Although Chimhanda's parents interpreted her ordeal as one of her occupational hazards, December's parents were seriously affected by the arrest and encouraged their daughter to consider leaving civil activism for another safer job. December subsequently quit MMPZ and relocated to South Africa.

After their release in December 16 2011, Chimhanda and December frequently travelled to Gwanda, close to 600km away from their Harare base, for two months to report to the police as per their bail conditions. While their bail conditions were subsequently relaxed, their case is still to go for trial. Chimhanda and her colleagues are now challenging the constitutionality of section 33 of the CODE, under which they remain charged.

3.3.8 Gabriel Chaibva

Mr Gabriel Chaibva⁹⁵ contends that there is no country that has a dynamic free press where there is genuine free flow of information than Zimbabwe. Chaibva argued that there was no nation where there was the kind of media dynamism in place and irresponsible Press with no repercussions than found in Zimbabwe. He claimed there were no other European countries where journalists would ever do what they do in Zimbabwe.

To round up his arguments he asserted:

There is no such thing as free flow of information and media freedom. 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

⁹⁵ Presentation made at the Media Stakeholders Conference September 4, 2013. Mr Gabriel Chaibva is a ZANU PF loyalist and was reported to be working with the elections directorate of the party for the July 31, 2013 elections. He is often quoted in the state media defending ZANU PF policies masquerading as a political analyst. Although he had agreed to be interviewed for this research on September 6, 2013, he subsequently when he met the researcher. He however permitted the researcher to use the remarks he made at the Media Stakeholders Conference.

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...

3.3.9 Netsai Hluphekile*

Netsai Hluphekile⁹⁶ cited AIPPA as the most harmful law that criminalised expression through the media. This is because the law was established to control the proliferation of media platforms through which citizens could express themselves as well as to criminalise free journalism enterprise, itself a vehicle of free expression. Hluphekile supported their argument by citing as an the closure of the then top circulating daily newspaper *The Daily News* more than 10 years ago. They pointed out that experiences of that paper and all the troubles it went through sent a strong message to publishers that the state would pounce on them should they operate outside the confines of the Act. And once the publisher is barred from operating under the Act, it means the end to their means of survival through providing space to members of the public to express themselves and selling news. Besides the cost of closure on the publisher's investments, Hluphekile pointed out how the arrests of journalists under the country's laws has also had a negative impact on media as a business. Hluphekile pointed out that a publisher would have to pay for legal costs of hiring a lawyer for the arrested reporters/editors as well as provide support for their immediate family members. She noted:

We have been lucky in the last four years, we haven't had a situation where a journalist has been arrested and spent days in jail... I remember in one incident in 2011 one of our journalist was arrested and his wife was expecting and as a publisher one had to take care of the situation and support the immediate family...

To make matters worse, Hluphekile added most lawyers are afraid of handling cases of journalists arrests forcing publishers to look for one from a small pool of brave ones. This has resulted in high legal costs, which affects running costs for publishers.

The potential devastating impact of lawsuits filed against publishers under the country's laws is yet another challenge that publishers have to contend with. Hluphekile argued that if the lawsuits they get were to be successfully rewarded to the complainants news papers will definitely close. Resultantly, she noted:

You need to be careful what you publish to avoid lawsuits and guarantee your sustainability. Fears are that if your case is taken to a compromised bench like the one we have, you would lose and close down.

It is against these challenges steeped in the country's repressive legislative regime that publishers tread carefully and delicately balancing their duty to inform as well as their business interests, Hluphekile contended.

3.3.10 Xolisani Ncube

Xolisani Ncube⁹⁷ cited AIPPA, POSA and the CODE as the laws that criminalised expression. He identified CODE and POSA as the worst as they made it criminal to interrogate or expose public officials as well as the law enforcement agents. Mr Ncube recalled his experience as a victim of the CODE. He noted that he was arrested in November 2011 following a story he wrote a story about Local Government Minister Ignatius Chombo and his alleged corruption in the allocation of residential stands. Ncube attended the meeting where Chombo spoke on the issue. Ncube recorded Chombo verbatim but the minister didn't dispute the facts but their presentation which constituted criminal character assassination. While Ncube believed that

⁹⁶ Interview October 2, 2013. NetsaiHluphekile is a publisher. They publish a number of popular titles in the country. They refused to have their identity revealed for fears that what they may say may lend them in problems with the authorities thereby threatening the sustainability of their titles.

