

Freedom of Expression in Zimbabwe

31 DECEMBER 2019

A research paper done by Hlengiwe Dube
on behalf of MISA Zimbabwe



MISA
ZIMBABWE



Table of Contents

Executive Summary	2
Freedom of expression in the international human rights framework	3
<i>United Nations instruments</i>	3
<i>African Human Rights System</i>	4
Legislative and Institutional Framework	7
Media Lobby Organisations	13
Media Diversity and Pluralism in Zimbabwe	14
Safety of Journalists and other Media Practitioners	15
Criminal Defamation	17
Freedom of Expression Online	19
Misinformation and Disinformation	27
Conclusion	28



Executive Summary

The protection and promotion of the right to freedom of expression has an extensive and diverse history that is unique across jurisdictions. It is mainly influenced and shaped by cultural, political, socio-economic, and technological changes.

Freedom of expression is a fundamental human right and an indispensable element in the development and consolidation of a democratic society. It enhances transparency and accountability of governments and institutions.

Freedom of expression is a facilitative right that is essential for the enjoyment of other human rights such as the right to education, freedoms of assembly and association, political participation, access to justice, human dignity, equality, and other rights. It is also essential for human development.

Under international law, states have an obligation to adopt measures to ensure full enjoyment of the right to freedom of expression. The right to freedom of expression is guaranteed under international law and most constitutions have provisions that provide for the right to freedom of expression, albeit with limitations.

However, this right is seemingly under threat, remains contested in most jurisdictions worldwide and is being subjected to more limitations through practices and adoption of laws that limit this right.

The digital age that is characterised by advancements in information and communications technology (ICT) has greatly transformed freedom of expression and brought opportunities and challenges.

In Zimbabwe, the Constitution guarantees freedom of expression but there is dearth in statutory laws that give effect to the relevant constitutional provisions. Since Zimbabwe attained independence in 1980, there has been a general disregard of freedom of expression and the state has focused on passing laws and practices that entrench violations of freedom of expression, prior to the coming into being of the 2013 Constitution with its comprehensive and democratic Bill of Rights.

The purpose of this article is to examine the status of the right to freedom of expression in Zimbabwe, articulating its legal basics and normative foundations, analysing the current circumstances. The article also draws on international human rights standards, while also examining the relevant restrictions. The article recommends the repeal and revision of laws that hinder the enjoyment of the right to freedom of expression in Zimbabwe.

Freedom of expression in the international human rights framework

Freedom of expression is firmly guaranteed in international law. International human rights treaties have obligations which require state parties to respect, to protect and to fulfil human rights through adoption of legislative frameworks and other measures that give effect to human rights enshrined in the instruments they ratified.

In that regard, states have an obligation not to interfere with the exercise of the right to freedom of expression to enable people to seek, receive and impart information and ideas, within the confines and expectations of international law. On the other hand, states are expected to take positive steps that will create a conducive environment for the exercise of this right.

United Nations instruments

The right to freedom of expression, opinion and information is expressly provided for under Article 19 of the Universal Declaration of Human Rights (UDHR). It provides that, “[e]veryone has the right to freedom of opinion and expression; this right includes freedom

to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers”¹.

The International Covenant on Civil and Political Rights (ICCPR) is more detailed. It provides for the right to hold opinions without interference; have the right to freedom of expression including the right to seek, receive and impart information and ideas². The ICCPR also stipulates conditions under which freedom of expression can be restricted including maintenance of public order and national security; protection of reputations; and protection public health or morals³.

This right also finds expression in other human rights instruments such as the International Covenant on Economic, Social and Cultural Rights⁴, International Convention on the Elimination of all forms of Racial Discrimination (ICERD, prohibits hate speech and racism⁵); the Convention on the Rights of the Child⁶, the Convention on the Rights of Persons with Disabilities (CRPD).

The UN Special Rapporteur on Freedom of Expression has also adopted General Comments elaborating on Article 19 of the ICCPR. Also, several resolutions have been adopted to advance freedom of expression. The UN General Comment No. 34 extensively expound on Article 19 of the ICCPR, making reference to the jurisprudence of the Human Rights Committee on the right to freedom of expression⁷.

¹ *Universal Declaration of Human Rights Article 19.*

² *International Covenant on Civil and Political Rights Article 19.*

³ *As above*

⁴ *As above article 15(3).*

⁵ *Convention on the Elimination of all forms of Racial Discrimination*

⁶ *Convention on the Rights of the Child article 13*

⁷ *UN Human Rights Committee General Comment No. 34 CCPR/C/GC/34.*

African Human Rights System

Article 9 of the African Charter on Human and Peoples' Rights guarantees freedom of expression. It also provides for the right to receive information and disseminate opinions⁸. Other African Union instruments such as the African Charter on the Rights and Welfare of the Child⁹, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, (the Maputo Protocol)¹⁰, African Youth Charter¹¹, African Charter on Democracy, Elections and Governance¹², also provide for freedom of expression.

The Declaration of Principles of Freedom of Expression and Access to Information in Africa expounds on this right quite succinctly and explicitly¹³. The Guidelines on Freedom of Association and Assembly in Africa have elaborate provisions on freedom of expression in the context of freedoms of association and assembly¹⁴.

The African Court and the African Commission on Human and Peoples' Rights have a rich jurisprudence on the right to freedom of expression in Africa¹⁵ that can provide guidance to Zimbabwe in the implementation of Article 9 of the African Charter. Zimbabwe is party to the aforementioned treaties like the ICCPR and the African Charter and is thus expected to implement them in good faith.

It is also recognised in terms of the international framework, that freedom of expression and access to information are not absolute rights, they are subject

to exemption that are prescribed by the law, necessary and proportionate and also projected to serve a legitimate aim in a democratic society¹⁶. *Amnesty International and Others v Sudan* is illustrative of this principle. The African Commission held that the state cannot impose a blanket ban on freedom of expression, instead, restrictions to rights should be minimal and not undermine fundamental rights guaranteed under international law¹⁷.

Background to freedom of expression in Zimbabwe

Zimbabwe attained independence in 1980 and has been under the political leadership of ZANU-PF since then. Between 2009 and 2013 the country was under an inclusive government that brought together ZANU PF and two of the leading opposition parties MDC-T and MDC-M following the 2008 inconclusive presidential elections.

⁸ African Charter on Human and Peoples' Rights article 9.

⁹ African Charter on the Rights and Welfare of the Child article 7.

¹⁰ Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa article 9.

¹¹ African Youth Charter Article 4.

¹² African Charter on Democracy, Elections and Governance article 27.

¹³ Declaration of Principles of Freedom of Expression and Access to Information in Africa. The Declaration was adopted in 2002 and, the Special Rapporteur on of Freedom of Expression and Access to Information in Africa recently concluded a led a process of revising the Declaration in line with new developments with regards to access to information and freedom of expression, taking into consideration technological developments. The revised Declaration was adopted on 5 November 2019.

¹⁴ Guidelines on Freedom of Association and Assembly in Africa see article 77-82.

¹⁵ See Article 19 v Eritrea (2007) AHRLR 73 (ACHPR 2007), Amnesty International and Others v Sudan (2000) AHRLR 297 (ACHPR 1999), Jawara v The Gambia (2000) AHRLR 107 (ACHPR 2000), Interights and Others vMauritania (2004) AHRLR 87 (ACHPR 2004) and Zimbabwe Lawyers for Human Rights and Another (on behalf of Meldrum) v Zimbabwe (2009) AHRLR 268 (ACHPR 2009), Zongo v Burkina Faso, Judgment on reparations [Application 013/2011 (2015)] and 1) Konaté v Burkina Faso [Application 004/2013 (2013)]

¹⁶ See Declaration of Principles of Freedom of Expression, UN Human Rights Committee, General comment 34.

¹⁷ Amnesty International and Others v Sudan (2000) AHRLR 297 (ACHPR 1999).

Throughout the colonial period and post-independence, laws that limit freedom of expression have always existed despite the fact that some of the grievances during the struggle for independence included demands for fundamental freedoms like freedom of expression. The post-independence administration inherited laws that were used by the white minority rule to consolidate power such as the Law and Order Maintenance Act (LOMA) and Official Secrets Act (OSA).

It should be noted that with the advent of independence, the ZANU-PF administration desired to create a one-party state and consolidate its power by limiting fundamental freedoms. Thus, the quest for such a political establishment contributed to adoption of laws that undermined the enjoyment of the right to freedom of expression despite promises during the liberation struggle to repeal repressive laws that violated fundamental human rights.

The government established the Zimbabwe Mass Media Trust (ZMMT) in 1981 to administer the post-independence print media reforms¹⁸. The establishment of the ZMMT changed the ownership structure of the main daily newspapers in Harare and Bulawayo, *The Herald* and *Chronicle*¹⁹. The two dailies were originally owned by a South African media entity, Argus Company.

The government purchased the stock that the Argus Company owned and placed it under a new entity called the Zimbabwe Mass Media Trust with the state as the main shareholder. The Argus company was renamed the Zimbabwe Newspapers Limited (ZimPapers)²⁰.

The government later assumed full ownership of the ZMMT in 1996 through an amendment of the ZMMT

deed. The original intention of setting ZMMT was to decolonise the media and not to control it. Thus, the full ownership of ZMMT was viewed as a strategy to initiate close control of the media including editorial policy.

The media played a critical role in the 1980s and exposed corruption, particularly the Willowgate scandal²¹. However, in the mid-90s, a formidable trade union movement emerged resulting in the formation of the Movement for Democratic Change (MDC) in 1999, arguably Zimbabwe's strongest opposition party since independence that threatened to end ZANU PF's stronghold on power.

The emergence of a strong opposition party altered the political landscape after the intense and vehemently contested elections of 2000. The changed political climate and emergence of dissenting voices contributed to the adoption of obnoxious laws that muzzled the media and put stringent requirements on access to information.

The Access to Information and Protection of Privacy Act (AIPPA), Broadcasting Services Act (BSA) were enacted in 2002 and 2001 and the Ministry of Information and Publicity was given the responsibility to enforce them. In an effort to further suffocate the democratic space for civil society organisations, the Private Voluntary Organisations Act (PVOA) was enacted in 2002²². AIPPA in particular was used by the state with reckless abandon to ban newspapers and silence dissent to the extent that most private and independent media houses resorted to self-censorship²³.

¹⁸ E Muchena 'Revisiting the Media Landscape: A Context-Based Reappraisal of the New Media Laws in Zimbabwe' (2013)17 *Journal of Humanities and Social Science* 68.

¹⁹ H Ronning 'The Media in Zimbabwe: The Struggle between State and Civil Society' in S. Darnoff et al. (eds) *Twenty years of Independence in Zimbabwe* (2003)196-197.

²⁰ As above.

²¹ *The Chronicle* exposed the corruption of government officials in which government officials purchased foreign owned cars at inflated rates.

