

The struggle for the realisation of the right to freedom of expression in Southern Africa

AFRICAN
DECLARATION
ON INTERNET RIGHTS
AND FREEDOMS



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Published by the African Declaration on Internet Rights and Freedoms Coalition

<https://africaninternetrights.org>

November 2020

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978-92-95113-34-3

APC-202011-CIPP-R-EN-DIGITAL-324



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LIST OF ACRONYMS

ACHPR	African Commission on Human and Peoples' Rights
ACRWC	African Charter on the Rights and Welfare of the Child
AfDec	African Declaration on Internet Rights and Freedoms
AU	African Union
CRC	Convention on the Rights of the Child
CRPD	Convention on the Rights of Persons with Disabilities
EACJ	East African Court of Justice
ECOWAS	Economic Community of West African States
HRC	Human Rights Council of the United Nations
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICTs	Information and communication technologies
IP	Internet protocol
ISP	Internet service provider
MNO	Mobile network operator
SADC	Southern African Development Community
SDGs	Sustainable Development Goals
SIM	Subscriber identity module
SMS	Short message service
UDHR	Universal Declaration of Human Rights
UN	United Nations
VPN	Virtual private network

INTRODUCTION

The right to freedom of expression is enshrined as a cornerstone of democracy. This is because of its intrinsic importance in informing the public and encouraging debate. Inherent in the right to freedom of expression is the notion of access to information and press freedom. Freedom of expression also underpins a range of other rights, thereby enabling the full realisation of fundamental rights.

It is by now well-established by the UN and the African Commission on Human and Peoples' Rights (ACHPR) that rights, particularly the right to freedom of expression, apply equally online and offline.¹ As set out in the African Declaration on Internet Rights and Freedoms:²

- Everyone has the right to hold opinions without interference.
- Everyone has a right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds through the Internet and digital technologies and regardless of frontiers.
- The exercise of this right should not be subject to any restrictions, except those which are provided by law, pursue a legitimate aim as expressly listed under international human rights law (namely the rights or reputations of others, the protection of national security, or of public order, public health or morals) and are necessary and proportionate in pursuance of a legitimate aim.

The exercise of the right to freedom of expression can, at times, require tolerance from others. As has been explained by the Constitutional Court of South Africa, the right to receive or impart information or ideas is applicable “not only to ‘information’ or ‘ideas’ that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb.”³ Indeed, the right extends even where those views are controversial:

The corollary of the freedom of expression and its related rights is tolerance by society of different views. Tolerance, of course, does not require approbation of a particular view. In essence, it requires the

1 HRC. (2016, 27 June). Resolution on the promotion, protection and enjoyment of human rights on the internet. A/HRC/32/L.20, para 1. https://www.article19.org/data/files/Internet_Statement_Adopted.pdf

ACHPR. (2016, 4 November). Resolution on the right to freedom of information and expression on the internet in Africa. ACHPR/Res.362(LIX). <https://www.achpr.org/sessions/resolutions?id=374>

2 The Declaration is a Pan-African initiative to promote human rights standards and principles of openness in internet policy formulation and implementation on the continent. <https://africaninternetrights.org/articles/>

3 *De Reuck v Director of Public Prosecutions (Witwatersrand Local Division) and Others*. [2003]. ZACC 19, para 49. <http://www.saflii.org/za/cases/ZACC/2003/19.html>

acceptance of the public airing of disagreements and the refusal to silence unpopular views.⁴

Notably, however, the right to freedom of expression is not absolute. It must necessarily be balanced against competing rights and interests. Some forms of speech do not enjoy any protection under international law, while other restrictions to the right to freedom of expression are only permissible under certain circumstances.

The challenge being experienced in Southern Africa – and indeed globally – is that states and private sector actors are adopting laws, policies and other measures that unjustifiably restrict the right to freedom of expression. This is typically done under the guise of, for instance, national security or the protection of reputation, but it encroaches far beyond that which is permitted under the law. These unjustifiable restrictions have a chilling effect on the free flow of ideas and meaningful discourse, and have the potential to severely undermine the full realisation of the right.