⁹⁷interview October 1, 2013. Xolisani is journalist working for The Daily News and is a victim of the CODE. He was arrested in November 2011 together with his Editor Stanley Gama over a story they published involving the Local Government Minister Ignatius Chombo.

the issue could be resolved through civil means, the minister took the matter to the police and pressed criminal defamation charges. He interpreted the move to try and deter Ncube from writing about the minister. He recalled his experience:

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. They even went on and produced stories I had written on Chombo when I was a municipal reporter. They even said to me 'young man you say you have no vendetta against the minister, but there are these stories you wrote'... So even if I wasn't physically tortured but 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.

The police were divided on how to treat him. While others wanted to punch him others did not see the reason for beating him up. Ncube recalls that this division saw some police officers try to mislead his lawyer Alec Muchadehama about his whereabouts by tossing him from one office to another until he secretly notified of the exact office he was being detained through his mobile phone. Once his lawyer pitched up, the police started treating him with the respect due to a suspect and he began feeling more secure than when he was alone.

Following this experience, Ncube has since asked to be removed from the municipal desk and is now doing crime stories to avoid hard stories that involved Chombo.

Ncube also recalled his arrest in March 2013 for four stories he wrote in February 2013 on an incident of political violence where the state security minister Didymus Mutasa was allegedly involved. Mutasa reported the issue to the police and though he was briefly detained and submitted his warned cautioned statement, he still views the two incidents as constituting criminalisation of expression. Like other journalists that have been arrested, there is still no progress regarding prosecution of the cases. Ncube noted that the police told him that they wanted to investigate further. He said:

I know what that means. It means that anytime at their discretion they might decide to get back to me. Probably that's when you are making a move be it academic, politically or whatever. When they see that you are probably advancing they may use the case to stop you.

He openly acknowledged that his experiences have seen him self-censoring himself effect

But this self-censorship is not. Though I have taken a stance to say I am a journalist by profession, whatever comes it's a sacrifice, it's a calling, I will write. But I will write the story with a self-censorship aspect to say let me censor anything that might lend me in trouble. I will put the public interest first but there is a small calling inside me that will say; 'do you still remember 2011, you have forgotten about the lawsuits, have you forgotten that you were taken by the police'.

only isolated to Ncube but has affected the whole newsroom. The censorship is so prevalent that Ncube has had several stories spiked or diluted. He notes that there are certain stories especially those that involve the police, which they avoid for fear of being accused of undermining the authority of the police and being arrested.

Asked why they would self-censor if they were sure their stories were solid and they could defend them in court, Ncube noted:

Litigation is not a matter because you can defend your case. The issue is about arrest. Politicians know that suing you will not help matters because they might not even win the case. Actually they might open up more issues because when you go to court you may produce a lot including those things you left out. The only possible thing is to make you arrested...for intimidation where you are told 'young man know what to write and

what not to write, somethings are not to be touched'. And if it's your first time and you are not strong like I was, you come out shivering, you feel demotivated and the profession is a lion's den...

But while Ncube can deal with the police, he can't interview defence ministers. This is because the successive defence ministers have refused to grant interviews demanding to know who would have given him their contacts as well as who he was. Ncube also avoids the police chief. To illustrate the difficulties he has had covering issues to do with the security forces he recalled:

Last month I was invited by the ministry of information to attend a graduation of (security) officers... We (Ncube and private newspapers journalists) were barred to get in even at the invitation of the ministry. We were told that we couldn't cover the event and it was only for the invited and those invited by the army... The army spokesperson of the army said no we never sent an invitation for the Daily News. How did you get invited? Now the police have developed an attitude against the private press. The police have developed an attitude against the private press. The spokesperson of the police Charity Charamba is even boasting about it. You call her she will tell you I won't comment much, I won't eventell you what's happening. You write what you want. The (aim) is to have you to say you wrote what you wanted and if it's not true they will lay charges against you...

Although Ncube has faced problems practicing as a journalist, he notes that he is lucky that his father was a journalist and he supported him when he was arrested and encouraged. But his wife did not understand at first, but she now supports him in his profession. However, she always reminds him not to tackle stories that may lend him in trouble.