²² L Moyo et al 'Freedom of the Press, the Zimbabwean Situation Up to 2009' (2014)5 *Mediterranean Journal of Social Sciences* 1543-1552.

²³ As above

The period from the fast track land reform programme in the early 2000s following the emergence of the MDC in 1999, saw intensified brutality on dissenting voices predominantly those who supported the pro-democracy movement. Intimidation of journalists also escalated as exemplified by the arrest and assault of two journalists from the privately run *Standard* newspaper, Ray Choto and Mark Chavunduka in 1999, over a story that alleged a coup plot by members of the military.

Between 2009 and 2013, Zimbabwe had an inclusive government that was brokered through the signing of the Global Political Agreement (GPA) that was mediated by South Africa. The GPA acknowledged the role of the right to freedom of expression in a democracy²⁴. The GPA recognised challenges that prevailed in the media landscape and proposed reforms that included licensing of privately run radio stations and community radio stations²⁵.

During the inclusive government, two radio stations, *Star FM* and *ZIFM* were licensed to operate and both started broadcasting in June and August 2012 respectively. It is important to note that this was a biased issuance of operating licenses to broadcasters aligned to the state at the expense of privately run commercial and community radio stations. The net effect of this was not media diversity but a continuation of ZBC monopoly of the airwaves.

During the inclusive government, a new constitution that guarantees freedom of expression was adopted. The Constitution was introduced into an environment that was replete with notorious laws that impede on freedom of expression. These laws which limit access to information; centralise media registration; criminalise insulting statements about the head of state, impose



heavy punishments imposed on those perceived to have violated the laws, restrict media diversity and pluralism, remained in place and promote media monopoly, harassment of media practitioners²⁶.

Due to the aforementioned challenges, in 2014, the Ministry of Information, Media and Broadcasting Services initiated the Information and Media Panel of Inquiry (IMPI) to evaluate the Zimbabwean media industry and propose recommendations for reform.

Areas covered by the IMPI include media as business; information platforms and content of media products; polarisation, perceptions and interference; media training, training capacity and ethics; gender advocacy and marginalised groups; employment opportunities and conditions of service and media law reform and access to information.

²⁴ Article 19 Global Political Agreement (2008).

²⁵ As above.

²⁶ J Mpofu & Mr S Chimhenga 'The impact of Zimbabwean Media Laws on the work of Journalists and Media organisations' (2013)2 *Journal of Research & Method in Education* 84.

The process produced a report that was presented to the Parliamentary Portfolio Committee on Media, Information and Broadcasting Services. The report outlined areas of concern and proposed recommendations that were envisaged to improve and transform the media environment in Zimbabwe²⁷. Some of the recommendations include, the need to review laws such as the Access to Information and Protection of Privacy Act, Criminal Law (Codification and Reform) Act, Broadcasting Services Act, Censorship and Entertainment Controls Act, Official Secrets Act and Copyright and Neighbouring Rights Act.

The IMPI also proposed the repeal and replacement of AIPPA with an access to information specific law. There were criticisms too. Some described the report by the IMPI as shallow, repetitive and not ground-breaking²⁸.

The report was also criticised for failing to examine fundamental changes in the media landscape and failing to make meaningful projections about the transition into the digital age²⁹.

During the 65th Ordinary Session of the African Commission on Human and Peoples' Rights (the African Commission), that was held in Banjul, The Gambia, in November 2019, Zimbabwe's periodic report was considered by the African Commission in terms of Article 62 of the African Charter that mandates state parties to submit their periodic reports indicating the measures they would have taken to give effect to the rights enshrined in the Charter.

In this exercise, the Special Rapporteur on Freedom of Expression, analysed the report on matters concerning freedom of expression and access to information. Criticisms by the Special Rapporteur included the government's decision to shut down internet during protests in January 2019; the prevalence of harassment of journalists and media practitioners; and existence

of laws that infringe of the right to freedom of expression.

The Special Rapporteur also commented on the ongoing law reform exercise and emphasised the need to premise the process on international human rights law and standards. It is expected that the ongoing law reform process that started in December 2018 will usher in progressive laws that will protect and promote freedom of expression.

Legislative and Institutional Framework

The Constitution

Zimbabwe adopted a new constitution in 2013, replacing the Lancaster House constitution which was amended several times mainly for political expediency. Section 61 of the 2013 Constitution guarantees freedom of expression including the freedom to seek, receive and communicate ideas and other information; academic freedom; freedom of artistic expression and scientific research and creativity³⁰.

It also provides for freedom of the media including protection of the confidentiality of journalists' sources of information; broadcast and other electronic media freedom subject to State licensing procedures³¹.

²⁷ 'IMPI submits report' (2015) <https://www.herald.co.zw/impi-submits-report/> (accessed 25 November 2019).

²⁸ T Mushakavanhu 'If IMPI report is a predictor of journalism's future in Zimbabwe, then we're damned' (2015) <https://medium.com/@tinsmushlif-impireport-is-a-predictor-of-journalism-s-future-in-zimbabwe-then-we-re-damned-8dace1b0bb0f> (accessed 25 November 2019).

²⁹ As above.

³⁰ Constitution of Zimbabwe Amendment (No. 20) Act 2013 Section 61.

³¹ As above.

In terms of the Constitution, freedom of expression may be limited in instances where there is malicious injury to a person's reputation or dignity; incitement to violence; advocacy of hatred or hate speech and malicious or unwarranted breach of a person's right to privacy³².

Criminal Law (Codification and Reform) Act

This is Zimbabwe's criminal law statute. In terms of Section 31 it is a crime to publish or communicate false statements that are prejudicial to the state. Such an offence attracts a fine of up to \$5,000 or up to 20 years' imprisonment.

The crimes include "inciting or promoting public disorder or public violence or endangering public safety; or adversely affecting the defence or economic interests of Zimbabwe or undermining public confidence in a law enforcement agency, the Prison Service or the Defence Forces of Zimbabwe; or interfering with, disrupting or interrupting any essential service"³³. Section 33 criminalises expressions that undermine the president³⁴. Due to these provisions, journalists, artists, or human rights defenders are forced into self-censorship in fear of these chilling penalties.

Broadcasting Services Act (BSA)

The BSA (2001) establishes the Broadcasting Authority of Zimbabwe (BAZ)³⁵ which has the licensing mandate for broadcasting players and other functions related to regulating the broadcasting sector and advising the relevant ministry. The BAZ board is appointed by the Minister of Information, Publicity and Broadcasting

Services after consultations with the President. This has been a source of criticism since its independence and objectivity is compromised and not insulated from political interference³⁶.

In terms of the constitution, "broadcasting and other electronic media of communication have freedom of establishment subject only to State licensing procedures that are necessary to regulate the airwaves and other forms of signal distribution; and are independent of control by government or by political or commercial interests³⁷".

Thus, with the BSA in place, regulators enjoy the privilege of deciding on the establishment of broadcasting stations in the country. This is ultra vires the spirit and letter of the constitutional provisions set out in Section 61 on broadcasting and electronic media. Since its establishment, BAZ licensed a few radio stations and (at the time of the writing of this report), is yet to licence community radio stations. The BSA prohibits broadcasting without a licence and only citizens and permanent residents are eligible for licenses³⁸. This criterion of prohibiting foreign stakeholders hinders real and potential investment in the broadcasting sector. This affects mostly commercial broadcasting³⁹.



³² As above.

³³ Criminal Law (Codification and Reform) Act section 31.

³⁴ As above section 33.

³⁵ Broadcasting Services Act (BSA) of 2001 Section 3.

³⁶ African Media Barometer: Zimbabwe (2012) <https://library.fes.de/pdf-files/bueros/africa-media/09529.pdf> (accessed 25 November 2019).

³⁷ n31 above section 61.

³⁸ n36 above Section 22.

³⁹ n27 above 85.

The BSA is now an outdated piece of legislation which is no longer compatible with the broadcasting landscape that has significantly transformed especially within the context of the digital age and specifically the migration from analogue to digital broadcasting⁴⁰. This comes in the wake of the current proposal to repeal the BSA and replace it with a law that will promote diversity in the broadcasting sector and converge the broadcasting and telecommunications sectors that have become linked due to advancements in ITCs⁴¹.

Maintenance of Peace and Order Act

It was enacted in 2019 and replaced POSA, 2002⁴². POSA imposed stringent restrictions on the media and limited demonstrations and public gatherings⁴³. Similarly, MOPA is a repackaged POSA just as POSA was a repackaged LOMA because most of the POSA provisions are replicated under the new law⁴⁴.

Freedom of expression is still constrained under MOPA as was the case under POSA⁴⁵. According to the Zimbabwe Human Rights NGO Forum's position paper on MOPA, "is constraining the very core of freedom of expression is particularly egregious given its value in democratic society."⁴⁶

If MOPA has a negative impact on freedom of assembly then that has a direct impact on freedom of expression because freedom of assembly provides a platform for

the exercise of political, religious, artistic, cultural and other forms of expression. If people are denied the opportunity to assemble, they are inevitably denied the freedom to express themselves as active citizens in a democratic society.

The Access to Information and Protection of Privacy Act (AIPPA)

AIPPA was adopted in 2002 and Zimbabwe became one of the pioneer countries to adopt access to information legislation in Africa. AIPPA came at a time when the political climate had changed. A formidable opposition had emerged and an influential private print media had materialised.

These and other political developments that threatened the dominant position of the ruling party, are said to have been the driving forces for the adoption of AIPPA⁴⁷. Contrary to facilitating access to information especially in the exercise of the right to freedom of expression, AIPPA is riddled with impediments that made access to information cumbersome despite being amended several times⁴⁸. AIPPA does not provide for proactive disclosure of information. It places an obligation to provide information on public bodies and excludes private bodies which is contrary to the Model Law and the Declaration provisions for relevant private bodies to disclose information for the exercise of human rights⁴⁹.

⁴⁰ 'Zimbabwe Still Needs Diverse Radio' (2018) <https://misa.org/media-centre/press-releases/zimbabwe-still-needs-diverse-radio/> (accessed 25 November 2019).

⁴¹ As above.

⁴² POSA replaced the Law and Order Maintenance Act (LOMA) of 1960, which was a Rhodesian law for controlling civil unrest. POSA was LOMA incarnate" because of the striking similarities. See <https://www.newsday.co.zw/2019/04/posa-is-that-you-part-1/> (accessed 29 November 2019)

⁴³ The Access to Information and Protection of Privacy Act: Two Years On' (2004) Article 19/Misa-Zimbabwe <https://www.article19.org/data/files/pdfs/publications/zimbabwe-aippa-report.pdf>(accessed 29 November 2019)

⁴⁴ P Kaseke 'POSA, is that you? – Part 1' (2019) <https://www.newsday.co.zw/2019/04/posa-is-that-you-part-1/>(accessed 29 November 2019).

⁴⁵ 'An Analysis of the Maintenance of Peace and Order Bill, 2019, (2019) Zimbabwe Human Rights NGO Forum <http://www.hrforumzim.org/publications/an-analysis-of-the-maintenance-of-peace-and-order-bill-2019/> (accessed 29 November 2019)

⁴⁶ As above.

