

Media Regulation and Legal Frameworks in Swaziland and Zimbabwe

So Different and Yet So Alike

By Beatrice Mtetwa

Swaziland and Zimbabwe are alike in more ways than they are different. For a start, both are members of the Southern Africa Development Community (SADC) and as such both have agreed to be bound by that body's Protocols, Principles and Treaties that deal with certain basic freedoms which include freedom of expression and freedom of the media. These include the SADC Protocol on Culture, Information and Sport, whose Article 20 provides that "State Parties shall take necessary measures to ensure the freedom and independence of the media". In addition, both are bound by the SADC Principles and Guidelines Governing Democratic Elections whose Article 7.4 tasks member states with the responsibility to "Safeguard the human and civil liberties of all citizens including the freedom of movement, assembly, association, expression, and campaigning as well as access to the media on the part of all stakeholders..." They are also members of the African Union, whose African Charter on Human and People's Rights provides, through Article 9, for freedom of expression and information in all facets. So, from a regional and continental perspective, both countries have committed themselves to the principles of freedom of expression, information and the media.

Both countries' constitutions have provisions that deal with freedom of expression. Swaziland's long-awaited constitution, assented to by the King in July 2005 and

made operational in February 2006, provides for freedom of expression and freedom of the media in its Section 24. Section 20 of the Zimbabwean constitution also provides for the unhindered enjoyment of freedom of expression which includes "freedom to hold opinions and to receive and impart ideas and information without interference, and freedom from interference with correspondence."

Although Swaziland has no direct legislation that deals with freedom of expression and freedom of the media, like many other African countries, it has a myriad of legislation which has the effect of limiting these freedoms. MISA-Swaziland has determined that 32 pieces of legislation in the country directly inhibit freedom of expression. These include the Prescribed Publications Act (1968) which prohibits the publication of material deemed "prejudicial or potentially prejudicial to the interests of defence, public safety, public morality or public health" (all as determined by the Minister of Information); the Official Secrets Act (1963) which limits access to information held by the State; the 1973 King's Proclamation which suspended the country's independence constitution, thus taking away all freedoms that had hitherto been guaranteed under the bill of rights, including freedom of expression; the Sedition and Subversive Activities Act (1968) which prohibits the publication or the making of statements deemed likely to bring the monarch into "hatred and contempt", incitement of any kind deemed



Newspaper vendor, Swaziland.

likely to incite, raise discontent or promote feelings of ill-will and hostility amongst the Swazi population; the Public Order Act (1963) which regulates political and civil society gatherings and processions deemed to be of a political nature without prior police authorisation; and the Books and Newspapers Act (1963) which provides for the registration of print media by paying a prescribed fee, before being allowed to operate a print media house.

With the coming into law of the new Constitution, it is generally believed that those pieces of legislation that hinder or curtail the enjoyment of freedom of expression have been rendered ineffective and are as good as repealed. However, in the absence of enabling legislation making provisions for the enjoyment of those freedoms that are guaranteed under the Constitution, it is difficult to see how freedom of expression can be enjoyed in the interim. Even if enabling legislation is passed, there is no guarantee that freedom of expression and freedom of the media will be enjoyed as this will be subject to legal interpretation by the courts, in addition to the wide powers that the King continues to enjoy under the new Constitution. Even if the courts ultimately interpret the constitutional provisions in favour of the enjoyment of freedom of expression, there will be no guarantees that the government will abide by the decisions of the Court, as precedent shows selective compliance with court orders.

Although the state currently holds a monopoly in the broadcast media, with it controlling both radio and television, there is one privately owned television channel and two privately owned religious radio broadcasters, presumably licensed under the country's Posts and Telecommunications Act. A media policy, which is hoped will free the airwaves from government control, has been adopted, although this is yet to be implemented and it is not as yet possible to determine whether this will translate into a pluralistic broadcast media that will afford Swazis freedom of expression, freedom of the media and access to information as provided for in regional, continental and international instruments.

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It is also not clear whether the new constitution and the media policy will definitively deal with the murky and uncertain licensing and regulatory provisions of the Posts and Telecommunications Act (1962), and how the Swaziland Television Authority Act (1983) will fare. That

the media policy was adopted through a process that allowed participation by all stakeholders is perhaps cause for optimism.

Although not a formal regulatory mechanism, Swaziland's media is, like media in other developing countries, constantly faced with the spectre of over litigation. The media in the developing world is generally not a lucrative venture and exorbitant civil defamation suits clearly threaten press freedom as media owners will practise self censorship where a story might attract civil litigation. This is particularly so where the story involves the powerful, yet these are the newsworthy members of society.