3.4 Interviews with other stakeholders

3.4.1 Virginia Muwanigwa

Ms Virginia Muwanigwa⁹⁸ identified POSA, AIPPA, CODE as the laws that criminalise freedom of expression in Zimbabwe. To illustrate her views that POSA had stringent provisions that criminalised expression she recalled an incident that occurred in 2006 where the Women's Coalition had organised a demonstration against one legislator who had criticised the Domestic Violence Bill that was under discussion in Parliament. She recounted:

It was on Thursday when that happened and we wanted to stage our demonstration the next Friday. But when we spoke to the police and applied for clearance to demonstrate we were advised to do our demonstration on Tuesday, about four days later than when we wanted to demonstrate. So that shows you, you can't have spontaneous demonstration. There are times where something happens and you want to respond in as quick a fashion as possible, but that can't happen.

As another example, she also cited the beating and arrest of women who were demonstrating on behalf of their husbands in Hwange non-payment of salaries.⁹⁹ Such incidents discourage people from freely expressing themselves on matters affecting them. Although Muwanigwa has not been directly affected by the laws as an individual, she noted that some of the Women's Coalition sister organisations such as Women of Zimbabwe Arise has been affected several times for expressing themselves by means of protest.

However, while she has not victim of the laws, she does temper her speech when addressing public gatherings as she has to think about possible consequences of what she says.

⁹⁸ Interview October 8, 2013. Ms Virginia Muwanigwa is the Chairperson of the Women's Coalition in Zimbabwe. The Coalition draws up its membership from women's organisations in Zimbabwe and seeks to fight for women's rights from a coordinated position.

⁹⁹ On October 7, 2013 the police violently broke up a protest by wives of Hwange miners who were demonstrating against the five months non-payment of their husbands salaries. Two women were reported to have sustained serious injuries following the police action. See story on, www.nehandaradio.com/2013/10/07/riot-police-beat-up-hwange-women-protestors/ [accessed October 9, 2013]

As a consumer of media products, Muwanigwa noted that the laws are affecting the work of journalists as the laws appear to be targeted at some media groups and civil society organisations. She cited the arrest of MMPZ officers, Molly Chimhanda and Fadzai December, who were arrested while in the course of duty and charged under the CODE. She opined:

People's freedom to express themselves can only lead to a better society in which the diversity is reflected and more development is achieved. I believe that if we have a situation or a society where people are expected to agree all the time, that kind of mechanical solidarity reflects a very poor image of a democracy. We need to be able to be having an organic solidarity where people, if they are unhappy about a situation, they are free to express themselves even if their views do not conform to the accepted majority position in society.

Conclusion

From the interviews conducted there was general consensus among civil society organisations and activists on the need to overhaul the country's legislative framework in order to replace the current pieces of legislation on freedom of expression with democratic ones. Probably underlining the ideological standing of some in ZANU PF on freedom of expression and access to information, it was only Mr Gabriel Chaibva who found nothing amiss with the country's state of freedom of expression. But that is understandable given that, those aligned to ZANU PF including the media the party controls have hardly been affected by the laws. That in itself appeared to vindicate observations by the majority of those interviewed that the selective application of the laws betrays the underlying intention of their promulgation: to try and harass and silence those seen as propping up the political chances of ZANU PF's main rival the MDC. It is for this reason that though explicitly stated during the interviews, many of the respondents inferred that the laws continue to dominate Zimbabwean statutes mainly for narrow political expediency than protecting national interest and citizens' basic liberties. In summary, it was clear that the laws were used against journalists working for the independent media to deter them from exposing unflattering transgressions of public officials. This perception was bolstered by the fact that despite numerous arrests, there was hardly any prosecution let alone conviction of those accused. In many cases arrested journalists are released after a brief detention and told that the state will proceed by way of summons. Some of the journalists have lived in uncertainty for close to a decade as their cases are still to be finalised. The effect of that, as it emerged from the interviews, is that journalists tread with caution in the course of duty fearful of the legal axe that forever hangs above their heads. That has engendered self-censorship among the newsrooms as openly acknowledged by those interviewed.

The fear of arrest and likely ill treatment at the hands of the police such as denial of sufficient access to lawyers; psychological and physical torture and filthy detention cells appeared to be at the centre of self-censorship and avoidance of certain hard topics that involved prominent public figures by journalists. However, not all officials were feared but those that were highly litigious such as Jonathan Moyo, Munyaradzi Kereke, Ignatius Chombo, Obert Mpofu, among others.