⁴⁷ The Access to Information and Protection of Privacy Act: Two Years On' (2004) Article 19/Misa-Zimbabwe <https://www.article19.org/data/files/pdfs/publications/zimbabwe-aippa-report.pdf>(accessed 29 November 2019).

⁴⁸ N Ngwenya 'Compliance through Decoration: Access to Information in Zimbabwe' in O Shyllon "Model Law on Access to Information for Africa and other regional instruments: Soft law and human rights in Africa" (2018) 14.

⁴⁹ See Model Law and the Declaration. Principle 4: Principle 4 under the 2002 Declaration stated that 'Everyone has the right to access information held by private bodies which is necessary for the exercise or protection of any right.' The revised Declaration expands on the private bodies. The Model law defines a relevant private body as "anybody that would otherwise be a private body but owned totally or partially or controlled or financed, directly or indirectly, by public funds, but only to the extent of that financing; or carrying out a statutory or public function or a statutory or public service, but only to the extent of that statutory or public function or that statutory or public service".

Access to information is not an absolute right, thus it is standard practice to exempt some categories of information through narrowly defined exemptions, "to the extent that these restrictions are fair, reasonable, necessary and justifiable in a democratic society based on openness, justice, human dignity, equality and freedom."⁵⁰

Under AIPPA the exemptions are overly broad and vague as demonstrated by the national security exemptions and restrictions on disclosure of cabinet and local government deliberations. The vague exemptions leave room for broad interpretation which is open to abuse and ultimately hinder access. Politically sensitive information could easily fall under the ambit of national security⁵¹. Such provisions that impose restrictions to accessing information also undermine the active agency of citizens through protecting the governing elite from public scrutiny⁵². Democracy cannot survive without accountability and the basic postulate of accountability is that people should have access to information about their government⁵³.

The wide scope of protected information creates stringent restrictions on information disclosure and create challenges for the media to report on matters of public interest. Specifically, it cripples the potential of investigative journalism because the ability to investigate is contingent on journalists and media practitioners accessing information through access to information legislation.

This is compounded by the absence of an internal review mechanism in circumstances where access to information is denied and the unfettered discretion enjoyed by the head of a public institution over information that could be accessed by the public⁵⁴.

Thus, while there is a lot of information that is churned through social media platforms, there is dearth of official information particularly information that is held by public bodies and relevant private bodies.

Thus, without adequate information it is difficult to verify, corroborate facts and produce credible information for public consumption⁵⁵.

AIPPA imposes statutory regulation of the media; unreasonable requirements for media operators and journalists; and disproportionate punishments on those perceived to have violated it through hefty fines and imprisonment. Since its adoption HRDs, journalists and other media practitioners have been harassed, persecuted, and silenced while some journalists have been refused registration and media houses deregistered⁵⁶. Such actions resulted in journalists fleeing the country in search of secure environments; self-censorship for fear of arrests and heavy penalties. The intimidation of private media practitioners and other dissenting voices immensely augmented the dominance of the state-controlled media. Fear of arrests silences journalists. AIPPA was over the years been used to target private media and other dissenting voices critical of the ruling elite. Thus, AIPPA undermines the oversight role of the media and shields public officials from media and public scrutiny. Further, AIPPA does not give primacy access to information and establishes a cumbersome process of accessing the information that do not facilitate accessing information expeditiously. This works against journalists who require information timely.

AIPPA also contains provisions that regulate the media. It establishes a regulatory body, the Media and Information Commission (MIC) whose board is appointed by the Minister of Information in consultation

⁵⁰ G Feltoe 'Defamation: protecting reputation or suppressing media freedom?' (2018) *Zimbabwe Electronic Law Journal*

⁵¹ n 49 above 151.

⁵² n1 49 above 47.

⁵³ *S.P. Gupta v Union of India* [1982] AIR (SC) 149 para 232.

⁵⁴ n 49 above 151.

⁵⁵ n 51 above.

⁵⁶ n 49 above.

with the president. Its mandate is to accredit journalists, register and monitor mass media, enforce professional and ethical standards in the mass media to developing codes of conduct for media practitioners, and to exercise disciplinary control over them. The MIC was later replaced by the Zimbabwe Media Commission (ZMC) in 2009 through Constitutional Amendment 19 and later Section 248 of the Constitution. The functions of the ZMC are similar to those of the MIC. One major criticism against AIPPA is that most of its provisions do not pertain to access to information or privacy but rather targeted at the media and restricting freedom of expression. The ministerial powers over the MIC created a regime of political interference over the media, which stifles media freedom.

It should however be noted that in February 2019, the Cabinet approved the repeal of AIPPA, which gave rise to the proposed Freedom of Information Bill, Zimbabwe Media Commission Bill and Protection of Personal Information/ Data Protection Bill. This was considered to be the dawn of a new era in the media and broadcasting sector. AIPPA will be successfully repealed once these new provisions are enacted.

Freedom of Information Bill

The right of access to information is expressly guaranteed under Section 62 of the 2013 Constitution. It states that, everyone has the right of access to information in the interests of public accountability and for the exercise or protection of a right⁵⁷. It also provides for the exceptions which include protection of national security and defence, and professional confidentiality⁵⁸.

Thus, to give effect to the constitutional guarantees on access to information, a Freedom of Information Bill was gazetted and has since been passed by parliament awaiting enactment by the President. The introduction of a new law is on the basis of the grave weaknesses of AIPPA. As AIPPA is being replaced, it is important to align the new legislation with international standards, as embodied in the Model Law on Access to Information for Africa⁵⁹, the Declaration of Principles of Freedom of Expression and Access to Information for Africa and the Guidelines on Access to Information and Elections that were adopted by the African Commission.

Preliminary observations by the media and legal fraternity point to the insincerity of the government citing that the law reform process is unlikely to result in the adoption of laws that are locally and globally acceptable⁶⁰.

For example, it does not make information disclosure mandatory yet it is the cardinal principle in terms of the access to information discourse. It also provides differential treatment of non-residents and non-citizens on access to information⁶¹. Also, the State intends to make the Zimbabwe Media Commission the arbiter and overseer of the enjoyment of the right to freedom of expression and information.

As mentioned earlier, access to information is a cross-cutting right. By mandating the Zimbabwe Media Commission as the oversight body for this right, access to information will be viewed as a media related right. The Model Law provides guidance on the oversight mechanism which should be an independent and impartial body, made up of information commissioners

⁵⁷ Constitution of Zimbabwe Amendment (No. 20) Act 2013 section 62.

⁵⁸ As above.

⁵⁹ The Model Law was adopted in 2013 by the African Commission on Human and Peoples' Rights. It is a framework that facilitates states compliance to the positive obligation on African Union member states to enact laws that protect access to information. Its aim is to "ensure that legislative drafters and policy-makers address all issues relevant to the African context in their adoption or review of access to information legislation". It is a useful instrument either for revision of access to information legislation or for development of a new law through "providing guidance on the form and content of the legislation to be enacted to give effect to these obligations at the domestic level." See <http://www.africanplatform.org/fileadmin/Content/PDF/Resources/State-of-ATI-in-Africa-2017.pdf> (accessed 1 December 2019)

⁶⁰ Analysis: Does Freedom of Information Bill go far enough? (2019) <https://zimfact.org/analysis-does-freedom-of-information-bill-go-far-enough/> (accessed 30 November 2019).

⁶¹ Analysis: Does Freedom of Information Bill go far enough? (2019) <https://zimfact.org/analysis-does-freedom-of-information-bill-go-far-enough/> (accessed 30 November 2019).

whose role is to promote, monitor and facilitate access to information⁶².

In addition to enacting a freedom of information law, the government should consider amending or repealing laws that hinder access to information or prohibit maximum or proactive disclosure of information. The Official Secrecy Act is a case in point. It is used to “embargo information held by government bodies and agencies”⁶³.

It would also be prudent measure to come up with whistle-blower protection legislation to protect those who release information on wrongdoing in good faith. Whistle-blowers play an important role in fighting and exposing corruption and other malpractices. The reform process could be an opportunity to introduce sectoral laws to facilitate access to information in different sectors, for example, the extractive industries sector.

The Zimbabwe Media Commission Bill

The government gazetted the Zimbabwe Media Commission (ZMC) Bill in August 2019 as one of three laws that will repeal AIPPA⁶⁴. Its purpose is to give effect to Sections 61, 248 and 249 of the Constitution and regulate and control the functions of the media, essentially addressing the sections of AIPPA that deal with the media. Its objective is to protect freedom of expression and freedom of the media. It regularises the establishment of the Zimbabwe Media Commission established in Section 249 of the Constitution.

The bill provides for the functions of the Commission and that of its members. Among the stated functions, the Commission is vested with the authority to

investigate and hear matters that are within the ambit of Section 61 of the Constitution. In this regard, the Bill sets out the procedure for submission of complaints, conduct of investigations, rights of interested persons, the procedure to be followed after an investigation and enforcement of orders of Commission.

On enforcement of the Commission’s orders, Section 14 provides that: *Any person who, without lawful excuse, contravenes or fails to comply with any decision or order of the Commission made in terms of this Act shall be guilty of an offence and liable to a fine not exceeding level seven or to imprisonment for a period not exceeding six months or to both such fine and such imprisonment.*

This has been one of the criticisms of the Bill that it criminalise freedom of expression and of the media profession in the form of penalties for offences and for contraventions of regulations. This clause has been perceived as a way of reincarnating criminal defamation that was declared unconstitutional by the Constitutional Court⁶⁵.

On the Commission’s investigatory powers on media freedom related violations, the Commission may use the police in the inquiry, hearings or investigations. The challenge with such a provision lies in the history of the criminalisation of journalism that is characteristic of the media environment in Zimbabwe⁶⁶. This will in essence entrench restrictions on freedom of expression and the media.

If this bill is passed in its current status, this will be a missed opportunity to democratise the media environment and promote freedom of expression.

⁶² Model Law part four section 43). This part of the Model Law also provides guidance on the structure of the oversight mechanism, powers and duties of the oversight mechanism; appointment, terms of office, termination of duties of information commissioners.

⁶³ n 49 above 151

⁶⁴ The other two Bills are the Freedom of Information Bill and the Data Protection Bill.

⁶⁵ Voluntary Media Council of Zimbabwe Statement on the Recently Gazetted Zimbabwe Media Commission Bill (2019) <http://kubatana.net/2019/08/29/statement-on-the-recently-gazetted-zimbabwe-media-commission-bill/> (accessed 29 November 2019).

⁶⁶ As above.

See also <http://kubatana.net/wp-content/uploads/2019/09/misa-zimbabwe-commentary-on-the-zimbabwe-media-commission-bill-2019.pdf> (accessed 29 November 2019).