This report focuses on the content of the right to freedom of expression and gives an assessment of restrictions to the right. In Part I, we look at the international human rights framework on the right to freedom of expression as set out in international treaties and other appropriate resources, in order to distil the key elements of the right. In Part II, we set out the legal position on the circumstances under which the right to freedom of expression may be limited. In Part III, we explore key case studies across Southern Africa that raise serious concerns about existing or prospective laws that will restrict the right to freedom of expression. Lastly, in Part IV, we will take a forward-looking approach to consider what strategies can be used to safeguard the right to freedom of expression at its essence, and set out our recommendations for different stakeholder groups.

This report does not purport to cover all laws in the respective countries in Southern Africa. Instead, the researchers have had the discretion to identify those laws that are seen to be of most concern in the present time, taking into account the political, social and economic landscape in the country at the moment. Through this report, we have identified key trends and recommendations for states, private sector actors and civil society to consider in the development of laws, policies and measures that impact the right to freedom of expression.

The need for this report was identified at a meeting of the Southern African members of the African Declaration on Internet Rights and Freedoms (AfDec) Coalition. It was recognised that while the right to freedom of expression is firmly entrenched at the domestic, regional and international levels, the realisation of this right remains a struggle in practice, particularly in the digital era.

⁴ *South African National Defence Union v Minister of Defence and Another*. [1999]. ZACC 7, para 8. <http://www.saflii.org/za/cases/ZACC/1999/7.html>

PART I: CONTENT OF THE RIGHT TO FREEDOM OF EXPRESSION

IMPORTANCE OF THE RIGHT TO FREEDOM OF EXPRESSION

Human rights are fundamental and inherent to all persons. They are enshrined in both national and international law, and all persons are entitled to enjoy such rights without distinction, by virtue of their humanity. When fully realised, human rights reflect the minimum standards to enable persons to live with dignity, freedom, equality, justice and peace.

Freedom of expression is one such right. The right has repeatedly been recognised as a core value of a democratic society, and deserving of the utmost protection. As explained by the Supreme Court of Zimbabwe, it serves four broad objectives: it helps an individual to obtain self-fulfilment; it assists in the discovery of truth and in promoting political and social participation; it strengthens the capacity of an individual to participate in decision making; and it provides a mechanism by which it is possible to establish a reasonable balance between stability and change.⁵

At its core, the right to freedom of expression – as framed in the International Covenant on Civil and Political Rights (ICCPR) and the African Charter on Human and Peoples’ Rights (African Charter) – is made up of three interrelated rights that apply equally online and offline:⁶

- The right to hold opinions without interference
- The right to seek and receive information
- The right to impart information.

Freedom of expression also enables a range of other rights. For instance, when considered together with the right to freedom of assembly, it is apparent that freedom of expression has created opportunities for communities to interact, regardless of geographic borders or physical constraints, in order to mobilise and document protests, repression or intimidation. As set out in the ACHPR Guidelines on Freedom of Association and Assembly in Africa, the right to freedom of association protects, amongst other things, expression and criticism of state conduct, and calls on states to fully respect the right to freedom of expression through assembly, providing that: “The expression aimed at, in and through assemblies is protected by the right to freedom of expression, and includes expression that may give offence or be provocative.”⁷

5 *Chavunduka and Others v Minister of Home Affairs and Another*. [2000]. JOL 6540 (ZS).
<https://globalfreedomofexpression.columbia.edu/cases/chavunduka-v-minister-home-affairs/>

6 HRC. (2016, 27 June). Op. cit.

7 https://www.ishr.ch/sites/default/files/documents/guidelines_on_foaa-english.pdf

The right to freedom of expression also enables the enjoyment of socio-economic rights, such as the right to education, the right to an adequate standard of living, and the right to health and welfare. The HRC has noted the particularly important role that the internet can play in facilitating the right to education, and has called on states to promote digital literacy and facilitate access to information on the internet as it “can be an important tool in facilitating the promotion of the right to education.”⁸ Essentially, socio-economic rights are rendered more available and accessible to the public through the use of technology and the internet, and the ability that this provides to exchange and critique information.

