NEGOTIATIONS, DEMOCRATIC SPACE AND ZIMBABWE'S 2008 ELECTIONS

Research and Advocacy Unit

Executive Summary

The publicly proclaimed objective of the SADC political mediation in Zimbabwe was to create political conditions for the holding of free and fair elections in Zimbabwe. The negotiations have led to a series of changes to the constitution, the electoral laws, the laws regulating freedom of assembly and the operation of the print and electronic media. The ruling party and the main opposition party agreed to these changes to the law.

There was considerable scepticism about this Mbeki led mediation process. After President Mugabe made a few insignificant amendments to electoral laws ahead of the 2005 elections, President Mbeki disingenuously proclaimed that conditions had been put in place to allow free and fair elections to take place. Many believed that the SADC mediation process would follow the same route and that Mugabe would only agree to a few insignificant changes to the electoral and political terrain shortly before any elections. These changes would be made at the last moment and would not result in any real opening up of the political space. Even if more significant changes were agreed to, they would be implemented so close to the election that they would not make any difference. They would, however, be exploited to allow Mbeki and SADC to characterise the elections as free and fair.

This paper explores the extent, if any, to which the amendments to BSA, AIPPA and POSA have increased democratic space in Zimbabwe.

The amendments to BSA will not open up the airways to a diverse range of broadcasters and end the current government's effective monopoly of the media. The reconstituted regulatory board will be still under the control of the executive. Even if the new board is appointed prior to the March elections, it will be unlikely to grant any new broadcasting licences before the election, particularly to applicants that are perceived as being critical of the government. If such licences were to be granted, the new stations would have little time ahead of the election to have any significant impact. There are also still a whole variety of other stringent requirements for potential licence holders that will be very hard to satisfy. These include local content requirements and the requirement that only Zimbabweans can be licence holders, unless there is ministerial approval for the grant of a licence to a foreigner - a provision that is likely to lead to the granting of licences only to foreigners who are sympathetic to government.

The amendments to AIPPA also fail to create much additional democratic space. The regulatory board is still likely to be dominated by ruling party sympathisers and this will dictate the way in which it functions. For instance, its new power to accredit foreign journalists for limited periods is likely to lead to accreditation mostly of foreign journalists that are sympathetic to the ruling party. Newspapers will still have to obtain registration as will journalists who want to enjoy various 'privileges'. Unaccredited journalists will be permitted to operate, but subject to many restrictions and the plethora of repressive criminal laws can continue to be used as a weapon to silence "unfriendly" journalists. New powers to discipline journalists for unethical practices may also be used to silence anti-government journalists.

The amendments to POSA in theory open up the democratic space to a limited extent. The amendments are supposed to lead to a situation where Zimbabweans of all political persuasions will be able freely to exercise their democratic rights to hold meetings and to mount demonstrations. The law enforcement agencies are supposed to do everything possible to find ways to allow these rights to be exercised. If they receive credible information on oath that a demonstration will lead to extensive damage to property or other public disorder, it must hold a meeting with the organisers to try to find a way of eliminating the danger of such harm. If such negotiations fail and the authorities prohibit the demonstration, the organisers can appeal against the banning of the demonstration to a magistrate. However, the heavily politicised and partisan police force is still likely to apply these provisions in a biased fashion so that pro-government gatherings will be freely allowed and excuses will be found to close down most anti-government gatherings. This biased attitude was already evidenced in the banning of a MDC demonstration within weeks of the legislation becoming effective.

These so-called reforms are thus too little too late. They are very limited in scope and require the regulatory bodies, and, in the case of POSA, the police, to perform their duties in a fair, unbiased and professional manner, which is unlikely to be the case.

Nonetheless the 'reforms' should be put to the test, even if for no other reason than to expose their lack of any real substance and limited scope.

The protracted negotiations between the MDC and the Government of Zimbabwe have thus done little to open up democratic space and have been merely a time buying exercise for Presidents Mugabe and Mbeki. The pre-election climate shows every indication that the impending elections will be as unfree and unfair as the predecessors.

Introduction

At the end of March 2007, the Southern African Development Community (SADC) gave South Africa's President Thabo Mbeki a mandate to facilitate negotiations between the Zimbabwean Government and opposition Movement for Democratic Change. The declared intention was that these negotiations would result in such changes to the electoral and political terrain as were necessary to ensure that elections held in 2008 could be considered by all to be free and fair[1]. Within this mandate lay a tacit admission by SADC leaders (despite previous explicit pronouncements to the contrary[2]) that the previous legislative framework and electoral conditions did not meet such criteria. While the mandate was welcomed warmly at a diplomatic level, Zimbabwean observers noted that the mandate appeared simply to be a re-run of the build

[1] See "South Africa's president says Zimbabwe elections must be 'free and fair' **"** *International Herald Tribune* 29/07/07

[2] Mbeki for example stated in relation to the 2005 elections: "Things like an independent electoral commission, things like access to the public media, things like the absence of violence and intimidation - those matters have been addressed…. I have no reason to think that anybody in Zimbabwe will act in a way that will militate against elections being free and fair." See *Play it Again Thabo – De Javu and the Zimbabwean Elections.* available at http://www.africanews.com/site/list_messages/10980.

up to the Parliamentary elections of 2005[3]. Those elections were preceded by the adoption of the *SADC Principles and Guidelines for Democratic Elections*[4]. President Mugabe made a few minor and insignificant amendments to electoral laws sufficient to allow the wilfully uninformed and disingenuous, such as Mbeki, to proclaim that conditions had been put in place to allow free and fair elections to take place in Zimbabwe. The subsequent elections, unsurprisingly, were considered by most international observers outside of SADC as any thing but free and fair[5]. However, the SADC Guidelines and Mugabe's passing nod to the principles thereof, for a considerable period, removed international pressure on both Mugabe and the SADC community to resolve the Zimbabwean impasse. When Mbeki was given the 2007 SADC mandate to facilitate negotiations, it was thus believed this was a similar tactic to relieve international pressure, and particularly international pressure placed on Mbeki.

There was widespread scepticism that Mugabe would agree to any real opening of democratic space and would instead drag out the negotiations for as long as possible, again allowing only a few insignificant changes to the electoral and political terrain shortly before any elections[6]. These insignificant changes would be seized upon by Mbeki, as he had done in 2005, to pronounce that conditions had been agreed for a free and fair election. While the negotiations were in progress both Mugabe and Mbeki could hold out to the international community that the situation in Zimbabwe was being attended to and that there was no need for external interference. Accordingly, in several international forums, such as the AU-EU summit in Portugal held in December, 2007, African leaders deflected criticism of the handling of the Zimbabwe situation by pointing to the ongoing negotiations as an indication that the matter was in hand[7]. Since a condition for the negotiations was a media blackout, it was difficult for anyone to suggest that tangible progress was not occurring.

The first publicly revealed result of the negotiations was the passing of Zimbabwe's Eighteenth Constitutional Amendment in Parliament, with the support of the MDC. The uncontested passage of the Bill was lauded as a sign of progress in the negotiations simply on the basis that the Government and opposition had appeared able to reach an agreement on something. What that "something" was, was subjected to little analysis by those eager to see signs of progress. In fact, constitutional amendment number 18 is a key plank in Mugabe's electoral and succession strategy. The amendment not only synchronises parliamentary and presidential elections, but also increases the size of both the Senate and House of Assembly from 66 to 84 and 150 to 210 seats respectively[8]. Then, crucially in regard to the determination of who is to succeed President Mugabe, nearly 84, the amendment provides that if a president retires whilst in office, his successor will be determined by Parliament acting as an electoral college[9]. Accordingly, if

---

[3] For general commentary to this effect see *Play it Again Thabo – De Javu and the Zimbabwean Elections*. Footnote 2

[4] Adopted by SADC in Mauritius in August 2004.

[5] See *Of Stuffed Ballots and Empty Stomachs - Reviewing Zimbabwe's 2005 and Election and Post Election Period* Zimbabwe Human Rights NGO Forum 2005

[6] Again see *Play it Again Thabo – De Javu and the Zimbabwean Elections* for general comment and analysis of this point, footnote 2.

[7] See for example SABC **"**EU ignorant on Zimbabwe issue, says Mbeki" published on the internet site *Zimbabwesituation.com* 11/12/07 and "African states rally behind Robert Mugabe" *The Times* 29/11/2007

[8] Clauses 6 and 7 of the Constitutional Amendment.