Also, the Bill only provides for statutory regulation and excludes self-regulation which is contrary to the letter and spirit of the Declaration of Principles of Freedom Expression and Access to Information in Africa which encourages impartial, expeditious, cost-effective self-regulation which relies on codes of ethics and conduct that are developed by the media through transparent and participatory processes⁶⁷.

The Declaration states that co-regulation may be adopted to complement self-regulation⁶⁸. The recommendation to adopt co-regulation also came out of the government-sanctioned and funded (IMPI) as the most preferred framework⁶⁹. Another criticism of the Bill is the excessive powers bestowed on the Minister of Information, Publicity and Broadcasting Services. This renders the law susceptible to political interference, contrary to constitutional aspirations that Chapter 12 institutions should be independent⁷⁰. Instead of being accountable to the public, the ZMC will be subservient to the Ministry⁷¹. Principle 18 of the Declaration reiterates the need for an independent regulatory body that is protected against any form of interference⁷².

The Bill should be revised to create an environment that will promote and not stifle freedom of expression in line with international standards. Also, there is no clarity in the Bill about the Commission's access to information functions.

Media Lobby Organisations

There are a number of representative and lobby organisations working in the area of freedom of expression and access to information in Zimbabwe. The Media Alliance of Zimbabwe (MAZ) comprises Media Monitors Zimbabwe, Media Institute of Southern Africa (Zimbabwe Chapter), Zimbabwe Union of Journalists (ZUJ), Zimbabwe National Editors' Forum (ZINEF), Gender and Media Connect (GMC), the Media Centre, the Zimbabwe Association of Community Radio Stations (ZACRAS), the Voluntary Media Council of Zimbabwe (VMCZ) and the African Community Publishing Development Trust (ACPDT).

These organisations advocate for freedom of expression and access to information in its different facets including legal reform, media self-regulation, women empowerment in the media and community media. These organisations have played a pivotal role in driving the freedom of expression agenda in Zimbabwe and challenged the government to create a conducive environment for freedom of expression. A case in point is the role that MISA Zimbabwe played in litigating on freedom of expression issues. The Internet shutdown and defamation cases are worth mentioning as well. These organisations depend on donor funding to execute their functions. The shifting of priorities by donor organisations and fluctuations in donor funding greatly influence their operations. The shift in priorities might also compromise the independence of these organisations as they endeavour to align their programming with donor priorities in order to access funds.

⁶⁷ Declaration Principle 16

⁶⁸ Declaration Principle 16(3)

⁶⁹ n 66 above. Self-regulation is championed by Voluntary Media Council of Zimbabwe (VMCZ) is a media self-regulatory body that was established in 2007 by Zimbabwean journalists and civil society stakeholders to promote a strong and ethical media and subscribes to principles of media freedom, accountability, independence, and ethical journalism. Its work is anchored on the 2002 Declaration of Principles on Freedom of Expression in Africa, adopted by the African Commission on Human and People's Rights, which proclaims in Article IX (3) that "effective self-regulation is the best system of promoting high standards in the media." It also subscribes to the 1991 Windhoek Declaration on Promoting an Independent and Pluralistic African Press, which says that an "independent, pluralistic and free Press is essential to the development and maintenance of democracy in a nation and for economic development",

⁷⁰ Constitution chapter 12.

⁷¹ n 66 above.

⁷² Declaration Principle 18.

Media Diversity and Pluralism in Zimbabwe

Although there is enhanced internet access and increased use of social media which acts alternative media for accessing information, generally, there is limited media diversity when it comes to the mainstream media. Radio ownership is dominated by a few players, who are either government or individuals connected to the ruling party⁷³. This may be viewed as an attempt at pluralism, albeit, without diversity.

The country's only television station is run by the state controlled public broadcaster, Zimbabwe Broadcasting Corporation (ZBC). It also runs four radio stations. The commercial radio stations that were licenced i.e. *Capital FM*, *Mutare's Diamond FM* and *Kariba's Nyaminyami FM* and *Star FM*, are state-controlled under the ZimPapers Group.

This licensing of Zimpapers-run stations is promoting monopoly and concentration of ownership which also does not promote diversity. ZiFM, Hevoi FM and 98.5FM are privately run by AB Communications and its owners are affiliated to the ruling ZANU PF⁷⁴.

As for the print media, the government, through ZimPapers, controls most newspapers. The Associated Newspapers Zimbabwe (ANZ) and Alpha Media Holdings (AMH) runs other daily and weekly newspapers. This

creates a situation where only a few entities control the channels of expression, thus increasing media concentration⁷⁵ in a few hands. What has transpired on the Zimbabwe media landscape is a bit of decentralisation and plurality but not diversity. Media activist, Takura Zhangazha explained the situation succinctly:

It is those with resources that are not only spreading their wings across differing media platforms (newspaper to radio to television), but are also beginning to have uniform editorial policies that disable media diversity and in the final analysis determine what is 'news' in favour of their own political or economic interests⁷⁶.

Thus, the above sentiments are substantiation that in Zimbabwe there is no media diversity or pluralism.

Community media

It has been noted that community radio is a significant and accessible medium in Africa⁷⁷. In many parts of the world, the proliferation of community media is enabled by the democratisation, decentralisation and deregulation of the media⁷⁸. Zimbabwe had not yet (at the time of this research), licenced community radio stations, despite radio being the most widely accessed medium in the country, especially in rural areas⁷⁹.

Although there are a number of community media initiatives throughout the country,⁸⁰ the Broadcasting Authority of Zimbabwe (BAZ) has only licenced national and local commercial radio stations. There is generally lack of political will to licence these community radios which are also tools of advocacy and social change.

⁷³ F Ndlovu 'Zimbabwe media capture' (2017) <https://mediapluralism.com/2017/07/30/zimbabwe-media-capture/> (accessed 26 November 2019).

⁷⁴ 'Zimbabwe Still Needs Diverse Radio' 13 Feb 2018 <https://misa.org/media-centre/press-releases/zimbabwe-still-needs-diverse-radio/> (accessed 25 November 2019)

⁷⁵ N Nyamutumbu 'Mugabe to Mnangagwa transition: Not much media plurality, diversity yet' (2019) <http://www.radiovop.com/mugabe-to-mnangagwa-transition-not-much-media-pluralitydiversity-yet/> (accessed 26 November 2019).

⁷⁶ T Zhangazha as cited in F Ndlovu 'Zimbabwe media capture' (2017) <https://mediapluralism.com/2017/07/30/zimbabwe-media-capture/> (accessed 26 November 2019)

⁷⁷ M Myers 'Voices from Villages: Community Radio in the Developing World' (2011) Centre for International Media Assistance 11.

⁷⁸ C Fraser & SR Estrada Community Radio Handbook (2001)

⁷⁹ J Masuku 'Community Radio Take-off in Zimbabwe: Delayed Indefinitely?' (2019) <https://medium.com/center-for-media-data-and-society/community-radio-takeoff-in-zimbabwe-delayed-indefinitely-6ec63c88d743> (accessed 29 November 2019).

⁸⁰ n 37 above.

Depriving communities of this type of media denies them the socio-economic and political benefits that community media bring to communities. Community media encourages diversity, represents communities' interests, foster community participation, and is important for nurturing languages and cultures. Community media gives a voice to marginalised communities, especially if broadcasting is in local languages that are rarely included in the mainstream media. Community media discuss issues such as agriculture, health, education, natural disasters, peace-building initiatives, political issues, gender equality and other matters that are of significance to the communities⁸¹.

Thus, such media has the potential promote civic rights, to footer public participation, nurture community integration and social cohesion and also can serve as a tool for community mobilisation and building communities that are vibrant⁸². The absence of licensed community radio stations in the country is contrary to democratic spirit and an impediment to the enjoyment of the right to freedom of expression and the right of access to information⁸³ and limits media diversity⁸⁴. The media sector is thus yet to be fully liberalised since independence.⁸⁵

In light of these current circumstances on media diversity, there is need for the state to take measures to promote a diverse and pluralistic media as state or private monopoly over print, broadcast and online media is not compatible with the right to freedom of expression.

There is also a need to transform ZBC into a public service broadcaster that is accountable to the public through the legislature or other mechanisms for public accountability; and to take measures to ensure access to media and other means of communication, including

by marginalised groups, as well as linguistic and cultural groups.

It is also prudent to promote transparency and diversity in media ownership and facilitate the establishment of independent non-profit community media with the objective of developing and disseminating content that is relevant to the interests of geographic communities or communities sharing common interests such as language and culture. Promoting access to the media by poor and rural communities, including by subsidising household costs associated with digital migration should also not be overlooked. A diverse media will ensure a representation of the different political, social and economic facets of the Zimbabwe society. And a plural media would, among other variables mean plurality of ownership, presence of affordable public and private news, accessibility to domestics and local media.

Safety of Journalists and other Media Practitioners

The Declaration of Principles of Freedom of Expression in Africa states: *State parties should take measures to guarantee the safety of journalists and other media practitioners to prevent attacks on journalists and other media practitioners, including murder, extra-judicial killing, torture and other forms*

⁸¹ *Developing communities through radio 20 June 2018* <https://en.unesco.org/radioict/press/developing-communities-through-radio>

⁸² S N Maina 'Communication strategies employed by Kenya community radio in fostering social cohesion and integration in Kenya' (2013) 1 *International Journal of Arts and Entrepreneurship* 1-25.

⁸³ Zimbabwe Association of Community Radio Stations (ZACRAS) and Amnesty International 2019 World Radio Day Statement. <http://www.zacraszim.org/index.php/news/125-zimbabwe-association-of-community-radio-stations-zacras-and-amnesty-international-2019-world-radio-day-statement>

⁸⁴ <https://freedomhouse.org/report/freedom-press/2017/zimbabwe> (accessed 29 November 2019)

⁸⁵ As above.

of ill-treatment, arbitrary arrest and detention, enforced disappearance, kidnapping, intimidation, threats and unlawful surveillance undertaken by State and non-State actors⁸⁶.

The obligation of the state includes taking effective legal and other measures to investigate, prosecute and punish perpetrators of attacks against journalists and other media practitioners, and ensure that victims have access to effective remedies⁸⁷.

Attacks and intimidation of journalists including arrests and imprisonment deprives them of their freedom of expression and also deprives the public their right to access information that they require for the exercise of other rights⁸⁸.



In Zimbabwe, cases of violence against journalists in the form of intimidation and threats are common and this compromises their safety in the line of duty. The challenge is mostly common when covering stories on political developments⁸⁹.

There many cases of journalists being assaulted, intimidated and threatened while conducting their duties, which is a constitutionally guaranteed right⁹⁰. Police officers and state security agents have been named as perpetrators in some of the cases⁹¹. Regarding police officers, the Declaration states that states shall be liable for the conduct of law enforcement, security, intelligence, military and other personnel which threatens, undermines or violates the safety of journalists and other media practitioners⁹².

It is unfortunate that there is a culture of impunity and perpetrators rarely account for these violations despite being reported to the police⁹³. This culture of impunity negatively endangers the lives and safety of journalists.