Freedom of expression has a particularly important role in democratic processes. As explained in the Human Rights Committee General Comment No. 25,⁹ which deals with the right to participate in public affairs, voting rights and the right of equal access to public service, freedom of expression has an important role to play in securing an open and democratic society for the public and the media. In this regard, General Comment No. 25 states that:

Citizens can also take part in the conduct of public affairs by exerting influence through public debate and dialogue with their representatives or through their capacity to organize themselves. This participation is supported by ensuring freedom of expression, assembly and association.

It goes on to state that: “Voters should be able to form opinions independently, free of violence or threat of violence, compulsion, inducement or manipulative interference of any kind.”¹⁰

It should be apparent by now that the importance of the right to freedom of expression cannot be gainsaid. It is for this reason that the right is reflected in a number of regional and international instruments. The next section sets out the content of the right to freedom of expression as contained in these instruments.

CONTENT OF THE RIGHT TO FREEDOM OF EXPRESSION

INTERNATIONAL FRAMEWORKS

The right to freedom of expression was first encapsulated in article 19 of the UDHR, which provides that: “Everyone 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.” While the UDHR is a non-binding instrument, it formed

8 HRC. (2016, 27 June). Op. cit.

9 HRC. (12 July 1996). General Comment No. 25 at para 8. The Right to Participate in Public Affairs, Voting Rights and the Right of Equal Access to Public Service. <https://www.refworld.org/docid/453883fc22.html>

10 Ibid., para 19.

the basis for the treaty law provision contained in article 19 of the ICCPR, which states as follows:

- (1) Everyone shall have the right to hold opinions without interference.
- (2) Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
- (3) The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore 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 of public order (ordre public), or of public health or morals.

In the Human Rights Committee General Comment No. 34, it is explained that article 19 of the ICCPR should be read to include a wide range of activities, such as political discourse, commentary on one's own affairs and on public affairs, canvassing, discussion of human rights, journalism, cultural and artistic expression, teaching and religious discourse.¹¹ It explains further that the right covers communications that are both verbal and non-verbal, such as artistic works, as well as all modes of expression, including audio-visual, electronic and internet-based modes of communication.¹²

This last-mentioned point is an important one. It is notable that, although the ICCPR was drafted at a time that predated the advent of the internet, the language used was deliberately technology-neutral. Both through the reading of the text and the subsequent interpretation thereof, it is clear that the right applies to freedom of expression both on- and offline.

The ICCPR is not the only treaty within the United Nations framework to address the right to freedom of expression. For instance, article 15(3) of the ICESCR specifically refers to the freedom required for scientific research and creative activity, providing that: "The States Parties to the present Covenant undertake to respect the freedom indispensable for scientific research and creative activity."

Articles 12 and 13 of the CRC contain extensive protections relating to the right to freedom of expression enjoyed by children, providing that:

¹¹ HRC. (2011, 12 September). General Comment No. 34 at para 11. Article 19: Freedoms of expression and opinion.

¹² Ibid., para 12.

Article 12

(1) States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

(2) For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

Article 13

(1) The child shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of the child's choice.

(2) The exercise of this right 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; or
- (b) For the protection of national security or of public order (*ordre public*), or of public health or morals.

Article 21 of the CRPD also contains an express guarantee of the right to freedom of expression for persons with disabilities, and notably makes specific reference to the internet in its terms. It requires states to take all appropriate measures to ensure that persons with disabilities can exercise the right to freedom of expression and opinion, including the freedom to seek, receive and impart information and ideas on an equal basis with others and through all forms of communication of their choice, including by:

- (a) Providing information intended for the general public to persons with disabilities in accessible formats and technologies appropriate to different kinds of disabilities in a timely manner and without additional cost;
- (b) Accepting and facilitating the use of sign languages, Braille, augmentative and alternative communication, and all other accessible means, modes and formats of communication of their choice by persons with disabilities in official interactions;
- (c) Urging private entities that provide services to the general public, including through the Internet, to provide information and services in accessible and usable formats for persons with disabilities;

- (d) Encouraging the mass media, including providers of information through the Internet, to make their services accessible to persons with disabilities;
- (e) Recognizing and promoting the use of sign languages.