[9] Ibid clauses 2 & 3.

Mugabe's supporters win a majority of the seats in Parliament, Mugabe will retain substantial control over the question of who succeeds him as president. The unreformed and partisan Zimbabwe Electoral Commission, using a heavily criticised and still defective voters' roll, in a less than subtle manner has dutifully and predictably set about delimiting the new constituencies for the additional parliamentary seats by carving up ZANU PF strongholds into multiple constituencies and merging MDC strongholds with adjacent ZANU PF ones[10]. One needs to peer long and hard at constitutional amendment number 18 to determine any benefit to the MDC for assisting Mugabe implement this obvious stratagem. When such an examination by the MDC's supporters failed to reveal any meaningful advantage to the MDC in making the concession, the MDC leadership responded to the resultant criticism by advising that the Government had committed itself to significant reforms as a *quid quo pro* which the media blackout prevented them from revealing at that stage.

It did emerge shortly thereafter that the Government had agreed to amendments to key legislation which has been used in the past to restrict democratic space in Zimbabwe: that is, amendments to the Broadcasting Service Act (BSA)[11]; the Access to Information and Protection of Privacy Act (AIPPA)[12] and the Public Order and Security Act (POSA)[13]. As anticipated[14], Mbeki used these amendments to proclaim in his report back to SADC in early February 2008 and State of the Nation address[15] that the negotiations had been successfully concluded. He cynically stated that all that remained to be agreed were a "few procedural matters". These "few procedural matters" relate to the fact that the Zimbabwean Government has refused to implement much of what was agreed until after the March 2008 elections, making mockery of the fact that the negotiations were supposed to lead to and free and fair pre-election climate.

The series of amendments to the electoral laws have been analysed elsewhere.[16] This document will examine the amendments to BSA, AIPPA and POSA, all of which concern the freedoms of assembly, association and expression.

Freedom of assembly and association and freedom of expression

Before examining the amendment provisions themselves it is important to underscore the democratic significance of the rights of freedom of assembly and association and freedom of expression. These rights are fundamental democratic rights: there can be no democracy if these rights cannot be exercised. A democracy will allow its citizens to exercise these rights freely and will only impose such reasonable restrictions on these rights as are necessary to protect legitimate interests.

---

[10] See "MDC cries foul over 'scandalous' delimitation**"** *Financial Gazette* 13/12/07.
[11] Chapter 12:06.
[12] Chapter 10:27.
[13] Chapter 11:17.
[14] Again see *Play it Again Thabo* footnote 2 *supra.*
[15] Delivered to Parliament on 08/02/08.
[16] These changes have been analysed in detail in Electoral Laws Amendment Bill, 2007 An Analysis by the Zimbabwe Electoral Support Network (Harare November 2007)

Citizens must be free to criticise government actions and to express this criticism by holding peaceful protests such as marches and demonstrations. Equally citizens must be free to register their support for government by way of peaceful demonstrations. Citizens must be allowed to hold meetings to discuss public affairs, such as the way the country is being governed.

All political parties must be allowed to campaign freely. They must have the right to hold meetings and rallies in order to communicate with voters and explain their policies to them and to try to persuade to voters to elect them into power. These rights must, however, be exercised in a peaceful manner and reasonable measures may be taken to prevent the abuse of these rights by the use of violence.

In a democracy the law enforcement agencies will remain politically neutral. They will ensure that persons of all political persuasions are able to exercise their democratic rights. They will not allow their agencies to be used as instruments of repression against critics and opponents of the government of the day.

All political parties must be able to use the mass media to disseminate information to the electorate about their political policies in order to try to persuade voters to vote for them. Radio is a particularly important medium in this regard as it is capable of reaching large numbers of people, including people who are illiterate. If the ruling party monopolises or dominates the electronic media, it is in a position to disseminate one-sided, pro-ruling party propaganda. The African Commission's 'Declaration of Principles on Freedom of Expression in Africa', thus emphasises the need for a diverse range of media.[17] It provides that States must encourage a diverse, independent private broadcasting sector and stipulates that a State monopoly over broadcasting is not compatible with the right to freedom of expression. The Declaration also provides that public broadcasters should be under an obligation to ensure that the public receive adequate, politically balanced information, particularly during election periods.

Have the amendments expanded the democratic space?

The key question is whether the amendments BSA, AIPPA and POSA have broadened the democratic space available prior to the elections. The amendments fall broadly into three categories: those which show a grudging concession to democratic form without any concession to substance; those which represent some advance but which fall short of democratic standards; and those which show a real opening of democratic space but allow the immediate and sudden closure thereof at the whim of government. Each of the three enactments and the amendments thereto will be considered in turn below.

The Broadcasting Services Act

The electronic media, and radio in particular, play the most important role in freedom of expression in developing countries. In a situation where the printed media is inaccessible for much of the population, either on account of cost or difficulties of extensive distribution, radio

[17] Adopted at the 32nd Session of the African Commission 17-23 October 2002.

affords a cheap way for a wide dissemination of alternative and dissenting opinions. The opening of the airwaves is regarded as being a significant factor, if not the most significant factor, in the elections which resulted in a change of government in Ghana and the consolidation of democracy.[18] The Government of Zimbabwe is fully cognisant of the power of radio. It has thus taken extensive steps to ensure that it retains exclusive control over this medium. The Government of Zimbabwe retained a *de jure* monopoly over the electronic media until this was ruled unconstitutional by the Supreme Court in 2000[19]. It then hastily introduced legislation that placed such onerous conditions upon the operations of any potential licensee, that it effectively retained a *de facto* monopoly[20]. It has jammed the signals of radio stations such as SW Radio and VOA which broadcast to Zimbabwe from outside the country[21]. In 2002 a bomb destroyed the broadcasting facilities of the private radio station, Voice of the People. No one was ever arrested for this action. The Zimbabwe Government has hitherto shown no indication whatsoever of relaxing its grip on broadcast media.

The amendments to the BSA fall into the first category mentioned above – a grudging concession to democratic form without meaningful reform of any substance.

The regulatory body

Unlike the printed media, due to the need to control the use of limited broadcasting frequencies etc, internationally, electronic media usually is subject to a statutory regulatory body. A distinguishing feature of a democracy in this regard is the fact that such a regulatory body is not under executive control.[22] This is a fact that Zimbabwe's Chief Justice chose to ignore when considering whether Mugabe's effective power to appoint the Board of the Broadcasting Authority was "reasonably justifiable in a democratic society" and thus constitutional[23]. Section 4(2) of the unamended Act provided that the Board "shall consist of not fewer than seven members and not more than nine members appointed by the Minister after consultation with the President and in accordance with any directions the President may give him".

In a democracy such boards are usually appointed by multiparty parliamentary committees, preferably with the public playing a role in the nomination process. The amendment to the Act gives a passing nod to this principle. The Parliamentary Committee on Standing Rules and Orders is brought into the process. However, an examination of the process reveals very little substantive change and the Government's determination to keep a firm hold on the electronic

---

[18] See Blankson, I. A (2002), "Re-examining Civil Society in Emerging Sub Sahara African Democracies: The State, the Media, and the Public in Ghana" *Global Media Journal*, Vol.1, Issue 1. [http://lass.calumet.purdue.edu/cca/gmj/fa02/gmj-fa02-blankson.htm].

[19] *Capital Radio (Pvt) Ltd v Minister of Information* (1) 2000 (2) ZLR 243 (S).

[20] This legislation was initially in the form of regulations passed under Presidential Powers (Special Measures) Act, and was later affirmed by Parliament in the form of the Broadcasting Services Act. See generally in this regard Case note on *Capital Radio (Pvt) Ltd v The Broadcasting Authority of Zimbabwe & Ors* S-128-02 ("the Capital Radio case") by the Media Monitoring Project Zimbabwe.

[21] See Media Monitoring Project *Weekly Media Update* 10/08/2006.

[22] The Declaration of Principles on Freedom of Expression in Africa, African Commission on Human and Peoples' Rights, 32nd Session, 17 - 23 October, 2002: Banjul, The Gambia states that "an independent regulatory body shall be responsible for issuing broadcasting licences and for ensuring observance of licence conditions."

[23] Capital Radio case *supra.*

media. The Board is now to consist of twelve members[24]. Three are chosen by the President from a list of six nominees submitted by the Committee[25].