Guidance in dealing with such cases of violence against journalists and other media practitioners can be found in the jurisprudence of the African Court on Human and Peoples' Rights. The Nobert Zongo case is instructive. The Court found that Burkina Faso "failed to act with due diligence in seeking, trying and judging the assassins of Norbert Zongo and his companions"⁹⁴.

⁸⁶ Declaration Principle 20.

⁸⁷ Declaration Principle 20.

⁸⁸ Article 19 v Eritrea (2007) AHRLR 73 (ACHPR 2007).

⁸⁹ 'Journalists Engage Zanu-Pf over Intimidation' <https://zimbabwe.misa.org/2018/09/26/journalists-engage-zanu-pf-over-intimidation/> (accessed 30 November 2019).

⁹⁰ Statement on International Day to End Impunity for Crimes against Journalists (2019) MISA <https://zimbabwe.misa.org/2019/10/31/statement-on-ukunited-nations-international-day-to-end-impunity-for-crimes-against-journalists/>. See also <https://www.hrw.org/news/2017/11/14/zimbabwe-end-clampdown-media> (accessed 30 November 2019).

⁹¹ As above.

⁹² Declaration Principle 20.

⁹³ n 91 above.

⁹⁴ *Zongo v Burkina Faso, Judgment on reparations [Application 013/2011 (2015)]*. Nobert Zongo, an investigative journalist and director of the weekly magazine *L'Indépéndant*, and his three work companions were murdered on 13 December 1998. His paper investigated on matter of public interest including corruption. They were murdered after Zongo had received several threats. The suspected assassins were never prosecuted. The case was later filed with the African Court.

Despite the complaints of threats by the victim, the state failed to investigate to protect him. The African Court decision, affirms the responsibility of the state to protect journalists and other media practitioners especially in ensuring access to justice and protection of fundamental rights⁹⁵.

Sexual harassment in the workplace is another serious cause for concern in the media industry. Female journalists fall victim to their male superiors. In terms of legislation, there is a gap as the Labour law is not clear on the crime of sexual harassment in the workplace⁹⁶.

Such concerns are being raised at a time the country is undergoing a media reform process and the Declaration of Principles of Freedom of Expression now [includes the issues of harassment of female journalists, it states that "states shall take specific measures to ensure the safety of female journalists and media practitioners by addressing gender-specific safety concerns, including sexual and gender-based violence, intimidation and harassment"⁹⁷. Some female journalists manage to navigate the toxic and predatory environment but it is important to note that female journalists cannot meaningfully exercise their right to freedom of expression if they are surrounded by a scourge of sexual harassment which "violates their dignity and make them feel degraded, humiliated, intimidated or threatened⁹⁸."

From the foregoing, it is imperative for Zimbabwe to adopt measures that will to ensure that journalists regardless of their sex or media affiliation practice their profession without fear or intimidation in line with the

African Commission's position that, "freedom of expression, press freedom and access to information can only be enjoyed when journalists and media practitioners are free from intimidation, pressure and coercion",⁹⁹ and that "media actors on all platforms are entitled to enjoy the fundamental right to freedom of expression and to the safe exercise of this right¹⁰⁰.

Thus, there is an expectation that the Zimbabwe Media Commission (ZMC) will live up to its constitutional obligation promote freedom of expression and media freedom and approach the investigations on media rights violations with due diligence¹⁰¹. This will enhance media freedom and the right to freedom of expression.

Criminal Defamation

In Zimbabwe, the statute that deals with criminal defamation is the Criminal Law Codification Act (2004).¹⁰² Zimbabwe's Constitutional Court abolished the crime of criminal defamation and declared it unconstitutional in *Madanhire & Anor v The Attorney General*.¹⁰³ In this case, a journalist and an editor of *The Standard Newspaper* were charged with criminal defamation following publication of an article critical of the Green Card Medical Aid Society. The paper alleged that the medical aid was facing financial challenges and was unable to pay its creditors and employees.

⁹⁵ 'Burkina Faso / Norbert Zongo Case: The African Court recognizes the responsibility of the State of Burkina Faso in the denial of justice for the victims' (2014) <https://www.fidh.org/en/region/Africa/burkina-faso/15142-burkina-faso-norbert-zongo-case-the-african-court-recognizes-the> (accessed 30 November 2019).

⁹⁶ P Mandivengerei 'Zim newsrooms a danger to female journalists' (2019) <https://www.newzimbabwe.com/zim-newsrooms-a-danger-to-female-journalists/> (accessed 30 November 2019).

⁹⁷ Declaration Principle 20.

⁹⁸ C Davidson 'Stamping out Sexual Harassment in the Newsroom' <https://www.wan-ifra.org/articles/2018/05/29/stamping-out-sexual-harassment-in-the-newsroom> (accessed 30 November 2019).

⁹⁹ Resolution on the Safety of Journalists and Media Practitioners in Africa (ACHPR/Res.185 (XLIX) 11).

¹⁰⁰ Inter-Session Activity Report of the Special Rapporteur on Freedom of Expression and Access to Information in Africa presented to the 65th Ordinary Session of the African Commission on Human and Peoples' Rights held from 21 October to 10 November 2019.

¹⁰¹ n 91 above.

¹⁰² Criminal Law Codification Act (2004) Section 96(1)

¹⁰³ *Madanhire & Anor v The Attorney General* 2014 (1) ZLR 719 (CC).



The Constitutional Court Criminal Law (Codification and Reform) Act (2004) in terms of the Lancaster House Constitution, declared that criminal defamation was unconstitutional and inconsistent with the protection of freedom of expression. In *MISA Zimbabwe-et al v Minister of Justice et Al*, the Constitutional Court confirmed that criminal defamation had been abolished under the 2013 Constitution, in favour of civil defamation. Civil defamation is arguably reasonable and justified in a democratic society¹⁰⁴.

In *Chimakure & Ors v The Attorney-General of Zimbabwe*, the Constitutional Court declared Section 31 (a) (iii) of Criminal Law Code unconstitutional¹⁰⁵. This provision pertains to publishing false statements which are wholly or materially false with the intention of undermining public confidence in a law enforcement agency, the Prison Service or the Defence Forces of Zimbabwe. The court held that this provision of the law imposes unreasonable restrictions to freedom of expression imposed by this provision which are not justifiable in a democracy. Also, it was not proportionate to the achievement of its legitimate objective¹⁰⁶.

However, while civil defamation might be preferred, it could be challenging in cases involving powerful people

like politicians and business people. Successful claims can render media institutions out of business because of the exorbitant damages sought¹⁰⁷. The fear of being put out of business by powerful entities of the society, particularly in cases that expose wrongdoing such as abuse of authority or corruption, media institutions might be forced to self-censor. This undermines the watchdog role of the media and freedom of the media. Zimbabwe's Constitutional Court took the African Commission's stance in *Good v. Botswana*, where the Commission held that "a higher degree of tolerance is expected when it is a political speech and an even higher threshold is required when it is directed towards the government and government officials"¹⁰⁸. Therefore, deporting Mr Goodman for authoring an article that was critical of the government was "unnecessary, disproportionate and incompatible with the practices of democratic societies, international human rights norms and the African Charter in particular"¹⁰⁹. This approach was also taken by South African courts which held that freedom of expression is essential in political discourse and the role of the media cannot be understated¹¹⁰.

According to Zimbabwean media law expert and academic, Geoff Feltoe, defamation laws should be vigilantly drafted such that they do not stifle media freedom¹¹¹. However, Zimbabwe's legal framework is still punctuated with laws that have a highly constraining effect on media freedom. The soon to be repealed AIPPA, Official Secrecy Act and some provisions of the criminal code law.

The Criminal Law (Codification and Reform) Act 2004, criminalises statements deemed to be prejudicial to the state and the head of state. It is an offence under this law to 'insult' the president. Based on these provisions, journalists, and human rights defenders and

104 n 51 above.

105 *Chimakire & Ors v The Attorney-General of Zimbabwe* CCZ-6-2014

106 as above

107 n 51 above.

108 *Good V Republic of Botswana* (Communication No. 313/05) [2010] ACHPR 106

109 As above.

110 *Thembi-Mahanyele v Mail and Guardian & Anor* 2004 (6) SA 329 (SCA)

111 n 51 above.

other media practitioners have been charged for the offence of 'insulting' the president¹¹². Such a law is an impediment to the enjoyment of freedom of expression as guaranteed by the Constitution. It limits what can be published about the head of state. Legitimate criticism can be easily misconstrued as an 'insult'.

As a result of the severe punishments stipulated by this law, citizens are not entirely free to criticise the president and resort to self-censorship. This legislation has generally been used to criminalise free speech and compromises freedom of expression¹¹³.

Freedom of Expression Online

The Joint Declaration on Freedom of Expression and the Internet, adopted by the UN Special Rapporteur on Freedom of Opinion and Expression, the Organisation for Security and Co-operation in Europe (OSCE) Representative on Freedom of the Media, the Organisation of American States (OAS) Special Rapporteur on Freedom of Expression and the African Commission's Special Rapporteur on Freedom of Expression and Access to Information in Africa in 2011, underscores the role of the internet on freedom of

expression and access to information¹¹⁴. Internet platforms provide a voice to the people and enables them to discourse on socio-economic and political issues far more than ever before¹¹⁵. The United Nations Human Rights Council Resolution HRC/RES/20/8 of 2012 upholds that "the same rights that people have offline must also be protected online¹¹⁶. This was also affirmed by the African Commission's Resolution 362 on the Right to Freedom of Information and Expression on the Internet in Africa.

The African Declaration on Internet Rights and Freedoms endorses the need to protect and promote human and people's rights on the Internet including freedom of expression and access to information¹¹⁷. The Joint Declaration and the UN Human Rights Council Resolution HRC/RES/20/8 of 2012 therefore emphasise the need to promote universal access to the internet as an enabler of other rights. The Declaration of Principles of Freedom of Expression places an obligation on states to "facilitate freedom of expression and access to information online and the means necessary to exercise these rights"¹¹⁸.

In Zimbabwe, more people are getting connected to the internet while mobile phone technologies have become accessible and more and more citizens, especially activists, are taking up space online including social media platforms, to express their views on developments in the country¹¹⁹. Consequently, citizens are able to express themselves and criticise the government on social media platforms (Facebook, Twitter and WhatsApp).

¹¹² N 37 above.

¹¹³ *Position on Government Media Law Reforms Progress 22 May 2019* <http://kubatana.net/2019/05/22/position-on-government-media-law-reforms-progress/> (accessed 29 November 2019).

¹¹⁴ *Joint declaration on freedom of expression and the Internet (2011)*.

