

Media Laws In Zimbabwe

By Wilbert Mandinde

Follows an analysis of legislation affecting free expression and access to information in Zimbabwe.

The Constitution of Zimbabwe

The right to free expression is guaranteed in Section 20 of the Constitution, which states.

"Except with his own consent or by way of parental discipline, no person shall be hindered in the enjoyment of his freedom of expression, that is to say, freedom to hold opinions and to receive and impart ideas and information without interference and freedom from interference with his correspondence."

- The above provision makes no specific mention of the right to media freedom, or the right to access information, which means these rights are inadequately protected.

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The Access to Information and Protection of Privacy Act

The Access to Information and Protection of Privacy Act (AIPPA) governs the operation and general conduct of the media in a way that leaves the media with little breathing space.

AIPPA provides for access to information held by public bodies, but it is up to the heads of these public bodies to decide what they will and will not release "in the public interest" Public interest is not defined in the law. The Act allows public officials to hold information for 30 days after a request for information is made, which is impractical for journalists. This 30-day period may be extended by another 30 days with the permission of the Media and Information Commission (MIC), the board of which is appointed by the Minister of Information. Where the information requested affects a third party, the latter is given up to 20 days to respond.

All journalists must be accredited by the MIC. Foreign journalists – including Zimbabweans not "ordinarily resident" in Zimbabwe - can be accredited for no more than 30 days. Media institutions and news agencies must be registered by the MIC, which has the power to refuse and withdraw registration. Foreigners and Zimbabweans not ordinarily resident in Zimbabwe are barred from registering media houses.

Public Order and Security Act (POSA)

- Promulgated in 2002, POSA was meant to repeal the Law and Order Maintenance Act (LOMA). But in effect, POSA is a reworded version of LOMA with a different name. Like its predecessor, POSA contains provisions that curtail freedom of expression.

- POSA re-introduces provisions of the 1964 Preservation of Constitutional Government Act, (repealed in 1999), which the Rhodesian government used to suppress nationalist movements such as the now-ruling ZANU-PF. The new provision carries a penalty of 20 years' imprisonment without the option of a fine. Section 5 has very broad provisions that incorporate the common law crime of treason. It also makes it an offence to set up, organise, or advocate for a group or body that may "coerce or attempt to coerce the Government". The law further prohibits any person to support, assist or even threaten such action, with or without the threat of violence. While the Constitution states that the rights to free expression, association and assembly may be limited in the interests of defence, public order or public safety, I would argue that acts of passive resistance and civil disobedience outlawed under POSA would not affect such interests, and are not reasonably justifiable in a democratic society.

- Section 15 of POSA deals with publishing or communicating "false statements" considered prejudicial to the State. Subsection 15(1) of POSA makes it a criminal offence for a person inside or outside the country to communicate a statement that is wholly or materially false, and which:

- Promotes public disorder or endangers public safety
- Adversely affects the defence or economic interests of Zimbabwe
- Undermines public confidence in the security forces
- Disrupts any essential service

Proof that the statement was intended to cause any of the above is enough to bring about a conviction, which carries a fine of Z\$100 000 and / or a five year prison sentence. The law applies not only to mass media, but also to reports produced by businesses and other civil society organisations. This false statements provision is a re-enactment of section 50 of LOMA, but takes into account the Supreme Court's judgment in *Chavunduka & Anor –v- Minister of Home Affairs & Anor*, (see 'Free Expression and the Judiciary' below) in which section 50 of LOMA was ruled to be in contravention of Section 20 of the Zimbabwean Constitution.

POSA's subsection 15 (2) prohibits the publication of a statement by a person who knows the statement to be false, or who does not have reasonable grounds for believing the statement to be true, if the statement gives rise to one of the four consequences listed above. By going beyond defence, public safety, public order and the country's economic interests, the subsection exceeds the permissible limits set out under section 20(2) of the Constitution. This offence is punishable even where the accused person thought their statement was true, if the court finds that the person did not have reasonable grounds for believing the statement to be true.