On its part, Zimbabwe has become notorious for legitimising and legalising the illegitimate and the illegal. Many of Zimbabwe's excesses, especially in the past six or so years, have been committed under the guise of one law or another. The media sector is no exception in this respect. Although Zimbabwe has always had an array of legislation that curtailed the enjoyment of freedom of expression, it was only in 2002 that the government brought into operation its infamous Access to Information and Protection of Privacy Act (AIPPA) to deal specifically with media related issues, including regulation. Other pieces of legislation which compliment AIPPA in the curtailment of freedom of expression include the Public Order and Security Act (POSA), the Criminal Law (Codification and Reform) Act, brought into operation on 1 July 2006, the Official Secrets Act, the Censorship and Entertainment Control Act, the Protected Areas Act, the Broadcasting Services Act and the Postal and Telecommunications Act. The Miscellaneous Offences Act – which was repealed by the Criminal Law (Codification and Reform) Act – has had its media unfriendly provisions incorporated into the Criminal Law (Codification and Reform) Act.

The Zimbabwe Constitution has suffered 17 amendments in the hands of the ruling elite and the majority of these were to reverse gains made in the Constitutional Court in the interpretation of the Declaration of Rights. In recent years – and as a clear response to what was perceived to be a strong opposition and civil society – the media has been the target of over-regulation and control by the government. The promulgation and coming into law of AIPPA in 2002 under the stewardship of the now out of favour former Minister of Information, Jonathan Moyo, heralded one of the most difficult periods for the media in Zimbabwe. Under AIPPA, journalists can only practice journalism at the pleasure of a government appointed Media and Information Commission (MIC) consisting of government apologists and whose chairperson spews vilification, hate speech, threats and intimidation against media workers and civil society activists in his weekly columns in the state media. Despite AIPPA giving the impression that it facilitates access to information, in practice the MIC has ensured that less information reaches the public. This has been achieved by ensuring that scores of journalists in the private media remain unaccredited, that scores are arrested for stories that are seen as putting the ruling elite in bad light, and that many become unemployed by refusing to register the publications they work for.

Media houses are not spared under AIPPA as they are subject to registration by the MIC every two years, and at least four independent newspapers have been shut down since September 2003 for alleged violations of AIPPA. Media owners, directors and editors have been arrested and prosecuted for alleged infractions of AIPPA, all of which has had the effect of curtailing the free flow of information. The superior courts, particularly the Supreme Court, have dismally failed to interpret the provisions of Section 20 of the Constitution to facilitate greater enjoyment of freedom of expression.

The Broadcasting Services Act is to broadcasting what AIPPA is to the print media. It is an Act that was enacted in 2001 in response to the Constitutional Court's declaration that the monopoly in broadcasting was not justifiable in a democratic society. The Act is administered by the government-appointed Broadcasting Authority of Zimbabwe (BAZ) and despite the law providing for the entry of private broadcasters, the airwaves in Zimbabwe remain the preserve of the state radios and television. The only visible acts the BAZ has been involved in, in recent years, were the closing down of independent broadcasters including the raid and confiscation of equipment from the premises of Voice of the People Communications Trust which broadcasts from The Netherlands, the raiding of

offices of independent journalists in early 2005 whose satellite dish was thought to be a transmitter by the BAZ officials, the raiding and confiscation of equipment, and the arrest of VOP employees and Trustees between December 2005 and January 2006 by the very same BAZ officials. The employees and Trustees were prosecuted at the instance of the BAZ. So, far from opening up the airwaves as mandated by the Act, the BAZ has embarked on a course similar to that of the MIC in ensuring that as little information as possible filters through to the people of Zimbabwe through radio and television.

Although concerned with law and order, POSA also criminalises normal media commentaries such as criticising the President, publication of information that causes or is likely to cause disaffection amongst the police and defence forces, publication or communication of false statements prejudicial to the State, etc. That these provisions limit the enjoyment of freedom of expression and are therefore a form of regulation cannot be disputed.

The recently introduced Criminal Law (Codification and Reform) Act equally restricts the enjoyment of media freedom and it is clearly a backdoor reintroduction of the provisions of Section 80(1)(b) of AIPPA, which criminalised the publication of falsehoods, and which was struck down as unconstitutional. What is striking with the reintroduced Section 31(a) of this Act is that it provides for very heavy penalties (such as imprisonment of up to 20 years). The law also incorporates criminal defamation and insult laws which were hitherto common law offences that have been used against media practitioners in the past.