¹¹⁵ *'Press Release by the Special Rapporteur on Freedom of Expression and Access to Information in Africa on the Continuing Trend of Internet and Social Media Shutdowns in Africa' (2019)* <https://www.achpr.org/pressrelease/detail?id=8> (accessed 29 November 2019)

¹¹⁶ *United Nations Human Rights Council Resolution HRC/RES/20/8 of 2012*

¹¹⁷ *African Declaration on Internet Rights and Freedoms* <https://africaninternetrights.org/> (accessed 29 November 2019)

¹¹⁸ n 22 above Principle 37.

¹¹⁹ *T Chitanana & B Mutsvairo 'The Deferred 'Democracy Dividend' of Citizen Journalism and Social Media: Perils, Promises and Prospects from the Zimbabwean Experience' (2019) Westminster Papers in Communication and Culture 14(1) 75.*

Social media activism has intensified in recent years. Social media has been viewed as an enabler of 'mini-revolutions' and protests that question government actions¹²⁰. Anti-government campaigns with hash-tags #Tajamuka, #Mugabemustgo and #Thisflag were necessitated by the social media¹²¹.

Activists' organisations such as Crisis in Zimbabwe Coalition, Kubatana, Zimbabwe Lawyers for Human Rights, and Magamba Activist Network, together with protest groups namely, Tajamuka, Generational Consensus, and Pachedu, also emerged. Better still, traditional activists' organisations, for example, intensified and reshaped the use of social media platforms for activism¹²². Media establishments such as BustopTV, Zimbabwe Today, Zimbabwe Yadzoka, ZimEye, and Zim Solutions have increased content questioning the government¹²³.

However, freedom of expression online is under threat as journalists and other media practitioners, including human rights defenders face repercussions for expressions made online. This social media activism prompted the drafting of the Computer Crimes and Cyber Crime Bill in 2016, which has been revised into the current Cyber Crime, Cyber Security and Data Protection Bill (2019)¹²⁴. The government discarded the Ministry of Cybersecurity, Threat Detection and Mitigation that had been created under the Mugabe government in 2017 and then launched the National Policy for Information and Communications Technology (ICT), was launched in 2018. The policy aims to centralise control of the internet¹²⁵.

Access to internet and the digital divide

The Declaration on Principles of Freedom of Expression mandates states to "recognise that universal, equitable, affordable and meaningful access to the internet is necessary for the realisation of freedom of expression, access to information and the exercise of other human rights.¹²⁶" According to Postal and Telecommunications Regulatory Authority of Zimbabwe (POTRAZ), the telecoms regulator, as of mid-2018, access to the internet in Zimbabwe was 52 percent^{127,128}. In terms of the cost of data, access to Facebook, WhatsApp, and Twitter for US\$ 1 for up to 250MB of use and daily social media access at US\$ 0.30 on Econet, while NetOne costs were at 40MB daily for US\$ 0.27 and 250MB for US\$ 2.80 per month as of mid-2018¹²⁹. Internet penetration and social media uptake is steadily increasing in Zimbabwe. WhatsApp is used extensively across the country, while Facebook and Twitter are yet to gain similar traction.

However, class challenges in internet and social media usage is prevalent¹³⁰. The digital divide is expansive. The divide is characterised by factors such as financial and economic status; illiteracy and geographical location. Internet users are concentrated in urban areas, mostly among the middle class in Harare and rural areas are lagging behind.

¹²⁰ G Daniels 'Scrutinizing Hashtag Activism in the #MustFall Protests in South Africa in 2015' in B Mutsvairo (Eds) *Digital Activism in the Social Media Era. Critical Reflections of Emerging Trends in sub-Saharan Africa* (2016).

¹²¹ T Karombo 'Zimbabwe is clamping down on social media use with a cyber-crime bill set to become law' 9 October 2019 <https://iqz.com/africa/1724542/zimbabwe-bill-clamps-down-on-social-media-porn-with-china-tech/> (accessed 29 November 2019).

¹²² n 120 above 76.

¹²³ As above 76.

¹²⁴ F Mudzingwa *Cyber Crime Bill Finally Gets Cabinet Approval* 9 Oct 2019 <https://www.techzim.co.zw/2019/10/cyber-crime-bill-finally-gets-cabinet-approval/> (accessed 29 November 2019).

¹²⁵ *Freedom on the Net Report: Zimbabwe (2018)* <https://freedomhouse.org/report/freedom-net/2018/zimbabwe> (accessed 14 December 2019).

¹²⁶ Declaration Principle 37.

¹²⁷ Declaration Principle 37.

¹²⁸ *Freedom on the Net Report: Zimbabwe (2018)* <https://freedomhouse.org/report/freedom-net/2018/zimbabwe> (accessed 14 December 2019). However, according to the International Telecommunications Union (ITU) statistics reported the rate was at 23 percent in 2017. See <http://bit.ly/1cblxxY> (accessed 14 December 2019).

¹²⁹ As above.

¹³⁰ n 120 above.

According to Chitanana and Mutsvairo, this divide “reinforces deep-rooted inequalities; disenfranchises other sections of the society and thus, undercuts the democratic potential of social media”¹³¹. The digital divide is an enormous deterrent of the right to freedom of expression.

In order to fully exercise this right, there must be free flow of information and this can be enabled by access to internet¹³².

Access to internet provides unlimited channels for expression. To address the challenge of digital divide, J Lamb proposes a multi-stakeholder process the private sector, NGOs, the government to address the digital divide challenge¹³³. According to the telecoms regulator, POTRAZ, steps are being taken to bridge the digital divide and enhance digital literacy¹³⁴. Such initiatives include the establishment of community information centres, a concept that uses redundant post offices as information centres connected with internet and equipped with computers. The cost of using these facilities for internet access is minimal.

Containerised village information centres are established mostly in rural areas as they are far from post offices¹³⁵. In other countries, courts are pronouncing progressive decisions on access to internet.

In India, for example, the Kerala High Court, in what has been described as a ‘monumental’ decision held that the “right to internet access is a fundamental

right.¹³⁶” This is an important decision as it promotes civil liberties including freedom of expression and access to information in the digital age¹³⁷.

In South Africa, Media organisations including the South African National Editors’ Forum (SANEF), the IABSA (Interactive Advertising Bureau of South Africa) Media Monitoring Africa (MMA) and the Association for Progressive Communication (APC), have developed a seven-point plan which provides guidance on achieving universal access to internet¹³⁸. Zimbabwean stakeholders can draw inspiration from the aforementioned initiatives.

Internet shut-down

In 2016 and 2019, Zimbabwe joined countries such as Sudan, Democratic Republic of Congo (DRC), The Gambia and Cameroon in shutting down internet. Governments resort to this kind of reaction when faced with strong criticisms and protests on social media platforms by citizens demanding political and economic reforms in their countries, or during elections. The government of Zimbabwe has also shut down internet services and fixed the telecommunications network, blocking access to popular social media platforms in order to restrict communications related to the protests against deteriorating economic conditions.

The Minister of State in the President's Office for National Security subsequently ordered the suspension of all internet services in terms of Section 6 of the

¹³¹ As above 75

¹³² J Lamb ‘The Digital Divide: Free Expression, Technology and a Fair Democracy’ (2013) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2245072&download=yes (accessed 30 November 2019)

¹³³ As above.

¹³⁴ ‘We’re working on bridging digital divide: Potraz’ 4 November 2018 <https://newsday.co.zw/2018/11/were-working-on-bridging-digital-divide-potraz/> (accessed 30 November 2019)

¹³⁵ As above.

¹³⁶ This is a case in which a Sree Narayana College student Faheema Shirin, who was residing at the institution’s students’ residence, petitioned against the discriminatory rules that girls were subjected to in the hostels. They were banned from using their mobile phones between 10 p.m. and 6 a.m. and undergraduates were not allowed to use laptops. The restriction later changed and was subsequently between 6 p.m. and 10 p.m. Essentially, during the time of the restriction, the students had no access to internet. Faheema Shirin defied the rule and was expelled from the college residence. See <https://sflc.in/kerala-high-court-declares-right-access-internet-fundamental-right> (accessed 30 November 2019).

¹³⁷ ‘Kerala High Court Declares ‘Right to Access Internet’ as a Fundamental Right’ <https://sflc.in/kerala-high-court-declares-right-access-internet-fundamental-right> (accessed 30 November 2019).

¹³⁸ ‘Working towards Universal Internet Access and Digital Equality in South Africa’ 27 September 2019 <https://sanef.org.za/working-towards-universal-internet-access-and-digital-equality-in-south-africa/> (accessed 29 November 2019).

Interception of Communications Act 2007 and service providers complied. In 2016, anti-government protests resulted in a similar reaction from the government.

Following an urgent chamber application by the Zimbabwe Lawyers for Human Rights and Media Institute of Southern Africa (Zimbabwe Chapter) challenging the shutdown, the High Court suspended the Minister's directive.

In response to internet shutdowns, the Special Rapporteur, reiterated that "internet and social media shutdowns violate the right to freedom of expression and access to information contrary to Article 9 of the African Charter on Human and Peoples' Rights and urged African states to "take all measures to guarantee, respect and protect the right to freedom of expression and access to information through ensuring access to internet and social media services" ¹³⁹.

Also, blanket restrictions on human rights have been condemned in human rights jurisprudence. The African Commission, in one of its decisions, held that there is no political situation that can justify the "wholesale violation of human rights¹⁴⁰". Such an approach undermines rule of law and exacerbates tensions within the state¹⁴¹.

The internet shutdown in Zimbabwe also brings to the fore the aspect of the role of service providers in the context of freedom of expression particularly in the digital era. When the government ordered an internet shutdown, service providers merely complied. It is true that such a situation places service providers in a precarious situation as they depend on the government for their operating licence.

On the other hand, Guiding Principles on Business and Human Rights, bestow an obligation on the private sector to respect human rights and the state is mandated to ensure that the business sector comply with human rights standards¹⁴². The UN Special Rapporteur on Freedom of Expression and Opinion affirmed the primary responsibility to protect and respect the right to exercise freedom of opinion and expression¹⁴³.

Thus, States should not compel private sector entities to implement actions that interfere with freedom of expression. Any such demands to the private sector shall be grounded on law, as necessary and proportionate means of achieving the desired aim and be subjected to external and independent oversight¹⁴⁴.

Arrests, harassment and threats



¹³⁹ 'Press Release by the Special Rapporteur on Freedom of Expression and Access to Information in Africa on the Continuing Trend of Internet and Social Media Shutdowns in Africa' (2019) <https://www.achpr.org/pressrelease/detail?id=8> (accessed 29 November 2019)

¹⁴⁰ *Article 19 v Eritrea* (2007) AHRLR 73 (ACHPR 2007).

¹⁴¹ *As above*.

¹⁴² See *Guiding Principles on Business and Human Rights (Ruggie Principles)*.

¹⁴³ *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression* (2016) AIHRC/32/38.

¹⁴⁴ *As above*.

To this end, several individuals including journalists and human rights defenders, have been arrested for speaking out against the government on social media platforms¹⁴⁵. Pastor Evan Mawarire, for example, was arrested for an anti-government protest movement in 2016¹⁴⁶. In 2017, Martha O'Donovan, an American, who was at that time working in Zimbabwe was arrested for referring to former President Robert Mugabe as a "sick and selfish man" on Twitter¹⁴⁷.