It also emerged that the most feared were members of the security forces, particularly the military. Almost all the journalists revealed that they were afraid of reporting on members of the security forces due to their penchant for arresting those they deem to have crossed the line. Also, the illegal detention and torture of two independent journalists in 1999 by the army for reporting on an alleged military coup has left an enduring reminder of what could happen to those that expose the military in bad light. Besides, it was also apparent that the fear to report on the security forces was largely hinged on the traditional fear of the security forces due to their position within the state.

While it was clear from the interviewees that the use of the laws against journalists was prompted by unpalatable reports on public officials they published, ordinary citizens were being arrested largely for comments, which they made in a social setting such as in pubs mainly on the head of state. As pointed out by Ms Petras, although some of the cases have been brought to trial there has been no urgency in deciding

the constitutionality of those cases that have been taken to the constitutional court thereby allowing the continued usage of the laws (the CODE) against ordinary citizens.

3.5 Description of campaigns to reform laws

What was clear from the research is that there is no coordinated campaign that specifically dealt with decriminalisation of expression per se. The issue was largely subordinated to a broader campaign around the democratisation of legislation governing expression by freedom of expression lobby groups, led mainly by MISA-Zimbabwe. However, none of those interviewed had details on the form and content of the lobby work, which in itself could either be an indication of poor publicity of the interventions by media freedom lobby groups or a failure by the lobbyists to build a strong and an all-inclusive network/coalitions on the decriminalisation of expression. But despite the scant knowledge on the specifics of the campaigns, there was general consensus that one of the key successes of the interventions has been the inclusion of explicit guarantees for media freedom and access to information, in addition to adequate protection of freedom of expression, in the new constitution. There was hardly any mention of government-led initiatives to safeguard freedom of expression prominent of which was the Kariba Media Stakeholders Conference held in 2009.

The conference was held to try and build consensus in promoting freedom of expression as enunciated in Article 19 of the coalition government's political agreement. Those invited included publishers, media owners, journalists, civil society activists and government officials. The conference came up with resolutions on how to reform the country's media space and decriminalise the practice of journalism. One of the key points of agreement was the need to review and amend AIPPA.¹⁰⁰ It was generally agreed that there was need to repeal the law and replace it with two acts; one that dealt with media regulation and another that provided for access to information. However, while the meeting agreed that the resolutions should be publicised and acted upon there was hardly any effort by the government to fulfil its pledges. What is known is that the convener of the conference, the MDC arm of the ministry of information, went on to draft two bills namely, the Media Practitioners Bill and Freedom of Information Bill as per the resolutions. Consultations of selected media freedom lobby groups and media practitioners were done to strengthen the documents before they could be tabled before the executive for consideration. While those consulted roundly condemned the Media Practitioners Bill as undemocratic as it was largely repackaged repressive provisions of AIPPA as it related to the licensing of the media and punitive sanctions for the breach of the law, there was consensus that the Freedom of Information Bill was a step in the right direction in enhancing access to information. However, it became clear that the executive was not willing to repeal AIPPA when President Mugabe presented the legislative agenda for the 3rd session of the Seventh Parliament on 13 July 2010. He only announced that government was to table the Media Practitioners Bill among the 23 bills but remained silent on the Freedom of Information Bill that Zimbabweans were looking forward to.¹⁰¹ Even then, he stated that the Media Practitioners Bill was merely going to amend few sections of AIPPA that dealt with registration of journalists and privacy issues.¹⁰²

In June 2011 the parties in government then came up with the Zimbabwe Election Road Map. Within the road map was an implementation matrix to guide the roll out of reforms as agreed by the parties. Included in the matrix was a section on envisaged reforms aimed at fulfilling the government's pledges to promoting freedom of expression and the media in the country. Below is the table of agreed reforms and set timelines.

¹⁰⁰ T Machakaire, in his autobiography *A Nose for News- The real life adventures of a Zimbabwean journalist*. Machakaire was one of the independent journalists that attended the conference and recorded notes of what transpired at the meeting.

