



## MISA Zimbabwe Monthly Alerts Digest- July 2009

### 1. In this Issue: *A comparative analysis of regional constitutional provisions on freedom of expression and media freedom: By Farai Nhende*

American constitutionalist, Alexander Hamilton, once said:

*"If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place, oblige it to control itself. A dependence on the people is no doubt the primary control on government; but experience has taught mankind the necessity of auxiliary precautions."*<sup>[1]</sup>

The "auxiliary precautions" referred to by Hamilton included, in my view, not only the courts and other organs of state but the need for a constitutional legal framework established to support these relationships between the state and the governed. If men and women were angels, indeed we would not require basic human freedoms such as the right to vote and freedom of expression (which includes the right to seek, receive and impart information) to be protected in national constitutions.

It is from this premise that the ensuing survey will attempt to examine the laws governing freedom of expression and media freedom in other jurisdictions within the SADC region more so in the context of Zimbabwe's ongoing constitution making process and the need for a constitutional provision that explicitly guarantees media freedom and the right to access to information.

The right to freedom of expression straddles numerous aspects of democratic society unlike is the case with other fundamental rights that we enjoy. It encompasses the rights to freedom of speech, media, academic inquiry and artistic endeavor. It extends to and can conceivably be regarded as essential to other fundamental rights such as freedom of choice, religion, conscience, association, protest, and political freedom. It includes the right of access to information and the right to receive and impart information. The right to access to information and freedom of expression form the backbone of many vital institutions and activities of civil society.

In calling for a constitutional provision that explicitly guarantees media freedom, MISA-Zimbabwe is cognitive of the role played by a free press in sustaining and monitoring a healthy democracy. A free press is critical in fostering greater accountability, good governance, and economic development.

The purpose of this survey is to analytically compare constitutional guarantees on press freedoms, freedom of expression and access to information as enshrined in some of the constitutions of the SADC countries. The intention is to find out whether or not these fundamental freedoms are provided for adequately in these countries, and if so, where Zimbabwe stands in that regard.

The analysis will also focus on the Zimbabwean constitution with a view to gauging how far it guarantees the freedoms outlined above. To this end, other constitutions from within the region shall be analysed in turn, within the context of media freedoms as a corollary aspect of the broader notion of freedom of expression. To this end, the analysis will draw extensively from the constitutions of Mozambique, South Africa, Zambia, Namibia, Botswana, Malawi and the Zimbabwean constitution itself.

#### **ZIMBABWE**

The relevant provision in the Zimbabwean Constitution for the subject at hand is section 20 (1) which reads:

*...no person shall be hindered in the enjoyment of his freedom of expression, that is to say, freedom to hold opinions and to receive and impart ideas and information without interference, and freedom from interference with his correspondence.*

A look at the Zimbabwean Constitution shows that it guarantees freedom of expression but it falls short of giving an explicit guarantee for freedom of the press and the right to access to information. There is no constitutional guarantee that protects media freedom. In other words, the section is not coined in a manner that overtly provides for the principle of press freedom.

Unlike the South African and Mozambican constitutions, our domestic constitution falls short of expressly making provisions for the freedom of press or of access to information. Freedom of the press and access to information, as far as section 20(1) of the Zimbabwean constitution is therefore subjected to broader interpretation of the right to freedom of expression.

Hypothetically, a situation may arise, where one may approach the court citing or challenging a clear violation of his or her right to press freedom. However, the grave threat arising from this scenario is that the courts are presented with a situation where they apply discretion to either stretch the meaning of section 20, to include such right (since the interpretation should be a generous and purposive one), or limit the import of the language so that precedence is given to that which is expressly stated, to the exclusion of that which may be logically implied.

While the idea of limiting the scope of section 20(1) might well be perceived as being ill-conceived because of its overly rigid approach, it does not make it any less hazardous or lawful since it is a question of the liberal or conservative inclinations of the judge that will prevail at the end of the day. This in fact highlights the imperative need to have a constitution that properly or adequately defines the parameters to which the right to freedom of expression extends and within which bounds it may not be infringed.

This actually amplifies the spirit behind the reasoning that since rights such as freedom of the press and access to information give effect and meaning to the right to freedom of expression, they must be prescribed in law through explicit constitutional provisions.