The arrest was made after the appointment of a minister for cybersecurity, which was perceived as a tactic for clamping down and silencing social media users¹⁴⁸. She was charged with undermining the authority of or insulting the president. During the election period in 2018, four people were reportedly arrested for spreading "falsehoods and hate speech" on social media¹⁴⁹. In 2018, Bus Stop TV¹⁵⁰ reporters had their cards confiscated and escorted out of the venue of a ruling party rally¹⁵¹. In 2019, one of its comedians and political satirists, Samantha Kureya, was abducted beaten, stripped and forced to drink sewage water¹⁵².

A human rights activist, Pride Mkono, was arrested for tweeting about the dire socio-economic and political situation in the country¹⁵³. He was charged with subverting a constitutional government. This digital authoritarianism that is characterised by digital expression violations, violates the rights to freedom of opinion and expression. It also forces people to self-censor as a result of fear of arrests. The crackdown on freedom of expression online violates the Constitution and other international human rights treaties that Zimbabwe is a party to.

Surveillance

The Interception of Communications Act of 2007 governs state communications surveillance in Zimbabwe. Through the law, officials intercept electronic or online communications for reasons such as national security threats or crime prevention¹⁵⁴. There is little that is publicly known about the interpretation of and compliance with this law.

The challenge with this legislation is that it has not been aligned with the current Constitution and international human rights standards which protect the right to privacy, which the constitution guarantees under Section 57. Contrary to expectations under international human rights standards, in Zimbabwe, the actual interception of communications is not controlled by an independent oversight authority such as an independent and impartial judicial scrutiny.

The process is controlled by members of the executive with the Minister of Transport and Communication being the arbiter. Later in 2014, the Office of the President and Cabinet (OPC) was added to the surveillance machinery. In fact, most of the functions that the law designates to the Minister are performed by the OPC, including authorising interception of communications and determining the duration of the interception.¹⁵⁵

¹⁴⁵ *Freedom on the Net Report: Zimbabwe (2018)* <https://freedomhouse.org/report/freedom-net/2018/zimbabwe> (accessed 14 December 2019).

¹⁴⁶ As above.

¹⁴⁷ *F Mutsaka 'US citizen arrested in Zimbabwe, accused of insulting Mugabe' 2017* <https://apnews.com/b52cfa03d9d2469f99d7a7f6650e244c/US-citizen-arrested-in-Zimbabwe,-accused-of-insulting-Mugabe> (accessed 14 December 2019).

¹⁴⁸ As above.

¹⁴⁹ *'Zim police arrest 4 for 'hate speech' on social media' (2018)* <https://www.news24.com/Africa/Zimbabwe/zim-police-arrest-4-for-hate-speech-on-social-media-20180715> (accessed 14 December 2019).

¹⁵⁰ *Bustop TV is a comedy video show that is published and broadcast on social media platforms. It covers socio-economic and political issues in Zimbabwe. See* <https://www.youtube.com/channel/UCGXpCeZNe7kzeHqMlg96Ebg> and <https://www.facebook.com/BUSTOPTV/> (accessed 14 December 2019).

¹⁵¹ <https://news.pindula.co.zw/2017/09/09/bus-stop-tv-responds-reports-assaulted-zanu-pf-youths-rally/> (accessed 14 December 2019).

¹⁵² *'Zimbabwean comedian goes into hiding after abduction and beating' (2019)* <https://www.theguardian.com/world/2019/aug/23/zimbabwean-comedian-samantha-kureya-goes-into-hiding-after-abduction-and-beating> (accessed 14 December 2019).

¹⁵³ *'Pride Mkono Arrested & Charged with Treason – ZLHR' (2019)* <https://news.pindula.co.zw/2019/08/15/pride-mkono-arrested-charged-with-treason-zlhr/> (accessed 14 December 2019).

¹⁵⁴ *Freedom of the Press 2015 – Zimbabwe' (2015)* <https://www.refworld.org/docid/55d5b79624.html> (accessed 14 December 2019).

¹⁵⁵ *Privacy International, "The Right to Privacy in Zimbabwe", March 2016*

Again, individuals that had been under surveillance are not notified and thus cannot seek redress in case of unlawful surveillance. Also, the independent complaints mechanism in cases of security forces misconduct is yet to be established. This mechanism is established by the 2013 constitution¹⁵⁶. Under this law, service providers (telecommunications), are mandated to facilitate state surveillance activities. It provides that telecommunications have to “provide a telecommunications service which has the capacity to be intercepted” and ensure that “its services are capable of rendering real time and full time monitoring facilities for the interception of communications”¹⁵⁷.

It also makes it mandatory for service providers to retain data and avail it to security agents upon request. In its current state, it impacts negatively on the right to privacy. Encryption and anonymity provide individuals and groups with a zone of privacy online to hold opinions and exercise freedom of expression without arbitrary and unlawful interference or attacks¹⁵⁸. The Postal and Telecommunications Regulatory Authority (POTRAZ)¹⁵⁹, interprets the law to imply a ban on encryption because of the broad provisions which stipulates that services must have “the capability to be intercepted.”

Based on this interpretation, the act obstructs access to encrypted services and the ability to communicate in private. Encryption and anonymity shields users from arbitrary interference and affords them the privacy to exercise their right to freedom of expression and to hold opinions¹⁶⁰. Bans on the use of encryption technology violate the right to privacy and the right to

freedom of expression in that online users are deprived of their private space to express themselves without being watched because of the Central Intelligence Organisation (CIO)’s extensive surveillance capabilities. For instance, sophisticated surveillance technology such as FinFisher, retrieves information and spies on computers without the user’s knowledge¹⁶¹. The right to privacy and the right to freedom of expression are interdependent and mutually reinforcing¹⁶². Thus, infringements on privacy through surveillance of communications, have a direct impact on freedom of expression.

As a result of the secrecy around surveillance activities in Zimbabwe, it is difficult to ascertain if the three-part test of legality, necessity and proportionality, is applied in case of any restrictions to freedom of expression such as restricting use of encryption¹⁶³.

There is need to align the Interception of Communications Act of 2007 with the constitution and international human rights standards. Also, the Central Intelligence Organisation (CIO) requires a legislative mandate so that its operations are established in law as required under the Constitution. A law reform process that is in line with international norms and standards will likely produce non-partisan, patriotic, professional intelligence and surveillance structures that are accountable to the public not a political party, as is the status quo¹⁶⁴.

Cabinet has passed the Cyber Crime, Cyber Security and Data Protection Bill of 2019¹⁶⁵. It has not been approved by parliament yet. It was initially drafted as

¹⁵⁶ *The Right to Privacy in Zimbabwe: Stakeholder Report Universal Periodic Review 26th Session – Zimbabwe* http://hrp.law.harvard.edu/wp-content/uploads/2016/04/zimbabwe_upr2016.pdf (accessed 14 December 2019).

¹⁵⁷ *Interception of Communications Act of 2007*.

¹⁵⁸ *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, David Kaye, May 2015, A/HRC/29/32, para 16*.

¹⁵⁹ *Postal and Telecommunications Regulatory Authority (POTRAZ) is the government agency that governs the licensing for telecommunications service providers. Its board members are presidential appointees hence the strong connection with the Office of the President and Cabinet. A challenge to this agency’s decisions is almost impossible with such a set up.*

¹⁶⁰ *n 159 above.*

¹⁶¹ *The Right to Privacy in Zimbabwe: Stakeholder Report Universal Periodic Review 26th Session – Zimbabwe* http://hrp.law.harvard.edu/wp-content/uploads/2016/04/zimbabwe_upr2016.pdf (accessed 14 December 2019).

¹⁶² <https://privacyinternational.org/blog/1111/two-sides-same-coin-right-privacy-and-freedom-expression>(accessed 14 December 2019).

¹⁶³ *n 159 above para 31.*

¹⁶⁴ *The Elephant in the Room: Reforming Zimbabwe’s Security Sector Ahead of Elections (2013) Human Rights Watch* https://www.hrw.org/sites/default/files/reports/zimbabwe0613webwcover_0.pdf (accessed 14 December 2019).

¹⁶⁵ *D Gilbert ‘Zimbabwe Is Trying to Build a China Style Surveillance State’* https://www.vice.com/en_ca/article/59n753/zimbabwe-is-trying-to-build-a-china-style-surveillance-state (accessed 14 December 2019).

Computer Crime and Cyber Crime Bill in 2016 during the Mugabe administration¹⁶⁶.

The bill is aimed at combating cyber-crime and increasing cyber security¹⁶⁷. If it becomes law, there are fears that it would infringe on civil and political liberties that are constitutionally guaranteed¹⁶⁸. It will authorise the use of surveillance technologies, grant sweeping powers to crack down on social media users, and allow the government to snoop on citizens' private communications.

The previous draft that was exposed to the public had overly broad definitions of crimes that one could be arrested for while expressing themselves online. It is reported that the close partnerships with the Chinese would result in Zimbabwe acquiring surveillance equipment to build a strong surveillance network in the country that would among other things be used to monitor online activities¹⁶⁹.

Surveillance has demonstrable impact on citizens and the exercise of democracy. In the case of journalists, the ability to protect one's sources is imperative. The sources provide journalists with information that might be sensitive and ordinarily off-limits such as information on corruption¹⁷⁰. Through surveillance a journalist's sources can be revealed and this undermines their ethical obligation to protect confidential sources.¹⁷¹ Thus having a law such as the Cyber Crime, Cyber Security and Data Protection Bill of 2019 could result in journalists failing to work with whistle-blowers or compel them to self-censor¹⁷². Such a surveillance regime would negatively affect investigative journalism. This would inevitably affect human rights defenders (HRDs) and anti-government political activists through political intelligence gathering.

The Declaration of Principles of Freedom of Expression in Africa¹⁷³, makes the following recommendation on surveillance:

1. *States shall not engage in or condone acts of indiscriminate and untargeted collection, storage, analysis or sharing of an individual's communications.*
2. *States shall only engage in targeted communication surveillance that is authorised by law which must itself conform to international human rights law and standards and is premised on specific and reasonable suspicion that a serious crime or other legitimate aim has been or is being carried out.*
3. *Any law authorising targeted communication surveillance shall provide adequate safeguards for the right to privacy including -*
 - a. *the prior authorisation of an independent and impartial judicial authority;*
 - b. *due process safeguards;*
 - c. *specific limitation on the time, manner, place and scope of the surveillance;*
 - d. *notification of decision authorising surveillance within a reasonable time of the conclusion of such surveillance;*
 - e. *proactive transparency on the nature and scope of its use; and*
 - f. *Effective monitoring and regular review by an independent oversight mechanism.*

Also, the UN adopted the Necessary and Proportionate Principles on Surveillance, International Principles on the Application of Human Rights to Communications Surveillance. *The principles provide guidance on surveillance to ensure interference with the right to privacy is in line with the principles of legality, necessity and proportionality*¹⁷⁴. Thus, with such international

¹⁶⁶ As above.