¹⁰¹ The Zimbabwean newspaper, Media Practitioners Bill in line for debate in parliament, <http://www.thezimbabwean.co/human-rights/32652/media-practitioners-bill-in-line-for-debate-in-parliament-.html> [accessed 10 September 2013]

¹⁰² President Robert Mugabe Parliamentary Speech as published by *The Herald*, July 13 2010

Table 8: Media reforms as proposed in the elections roadmap

ACTIVITY	TIMEFRAME	ACTION BY
i Appointment of new board of the Zimbabwe Broadcasting Corporation	Consideration of these issues was deferred	i. Political Parties
ii Appointment of a new Board for the Broadcasting Authority of Zimbabwe		
iii Licensing of new broadcasters	Within 120 days from 1 August 2011	ii. Government
iv Appointment of new Trustees for the Mass Media Trust	Consideration of this item was deferred	iii. Media Commission
v Establish the Media Council of Zimbabwe	Within 60 days from 1 August 2011	
vi Call Upon the governments that are hosting and/or funding external radio stations broadcasting into Zimbabwe to cease such hosting and funding	Immediate	
vii Encourage Zimbabweans running or working for external radio stations broadcasting into Zimbabwe to return to Zimbabwe	Immediate	
viii Hate Speech To direct the state media to support all agreed government programmes and put a stop to attacks against ministers implementing such programmes	Immediate	

Source; The GPA Elections Roadmap, June 2011

As shown in the table above, focus appeared to be on addressing some problems affecting the media and not holistically promoting and protecting free speech. Meeting at the 2011 annual Media Stakeholders conference, delegates dismissed the proposed interventions as woefully inadequate.¹⁰³ For instance, the proposed establishment of a Media Council under ZMC, was seen as an entrenchment of the discredited statutory regulation of the media, which was antithetical to promoting freedom of expression through a free media.

Earlier, Zimbabwean civil society sought to seek redress from the African Commission on Human and People's Rights, a platform they have intensively lobbied for several years as a means to influence the promotion and protection of human rights in Zimbabwe. In 2005 MISA-Zimbabwe in partnership with the Zimbabwe Lawyers for Human Rights supported Independent Journalists Association of Zimbabwe file papers with the African Commission challenging sections 79 and 80 of AIPPA.¹⁰⁴ The Commission finally

¹⁰³ MAZ stakeholders meeting report, September 2011

¹⁰⁴In the 2009 decision in the case of the *Independent Journalists' Association of Zimbabwe vs. Government of Zimbabwe*, the ACHPR declared sections 79 and 80 of AIPPA to be contrary to the Human and Peoples' Rights to which Zimbabwe is a state Party.

handed down judgment in June 2009, in which it found the sections to be undemocratic.¹⁰⁵ While government repealed section 80 of the Act in 2008, the provision was then moved to the CODE.

Litigation has not only been at a regional level, but locally too. Several journalists from the private media and the then Deputy Prime Minister Arthur Mutambara filed papers challenging the constitutionality of criminal defamation with the Supreme Court between 2009 and 2013. However, none of the cases have been set for trial and as such no legal precedent has been set.

Besides litigation, civil society, especially under the umbrella of MAZ, has formulated a media strategy that is reviewed annually as a means to forge a coordinated campaign on decriminalising expression by media stakeholders. The strategy has five pillars of intervention. These include Media policy and legal reform; Independent mainstream media; Alternative media and communication including social media; Professionalism and capacity building and Transformation of state media into public media.¹⁰⁶ On advocacy, there is general agreement that the strategies should be transformational, developmental and instrumental in order to build national consensus on the need to repeal laws that criminalise expression and influence the adoption of laws that are benchmarked against regional instruments and protocols on freedom of expression, some of which Zimbabwe is a state party. In line with this strategy, MAZ members have established community structures in the country that conduct civic education on freedom of expression and access to information as well as lobby their local leadership among their respective communes to strengthen the bottom-up engagement of policy makers; build capacities and media literacy of the media stakeholders so they can make their demand from an informed, strong and sustainable position; and engage policy makers prioritising power brokers within the arms of state that can play a more influential role¹⁰⁷.

Section Four: Conclusion and recommendations

The research on the use and impact of laws that criminalise expression in Zimbabwe, adds on to other work by media freedom groups in the country that have produced analytical reports on the subject as lobby tools to engage relevant stakeholders on the need for reforms. This research work is therefore complimentary to other research work that has been conducted in Zimbabwe on freedom of expression. This research provides a brief historical background of the country as well as the prevailing political and media context.