Of noteworthy importance is the fact that the courts will not always rule in favour of the need to uphold media freedom as a necessary extension of the right to freedom of expression. The case of the Associated Newspapers of Zimbabwe (ANZ) is ample testimony of this fact. The decision arrived at in this matter was without doubt one of the most fatal blows to freedom of expression in Zimbabwe under the guise of the Access to Information and Protection of Privacy Act (AIPPA).

This was precipitated by the courts' failure to appreciate the need to generously interpret the concept of freedom of expression in a liberal and purposeful manner in order to give effect to this right.

The case had largely revolved on the issue of whether or not the compulsion of all newspapers or media houses to be registered with the then MIC (under AIPPA was in fact constitutional. The Associated Newspapers of Zimbabwe<sup>3</sup> had not registered itself with the then MIC. It contested the constitutionality of that requirement before the courts. However the supreme court, in the infamous judgment by Chief Justice Godfrey Chidyausiku, dismissed the ANZ case on the basis of the 'dirty hands' doctrine. It held that since the company had failed to comply with AIPPA's requirement that all media houses be registered with the statutorily appointed MIC by 31 December 2002, it had no *locus standi* (legal standing).

The court ruled that the ANZ application could only be entertained upon full compliance with the law in question. Ironically, the court was of the opinion that the applicant should have first complied with the very law that was the subject of the contest. The application by the ANZ was therefore dismissed.

The right to freedom of expression as enshrined in the constitution is seemingly abridged by the provisions of section 20 (2). This section stipulates that the enjoyment of the right to freedom of expression may be restricted under any law that makes provision for issues relating to public safety, public health, or issues of national interests, provided such restrictions are reasonably necessary in a democratic society.

These limitations on freedom of expression permitted under the Zimbabwean Constitution are very widely drawn compared to what is permitted in the constitutions of other countries. Moreover, the International Covenant on Civil and Political Rights, to which Zimbabwe is a state party, states that:

*19(3) the exercise of the rights [to freedom of expression and information] ... may ... be subject to certain restrictions, but these shall only be such as are provided by law and are necessary: (a) For respect of the rights or reputations of others; (b) For the protection of national security or public order, or of public health or morals.*

In this respect, one can clearly note that the Constitution of Zimbabwe actually permits much wider limitations on freedom of expression than is permitted under international law. The Constitution sets out many more grounds for such limitations without providing the strict requirement that such limitations should be 'necessary' save for the much looser criterion that they be "reasonably justifiable".

Clearly "freedom of expression is one of the most precious of all the guaranteed freedoms", as was once noted by then Chief Justice Anthony Gubbay in the case of *Munhumeso & Another 1994(1) ZLR 49(s)*. He then went on to say "derogations from rights and freedoms which have been conferred should be given a strict and narrow, rather than a wide construction. "Rights and freedoms are not to be diluted or diminished unless necessity or intractability of language dictates otherwise," said the former Chief Justice.

## MOZAMBIQUE

### Article 74

*1 All citizens shall have the right to freedom of expression and to freedom of the press as well as the right to information.*

*2. Freedom of expression, which includes the right to disseminate one's opinion by all legal means, and the right to information, shall not be limited by censorship.*

*3. Freedom of the press shall include in particular the freedom of journalistic expression and creativity, access to sources of information, protection of professional independence and confidentiality, and the right to publish newspapers and other publications.*

*4. The exercise of the rights and freedoms referred to in this article shall be regulated by law based on the necessary respect for the Constitution, for the dignity of the human person, and for the mandates of foreign policy and national defence.*

In contrast with the Constitution of Zimbabwe, Mozambique expressly provides for freedom of the press as a fundamental freedom distinct from freedom of expression generally. Other constitutions like those of Namibia and South Africa, expressly state that freedom of expression includes freedom of the press and other media. However, what makes it distinctly different from the vast majority of the other constitutions in the region is the fact that it expressly provides for freedom of the press and other media.

Even though there is a constitutional guarantee of press freedom, Mozambique's 1991 Press Law contains statutes that permit press freedom to be abridged in order to respect the Constitution, human dignity, and imperatives of foreign policy and national defence. Press law also holds that in case of defamation against the president, truth is not a defence.

The vagueness of these provisions allows officials to prosecute journalists for a wide range of perceived wrongs that the Constitution would appear to protect, making the existence of press freedom somewhat questionable. This just goes to show that the mere citing of a particular right in it is inadequate if there is no complementary framework that allows or conduces to the attainment and exercise of such right.

It is very illogical to say that the constitution guarantees the right to freedom of expression on one hand while another piece of legislation (such as the press law in this instance) takes away the same right.