REGIONAL FRAMEWORKS IN AFRICA

Similarly, the right to freedom of expression is also well entrenched in the African regional system, with article 9 of the African Charter being the primary instrument in this regard. Article 9 provides for the right to freedom of expression in the following terms:

- (1) Every individual shall have the right to receive information.
- (2) Every individual shall have the right to express and disseminate his opinions within the law.

The reference to “within the law” in article 9(2) has been the cause of some concern, particularly that states may rely on their domestic laws to justify non-compliance with the right to freedom of expression under the African Charter. This issue was clarified by the ACHPR in *Constitutional Rights Project v Nigeria*,¹³ with reference to its earlier decision in *Civil Liberties Organisation (in respect of the Nigerian Bar Association) v Nigeria*,¹⁴ that the reference to “within the law” relates to constitutional and international human rights standards:

The government justifies its actions with regard to the journalists and proscription of publications by reference to the “chaotic” situation that transpired after the elections were annulled. The Commission decided, in its decision on communication 101/93, with respect to freedom of association, that “competent authorities should not enact provisions which limit the exercise of this freedom. The competent authorities should not override constitutional provisions or undermine fundamental rights guaranteed by the constitution and international human rights standards”.

With these words the Commission states a general principle that applies to all rights, not only freedom of association. Government should avoid restricting rights, and take special care with regard to those rights protected by constitutional or international human rights law. No situation justifies the wholesale violation of human rights. In fact, general restrictions on rights diminish public confidence in the rule of law and are often counter productive.

¹³ *Constitutional Rights Project v Nigeria*. (1998, 31 October). Communication No. 102/93, paras 57-58. <https://www.achpr.org/sessions/descions?id=100>

¹⁴ *Civil Liberties Organisation (in respect of the Nigerian Bar Association) v Nigeria*. (1995, 22 March). Communication No. 101/93. <https://www.achpr.org/sessions/descions?id=85>

In interpreting the right to freedom of expression under the African Charter, regard should be had to the revised Declaration of Principles on Freedom of Expression and Access to Information in Africa (ACHPR Declaration of Principles), adopted by the ACHPR in 2019. It firmly establishes that freedom of expression and access to information are fundamental rights protected under the African Charter and other international human rights laws and standards, and that the respect, protection and fulfilment of these rights is crucial and indispensable for the free development of the human person, the creation and nurturing of democratic societies and for enabling the exercise of other rights.¹⁵ It goes on to require that states create an enabling environment for the exercise of freedom of expression and access to information, including by ensuring protection against acts or omissions of non-state actors that curtail the enjoyment of freedom of expression and access to information.¹⁶ Notably, it provides that the exercise of freedom of expression and access to information must be protected from interference both online and offline, and that states must interpret and implement the protection of these rights as set out under international law accordingly.¹⁷

Further to the African Charter, there are also a number of legal instruments at the regional level that guarantee the right to freedom of expression. For instance, article 27(8) of the African Charter on Democracy, Elections and Governance¹⁸ provides that, in order to advance political, economic and social governance, state parties must commit themselves to, among other things, the promotion of freedom of expression, in particular freedom of the press and fostering a professional media.

Furthermore, in similar terms to the CRC, the African Charter on the Rights and Welfare of the Child specifically provides for the right to freedom of expression for every child capable of communication, as well as for the right to freedom of thought and conscience. In this regard, it provides as follows:

Article 7: Freedom of expression

Every child who is capable of communicating his or her own views shall be assured the right to express his opinions freely in all matters and to disseminate his opinions subject to such restrictions as are prescribed by laws.

Article 9: Freedom of thought, conscience and religion

(1) Every child shall have the right to freedom of thought, conscience and religion.

15 Principle 1(1) of the ACHPR Declaration of Principles; see, also, principle 10 of the ACHPR Declaration of Principles. <https://www.achpr.org/presspublic/publication?id=80>

16 Principle 1(2) of the ACHPR Declaration of Principles. <https://www.achpr.org/presspublic/publication?id=80>

17 Principle 5 of the ACHPR Declaration of Principles. <https://www.achpr.org/presspublic/publication?id=80>

18 <https://au.int/en/treaties/african-charter-democracy-elections-and-governance>

- (2) Parents, and where applicable, legal guardians shall have the duty to provide guidance and direction in the exercise of these rights having regard to the evolving capacities, and best interests of the child.
- (3) State Parties shall respect the duty of parents and where applicable, legal guardians, to provide guidance and direction in the enjoyment of these rights subject to the national laws and policies.