Other pieces of restrictive legislation include the Official Secrets Act which limits access to information held by the government and associated organs, the Posts and Telecommunications Act which is tasked with the licensing of telecommunications to yet another government-appointed body which has yet again demonstrated its lack of independence by withdrawing the licence that had been issued to a company controlled by a former ruling party provincial chairman who has since fallen out of favour. The Censorship and Entertainment Control Act equally provides for a government-appointed body to determine what material Zimbabweans can watch or read, including videos, DVDs and books in the privacy of their homes. The Protected Areas Act limits access to certain areas, such as the limitation placed on passing through a road that passes State house between the hours of 6.00 a.m. and 6.00 p.m.

There are other forms of control such as the bringing of civil defamation suits against newspapers claiming large amounts of money in an obvious endeavour to financially cripple the newspapers. Zimbabwe's private news-

papers and magazines have had numerous such civil suits and in the last ten years, two magazines, *The Horizon* and *Parade*, have folded up, with litigation playing a major role in their demise.

Conclusion

Although Swaziland and Zimbabwe appear to be like chalk and cheese in a number of respects, an analysis of their media landscapes shows striking similarities. Despite being members of regional and continental bodies that have embraced press freedom, both have been found wanting in implementing this through domestic legislation that facilitates the enjoyment of the free flow of information in all its facets. Both countries now have constitutionally entrenched press freedom clauses, although both suffer from wide exceptions that allow for executive interference. Both countries have a history of ignoring court orders that the executive does not like, with Zimbabwe now having perfected the art of reversing unfavourable court decisions through amending the Constitution and other legislation. Whether Swaziland will follow this route in its implementation of the new Constitution, the media policy and all subsidiary legislation that might follow, is yet to be seen.

The legislative controls and provisions in the two countries' statutes – for countries that have such a striking different history – are also interesting, although some of the legislation predates independence. Both countries have retained their Official Secrets Acts, which continue to restrict access to information held by government. This is despite Zimbabwe's pretence of access to information under AIPPA. Both countries have laws protecting the Heads of State in terms that criminalise criticism that would be taken for granted in normal democracies. Legislation in both countries limits the enjoyment of press freedom in its prohibition of publications deemed prejudicial to state interests such as defence, security, public safety, among others. Although legislation exists in both countries that could result in media diversity, both countries have interfered with the private media by closing down newspapers that have displeased the authorities in their articles. The arrest of journalists has been known to happen in both countries although Swaziland has not made arrests in a number of years, whereas Zimbabwe arrests, prosecutes, harasses and intimidates media workers routinely, and as a matter of course.

Both countries enjoy state monopoly on both radio and television. Although Swaziland has one TV channel which is "private", many doubt its independence and autonomy, and two religious radios have broadcasting licences. This is despite the fact that both countries have

legislation that allows the entry of private players into broadcasting.

Swaziland is currently posting positive signs whose implementation is yet to be tested. That the new Constitution has a freedom of expression and freedom of the media clause is a positive development – as has been the adoption of a Media Policy supported by all stakeholders. What remains of concern, of course, are the wide legislative and executive powers given to the King under the Constitution which may defeat all of these developments if exercised to restrict press freedom. This compares with the wide powers given to the Zimbabwean President who can make law through Presidential Powers without going to Parliament, and who can influence court process by appointing his cronies to the bench.

Where there is a gleam of hope in the Swazi media environment, Zimbabwe continues to regress as new laws re-enact and tighten up media controls as seen by the introduction of heavier penalties for offences involving perceived publication of falsehoods under the Codification Act. The pending Interception of Communications Bill which will allow interception of private communications will be a further assault on press freedom if passed into law. The retention in regulatory bodies of biased and psychopathic individuals who perceive their mandate as agents in the fight against press freedom also confirms that regulatory bodies are merely extensions of the government and the ruling elite. That it is members of these bodies who lead the police in raids against media houses – such as the confiscation of equipment and closure of *The Daily News* and *Voice of the People* – confirms the lack of independence of these bodies.

The use of civil litigation, especially by the powerful and the ruling elite – by financially crippling media houses – is also quite apparent in both countries. So, despite superficial appearances of a monarchy steeped in the ways of outdated tradition and a revolutionary country brimming with democratic principles attained after a protracted and bloody struggle for independence, there is much that brings Swaziland and Zimbabwe together in the media sector. Although the two appear "so close and yet so far" at face value, they are in reality, "so different, and yet so alike." ■

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