## SOUTH AFRICA

### Section 16. Freedom of Expression

Everyone has the right to freedom of expression, which includes:

- *Freedom of the press and other media;*
- *Freedom to receive and impart information or ideas;*
- *Freedom of artistic creativity; and*
- *Academic freedom and freedom of scientific research,*

*The right in subsection (1) does not extend to:*

- *Propaganda of war;*
- *Incitement of imminent violence; or*
- *Advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm*

The South African constitution unlike the Zimbabwean one expressly states that freedom of expression shall incorporate within it the right to freedom of the press and other media. This is in clear distinction to the position under the Mozambican constitution, which provides for the right to freedom of expression and the right to freedom of the press as two separate and distinct rights.

Given the historical experiences of South Africa during apartheid and the degree of censorship that existed back then, it is hardly shocking that the country now enjoys basic rights and freedoms that many other countries may take for granted. South Africa enjoys a constitutionally protected right to freedom of expression and access to information.

Jurisprudentially the South African judiciary has been rather proactive in its interpretation of the clause on freedom of expression. In the case of *Islamic Unity Convention v Independent Broadcasting Authority & Others 2002 (4) SA 294 (CC)*, the Constitutional Court of South Africa interrogated a provision in the BMCC Code, a statutory code administered

by the BMCC <sup>[2]</sup> under the IBA Act. The provision prohibited the broadcasting of material that was "likely to prejudice relations between sections of the population."

The court declared the provision unconstitutional on the basis that this clause was overbroad and that it constituted an unjustifiable limitation on the right to freedom of expression in section 16 of the South African Constitution. The court stated that:

*"The prohibition is so widely-phrased and so far-reaching that it would be difficult to know before hand what is really prohibited or permitted. No intelligible standard has been provided to assist in the determination of the scope of the prohibition. It could deny both the broadcaster and their audience the right to hear, form and freely express and disseminate their opinions and views on the wide range of subject."*

#### **BOTSWANA**

Unlike the South African constitution, section 12 (1) of the Botswana Constitution does not expressly provide for media freedom.

The rights and freedoms are restricted, for example, in relation to national security, to protect the rights of other people, to protect the freedom of civil servants to perform their duties and where public order is threatened. It is certainly difficult to state whether the provision in the constitution guaranteeing freedom of expression is sufficient given all these exemptions.

The obvious criticism against this clause is that exemptions are so broad that they may not pass the three-part test, which says that any restrictions on freedom of expression shall be provided for by law, serve a legitimate interest and be reasonably necessary in a democratic society.

The Botswana constitution actually bears an amazingly striking resemblance to the Zimbabwean constitution. In fact, it only appears to have been worded in a slightly different manner but the import of its provision ultimately appears to be the same.

#### **NAMIBIA**

Article 21 of the Namibian constitution is a lot like the South African constitution in that both expressly provide that freedom of expression shall include the right to freedom of the media. However, the disturbing aspect about the Namibian constitution is the fact that it is silent on the right to information.

Comparatively, Swaziland does not have a constitutional guarantee at all on the same right. On the other hand, the constitutions of other SADC states such as Botswana, Lesotho, Zambia and Zimbabwe have provisions that protect the right to information in a weak and passive fashion. In the case of Zimbabwe, there are actually legal enactments that restrict and undermine the exercise of this right such as the Access to information and Protection of Privacy Act and the Broadcasting Services Act. This law is actually inconsistent with the exercise of the right to information as it imposes too many restrictions on the same right.

Further, section 24 of the Namibian Constitution permits derogation from the fundamental rights where Namibia is in a state of national defence or where a state of emergency has been declared. However, it still stands as the contention of the writer that such derogation must not only be reasonably justifiable but necessary.

As regards the right to information, only few countries expressly provide for the protection of such right in their Constitutions in SADC. These countries include Mozambique, South Africa and Malawi. All the other countries leave it to be read in the rights and freedom of expression.

However, not all is grim. There have actually been some progressive developments on the Namibian landscape, judicially. The term "reasonable" publication was subjected to scrutiny in the Bogoshi judgment in the case of *Muhoza and Others v Namibian Broadcasting Corporation 2000 NR 178 (HC)*. In that matter, the court held that the publication of a defamatory matter in the public media would be regarded as lawful if the publication found to be reasonable. If the person making the publication has reasonable grounds to believe that the allegations are true and that steps have been taken to verify accuracy of the information, then the publication is reasonable.