Freedom of expression is also provided for in terms of the legal instruments at the sub-regional level. For instance, in Southern African Development Community (SADC) article 19(1) of the Protocol on Culture, Information and Sport provides that state parties must cooperate on improving the free flow of information within the region, and article 20 provides that state parties must take the necessary measures to ensure the development of media that are editorially independent and conscious of their obligations to the public and greater society. In East Africa, article 6 of the Treaty Establishing the East African Community includes among its fundamental principles the principle of good governance, and goes on to state that this includes the principles of democracy, rule of law, accountability, transparency and the rights contained in the African Charter. For West Africa, article 66 of the Revised Treaty of Economic Community of West African States (ECOWAS) provides that members agree to maintain freedom of access for professionals of the communication industry and for information sources; to facilitate exchange of information between press organs; to promote and foster effective dissemination of information within ECOWAS; to ensure respect for the rights of journalists; and to take measures to encourage investment capital, both public and private, in the communication industries in member states.

MODERNISATION OF THE RIGHT TO FREEDOM OF EXPRESSION IN THE DIGITAL ERA

The speed and global reach of the internet has provided unparalleled opportunities for the exercise and enjoyment of the right to freedom of expression. Through the internet, people around the world are able to communicate quickly and effectively across borders; use digital technologies to mobilise, associate, share information and ideas; and engage in robust debate on matters of public importance. This has also led to an increase in citizen journalism and user-generated content, which has fundamentally altered the traditional way in which we had previously conceived of the media.

Indeed, the internet has fundamentally changed aspects of our society. This includes the production, trade and consumption of goods and services; the nature of work and the distribution between work and leisure in people's lives; the (potential) availability of information of all kinds, at all times, in all places, and the capacity to bring different sources of information together; interactions

amongst individuals, between individuals and businesses, and between citizens and governments; and relationships amongst nation-states and between national and international jurisdictions.¹⁹

The Human Rights Committee has called on states to take account of the extent to which developments in information and communication technologies, such as the internet and mobile-based electronic information dissemination systems, have substantially changed communication practices around the world.²⁰ In General Comment No. 34, the Human Rights Committee noted that there is now a global network for exchanging ideas and opinions that does not necessarily rely on the traditional mass media intermediaries, and called on states to take all necessary steps to foster the independence of these new media and to ensure access of individuals thereto.²¹

The UN Commission on Science and Technology for Development has also expanded upon some of the economic, social and political benefits that can accrue from providing citizens with access to the internet.²² This includes creating possibilities for economic development by the creation of online services, businesses and applications which concurrently create jobs; enhancing education as the internet provides a platform for exchanging information and learning from others; benefiting healthcare by giving people, especially in rural areas, fast and direct access to consult about basic health questions; contributing to cultural and social development; and enhancing political engagement.²³

In 2011, the mandate holders on freedom of expression, including the ACHPR Special Rapporteur on Freedom of Expression and Access to Information, published the Joint Declaration on Freedom of Expression and the Internet. In it, the mandate holders provide that states are under a positive obligation to promote universal access to the internet, which includes a duty to put in place special measures to ensure equitable access to the internet for disabled and disadvantaged persons. In order to implement this, the mandate holders stipulate that states should adopt detailed multi-year action plans for increasing access to the internet, which should include clear and specific targets, standards of transparency and public reporting and monitoring systems.

19 Souter, D. (2013, 22 March). *Multimedia Training Kit. Human rights, ICTs and the internet*, 5. Association for Progressive Communications. http://itrainonline.org/itrainonline/mmtk/APC_IRHRCurriculum_Intro_Handout.pdf

20 HRC. (2011, 12 September). General Comment No. 34, para 15. Op. cit.

21 Ibid.

22 UN. (2013). UN Commission on Science and Technology for Development. Internet broadband for an inclusive digital society. UN Doc. E/CN.16/2013.