It also provides details on the regional and international instruments that the country has ratified and those that it hasn't. The idea behind was so that it provides information on which instruments and obligations could be held against as lobbyists seek to influence its adherence to its international obligations. After detailing this information, it was important that there be a discussion of the specific sections of the laws that exist in the country, which criminalise freedom of expression or impose severe restrictions to the enjoyment of this fundamental liberty. Often, those in authority usually escape responsibility and accountability to its citizens by glossing over the scope of legislation that they administer under the guise of protecting national interest. Such has prevailed largely because of public ignorance of the laws that govern their citizenship, which itself is a symptom of lack of or poor civic education on basic civil liberties. In that light, details of the obnoxious provisions of the law will come in handy when the acts are juxtaposed against the country's new constitution, which for the very first time since the country's independence has an expansive Bill of Rights that include explicit guarantees for media freedom and access to information and protection of free expression. It is through an analysis of the provisions outlined in section two of the research that the disconnect between the new constitution and the existing laws can easily be identified, making a case for constitutional testing of the acts.

¹⁰⁵ Earlier, in its 2002 report, following a fact finding mission to Zimbabwe, the Commission made strong recommendations on the need to reform AIPPA and POSA, which they found undemocratic.

¹⁰⁶ MAZ Revised Media Strategy, 2013

¹⁰⁷ Minutes from the MAZ media stakeholders annual meeting that took place at the Wild Geese in Harare on 4 September, 2013.

But simply relying on the acts for the research would not have been sufficient in illustrating the repressive nature of the legislative environment. It is against this background that interviews with selected civil society representatives, media practitioners, politicians – some of whom are victims of the laws – was done. This was to give concrete evidence on the effects of the laws without which their impact would remain abstract. Notably, almost all those that were interviewed are affected by the laws one way or the other. The severity of impact range from fear to freely express oneself; self-censorship by journalists or tempering of speech by other citizens; to arrests/detention of those deemed to have “criminally” abused their liberty to speak. Threats, beatings and illegal detentions are also used to give a practical example of what may happen to those that may dare cross the thin line of what is right or wrong as narrowly drawn by authorities administering the acts.

Recommendations

It is against this background that the research’s findings that the following recommendations are made:

(a) *Repeal or amendment of laws to align them with the new constitution*

1. *AIPPA*

There is need to extensively amend the Act so that it becomes a truly access to information law and not the other way round. This can be done by benchmarking its revision against the basic principles on formulating an access to information law as contained in several regional and international instruments. Alternatively, as media stakeholders recommended in 2009, the law should be repealed altogether and replaced with an access to information legislation that is divorced from issues relating to media regulation as is currently the case. Issues relating to media regulation should be dealt with through a separate law. Again, such a law should be informed by best practice in regulating the media grounded in regional and international protocols as well as the collective aspirations of Zimbabweans, including the media. It would even be more effective if the Special Rapporteur engages the Zimbabwean government on the implementation of the ACHPR ruling called for the alignment of the Act with Article 9 of the African Charter and other principles and international human rights instruments. Her intervention on the matter will compliment and add weight to local pressure on the need for the repeal of the law. More importantly, by urging Zimbabwean government to benchmark the law against African instruments, will be in line with Zimbabwe’s position on the requisite measures to address its own problems.

2. *CODE*

The law should be amended to repeal provisions that criminalise expression to protect those in authority from robust public scrutiny. There are many civil remedies in the country that can be pursued by those aggrieved by free speech or feel defamed by the media. These include seeking recourse from the self-regulatory board, the Voluntary Media Council of Zimbabwe, or approaching civil courts. It is important that the Special Rapporteur highlights these issues in her campaigns on decriminalisation of expression in Zimbabwe. As a starting point, there is need to convene an all stakeholders conference on the decriminalisation of the freedom of expression in Zimbabwe, at which event the Special Rapporteur would be the guest speaker. The event will bring to the spotlight the adverse effects of criminalisation of expression and will help in building consensus and common ground among government, media and civil society on what needs to be done to decriminalise expression.