## ZAMBIA

Again, the Zambian constitution expressly provides for freedom of the press under section 20(2), which states that, "subject to the provisions of this constitution no law shall make any provision that derogates from freedom of the press". This at least goes some way towards ensuring that there is no undue influence, or restrictions imposed on the media freedom, though cognisance should always be had to the fact that there can always be complementary legislation put in place, which will have the effect of taking away even those freedoms guaranteed in the constitution. This is, however, not to say that these constitutional guarantees then become irrelevant. In fact, this is when their express mention becomes essential because one then begins to measure the import of the other laws against the constitution.

## MALAWI

Section 36 of the constitution guarantees the right of the press. This right is separately provided for, while freedom of expression is also independently guaranteed. The section is worded in the following manner;

*"The press shall have the right to report and publish freely within Malawi and abroad and to be accorded the fullest possible facilities for access to public information"*

Section 44(1) contains a list of rights that are absolute and which may not be restricted, this list includes rights such as the right to life, the prohibition of genocide and the prohibition of slavery. Under section 44(2), all other rights may be limited, including the right to freedom of expression. The section reads,

*"Without prejudice to (1), no restrictions or limitations may be placed on the exercise of any right or freedoms provided for in this constitution other than those prescribed in by law, which are reasonable...and necessary in a democratic society"*

## CONCLUSION

The importance of having a section that provides for freedom of expression on one hand and freedom of press on the other cannot be down played. In essence this concretises the freedoms as opposed to subjecting them to legal interpretations as to whether the right to freedom of expression inherently protects that of media freedom as is the case in Zimbabwe.

It is trite to note that the African Charter on Human and Peoples Rights does not permit derogation from any of its provisions unlike is the case with other international human rights instruments. Accordingly, States Parties (which include Zimbabwe) have an obligation to uphold at all times the provisions of Article 9 of the African Charter and the Declaration of Principles of Freedom of Expression in Africa which supplements it irrespective of circumstances such as armed conflict, civil unrest or any other form of emergency that may exist in States Parties.

Read in tandem with other protocols and declarations such as the Windhoek Declaration of 1991, it is therefore incumbent upon Zimbabwe and other African countries that do not have constitutional guarantees on media freedom, to urgently review and abolish any laws that restrict press freedom and the right to access to information.

This will ensure the emergence of an environment where the press is free and independent of state, political or economic control which is central to good governance, transparency and accountability and economic prosperity.

Suffice to say, the advances that other southern African countries such as South Africa, Mozambique, Malawi, Namibia and Zambia towards protecting press freedom in line with the principles of the Windhoek Declaration, African Charter on Human and Peoples Rights and Banjul Declaration among others, makes a strong case for a constitutional provision that guarantees media freedom and the citizens right to access to information in Zimbabwe.

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## 2. Media violations statistics July 2009

Concerned Party	Violation/event/issue	Date	Status of the matter
ce photojournalist on Manyere`	Manyere and five other alleged Movement for Democratic Change (MDC) activists are facing charges of	1 July 2009	High Court judge Justice Charles Hungwe on 1 July 2009 granted an application