Increasingly the authorities have used Section 15 against the private media, as well as civil society leaders and those perceived to support the opposition. In most instances, charges have been dropped on the advice of the Attorney General's office. But the on-going threat of the use of POSA doubtless has a chilling effect on the government's critics.

Meanwhile, section 16 of POSA deals with issues of undermining authority of, or insulting President, and is taken from section 46 of LOMA. Section 16 prohibits the making, publicly and intentionally, of any false statement (including an act or gesture) about or concerning the President or Acting President if the person knows or realises that there is a risk or possibility of engendering feelings of hostility towards or causing hatred, contempt or ridicule of the President / Acting President, whether in their official or personal capacity. It is also an offence to make abusive, indecent, obscene or false statements about the President. None of these terms are defined. Zimbabwe has an Executive President and therefore it is perfectly permissible for him to come under public scrutiny and criticism as the politician responsible for the policies and practices of the government.

In terms of section 24 of POSA, anyone organising a public gathering has to give the police at least four days' notice. Many police stations, whether deliberately or by mistake, interpret this provision to mean that the organiser must apply for, and obtain police permission to hold a gathering, whereas the law simply requires notification. Police have been broken up many gatherings on the basis of this provision.

The Broadcasting Services Act (BSA)

Promulgated following attempts by Capital Radio to go on air in 2000, BSA establishes the Broadcasting Authority of Zimbabwe (BAZ), which grants broadcasting licenses. As with MIC, the Minister appoints the BAZ board, which has yet to license a private or community broadcaster. Under the BSA, it is an offence to broadcast without a license, and only citizens ordinarily resident in Zimbabwe, or a body corporate whose controlling interest are held in Zimbabwe, can apply for a license. Contravention of the law attracts a fine of Z\$5 million and / or two years imprisonment.

The BSA further requires a broadcaster to reserve, free of charge, one hour of programming a week for the government to explain its policies. At least 75% of a broadcaster's programming must be produced either locally or elsewhere in Africa.

The Criminal Law (Codification and Reform) Act

The Criminal Law (Codification and Reform) Act was gazetted on June 2, and is anticipated to come into force on January 1 2006. The Act will introduce stiffer penalties than those initially provided for in POSA and AIPPA.

Section 31(a) of the Act is almost a carbon copy of the “false statements” provisions of POSA, but provides for fines of up to Z\$2,500,000 and / or 20 years imprisonment, whereas POSA provides for fines of Z\$100 000 and / or five years in jail. Section 31(b) mirrors Section 80 of AIPPA, and deals with the communication of “falsehoods”. Whilst AIPPA provides for penalties of a Z\$400,000 fine or a two year jail term, the new Act states that anyone convicted under section 31 will be liable to 20 years in prison or a fine of Z\$2,500,000.

Section 33 of the Codification is similar in all respects to Section 16 of POSA, and deals with “undermining authority of, or insulting the President”. Under POSA, those convicted for such offences are liable to be fined Z\$20,000 and / or a one-year jail term. The Codification Act increases the penalties to a Z\$200,000 fine and / or one year’s imprisonment. When considering the Bill, the Parliamentary Legal Committee noted that Section 33 was unconstitutional. However, Parliament chose to reject the committee’s report.

General Laws Amendment Bill

This Bill – currently before Parliament’s Legal Committee - seeks to tighten POSA still further by increasing the penalties for those convicted. The Bill, that aims to amend several other Acts, affects 22 sections of POSA. The proposed amendments seek to increase the fine imposed under Section 16 of POSA (insulting / undermining the authority of the president) from Z\$20 000 to \$2 million. The penalty for those convicted under Section 15 (false statements) will now be Z\$10 million and / or five years in prison. The maximum fine for unauthorised public gatherings (section 24) will increase to Z\$10 million.