¹⁶⁷ n 15 above.

¹⁶⁸ n 122 above.

¹⁶⁹ n 171 above.

¹⁷⁰ E Light and JA Obar 'Surveillance reform: revealing surveillance harms and emerging reform tactics' in B Wagner et al (eds) 'Research Handbook on Human Rights and Digital Technology' (2019) 198.

¹⁷¹ J Duncan 'Stopping the Spies: Constructing and resisting the surveillance state in South Africa' (2018)187.

¹⁷² n 173 above 198, 199.

¹⁷³ Declaration principle 41.

¹⁷⁴ Necessary and Proportionate International Principles on the Application of Human Rights Law to Communications Surveillance see <https://www.ohchr.org/Documents/Issues/Privacy/ElectronicFrontierFoundation.pdf> (accessed 30 November 2019).

standards, Zimbabwe can amend the Interception of Communications Act of 2007 in compliance with these norms and standards. In South Africa, the High Court decided on surveillance in *AmaBhungane Centre for Investigative Journalism v Minister of Justice and Correctional Services*¹⁷⁵. The court held that mass surveillance conducted by the South African National Communications Centre is unlawful and declared Sections 16 (7), 17 (6), 18 (3), 19 (6), 20 (6), 22 (7) of the Regulation of Interception of Communications Act of 2002 (RICA) invalid and unconstitutional¹⁷⁶.

Violence against women online is most prevalent on social media platforms, perpetrated against female politicians. This is mostly in the form of sexist comments that question their political acumen and their suitability for public positions. Some of the comments are centered on their physical appearance and marital status¹⁷⁸. Most of the perpetrators are men¹⁷⁹.

Cyber Violence

As more people embrace technology, online violence also escalates. Online violence against women is now prevalent in Zimbabwe. Online sexual harassment, surveillance, unauthorised use and manipulation of personal information, including leaked images and videos, are some of the forms of violence that are prominent, either subtle or blatant¹⁷⁷.



¹⁷⁵ *AmaBhungane Centre for Investigative Journalism v Minister of Justice and Correctional Services* [2019] ZAGPPHC. The case entailed the surveillance of an investigative journalist Stephen Patrick Sole who was spied on through interception of his telephone communications. The applicants in the matter argued that the regulatory framework on surveillance was inconsistent with the constitution and challenged the Regulation of Interception of Communications Act of 2002 (RICA) and the National Strategic Intelligence Act 39 of 1994 (NSIA) arguing that they violate the right to privacy. Privacy International and Right2Know joined as amicus curiae. Issues raised in the case were on the processing of intercepted information (examining, copying, destroying, sharing and sorting), the independence, appointment and tenure of the designated judge, notification of the subject under surveillance, inadequate safeguards in cases of surveillance and mass surveillance.

¹⁷⁶ *AmaBhungane Centre for Investigative Journalism v Minister of Justice and Correctional Services* [2019] ZAGPPHC. Specifically, the Court declared that RICA 1) did not provide a notification procedure for subjects of interception; 2) did not ensure sufficient judicial independence for authorising authorities; 3) failed to provide appropriate safeguards when an order was granted ex parte; 4) lacked appropriate procedures to be followed when state officials examine, copy, share, sort through, use, destroy and store data obtained from interceptions; and finally, 5) failed to prescribe special procedures for cases when the subject of surveillance was either a practicing lawyer or a journalist.

¹⁷⁷ K Majama 'Cyber Violence Makes Internet Use a Gendered Issue' 13 August 2018 <https://www.genderit.org/feminist-talk/cyber-violence-makes-internet-use-gendered-issue> (accessed 30 November 2019).

¹⁷⁸ As above. On her Facebook page, former Vice President of Zimbabwe, Joice Mujuru, who ran as one of the four female presidential candidates was often referred to derogatively as Mbuya (hag) despite that the country's president-elect, Emmerson Mnangagwa was thirteen years older but his age never became an issue in comparison to hers. Following the wrangle for the leadership of the Movement for Democratic Change Alliance between Nelson Chamisa and Thokozani Khuphe after the death of Morgan Tsvangirai, the founding president, the latter became a target of abuse simply because of her gender. Following Tsvangirai's demise in February, Khuphe as vice-president was the natural successor but she was elbowed out on sexist grounds. Not only was she attacked on her Twitter handle, @DrThokoKhuphe, but also on comments on popular online news platforms such as Nehanda Radio and the Voice of America. Despite the apparent reality of Khuphe's lack of popular support, given her 0.9% showing in the presidential election, she continued to be victimized for the loss of rival party MDC Alliance. A Facebook post by senior journalist, John Mokwetsi which read, 'I am happy that Khuphe is now sitting at home with no relevance. Good riddance,' attracted derogatory labels such as 'bitch' and 'fool'.

¹⁷⁹ *Violence against Women in Elections in Zimbabwe: An IFES Assessment (2018)* International Foundation for Electoral Systems https://iknowpolitics.org/sites/default/files/vawie_in_zimbabwe_july_2018.pdf (accessed 30 November 2019).

Violence against women undermines women's voices in political spaces¹⁸⁰. Violence online is also perpetrated against sexual minorities (LGBTIQ). The violence is mostly in the form of hate speech, harassment and bullying¹⁸¹. There are also concerns on online security and privacy and their impact on the ability to enjoy the right to freedom of expression. Due to online violence, there is a tendency to resort to self-censorship¹⁸².

In Zimbabwe, the polarised media environment is fertile ground for the proliferation of false news that is spread through Facebook, Twitter and WhatsApp¹⁸⁴. The misgivings about the mainstream media exacerbate the situation. The state controlled media is said to uncritically report on the government and ruling party activities while the private media is inclined towards the opposition and also self-censor for fear of harassment or arrests¹⁸⁵.

Misinformation — and — Disinformation

The digital age has given and amplified peoples' voices and enhanced access to information. At the same time, it is an era of information disorder characterised by misinformation and disinformation¹⁸³ particularly during major political events like elections and mass protests. The trend has intensified with increased use of digital technologies as a result of the gradual collapse of the traditional media and the popularisation of social media platforms.

The information void created by such an environment forces people to rely on social media for news which is mostly taken as truth. Citizen journalism also contributes to spread of false news as there is no editorial responsibility for fact-checking and quality control that is found in traditional mainstream media¹⁸⁶.

While misinformation and disinformation are prevalent on social media, mainstream media is also not spared as some journalists now rely on social media without exercising due diligence¹⁸⁷. During the election period in 2018 false news spread regarding the role of the army, polling stations, vote buying and other election related matters¹⁸⁸. Also, during the anti-government protests in January 2019, protestors were subjected to police brutality and the government shut the internet. During that period misinformation and disinformation escalated to the extent that it became difficult to ascertain the impact of the police brutality and identification of the victims¹⁸⁹.

¹⁸⁰ As above.

¹⁸¹ K Majama' A Study of The Politics of Internet Use by Gender and Sexual Minorities in Zimbabwe (2018) 24 <http://koliwemajama.co.zw/pitfalls-research/> (accessed 13 December 2019).

¹⁸² As above.

¹⁸³ Disinformation is deliberately spreading of information that is not true and misinformation is spreading false information under the pretext that it is true. See <https://www.herald.co.zw/disinformation-misinformation-the-new-battlefront/> (accessed 29 November 2019).

¹⁸⁴ R Mberi 'Zimbabwe: Fake news and its effects in a time of crisis' 5 February 2019 <https://www.africaportal.org/features/zimbabwe-fake-news-and-its-effects-time-crisis/> (accessed 29 November 2019).

¹⁸⁵ As above.

¹⁸⁶ As above.

¹⁸⁷ D Kaiyo 'Zimbabwe: Disinformation, Misinformation the New Battlefield' 20 February 2019 <https://www.herald.co.zw/disinformation-misinformation-the-new-battlefront/> (accessed 29 November 2019).

¹⁸⁸ E Mugendi & S Ndllovu 'Fact-Checking Zimbabwe's Election: How Online Misinformation Was Tracked during Zimbabwe's Long-Awaited Vote' 31 October 2018 <https://www.icfj.org/news/fact-checking-zimbabwes-election-how-online-misinformation-was-tracked-during-zimbabwes-long> (accessed 29 November 2019).

¹⁸⁹ n 187 above.

¹⁹⁰ n 191 above.

¹⁹¹ <https://zimfact.org/about-us/> (accessed 29 November 2019).

The government is introducing legislative measures such as the Data Protection and Cybercrime Bill to among other things, deal with misinformation and disinformation. However, there are concerns that these laws might be used for unlawful surveillance and further violate human rights. Organisations such as the Centre for Innovation and Technology (CITE) in partnership with Code for Africa and PesaCheck (partners of the International Center for Journalists) are taking initiatives such as trainings on tackling misinformation¹⁹⁰. ZimFact is also another online fact-checking platform to ensure that the public consume verified information¹⁹¹.



Conclusion

As Zimbabwe is going through a process of law reform following the adoption of a new constitution in 2013, it is an appropriate time to evolve and align with international law and standards and these standards should be reflected in national laws and judgments of national courts.

The law reform process is happening at time when the African Commission is updating the normative standards of Article 9 of the African Charter which provides for the right to freedom of expression and access to information. The government should repeal laws that infringe on the right to freedom of expression, criminalise media work and hinder media diversity. The envisaged laws on data protection, cybercrime, cybersecurity, freedom of information and others should be developed with due regard to international standards and the evolving nature of the right to freedom of expression and access to information, due to the new digital technologies and the emerging jurisprudence of judicial and quasi-judicial organs of the AU and at the UN level. The media landscape in Zimbabwe has been greatly transformed by the internet age which has significantly expanded the platforms for expression

through social media (WhatsApp, Facebook and to some degree, Twitter). However, challenges such as hate speech; misinformation and disinformation have also escalated. On the other hand, the fundamental right to freedom of expression is undermined by digital threats from the state in its endeavour to control the behaviour of people in the digital space.

It has to be reiterated that “the same rights that people have offline should be protected online”. This is an international human rights standard that has gained traction through declarations by the UN and African Commission Special Rapporteurs on freedom of expression. Any limitation to the exercise of the right to freedom of expression has to be prescribed by law; serve a legitimate aim; and should be necessary and proportionate means to achieve the stated aim in a democratic society. While the law reform process is in motion, laws such as the Official Secrets Act, Censorship and Entertainment Controls Act, and some provisions of the Criminal Law (Codification and Reform) Act, should be repealed or amended in order for Zimbabweans to meaningfully enjoy the right to freedom of expression.



84 McChlery Avenue • Eastlea • Harare • Zimbabwe

 www.zimbabwe.misa.org  @misazimbabwe

 MISA Zimbabwe  +263 784 437 338