23 Ibid.

In 2016 the ACHPR adopted a landmark resolution that noted the transformative nature of the internet in giving a voice to billions around the world.²⁴ In the same resolution, the ACHPR called on states to respect and take legislative and other measures to guarantee, respect and protect a citizen's right to freedom of information and expression through access to internet services.²⁵ The resolution also makes specific reference to the conduct of citizens, thereby urging African citizens to exercise their right to freedom of information and expression on the internet responsibly.²⁶

Most recently, the revised ACHPR Declaration of Principles has provided significant guidance on the exercise of the right to freedom of expression in the digital era. As mentioned above, it stipulates that the exercise of freedom of expression and access to information must be protected from interference both online and offline, and that states must implement the protection of these rights in the ACHPR Declaration of Principles and other relevant international standards accordingly.²⁷ Part IV is of further relevance, and deals specifically with freedom of expression and access to information on the internet. Importantly, it provides that: "States shall facilitate the rights to freedom of expression and access to information online and the means necessary to exercise these rights."²⁸ In order to do so, states are required 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.²⁹

It bears highlighting that the African Declaration on Internet Rights and Freedoms stipulates that states should review and reform their legislation related to freedom of expression online and ensure this legislation fully complies with international standards. This includes abolishing criminal defamation, sedition and speech-related offences, including their application on the internet. It is imperative for the full realisation of the right to freedom of expression that states and other stakeholders respect the rights of all to engage in individual or collective expression of oppositional, dissenting, reactive or responsive views, values and interests through the internet.

24 ACHPR. (2016, 4 November). Resolution on the right to freedom of information and expression on the internet in Africa. ACHPR/Res.362(LIX). <https://www.achpr.org/sessions/resolutions?id=374>

25 Ibid.

26 Ibid.

27 Principle 5 of the ACHPR Declaration of Principles.

28 Principle 37(1) of the ACHPR Declaration of Principles.

29 Principle 37(2) of the ACHPR Declaration of Principles.

PART II: RESTRICTIONS ON THE RIGHT TO FREEDOM OF EXPRESSION

RESTRICTIONS MUST NOT RENDER THE RIGHT ILLUSORY

It is trite that the right to freedom of expression is not absolute. There may be circumstances that arise that require the right to be weighed against other competing rights and interests. However, rights cannot be limited in a way that would render the right itself nugatory. For example, as explained by the Constitutional Court of Zimbabwe: “To control the manner of exercising a right should not signify its denial or invalidation”.³⁰

Importantly, restrictions on the right to freedom of expression may not put the right itself in jeopardy.³¹ This accords with article 5(1) of the ICCPR, which provides that:

Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for in the present Covenant.

In the context of the right to freedom of expression, a restriction or limitation must not undermine or jeopardise the essence of this right of freedom of expression, and the relationship between the right and the limitation – or between the rule and the exception – must not be reversed.³² All restrictions and limitations should be interpreted in the light and context of the particular right concerned, and should be consistent with other rights recognised under the treaty in question and other international human rights instruments, as well as with the fundamental principles of universality, interdependence, equality and non-discrimination as to race, colour, sex, language, religion, political or other belief, national or social origin, property, birth or any other status.³³ The burden of proving this congruence rests on the state.³⁴

Furthermore, as set out in General Comment No. 34, restrictions may never be invoked as a justification for the muzzling of any advocacy of multi-party democracy, democratic tenets and human rights, and one can never justify an attack on any person seeking to exercise their right to freedom of expression, including forms of attack such as arbitrary arrest, torture, threats to life and

30 *Chimakure v Attorney-General of Zimbabwe*, Constitutional Application No SC 247/09 (2014) at 17. <https://globalfreedomofexpression.columbia.edu/cases/chimakure-ors-v-the-attorney-general/>

31 HRC. (2011, 12 September). General Comment No. 34 at para 21. Op. cit.

32 La Rue, F. (2010, 20 April). Report of the UN Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, A/HRC/14/23, 20 April 2010, para 79. <https://www2.ohchr.org/english/bodies/hrcouncil/docs/14session/A.HRC.14.23.pdf>

33 Ibid.

34 Ibid.

killing.³⁵ Additionally, particular caution should be exercised when limiting certain types of speech, including the discussion of government policies and political debate; reporting on human rights, government activities and corruption in government; engaging in election campaigns, peaceful demonstrations or political activities, including for peace or democracy; and expression of opinion and dissent, religion or belief, including by persons belonging to minorities or vulnerable groups.