Even if ZANU PF does not exploit its majority on the Committee to ignore persons advanced by the MDC as nominees and allows the MDC to choose three of the six nominees, it is open to the President to simply ignore these three candidates. The six of the other nine members must have specified skills or belong to specific professions. Two must be persons with experience in broadcasting, one a traditional leader, selected by the Council of Chiefs, one a legal practitioner, one and accountant and one a representative of church groups[26]. The manner in which these nine people are to be selected appears to have been left deliberately obscure, allowing for executive control over the process. The legislation provides that the nine "shall be appointed by the President after consultation with the Minister and the Committee on Standing Rules and Orders". The process of appointments by the President using the formulation "after consultation with" rather than "acting on the recommendation of" obviously leaves the final power of the appointment in the hands of the President.

Exactly how this process is to take place in regard to the Board of the Broadcasting Authority is not specified. It is not indicated who proposes candidates to whom. It is suspected that the "after consultation" formulation has in the past seen Government intelligence officers and ZANU PF insiders identify sympathetic nominees, who are put to the Minister with their suitability outlined if necessary. The Minister then obtains the President's confirmation as to suitability and the candidates are put to the body, which the President is statutorily obliged to consult, to rubber stamp the decision. In this context one might recall that Zimbabwe's current Chief Justice received his appointment theoretically after the President had consulted the Judicial Services Commission. However, the independent press[27] anticipated the selection of High Court judge Justice Chidyausiku for this post, notwithstanding the fact that his selection would be ahead of sitting Supreme Court Judges of long standing and notwithstanding the fact that the Judicial Services Commission had not convened to consider the issue. Chidyausiku's declared support for governmental policies and reciprocated support from senior ZANU PF figures, including the President, coupled with a similarly opaque "nomination process" by the Judicial Services Commission, virtually guaranteed his appointment. It would be optimistic to assume that the consultation process with the Parliamentary Committee on Standing Rules and Orders will be any different. This Committee is given no real power. The amendment is thus a concession to the form of a democratic nicety only and of no substance. The executive remains firmly in control. For this reason other amendments transferring some powers from the Minister to this Board (which would be appropriate if a Board independent of executive influence had been established) are of little relevance[28]. In any event, Parliament adjourned before the Board could be established and will not reconvene until after the March 2008 elections[29]. In adjourning the House, the

[24] Section 4(2).
[25] Section 4(2)(b).
[26] Section 4(2)(a)(i) – (v).
[27] For details of this and the manner of the appointment of the Chief Justice see generally Matyszak D.A. *Creating a Compliant Judiciary in Zimbabwe 2000-2003 in Appointing Judges in an Age of Judicial Power*, Malleson & Russell (eds) University of Toronto Press (2006).
[28] See for example the amendments to section 46.
[29] The adjournment is to 08/04/08.

Speaker indicated that Parliamentary Committees, such as the Committee on Standing Rules and Orders, would not ordinarily convene during the recess. It is thus unlikely that this Committee will meet to propose nominees or to be available for "consultation". The result is that this particular amendment will not be implemented prior to the elections and thus has no effect on democratic space in the pre-election climate. This is one of the "few outstanding procedural issues" referred to by Mbeki and which led to the MDC leadership contradicting Mbeki's claim of a successful conclusion to the negotiation process[30].

When the Government's *de jure* monopoly over broadcasts was lifted, there were a number of applications for commercial broadcasting licences and there was one application for a community service broadcasting licence. The applications that were made were all turned down after lengthy delays in processing them. A variety of reasons were given for the rejection of these applications, but in the main referred to the Board's view that all applicants lacked the necessary financial wherewithal. That all applications were rejected suggests a determination on the part of the Authority (controlled by the executive or the responsible Minister) not to open up the broadcasting arena to broadcasters that might turn out to be critical of the government.

It remains to be seen whether the reconstituted Board will process applications for new broadcasting licences any more expeditiously than the previous Board and whether it will be prepared to grant licences to organisations that may be perceived as being critical of the ruling party. It seems unlikely that a Board which is still effectively under the control of the executive will allow any significant opening up of democratic space in regard to the electronic broadcasting.

In any event, by the time the new Board is appointed and it processes any applications the upcoming election will have already taken place.

Local content and ownership requirements

There are various requirements and restrictions for broadcasters that stand in the way of the creation of an independent and pluralistic broadcasting environment in the country. The amendments do not alter these requirements.

Unlike a public broadcaster, an independent commercial broadcaster does not have the benefit of listeners' licence fees to secure an income. The independent broadcaster is largely dependent on advertising revenue. Business will only advertise where the medium addresses its target audience. This will be those members of the public that can afford its products, mainly urban-based Zimbabweans whose interests and listener needs may well be very different from those resident in rural areas. A commercial radio will need to establish these interests through market surveys and determine the content of its broadcasts accordingly. In the case of the type of music broadcast by radio, for example, it should be for the broadcaster to determine what mix of genres of music would be most popular and thus most profitable. There is a wide range to choose from: international popular music, western classical music, folk music, country and western, ragga, hip hop, rap, "R n'B", local Zimbabwean music or regional African traditional or popular music.

[30] Information provided during an interview with an MDC parliamentarian 08/02/08

Indeed, one of the amendments to the Act introduces section 2A which paradoxically proclaims that one of the purposes of the Act is:

> to promote the provision of a wide range of broadcasting services in Zimbabwe which, taken as a whole, are of high quality and calculated to appeal to a wide variety of tastes and interests, providing education, information and entertainment …

Paradoxically, because three Schedules to the Act[31] and most of the Regulations passed under the Act as S.I 185/2004 specify what a broadcaster may or may not transmit. The Sixth Schedule to the Act determines 75% - 85% of the content of a daily broadcast. These Schedules are in addition to any code of conduct the Broadcasting Authority may develop to regulate content. The Sixth Schedule ensures that far from appealing to a wide variety of tastes, any broadcasts must remain irredeemably parochial. Henry Ford's dictum that "one could have any colour motor vehicle one wanted, as long as it was black" comes to mind. The Schedule provides, in the case of television broadcasts, that a licensee must ensure that "at least":

a) seventy *per centum* of its drama programming consists of Zimbabwean drama;
b) eighty *per centum* of its current affairs programming consists of Zimbabwean current affairs;
c) seventy *per centum* of its social documentary programming consists of Zimbabwean social documentary programming;
d) seventy *per centum* of its informal knowledge-building programming consists of Zimbabwean informal knowledge-building programming;
e) eighty *per centum* of its educational programming consists of Zimbabwean educational programming;
f) eighty *per centum* of its children's programming consists of Zimbabwean educational programming.

And in the case of radio broadcasts a licencee must ensure that "at least":

a) seventy-five *per centum* of the music broadcast consists of Zimbabwean music;
b) ten *per centum* of the music broadcast consists of music from Africa.

"Music from Africa" means music that is not only produced and performed by persons from the African continent but must be lawfully available for purchase in Zimbabwe. With diminishing foreign currency resources available in Zimbabwe, such music is likely to be extremely limited. Presumably, Zimbabwean music is African music, and thus if one adheres to the requirement that one broadcast 75% Zimbabwean music, there would be automatic compliance with the 10% African music requirement. The intention of the legislature, however, was probably a total of 85% of both.

For both radio and television, these content requirements are structured such that the non-specified percentage cannot be broadcast continuously during one period but must be spread through specified time slots. The unamended content requirement contradicts the amendment suggesting that the aim should be to cater for a wide variety of tastes. Urban fans of African-American music, ragga, R 'n B, hip hop and rap are likely to be very disappointed at the content

[31] Schedules 5, 6 and 7.

of any new licensee's broadcasts. Zimbabwean musicians rarely record anything other than jit, sungura or traditional mbira music. In the case of television, the funding required to produce such a large volume of locally produced shows of sufficient quality is simply unavailable. The Act intended that a portion of licencees' profits be contributed to a fund to enable local productions and that the fund be bolstered by parliamentary appropriations[32]. Apart from the "chicken and egg" dilemma of this approach, the Government does not have sufficient money for such appropriations. The result is clear in the dismal programming of the public broadcaster, the ZBC. Its television broadcasts are characterized by programmes of poor technical quality, of little public interest, presented by inadequately trained and skilled personnel which are repeated frequently. Many urban Zimbabweans illegally use satellite decoders to tune to the Batswanese and South African national broadcasters as a result. There is also insufficient recorded Zimbabwean music to meet the 75% requirement satisfactorily. Recently, it was reported that the same "hit" song was broadcast by ZBC 12 times in one hour. ZBC itself does not comply with the local content requirements[33].