	<p>contravening Section 23 (1) (a) (i) (ii) of the Criminal Law (Codification and Reform) Act, Chapter 9:23 which criminalises acts of insurgency, banditry, sabotage or terrorism, or alternatively Section 143 of the same Act which relates to aggravating circumstances in relation to malicious damage to property.</p>		<p>for referral to the Supreme Court by freelance photojournalist Andrison Manyere. Alec Muchadehama representing Manyere in his application for referral argued that there had been a clear violation of the applicant's constitutional right to liberty, and right to full protection of the law. He added that Manyere had been a victim of enforced disappearance and therefore ought to be the complainant in the matter.</p>
<p>ve Independent editors t Kahiya and ntine Chimakure</p>	<p>Kahiya and Chimakure are being charged with publishing or communicating falsehoods in terms of section 31 of the Criminal Law (Codification and Reform) Act following a story published in the <i>Zimbabwe Independent</i> edition of 8-14 May 2009 titled, <i>Activist abductors named</i>; with the subtitle <i>CIO, police role in activists' abduction revealed</i>.</p>	<p>9 July 2009</p>	<p>Harare magistrate Moses Murendo on 9 July 2009 postponed ruling to 21 July 2009 following an application by the accused for referral of the matter to the Supreme</p> <p>The two journalists contend that section 31 of the Criminal Codification Act is unconstitutional and that the penalty of a 20- year prison term is so heavy and disproportionate to the offence and infringe section 20 of the Bill of Rights. Section 20 of the constitution of Zimbabwe guarantees the right to freedom of expression.</p>
<p>ce journalist on Manyere and 15 ient for Democratic -T (MDC-T)</p>	<p>Manyere and five other alleged Movement for Democratic Change (MDC) activists are facing charges of contravening Section 23 (1) (a) (i) (ii) of the Criminal Law (Codification and Reform) Act, Chapter 9:23 which criminalises acts of insurgency, banditry, sabotage or terrorism, or alternatively Section 143 of the same Act which relates to aggravating circumstances in relation to malicious damage to property.</p>	<p>20 July 2009</p>	<p>Freelance photojournalist Andrison Manyere and 15 Movement for Democratic Change-T (MDC-T) on 14 July 2009 filed a lawsuit with the High Court demanding compensation totaling US\$19, 2 million from the co-Ministers of Home Affairs and State security agents following their alleged abduction, unlawful detention and deprivation of liberty.</p>
<p>r of Finance Tendai</p>	<p>The minister announced the scrapping of the 40 percent import duty on foreign newspapers distributed in Zimbabwe. The <i>Zimbabwean</i> and <i>Zimbabwean on Sunday</i> weeklies published abroad by exiled Zimbabwean publisher Wilf</p>	<p>21 July 2009</p>	<p>The duty was imposed in June 2009 and was criticised by media groups as aimed at limiting the circulation and distribution of foreign newspapers published outside the country.</p>

	Mbanga had prior to that reportedly forked out R2,85 million in import duty levies since June last year to get their newspapers into Zimbabwe.		
ce journalist Sydney	Police in Mutare on 21 July 2009 detained and questioned Mutare-based freelance photojournalist Sydney Saize while he was covering proceedings during the funeral ceremony for the Member of the House of Assembly for Mutare North Honourable Charles Pemhenayi.	22 July 2009	The police asked him about his personal details before they released him without any charges.
Wireless	Econet Wireless reduced the price of its bundled handset starter-packs following the removal of duty on mobile phones.	23 July 2009	This should enable more people to buy the handsets which are an essential communication and access to information tool.
News Network and British Broadcasting Corporation	BBC and CNN now free to resume operations in Zimbabwe following meetings they held with the Minister of Media, Information and Publicity, Webster Shamu, his Permanent Secretary, George Charamba, and Principal Director, Sylvester Maunganidze.	29 July 2009	The BBC and the government agreed that the latter would employ locals at its proposed Harare Bureau. The organisation was, however, still free to send its crews to Zimbabwe whenever the need arose. It was also agreed that BBC and CNN would respect local legislation and uphold professional standards.
Parliamentary Committee on Standing Rules and Orders	The Parliamentary Committee on Standing Rules and Orders was on 3 August 2009 set to conduct interviews with applicants who want to be considered for appointment to serve as Commissioners on the statutory Zimbabwe Media Commission (ZMC).	29 July 2009	The ZMC will be the successor body to the now defunct Media and Information Commission (MIC) following amendments to the repressive Access to Information and Protection of Privacy Act (AIPPA) and the passage of Constitutional Amendment No 19.
Two Independent Constantine Murendo, Vincent Kahiya and Michael Murendo	<i>Independent</i> editors, Vincent Kahiya and Constantine Chimakure who are challenging the constitutionality of section 31 of the Criminal Law (Codification and Reform) Act, (Criminal Code) under which they are charged.	31 July 2009	Harare magistrate Moses Murendo on 30 July 2009 granted an application for a referral to the Supreme Court.
Two Newspapers of Zimbabwe (ANZ) - The Daily News and The Daily News day	Zimbabwe's popular mass circulating newspaper banned in 2003 under the draconian Access to Information and Protection of Privacy (AIPPA) is set to bounce back after it was granted licence to resume operations ending a six-year agonising legal battle to be duly	31 July 2009	ANZ will have to wait for an unknown period as the licensing authority and successor body to the statutory Media and Information Commission (MIC), the Zimbabwe Media

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registered in terms of the law.

Commission (ZMC) is still  
to be constituted.

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<sup>[1]</sup> Alexander Hamilton – administrative and constitutional law, p.147

<sup>[2]</sup> The Broadcast Monitoring and Complaints Committee

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