THREE-PART TEST FOR A JUSTIFIABLE RESTRICTION

Both the ICCPR and the African Charter prescribe the test that must be applied in order for such a restriction to be permissible. In this regard, article 19(3) of the ICCPR provides as follows:

The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore 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 of public order (ordre public), or of public health or morals.

In a similar vein, article 27(2) of the African Charter provides that: “The rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interest.” The ACHPR has explained that the only legitimate reasons for limitations of the rights and freedoms of the African Charter are found in article 27(2), and that the justification of limitations must be strictly proportionate with and absolutely necessary for the advantages which follow.³⁶ Most importantly, “a limitation may not erode a right such that the right itself becomes illusory.”³⁷

This has now crystallised into a three-part test to assess whether the restriction of a right is justifiable:

- The restriction must be provided for in law
- It must pursue a legitimate aim
- It must be necessary and proportionate to achieve that aim.

The three-part test is summarised in the ACHPR Declaration of Principles as follows:³⁸

35 HRC. (2011, 12 September). General Comment No. 34, para 23. Op. cit.

36 *Constitutional Rights Project v Nigeria*, Communication. (1999, 15 November). Nos. 140/94, 141/94, 145/95. <https://africanlii.org/afu/judgment/african-commission-human-and-peoples-rights/1999/6>

37 Ibid.

38 Principle 9 of the ACHPR Declaration of Principles.

- (1) States may only limit the exercise of the rights to freedom of expression and access to information, if the limitation:
 - (a) is prescribed by law;
 - (b) serves a legitimate aim; and
 - (c) is a necessary and proportionate means to achieve the stated aim in a democratic society.
- (2) States shall ensure that any law limiting the right to freedom of expression and access to information:
 - (a) is clear, precise, accessible and foreseeable;
 - (b) is overseen by an independent body in a manner that is not arbitrary or discriminatory; and
 - (c) effectively safeguards against abuse including through the provision of a right of appeal to independent and impartial courts.
- (3) A limitation shall serve a legitimate aim where the objective of the limitation is:
 - (a) to preserve respect for the rights or reputations of others; or
 - (b) to protect national security, public order or public health.
- (4) To be necessary and proportionate, the limitation shall:
 - (a) originate from a pressing and substantial need that is relevant and sufficient;
 - (b) have a direct and immediate connection to the expression and disclosure of information, and be the least restrictive means of achieving the stated aim; and
 - (c) be such that the benefit of protecting the stated interest outweighs the harm to the expression and disclosure of information, including with respect to the sanction authorised.

Each element of the three-part test is discussed in turn below.

LEGALITY

As explained by the Constitutional Court of Zimbabwe, the principle of legality requires that states specify “clearly and concretely in the law the actual limitations to the exercise of freedom of expression” in order to enable the public to know in advance what is permissible and what the consequences are of disobedience.³⁹

Limitations must be provided for by prior existing law in the domestic legal framework of the state seeking to limit the right, and must be issued by the legislative body of that state.⁴⁰ The law must be publicly accessible, and formulated with sufficient precision to enable the public to regulate conduct accordingly.⁴¹ In other words, it must be concrete, clear and unambiguous, such that the limitations can

³⁹ *Chimakure v Attorney-General of Zimbabwe*, paras 24 and 26. Op. cit.

⁴⁰ HRC. (2011, 12 September). General Comment No. 34 at para 25. Op. cit..