The Official Secrets Act (OSA)

The OSA is a pre-independence statute that seeks to limit what official information can be made public. The Act prohibits communication of any official information by any civil servant. Communication of such information by anyone who state officials may have entrusted with it in confidence is also a crime. Under the Act, it is an offence to communicate official information unless authorised to do so by a competent authority. However, the Act does not say which authority can authorise the disclosure of official information.

OSA also criminalises communication with “foreign agents”, the definition of who includes people suspected of having committed crimes in Zimbabwe or elsewhere that are prejudicial to the state. At times the Act has been used to cover up the blunders and improprieties of government officials.

Criminal Defamation

In civil defamation, a defendant found liable would be ordered to pay damages to the plaintiff. In criminal defamation, the state brings a prosecution, and anyone convicted of this crime may be ordered to pay a fine, perform community service, or sent to prison. A defamatory statement will only attract criminal liability if it is considered so serious that a criminal prosecution is justified. In assessing such seriousness, the court will take into account factors such as:

- The extravagance of the allegation
- The extent of the publication
- Whether the interests of the state or community are likely to be harmed

The owner and editors of the Financial Gazette were convicted of criminal defamation in 1995, when the paper reported that President Mugabe had secretly married his secretary Grace Marufu – now Grace Mugabe - in a private ceremony solemnized by High Court Judge Paddington Garwe.

Free expression and the judiciary

Prior to 2000, both the Supreme Court and High Court benches were considered to be impartial. The following freedom of expression cases were determined during this period:

Ray Choto and Mark Chavunduka Versus the State

Choto and Chavunduka - journalists working for the privately owned Standard newspaper - were arrested and charged under the Law and Order Maintenance Act (LOMA) for publishing statements likely to cause public alarm or despondency. They had written about an alleged coup attempt. The Constitutional Court nullified the section of LOMA under which they were charged.

Capital Radio versus the Minister of Information and the Zimbabwe Broadcasting Corporation

In 2000, Capital Radio, a private radio station, successfully challenged the broadcasting monopoly of ZBC on the basis that it violated the right of free expression under section 20(1) of the Constitution. The Supreme Court later ruled that Capital Radio was allowed to broadcast. However, when the station went on air, armed soldiers and police confiscated its equipment.

After 2000, the government purged the judiciary, and Chief Justice Antony Gubbay was forced to resign together with a number of white Supreme Court judges. They were replaced by political appointees, the impartiality of who has been questioned at times. The High Court or the Supreme Court have heard the following freedom of expression cases since 2000:

Geoff Nyarota and Lloyd Mudiwa versus the State

Nyarota and Mudiwa of the Daily News challenged the constitutionality of the section 80(1)(b) of AIPPA, under which they had been charged with writing a false story. The state conceded that 80(1)(b) was unconstitutional, and the Supreme Court nullified this section of the law. This started an apparent trend whereby the court nullified only sections of laws that the state conceded to.

Associated Newspapers of Zimbabwe (Pvt) Ltd versus The Minister of State for Information and Publicity, the Media and Information Commission and the Attorney General. Supreme Court 20/03

In this case, the court refused to hear the application brought by ANZ challenging certain sections of AIPPA. The unprecedented refusal to hear a constitutional application was based on the ground that ANZ had "unclean hands" because the company had failed to comply with law whose validity they were challenging.

This marked the start of a series of protracted legal battles between ANZ and the authorities during 2003. The cases were as follows:

Associated Newspapers of Zimbabwe (Pvt) Ltd versus Chief Superintendent Madzingo and the Commissioner of Police, Harare High Court 157-03

After the "unclean hands" judgment, police invaded ANZ's offices and confiscated equipment. ANZ sought a provisional order to have police stationed at their offices to leave, and for the confiscated equipment to be returned. The provisional order was granted, but the police have refused to return the confiscated property.

Associated Newspapers of Zimbabwe (Pvt) Ltd versus the Media and Information Commission AIPP 1/03

Also following the "unclean hands judgment, ANZ applied to the Media and Information Commission (MIC) for registration. The MIC refused to register the company, culminating in this appeal to the Administrative Court. ANZ won the case, but the MIC appealed to the Supreme Court. The appeal is still pending.