If these restrictions were not sufficient disincentive to a potential investor, the Sixth Schedule further provides that the Minister may prescribe other local content conditions or increase the local content required if he or she deems this desirable[34]. An investor may have its licence cancelled for a single infringement of these content requirements[35]. One section of the regulations contains the following provision in relation to content:

> Programmes must uphold national sovereignty, national unity, national interest, national security, Zimbabwe's economic interests, project Zimbabwe's national values and national point of view, good taste and decency and public morality[36].

It is a brave entrepreneur who will risk the loss of his or her venture capital for violation of such a vague and sweeping provision.

The amendments also address the issue of the nationality of licencee. However, they provide little more than fuel to the disingenuous who may wish to allege that the lack of pluralism in the electronic media has been addressed by easing restrictions on licence ownership. It is a mark of the Zimbabwean Government's obsession with control over the electronic media, that the amendments even in regard to ownership are extremely limited. The requirement that any licencee be a Zimbabwean or an entity wholly owned by Zimbabweans remains. Given that investment in a broadcasting service is likely to require a substantial foreign currency component, foreign investment, and thus at least some (possibly non-controlling) foreign share in the business, is necessary. This restriction has eased, but only with executive authority and to Government's advantage. Hence the new section 8(7) provides that the Minster "may at his absolute discretion grant exemptions from these provisions". A non-Zimbabwean broadcaster sympathetic to the Government may thus be granted a licence. Other amendments in this regard remove the requirement that a Zimbabwean citizen who applies for a licence must also be

---

[32] See sections 29 – 30.
[33] Information supplied by the Media Montoring Project Zimbabwe 08/02/08.
[34] Section 7(a) and (b)
[35] Section 16(1)(b)
[36] Section 13 of S.I. 185/2004

"ordinarily resident in Zimbabwe". This does open up the possibility that a Zimbabwean citizen working outside the country, and thus with possible access to any necessary foreign currency component of the investment, may apply for a licence.

Also removed from the licensing requirements is the restriction that no single investor may own more than 10% of a broadcasting enterprise – which thus required a minimum of at least ten foolhardy investors rather the more likely single individual[37]. The restrictions and prescriptions relating to content however, make it improbable that any investor will come forward. These amendments, and the amendments to the Act generally, therefore, in the context of the continued repressive nature of the legislation, are of propaganda value only and reflect no real advance in opening up the airways and Zimbabwe's democratic space. Similarly, amendments which extend the period of a licence[38] and which allow a longer period before a licencee must start broadcasting[39] are largely irrelevant.

The Access to Information and Privacy Act

Amendments to this legislation fall into the second category mentioned at the outset: those which represent some advance, but which fall short of democratic standards.

In the past the Access to Information and Protection of Privacy Act has been used as an instrument for drastically curtailing the freedom of the press. The Act has been deployed to close down newspapers considered to be critical of the ruling party[40] and to prevent 'unfriendly' local and foreign journalists from reporting from Zimbabwe[41]. The key question is whether the recent amendments to AIPPA will result in the restoration of freedom of the press in Zimbabwe. As will be seen below, the amendments to AIPPA largely preserve the same repressive machinery as that which existed before the amendments.

The regulatory body

The Media Information Commission, which is now to be called the Zimbabwe Media Commission, will be reconstituted[42]. The outgoing Commission was headed by a fanatical ruling party supporter who publicly and repeatedly condemned the private media and waged a campaign against the private press. His actions resulted in the closure of a number of private newspapers and the harassment of many journalists within the private sector[43]. The question is whether the new composition of the Commission will lead to the appointment of Commissioners who will refrain from carrying out their duties in a politically partisan fashion.

Under the amended provisions, the President will appoint a chairperson and the eight other members for the Commission from a list of not fewer than twelve nominees submitted by the

[37] The change is effected by the repeal of section 8(5)
[38] The period in section 12(3) is extended from two to three years.
[39] The period of six months in section 11(7) is extended to 18 months.
[40] See for example the facts in the case of *Associated Newspapers of Zimbabwe (Pvt) Ltd v Minister of State in the President's Office and Ors* S-20-03.
[41] The BBC for example is banned from reporting from Zimbabwe and is obliged to file its reports from neighbouring South Africa.
[42] The amended section 38.
[43] Dr Tafatona Mahosa, the Chairperson of the MIC, was subsequently required by the High Court to recuse himself from consideration of the application of the Daily News and Associated Newspapers of Zimbabwe on account of his clear antipathy to the publication and its owner.

Parliamentary Committee on Standing Rules and Orders[44]. Potential Commissioners must be chosen for their knowledge and experience in the press, print or electronic media, or broadcasting[45]. In other words, the Parliamentary Committee on Standing Rules and Orders will now be the body responsible for identifying nominees and the President must appoint nine of the twelve nominees. The problem with this method of appointment is that the membership of the Parliamentary Committee is proportionate to the representation of the political parties in Parliament and thus the ruling party has the majority of the members. This will mean that the majority of the nominees are likely to be the nominees of the ruling party members of the Committee. The President, who is given the discretion to select nine of the twelve nominees, will then be able to select from the nominees a chairperson who is considered to be a ruling party loyalist as well as a majority of the members who are also of the same persuasion. Whether this will happen in practice will become apparent when the President appoints the new Commissioners. However, as indicated above in the context of the Broadcasting Services Act, since Parliament is now in recess until after the elections, the Parliamentary Committee on Standing Rules and Orders is unlikely to convene to identify nominees. Hence a reconstituted Commission is unlikely to be in place prior to the elections - rendering this amendment meaningless in the context of opening pre-election democratic space.

The risk of criminal liability for newspapers and journalists.

The amendments have left intact the wide and nebulous offences of abuse of freedom of expression by a newspaper and abuse of journalistic privilege by journalists. Prosecutions under this legislationhas been used by the Government to inhibit freedom of expression and to harass newspapers and journalists. A newspaper or a journalist commits an offence if, for instance, it or he or she publishes any statement that threatens the interests of defence, public safety, public order, the economic interests of the State, public morality or public health or is injurious to the reputation, rights and freedoms of other persons, knowing the statement to be false or recklessly representing the statement as a true statement[46].

This is not the only offence which stifles media freedom. There are a number of laws contained in other pieces of legislation that unduly restrict the freedom of the press, These include a raft of laws contained in the Criminal Law (Codification and Reform) Act[47], such as the offence of making of statements undermining the authority of or insulting the President[48], the offence of publishing false statements prejudicial to the State[49], the offence of causing disaffection among the police force[50] and the offence of criminal defamation.[51]

In the AIPPA amendments the very first function of the ZMC is stipulated to be to uphold and develop the freedom of the press.[52] It will certainly not be able to fulfill this function whilst there

[44] Section 38(2) as amended.
[45] Section 38 (3) as amended.
[46] Section 80.
[47] Chapter 9:23.
[48] Section 33.
[49] Section 31.
[50] Section 30.
[51] Section 96.
[52] Section 39(1)(a).

remain on the statute books a whole series of criminal offences which restrict media freedom to an extent that is completely incompatible with an open democratic society.[53]

Registration of newspapers and news agencies.

Newspapers and news agencies will still only be able to operate if they are registered by the Zimbabwe Media Commission (ZMC) but the period of registration of a newspaper is extended from two to five years[54]. However, the ZMC may only register a newspaper in which Zimbabwean citizens have a controlling interest[55]. The amendment, like the amended Broadcasting Services Act, does empower the Information Minister, in his absolute discretion, to grant an exemption from this provision and permit the ZMC to register a newspaper approved by the Minister in which the controlling interest or any portion thereof is held by persons who are not citizens of Zimbabwe[56]. There are no specified criteria for the exercise of this Ministerial power. The politically partisan Information Minister will therefore be likely to exempt only newspapers that are favorably inclined towards government.

It is submitted that the requirement for Zimbabweans to hold a controlling interest in any publishing company is unduly restrictive and discourages foreign investment in the media industry within Zimbabwe. On the other hand, foreign companies could arguably be required to have a minimum extent of Zimbabwean involvement. This could be achieved by requiring that at least, say, 40% of the paper's shareholding should be in the hands of Zimbabweans.