3. *Official Secrets Act*

This is an old colonial law that should not have a place in the country’s statutes. While it is uncontested that every state needs to classify sensitive information to protect its security and interests, the classification of

information is overbroad to the extent of criminalising the publication or communication of every data held by government bodies that could be of public interest. There is need to revise the law benchmarking its provisions against Global principles on National Security and the Right to Information known as the Tshwane Principles. The Special Rapporteur should engage Zimbabwean government officials on these principles

4. *Interception of Communications Act*

This law, as is the case with other pieces of legislation, needs extensive amendments to align it with the new constitution and international standards and regulations in protecting privacy and state security. As MISA-Zimbabwe notes in Media Law Handbook, in most countries such as Australia, New Zealand, Canada and Hong Kong there are mechanisms put in place to ensure information is handled in a manner that maximises both privacy and security when there is interception of communications. The Zimbabwean Act does not contain basic and requisite safeguards to balance the need for interception in the interests of the nation and the need to protect citizens' rights. The law is inconsistent with international and regional standards and does not protect against abuse and arbitrary applications. It is against this that there is need for far-reaching amendments to the Act in order to balance the right to privacy and basic rights to access to information and dissemination of information.

5. *Broadcasting Services Act*

While Zimbabwe definitely needs a law that would regulate the broadcasting services, the law as it currently stands imposes unnecessary restrictions to the exercise of freedom of expression through broadcast services. The enjoyment of this right is at the benevolence of the regulating authorities and not a given right supposed to be enjoyed by all citizens. This is because one cannot establish their broadcast services before the regulatory authorities invite them to do so. Doing so attracts a jail sentence. With the adoption of the new constitution, there is need to revise the law mindful of the fact that the new charter now provides for independent regulation of the broadcast media.

6. *POSA*

There is need to repeal this law in its entirety. And if it is deemed that other pieces of security laws are inadequate in safeguarding the country's security and there is need for additional law, that Act should clearly distinguish issues of national security and citizens' rights to assembly and legally express themselves within the limits provided for in the constitution. This is to avoid the abuse and arbitrary erosion of citizens' right on the pretext of protecting national security, when in actual fact the law is used as a tool to safeguard narrow political interest and crush dissent.

7. *Censorship and Entertainment Controls Act*

There is need to amend the law to align it with the new constitution, which for the first time provides for artistic freedom in the Bill of Rights.

(b) *Engagement*

There is need for regular and coordinated engagement of the new government by the Special Rapporteur and local media groups on the need for media reforms in Zimbabwe. While ZANU PF has previously presided over the decimation of the media space and erosion of freedom of expression, the new constitution gives a basis on which civil society, opposition and regional stakeholders could demand the protection and promotion of freedom of expression and access to information. The fact that the party, which has since formed a new government following its overwhelming victory in the 31July elections, supported the adoption of the constitution and embraces the charter as home-grown, it is enjoined to uphold the values and principles of the document.

(c) Domestication of regional instruments

It is also important that the Zimbabwean government is pressurised to honour its obligations under the regional and international instruments that the country is a state party. And since the new constitution compels the government to domesticate the instruments, it will be crucial that the new administration is lobbied on this.

(d) Litigation

Failure of above mentioned strategies should lead to litigation around provisions contained in the country's media and expression laws. This will put the laws to a constitutional test to determine their constitutionality. A successful outcome of the constitutional challenge will compel the authorities to act on the laws and thereby overhaul the country's legislative environment for the benefit of Zimbabweans.

(e) Leveraging regional networks

It is also important that as Zimbabweans lobby around the reformation of the country's media and expression legislative framework, they forge regional alliances with like-minded regional organisations. This will not only help in building networks on common issues around freedom of expression, but will also ensure dense regional networks that would legitimately advocate for regional citizens' demands with one voice before regional leaders and governments. It is through such strong regional networks that regional bodies such as SADC could easily be held to account for its members' violation of its own protocols.

(f) Regional platforms

The Zimbabwean civil society should continue leveraging regional platforms such as the ACHPR to seek intervention and redress around freedom of expression violations in the country. The Commission is recognised by the government of Zimbabwe as a legitimate African body and its intervention is bound to be respected by the authorities. It is also at such platforms that the Special Rapporteur could raise awareness on the criminalisation of expression in Zimbabwe and build continental pressure on the authorities to act on its regional obligations.

(g) Media literacy/ civic education

It is also important that there are more media literacy activities undertaken by both government and civil society to empower citizens with knowledge on their right to freedom of expression and access to information. Such civic education would ensure that citizens make informed demands on the protection of these liberties and would be empowered to report any incidents of their violation.