Associated Newspapers of Zimbabwe (Pvt) Ltd versus the Media and Information Commission AIPP 03/03

After the Administrative Court had ruled in favour of ANZ's registration, the MIC appealed. ANZ went to the Administrative Court to seek an order to be allowed to operate pending the appeal. Their application was granted, but it took another three orders before the police allowed ANZ to re-commence operations.

Other cases include the following:

IJAZ, Abel Mutsakani and Vincent Kahiya versus The Minister of State for Information and Publicity, the Media and Information Commission and the Attorney General – SC 136/02

The Independent Journalists Association of Zimbabwe (IJAZ) sought the nullification of sections 79, 80, 83 and 85 of AIPPA on the grounds that they were unconstitutional. The case was heard in November 2002, but it took fifteen months for judgment to be delivered. Chief Justice Godfrey Chidyausiku concurred with justices Cheda, Ziyambi and Malaba and declared that Sections 79(1)(d) and (2), Sections 80, 83 and 85 were constitutional. Section 79 deals with

the accreditation of journalists whilst section 83 outlaws the practice of journalism without accreditation. In his dissenting judgment Justice Wilson Sandura observed that the application for accreditation by a journalist is subject to approval by the Permanent Secretary and by the Minister of Information, which meant that accreditation was no longer an administrative matter only.

Chengetai Zvauya versus The State

A magistrate convicted Zvauya of Criminal Defamation after he wrote a story to the effect that the draft constitution had been printed prior to the consultative process that eventually took place. He appealed, and in this case the High Court quashed both his conviction and sentence.

Nonetheless, Magistrates have remained relatively impartial when interpreting the law. Magistrates acquitted all the following cases concerning contraventions of AIPPA:

- State versus Andrew Meldrum (Harare Magistrate Court)
- State versus Richard Musazulwa (Gweru Magistrate Court)
- State versus Kelvin Jakachira (Harare Magistrate Court)
- State versus Toby Harnder and Julian Simmonds (Norton Magistrate Court)

Unlike judges of the High and Supreme Courts, and the Presidents of the Administrative Court, who are appointed by the President, Magistrates are appointed on academic merit by the Public Service Commission. Magistrates are paid a pittance and do not enjoy the same perks enjoyed by judges. So magistrates have less to lose, and have not been in the habit of protecting the government.

Rising to the challenge

In February 2002, MISA-Zimbabwe established a Media Defence Fund (MDF) whose objectives are to promote and protect media freedom by offering legal assistance to media practitioners and media institutions. Two officers manage the fund. Journalists arrested under AIPPA and POSA have been assisted by the MDF. The fund also supported the ANZ and IJAZ constitutional cases. Amongst other things, the MDF assists lawyers with research work.

In June of the same year, MISA-Zimbabwe launched the Media Lawyers Network (MLN), whose purpose is to ensure that there is a pool of lawyers who can take on freedom of expression cases. MLN structures have been established in four major towns. Members of the MLN take part in MISA-Zimbabwe's advocacy committee's work, and receive information about media laws and best practice.

Conclusion

There exists little political will to create a supportive legal environment for the press, and therefore there is a need to create this will, particularly within the legislature, through campaigns targeting Parliamentarians. A clear constitutional provision for Freedom of Press would ensure better protection of the media in general and the right to freedom of expression in particular. With this in mind, there is need to establish and foster coalitions with like-minded organisations such as the National Constitutional Assembly (NCA), which has been campaigning for a new constitution.

The authorities in Zimbabwe do not like to be criticized by other African states. It is therefore necessary to lobby other African states to pressurise Zimbabwe to return to democracy. Using mechanisms available through the African Commission for Human and Peoples' Rights would be useful, too, as the Zimbabwean government usually reacts positively to issues raised at such a forum.

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