The ZMC still has wide powers over the registration of a newspaper or cancellation of registration. For example, the ZMC can still refuse to register a newspaper if it has previously operated without being registered. (This was the main ground upon which the Daily News, previously Zimbabwe's only non-government controlled Daily paper, was refused registration[57].)

The ZMC can also still refuse registration if the newspaper:

- has been convicted of the nebulous offence referred to above which entails the making of a false statement that causes harm;
- has failed to notify the Commission of changes in its registered particulars; or
- has failed to publish a correction of harmful untruthful information published by it.

The ZMC can also still suspend or cancel the registration of a newspaper on a wide variety of other grounds[58].

---

[53] In regard to such laws see Media Institute of Southern Africa *The Impact of Criminal Defamation and Insult Laws on the Right to Freedom of Expression in Zimbabwe* (Harare January 2008)
[54] Section 66.
[55] Section 65.
[56] The new subsection 65(4).
[57] See footnote 40 *supra.*
[58] All the powers indicated in the preceding text are provided for in sections 65 – 71.

The powers of the ZMC remain open to abuse. It is strongly arguable that if there is to be any registration requirement for newspapers, all that should be required is that the newspapers provide details of the place of business of the paper and its ownership structure.

Defamatory statements should be a matter for the civil law and not the criminal law. The making of harmful false statements should either be dealt with through the civil law of defamation or through a reasonable disciplinary system.

Accreditation.

Journalists who are Zimbabwean citizens and permanent residents will still need to obtain accreditation from ZMC if they are employed on a full time basis by registered newspapers. Accredited journalists still have to be accredited before they can work full time for registered newspapers and if they want to have access as journalists to cover parliamentary activities and various other national and public events. To obtain registration they will still have comply with the prescribed formalities and possess the prescribed qualifications.

The amendment will allow unaccredited journalist to operate, but they will be subject to severe restrictions. They will not be able to work on a full time basis for a newspaper or news agency operating in Zimbabwe. Secondly, they will not have access to Parliament and public bodies and access allowing proper coverage of national and public events[59].

Foreign journalists

Generally, only Zimbabwean citizens and permanent residents can be accredited as journalists. However, ZMC has been given the discretion to accredit non-Zimbabwean journalists for a maximum period of 60 days, which period can be extended for a further specified period for good cause shown or to enable a journalist to work for the duration of any event he or she has been accredited to cover[60]. No criteria are set out for the exercise of this discretion. It remains to be seen how this discretion will be exercised.

Before such accreditation can take place, the reconstituted Media Commission would have to be in place. The appointment of the new Commissioners does not now seem likely before the elections and thus applications from foreign journalists to cover the upcoming elections will not be processed by the new Commission..

The Media Council

The amendments provide that the ZMC will appoint the members of a Media Council[61]. The Council's chairperson must be a member of the ZMC[62]. Its other members will be appointed to represent various sectoral interests, but the Commission will have a wide discretion to decide which bodies are representative of these various sectors. The media will not be adequately represented on this Council, as they will constitute a minority of the members. Furthermore, media editors will not be represented at all.

---

[59] Sections 78 and 79 as amended.
[60] Section 79(4).
[61] The new Part VIIA of the Act, sections 42A et seq
[62] Section 42A(2).

The statutory Media Council will operate under the control of the Commission and have only limited functions. The ZMC, together with the Council, will be responsible for enforcing a code of conduct and ethics. The Commission will carry out an initial investigation into complaints and the Council will then conduct formal inquiries into alleged breaches of the code. If the Council finds that the complaint is well founded, it can recommend that the Commission should mete out various penalties, including imposing of a fine, cancelling the accreditation of a journalist and suspending from practice an unaccredited journalist. The Commission then decides whether or not to adopt, with or without modification, the Council's recommendation. If it adopts the recommendation, it then imposes the penalty[63].

As this system of disciplinary regulation will be established under the widely discredited AIPPA, it will inevitably be tainted by the repressive way in which this legislation has been applied in the past. Any system of State regulation carries with it the danger that the Government of the day will manipulate it to silence its critics. There is no need at all for the State to intervene in this area. Like other professionals, media practitioners should be left to regulate themselves by enforcing a code of ethical conduct. This system has worked well in many developed and developing countries. On the other hand, many statutory media councils have been used by ruling political parties to exert unreasonable and excessive controls over the media.

From the above it is clear that the amendments fail to bring AIPPA into line with accepted democratic standards. The 'reforms' are very limited. Basically all that they do is to slightly reconstitute the Commission, to allow unaccredited journalists to operate subject to severe restrictions and to allow the Commission to accredit foreign journalists for a short duration.

It is, however, important that these small openings are tested to see how far they will go. Zimbabwean journalists who have been prevented from operating previously should be encouraged to recommence media work immediately as unaccredited journalists whilst at the same time making fresh applications for accreditation. Zimbabwean journalists who have left the country should be encouraged to return to the country in order to report on the situation surrounding the impending elections. If then the Government clamps down on these persons and prevents them from operating, or fails to process applications on account of the reconstituted Commission not being in place it will be seen that the 'reforms' were never intended to open up the democratic space in relation to media operations.

Foreign journalists previously barred from operating in Zimbabwe should make applications to the ZMC to be given accreditation in order to cover the upcoming elections, if it is constituted in time. If the ZMC turns down these applications simply on the basis that the applicants are critical of the current Government, this will expose the partisanship of this body and will reveal that the ZMC will simply follow the same biased course of the Media and Information Commission before it.

It is thus clear that the AIPPA amendments do not change the fundamental aspects of this repressive legislation. The Media Commission still has powers over the media that are open to political abuse. Newspapers can only operate lawfully if they obtain registration from the Commission. Journalists still have to be accredited by the Commission in order to work full time for registered newspapers and to have various "privileges". The Commission, through the Media Council that it appoints, can exercise heavy handed disciplinary powers over the media. The

[63] Section 42B *et seq*.

nebulous "false statement" offences are still there, and, these together with other highly repressive criminal offences in other legislation, will continue to stifle press freedom.

The Public Order and Security Act (POSA)

Regrettably, in Zimbabwe, a partisan police force has effectively eliminated the fundamental rights to freedom of assembly and association of all those who are opposed to the present government. In the past this police force has freely allowed political gatherings by supporters of the ruling party, but has disallowed many meetings and demonstrations by those opposed to or critical of the ruling party. It has misused its powers under POSA in this regard. Although this legislation only required prior notification to the police of the holding of political gatherings, the police have consistently misinterpreted this provision to mean that such gatherings can only take place if the police give permission to the organisers to go ahead. The police then used the absence of police permission as a basis to violently disperse anti-government gatherings, either beating up the participants on the spot or taking them into custody and then subjecting them to torture and assaults. Thus in the past this legislation has been deliberately misinterpreted and misapplied in order to stop anti-government gatherings.

The police force thus became an instrument of repression on behalf of the ruling party. The force is headed by a Commissioner who is a self-proclaimed supporter of the ruling party. The political bias of the force has been manifested in other areas of policing. It has often turned a blind eye to attacks upon opposition supporters by pro-ruling party war veterans and youth militia personnel and has offered little protection against such attacks. When the injured parties have reported these attacks to the police they have often refused to take any action against the culprits and have on occasion even arrested the victims instead.[64]

Apart from the changes to accreditation requirements for journalists in AIPPA, if properly applied, the changes to POSA are currently the only legislative amendments resulting from the 2007/8 negotiations between the Government and opposition MDC which could increase the democratic space in Zimbabwe – and certainly the only ones likely to have any effect if elections take place as announced on 29 March 2008. These changes fall into the third category mentioned at the outset: the changes to POSA have the potential to bring about a real opening of democratic space but this space could be quickly closed by the police acting in a politically partisan fashion or acting on directions from members of the ruling party.

---

[64]See *Policing to protect human rights A survey of police practices in counties of the Southern African Development Community, 1997-2002* Amnesty International; "Disturbing the peace". An overview of civilian arrests in Zimbabwe: February 2003 – January 2004. July 2004. Solidarity Peace Trust, 2004; *Policing the State Instrument of state terror and repression rather than a professional politically neutral force An evaluation of 1,981 political arrests in Zimbabwe: 2000-2005* Institute of Justice and Solidarity Peace Reconciliation Trust. Johannesburg, 14 December 2006 *Who guards the guards? Violations by Law Enforcement Agencies in Zimbabwe, 2000 to 2006* Zimbabwe Human Rights NGO Forum. December 2006; *At best a falsehood at worst a lie. Comments on the ZRP reports: "Opposition Forces in Zimbabwe A Trail of Violence.*" Zimbabwe Human Rights NGO Forum. June 2007. The amendments to the electoral laws make all forms of intimidation a serious electoral offence. However, these provisions will only have the desired effect if they are properly enforced by the police.

The changes to POSA are centred on sections 24, 25, 26 and 27 of the Act, all of which provisions affect the ability of the opposition and civil society to convene (public) gatherings, whether as public meetings or demonstrations. These amendments (supported by all parties in Parliament) re-introduce provisions from the first version of POSA, passed by parliament in 1998 in the face of protests by the opposition which condemned the legislation as "more repressive than (Ian) Smith's Law and Order (Maintenance) Act". That Bill was never signed into law by the President and was returned to Parliament in the more draconian form which did in fact become law[65]. In order to consider the extent, if any, of the democratic space which may have opened up as a result of the amendments, a brief overview of the law relating to public gatherings prior to the amendments, and the manner in which the police conducted themselves in this regard, is necessary.

Section 24 of POSA required the organizer of a public gathering to give the regulating authority (the police Officer Commanding for the District in which the gathering was to take place) four clear days notice of the intended gathering. Failure to do so constituted an offence. The purpose of this notice was not to seek permission to hold the gathering but simply to afford the regulating authority the chance to make appropriate arrangements to ensure the gathering could proceed peacefully and without interference to traffic, and to liaise with the organizer to this end. On receipt of such a notice the regulating authority was not entitled to issue any directions in relation to the public gathering unless, based on all the circumstances in which the public gathering was to taking place, he or she had "reasonable grounds for believing" that the public gathering would "occasion" public disorder, a breach of the peace, or an obstruction of any thoroughfare without such directions. Where such conditions existed, he or she could then, in terms of s 25, issue such directions as appeared to him to be reasonably necessary for the preservation of public order and to prevent such obstruction[66]. These directions related to the time and place of the gathering and could include a requirement that the organizers appoint marshals and take other precautions to maintain order. The directions were effective immediately and, wherever practicable, a written copy had to be served on the organizer[67]. However, the regulating authority was required to give the organizer the opportunity to make representations in regard to the directions "wherever practicable to do so"[68]. If the organizer was aggrieved by any direction issued by the regulating authority there was a right of appeal to the Minister of Home Affairs.

However, the provisions of section 26 overshadowed the provisions of the two preceding sections. Section 26 allowed a regulating authority, if he or she believed on reasonable grounds that the public gathering would "occasion" public disorder, and that directions as to its conduct would not be sufficient to avert this, to prohibit the gathering altogether. The manner in which the gathering was to be prohibited was by publication in the local press, by affixing notices to public buildings in the appropriate area or by an announcement by a police officer "broadcast or made orally"[69]. The notice of prohibition, where this was practical, was to be reduced to writing

---

[65] See generally in this regard D. Matyszak *Democratic Space and State Security: Zimbabwe's Public Order and Security Act* Available from the Zimbabwe Human Rights NGO Forum website.
[66] Section 25(2).
[67] Section 25(4).
[68] Section 25(3)
[69] Section 26(3)

and served on the organizer of the meeting[70]. Any person attending such a meeting in terms of which such notice had been given was guilty of an offence[71]. A curious result of this legislation for purposes of the criminal law was that if a gathering was convened without notice to the police, the convener committed an office, but not those attending the gathering, if however notice was given of the intended gathering, and the gathering was prohibited, the convener *and* all those who attended the gathering, knowing of the prohibition, committed an offence. In practice, however, the police would arrest all those participating in the gathering in both instances, who would then be later released, most frequently without charge[72].

The police, purporting to act in terms of POSA, in fact conflated sections 24, 25 and 26. The result was a highly selective and thus illegitimate interpretation of these provisions. The police treated the *notices* of an intention to convene gatherings as applications for *permission* to do so and frequently referred to them as such in press statements. Almost invariably, in the case of the opposition or civic society, the police would respond to such notices by simply advising that permission to convene the proposed gathering had been refused. In so doing, various provisions of the legislation were by-passed and ignored. The clear intention of the legislation was that the Officer Commanding for the District (the regulating authority) should first consider whether there were any reasonable grounds for believing that the proposed gathering could occasion public disorder. The intention was that, if the Officer Commanding did have reasonable grounds for such a belief, he should then consider whether such possible public disorder could be averted by the imposition of certain directions, and the Officer Commanding, wherever possible was obliged to discuss the imposition of such directions with the convener and consider submissions by the convener in this regard. Only if the Officer Commanding believed on reasonable grounds that such directions would be insufficient to avert public disorder could he or she prohibit the proposed gathering by notice in the required form.

Clearly, these provisions gave the Officer Commanding considerable discretion as to whether a gathering could proceed or not. In order for the legislation to claim any constitutional legitimacy, the discretion ostensibly was fettered by the fact that an objectively held and reasonable belief of public disorder was a prerequisite prior to the imposition of directions or a notice of prohibition. The legislature intended that in arriving at this "belief on reasonable grounds" consideration of representations by the convener would be the norm, with a departure from this requirement only when the urgency demanded otherwise. Since four days notice was required of any proposed gathering, in most cases there would have been adequate time for such consultations to have taken place and a reasoned conclusion arrived at. In practice the requirement that the concerned police officer receive representations, "wherever practicable", from the convener of a gathering before issuing directions or prohibiting a gathering was simply ignored by the police.

Accordingly, where a prohibition notice was issued by the regulating authority, a convener had no basis for knowing the grounds upon which the regulating authority had exercised his discretion, whether or not such grounds were reasonable, or indeed, whether the concerned police office had in fact exercised his or her discretion at all. In this latter regard, there is

---

[70] Ibid.
[71] Section 26(5).
[72] See *Gender Based Violence and Opposition Politics in Zimbabwe* available on the Zimbabwe Human Rights NGO Forum Website.

certainly scant evidence to suggest that the regulating authorities ever turned their minds to the question of whether possible public disorder could be averted by the imposition of directions. The provisions of section 25 were ignored. The police officers appear to have proceeded directly to section 26, the prohibition of the meeting. The manner in which the regulating authorities thus exercised their discretion was completely opaque. The only "remedy" available to an aggrieved convener was to appeal to the Minister of Home Affairs (possibly the only person who might suggest the impartiality of such a procedure) who could vary or affirm the prohibition simply as he considered "just". Obviously this procedure, if anyone had been naïve enough to pursue it, would not have rendered the decision making process any more transparent.

Accordingly, the exercise of the regulating authorities' discretion in relation to the imposition of directions or the prohibition of a meeting, whether that discretion was exercised at all and whether the resultant determination was in fact made on reasonable grounds could not be subjected to any real scrutiny or challenged within any reasonable time frame and/or in an appropriate forum, without considerable difficulty.

The amendments to POSA seek to address this opacity and to provide an effective remedy for an aggrieved convener. Accordingly, the bulk of the amendments to POSA concern the manner in which the regulating authority arrives at a determination imposing restrictions on a proposed gathering or prohibiting it altogether. Sections 23, 24, 25, 26 and 27 of the previous Act, all of which related to public gatherings, have been repealed and replaced. There have also been noteworthy amendments elsewhere, including amendments to the definitions in section 2. Oddly, some new definitions have been added without removing previous and similar definitions. Hence "gathering" has been introduced and refers to a "procession, public demonstration or public meeting", yet the definition of a "public gathering" being a "public meeting or a public demonstration" remains, as does the definition of a "procession", meaning "a procession in a public place".

The Schedule which excludes from the definition of a public meeting, church services, agricultural shows, theatrical and sports meetings etc has been retained in the same form. However, the first opening of democratic space appears in that what constitutes a public meeting *is* now more limited as the definition of a "public meeting" has been narrowed. Previously defined to include *any* meeting in a public place, the new definition excludes from its ambit any public meeting of fourteen people or less and specifically excludes meetings of organs or structures of a political body when such meetings are held in private or not wholly open venues. This amendment should halt police interference with and the disruption of, essential administrative meetings of political parties that has occurred in the past. Unfortunately, presumably due to the Government of Zimbabwe's obsession with surveillance and control, this amendment comes with a rider in section 23(8) to the effect that in order to "help the regulating authority ascertain whether a meeting is excluded from the definition of public meeting" the regulating authority is entitled to request that the political body submit a list of persons who are entitled to attend a meeting of any of its particular organs or structures. This peculiar section, which unusually specifies its *raison d'etre*, could obviously be deployed to provide valuable intelligence relating to the operations and operatives of opposition political parties to the police and state intelligence services.

It can also be envisaged that the police may use the section to monitor any such meeting "to ensure it is in fact a meeting of a party organ" and may wrongfully interpret the section (as they have wrongfully interpreted sections of POSA in the past) to claim the power to exclude from a meeting any persons whose name is not on the list submitted to them. However, the section does not provide any sanction if such lists are not provided. There does not therefore seem to be any good reason why a political organ should comply with a request for such a list. Although if a list is not provided the police may interfere with the meeting, claiming that they ascertaining that the meeting is in fact one of an organ of a political body and excluded from the definition of a "public meeting", if the list is provided the police may interfere with the meeting on the grounds that they are ascertaining that the people at the meeting match the list provided and that it is therefore clearly an excluded meeting of a political organ or structure. The effect will be the same. However, in the latter instance the police may additionally seek to exclude from the meeting those not on the list.

Where a meeting does fall within the definition of a "public meeting" the procedure to be adopted is quite different to that previously legislated. It is not intended here to set out in detail the procedures for the convening of a public meeting, procession or demonstration[73], but simply to focus on those aspects which reflect an important change from the previous procedure. In terms of the amendments, each organisation intending to hold a public meeting must now appoint a convener and deputy convener for the meeting and to notify the regulating authority of the appointment and names, addresses and contact details of the appointees. The process of notification to the regulating authority for all purposes under the Act has been simplified and made easier by the new Section 3, which provides that service upon the officer-in-charge of the police station nearest to the proposed venue of the intended public meeting is deemed to be service on the regulating authority. The regulating authority may also delegate his or her powers to another police officer. This facilitates the contact with the police which has proved difficult in the past and lessens the possibility of deliberate obstruction of access to and contact with the regulating authority. The convener and deputy convener are intended to act as points of liaison with the police for purposes of the public meeting. It thus seems reasonable that they supply contact details.

This is not how the matter is viewed by some experienced conveners. Given the level of distrust which has been engendered between the conveners of meetings and the police by past police actions, conveners have a not unreasonable fear that disclosure of their addresses will facilitate harassment by the police. However, since the obvious purpose of the legislation in this regard is to facilitate contact between the parties and since the legislation does not specify that *home* contact details be supplied, it would be the more reasonable interpretation of the legislation that a convener supplies a work address and work telephone number. Indeed, the fact that the legislation uses the singular in this regard points to this interpretation: that is, *the* address and telephone number for *both* the convener and deputy convener is required, implying that these are the same number, itself implying a work address and work telephone number. Although not required by the legislation, it would be wise for a convener to provide a cell phone number.

Once appointed, the convener is obliged to give five days notice to the regulating authority of any intended public meeting, or three days notice during any election period (the notice period

[73] The details appear in sections 25(2)

for public demonstrations or processions is seven days). While this increase from the previous notice period of four days may initially appear retrogressive, in fact the intention is the healthy one of allowing sufficient time for other salutary procedures, discussed below, to take place if necessary (including the possibility of an appeal by an aggrieved convener against any decision of the regulating authority).

The notice of the intended public meeting must contain certain information specified in section 25(2) all of which is that which is arguably reasonably required by a police force that intended to plan properly for the security of the event and its participants. Accordingly, the notice must indicate details such as the venue and time of the meeting, the anticipated numbers attending, the names of the marshals, where possible, etc. The provisions in the case of processions or public demonstrations are similar to those of a public meeting in relation to notification of the venue and times etc, though the notice must in addition specify the route of the demonstration or procession and the type of vehicles to be used in the procession or to bring people to the procession or demonstration.

The procedure after the receipt of such a notice by the police is then markedly different from that previously, and removes some of the opacity from the previous process. If the regulating authority believes that the procession, demonstration or public meeting may safely take place in the manner indicated in the notice, then in the case of a public meeting the meeting may take place without any further communication from or with the police. In the case of a procession or demonstration, the convener is specifically informed of this fact. This means in effect that the convener of a procession or demonstration must have police permission to go ahead. However, it is not an offence for the convener to go ahead with the procession or demonstration if the police have not communicated their attitude prior to the date of the procession or demonstration.

The situation is different if there is a threat that a proposed procession, public demonstration or public meeting will result in serious disruption of vehicular or pedestrian traffic, injury to participants or extensive damage to property or other public disorder. However, the basis for the perceived threat is no longer that the regulating authority "believes on reasonable grounds" that there is such a threat but that the regulating authority "receives credible information on oath" of such a threat. Ostensibly, this allows for greater transparency as the previous requirement that the "regulating authority believe on reasonable grounds" could never be subjected to any real scrutiny. This procedure is similar to that in an application for a search warrant[74]. The police have the power to issue search warrants on a like basis, that is, that they have "information on oath" that an item of probative value is on specified property or in the custody of a particular person.
What then happens in practice is that a junior police officer applies to senior police officer (who is a Justice of the Peace) for the search warrant by attesting to an appropriate affidavit. The application by the junior officer may often be on the instructions of his or her seniors in any event and its contents thus rarely, if ever, challenged by the issuer of the warrant. When the search warrant is executed there is no requirement that the information supplied on oath which justifies the warrant, or the identity of the person who supplied the information, is disclosed. Thus, from the point of view of the person affected, the process leading to the issuing of the warrant remains opaque.

[74] See sections 49 and 50 of the Criminal Procedure and Evidence Act [*Chapter 9:07*].

This kind of opacity is repeated in the provisions relating to processions, demonstrations and public meetings. No provision expressly obliges the regulating authority to disclose the information received on oath to the convener, to provide the convener with a copy of any affidavit made in this regard or to reveal the identity of the informant. However, significant transparency *is* afforded by the fact that after receiving the information on oath as to the perceived threat to public order and safety the regulating authority must immediately advise the convener of the attested threat. The convener must then be invited to a meeting with the police on a date prior to the day of the intended event.

Unfortunately no time limits are stipulated for convening this meeting, which may well be very shortly before the proposed event, leaving little time to pursue the appeal procedures (see below) if the outcome of the meeting is adverse. The purpose of the meeting with the police is that discussions take place "in good faith" in relation to the perceived threat and that the convener is afforded an opportunity in the course thereof to make representations as to whether the apprehension of public disorder is justified or as to how the perceived threat might be averted. The regulating authority may invite representations from other groups such as local authorities or civic groups at this meeting. It will be interesting to see how this provision works in practice. The police may choose to invite only bodies sympathetic to government to make representations in this regard – for example, the present Commission appointed by Government to run the City of Harare in place of the elected City Council.

If, as a result of this meeting the parties reach an agreement as to the conduct of the event which will avert the "credible" threat to public order, the notice convening the meeting is amended accordingly, and the meeting must take place in accordance with the amended requirements. Where the parties are unable to agree, the police officer may either impose such conditions on the event "as are reasonably necessary" to avert public disorder or, where the regulating authority is "convinced" on reasonable grounds that no conditions imposed on the conduct of the event will avert the threat, the regulating authority may issue a prohibition order, banning the event altogether. Knowingly contravening a prohibition order constitutes an offence. These amended procedures ensure adherence to previously by passed requirements of engaging the convener in discussions pertaining to the risk to public order and consideration of the imposition of directions as an alternative to an outright prohibition. Considerable transparency is thus added to the process.

The legislation does not appear to deal with a situation where information alleging a "credible" threat to public disorder is received after the go ahead for a public gathering has been given by the police, either on their own accord or pursuant to discussions with the convener. However, since section 26(5) provides the public gathering "may take place" after the police have given the go ahead or an agreement reached with the convener, in such a situation there seems little that the police may lawfully do to prevent the public gathering and must instead act in terms of section 29(2) if necessary.

These salutary changes to the Act are augmented by an improved right of appeal afforded to a convener aggrieved by the imposition of any conditions on the conduct of the event or the issuance of a prohibition order. The appeal no longer lies to the Minister of Home Affairs, but to

a magistrate[75]. In addition, the appeal must be "dealt with" on an urgent basis and at least before the date of the proposed event. By using the term "dealt with" it must be assumed that the matter must not only be heard, but a judgment given within the stipulated time frame. This amendment obviates a previous difficulty encountered by conveners where the judiciary has refused to treat applications against police bans as urgent. Hence the amendment to the appeal procedure significantly widens the available democratic space. The appeal is now to an at least theoretically independent body. Furthermore, whether the appeal succeeds or fails, the reasons and reasoning of the regulating authority in imposing the conditions or prohibition will be subjected to scrutiny and be publicly available. For example, it has been thought in the past that the police have used the "hecklers veto" to justify the ban of an event: that is, the police have banned events on the basis that due to the antipathy of those opposed to the event, the event will "occasion" public disorder.

Accordingly, with the new procedures, the question may usefully be put under judicial scrutiny as to whether an event ought to be prohibited due to a threat of public disorder emanating, not from the participants, but those opposed to it. Clearly the police should have an obligation to provide security to persons participating in lawful events to prevent unlawful interference with such events, which is a criminal offence. Any police claim that they cannot provide the necessary security should also come under judicial scrutiny. And obviously, since the reasons for banning a meeting are liable to come under judicial and public scrutiny, there is some pressure on the regulating authority that the reasons be less fatuous or disingenuous than previously.
The appeal procedure is not, however, without defect. The current difficulty in locating duty judges to hear urgent matters is likely to be repeated in the magistracy. There are also no provisions outlining further appeals from a magistrate's decision. After the "restructuring" of the superior courts in 2001, the allocation of cases in the High Court no longer took place on the basis of a simple roster. Politically sensitive cases appear to have been allocated to a select group of judges. There is a fear that the same process may happen in regard to appeals to the magistrate's court in terms of section 27B, with such appeals being heard by a small group of magistrates who the Government regards as sympathetic. Nonetheless, the procedure is a significant improvement on that existing previously and at the very least brings into the open the processes and the bases for decisions which were previously opaque. In this regard it should be noted that the retained ability of a regulating authority to impose a blanket ban on demonstrations and processions for one month is also now subject to these appeal procedures.

A few remaining changes to the legislation require mention for these purposes. Despite the new and salutary fetters on police discretion in banning certain public events, these fetters are loosened to a considerable extent by the provisions of section 29 (2). In terms of this subsection if, during the course of a lawful gathering, *any* act is committed that constitutes a danger to persons and property, a police officer of or above the rank of assistant inspector may call upon the persons participating in the gathering to disperse. Accordingly, an event, although legitimately convened and sanctioned by the police may be prevented by a single act of an *agent provocateur* which may give the police grounds to stop the event from continuing. In addition, section 29 specifically authorizes the use of lethal force if such force is "proportionate to the circumstances" – the drafters, for some reason, eschewing the constitutional formulation used in

[75] Section 27B

the Criminal Procedure and Evidence Act that the force used must be "reasonably justifiable in the circumstances."

The amendments also introduce a new restriction on the freedom of expression. Gatherings within a radius of 20 metres of the vicinity of Parliament or within a radius of 100 metres of the Courts and Protected Places are prohibited[76]. The Courts and Parliament are obvious sites for demonstrations. The use of the word "vicinity" in the legislation is as unfortunate as it is vague and imprecise. Where "the vicinity" begins and ends may be open to interpretation. The most logical interpretation would be that it means a radius of 20 or 100 metres from any point of the perimeter of such premises.

The POSA amendments are an improvement upon the previous provisions. However these provisions will only open up the democratic space and allow people to exercise their fundamental rights to freedom of assembly and association if the Zimbabwe Republic Police completely change their mindset. If they continue to display political bias in favour of the ruling party, they will still attempt to apply these new provisions in a manner that will place barriers in the paths of opposition political parties and non-governmental organisations seen as being critical government. Unless the police transforms itself into a professional force that protects the rights of all, the police will also continue to offer little protection against violent attacks upon opposition supporters. In the lead up to the elections, all political parties should be able to travel without illegal interference and to hold rallies and meetings throughout the country. The police force must itself refrain from illegal obstruction of campaigning by the opposition and must prevent illegal interference with this campaigning by supporters of the ruling party. As has been pointed out in a report entitled *Partisan Policing: An obstacle to human rights and democracy in Zimbabwe*:

> "without accountable, impartial policing that protects human rights, it will be difficult and perhaps impossible for the citizens of Zimbabwe to participate freely in any democratic process, including elections". [77]

The amendments to POSA considered here represent an advance for the freedom of expression and freedom of assembly in Zimbabwe. Certainly the amendments are not without flaws and lacunae which may be exploited in by the police to continue to repress and prevent the convening of public meetings, processions and demonstrations. However, if these flaws exist they ought to be exposed in the practice. In this practice the argument for greater freedom of expression and assembly will be strengthened and the source of any hindrance to these freedoms and the nature of the remedial steps required, made manifest to all.

The weaknesses and ambiguities in these amendments and failure of the police to abide by the new provisions have already been exposed in the way in which the police responded to a "Freedom March" convened by the MDC on the 23rd January 2008. The police at first allowed the MDC 'Freedom March', then banned it without recourse to the courts. On appeal the magistrate upheld the police decision to prohibit the Freedom March but ordered that the police allow the MDC to hold a rally at a specified location outside the City's central business district.

---

[76] Section 27A

[77] Report of the International Bar Association Human Rights Institute. October 2007

When MDC members sought to proceed from their headquarters in the central business district to the scene of the permitted rally, the police apparently construed this as an attempt to engage in the banned march and dispersed these persons using teargas, beating some people and arresting others. In early February 2008 the police also prohibited MDC's 'Freedom Marches' in Mutare and Rusape. Like the march in Harare, these marches were mounted to press the demand for a new constitution and free and fair elections. In Mutare the ban was challenged but amagistrate ruled in the appeal against the ban that the protestors could not march into the city centre but should instead gather at a venue outside the city. In at least one instance the prohibition was upheld by a magistrate who apparently accepted police assertions that "street kids" were likely to exploit the demonstrations to engage in public violence and that the police would be unable to prevent this, and even more bizarrely, that there would be damage to electricity pylons at a time when electricity supplies are already erratic[78]. These conditions, if they are to be given any credence, are static and would thus justify a perpetual ban on demonstrations. They also do not appear to have entered into police deliberations when a demonstration has been proposed by Government supporters.

Hence, indicating the bias of the police, a "Million Man March" convened by supporters of Mugabe in December 2007 was able to take place, with no suggestion by the police of possible "public disorder" or the grounds for prohibition later applied to the MDC's Freedom March.

The general attitude of the police towards demonstrations was recently summed up in a public statement by the Police Commissioner who said, " I challenge all political parties to organise rallies and meetings in accordance with the law of the land. Right now, what our people need is peace and tranquillity and not endless demonstrations, marches and processions, which waste their precious time for development. This is not the time for demonstrations and marches, but for constructive campaigning devoid of intimidation." This in effect is saying that the police disapprove of demonstrations, except those mounted by supporters of the ruling party.

It is clear therefore that the police are likely to ban all marches by opposition parties in the towns and magistrates are likely to side with the police in upholding these bans, thereby effectively eliminating the right of the opposition to stage protest marches.

Testing the limits of the amendments

Despite the limited scope of the 'reforms', these provisions should be fully tested, if for no other purposes than to establish their bogus nature. In exposing the inadequacy of the amendments in practice, so too will be exposed the repressive nature of the political milieu in Zimbabwe.

Prospective broadcasters should apply for licences, journalists who cannot operate as accredited journalists should start operating as unaccredited journalists; previously excluded foreign journalists should apply to the Media Commission for accreditation for the limited period allowed; non-Zimbabweans wanting to run newspapers in the country should request the

[78] Information supplied by lawyers appealing the ruling 01/02/08.

Minister to use his discretion to allow them to operate; political parties and civic organisations should use the new POSA provisions in order to mount demonstrations to establish how the police will respond. Only by doing this will it be possible to establish clearly that these powers will continue to be exercised in a politically biased fashion.

Conclusion It is clear that nearly a year of negotiations between the MDC and Government of Zimbabwe has done little to open up democratic space in Zimbabwe and has been merely a welcome time buying exercise for Presidents Mugabe and Mbeki. While President Mugabe may be pleased that constitutional amendment number 18 was passed by parliament with little debate, the MDC has not secured anything that will ensure a level playing field and an appropriate and democratic legislative framework for elections. The pre-election climate shows every indication that the impending elections will be as unfree and unfair as the predecessors.