⁴¹ Ibid.

be understood and applied by everyone.⁴² Furthermore, it must provide sufficient guidance to those charged with its execution to enable them to ascertain what sorts of expression are properly restricted and what sorts are not.⁴³

Laws imposing restrictions or limitations must not be arbitrary or unreasonable and must not be used as a means of political censorship or of silencing criticism of public officials or public policies.⁴⁴ According to General Comment No. 34, it is not compatible with the ICCPR for a restriction to be enshrined in a traditional, religious or other customary law.⁴⁵

This arises, for example, in the context of internet shutdowns or the intentional disruption of certain websites. As has been seen in practice, these are typically effected by way of an instruction or direction to a telecommunications service provider, rather than in terms of a law of general application. In such circumstances, this would fail to meet the requirements of a justifiable limitation of the right to freedom of expression and other associated rights.

LEGITIMATE AIMS

Both the ICCPR and the African Charter stipulate the legitimate aims that can be relied on in order for a justifiable restriction of a right. Under the ICCPR, these aims are the respect of the rights or reputations of others; national security; public order; public health; or morals. Under the African Charter, these aims are the rights of others; collective security; morality; and common interest. In interpreting this provision of the African Charter, the ACHPR has made clear that they are the only legitimate aims that may be relied on to justify the restriction of a right.⁴⁶

(i) Reputation

Regarding the reputation of others, most states contain domestic laws relating to civil claims for defamation where one's reputation has been unjustifiably harmed. Article 17 of the ICCPR protects citizens against attacks on their honour and reputation. This is also dealt with in the ACHPR Declaration of Principles, which provides that:⁴⁷

(1) States shall ensure that laws relating to defamation conform with the following standards:

42 Ibid

43 Ibid.

44 Ibid.

45 Ibid., para 24.

46 *Constitutional Rights Project v Nigeria*. (1999, 15 November). Op. cit.

47 Principle 21 of the ACHPR Declaration.

- (a) No one shall be found liable for true statements, expressions of opinions or statements which are reasonable to make in the circumstances.
 - (b) Public figures shall be required to tolerate a greater degree of criticism.
 - (c) Sanctions shall never be so severe as to inhibit the right to freedom of expression.
- (2) Privacy and secrecy laws shall not inhibit the dissemination of information of public interest.

Some states also maintain the criminal law offence of criminal defamation, although this has been held by the African Court on Human and Peoples' Rights to be incompatible with the African Charter.⁴⁸ According to the ACHPR Declaration of Principles, states must amend criminal laws on defamation and libel in favour of civil sanctions which must themselves be necessary and proportionate;⁴⁹ further, the imposition of custodial sentences for the offences of defamation and libel are a violation of the right to freedom of expression.⁵⁰ Any defamation law should be crafted with care to ensure that it does not serve in practice to stifle freedom of expression.⁵¹

(ii) Morality

Regarding morality, the Human Rights Committee General Comment No. 22, relating to freedom of thought, conscience or religion, notes that: "[T]he concept of morals derives from many social, philosophical and religious traditions; consequently, limitations on the freedom to manifest a religion or belief for the purpose of protecting morals must be based on principles not deriving exclusively from a single tradition".⁵² General Comment No. 22 goes further to state that:

The fact that a religion is recognized as a State religion or that it is established as official or traditional or that its followers comprise the majority of the population, shall not result in any impairment of the enjoyment of any of the rights under the Covenant ... nor in any discrimination against adherents to other religions or non-believers.⁵³

Any limitation sought to be justified on the ground of morality must therefore be understood in the light of the universality of human rights and the principle

48 Konate v Burkina Faso, Application No. 004/2013. <https://en.african-court.org/index.php/55-finalised-cases-details/857-app-no-004-2013-lohe-issa-konate-v-burkina-faso-details>

49 Principle 22(3) of the ACHPR Declaration of Principles.

50 Principle 22(4) of the ACHPR Declaration of Principles.

51 HRC. (2011, 12 September). General Comment No. 34, para 47. Op. cit.

52 HRC. (1993, 30 July). General Comment No. 22, para 8. <https://www.refworld.org/docid/453883fb22.html>

53 Ibid.

of non-discrimination.⁵⁴ Legal provisions relating to an alleged lack of respect for a religion or other belief system, such as blasphemy laws, are generally incompatible with international human rights law, as they would run contrary to the principle of non-discrimination.⁵⁵ It would also be inappropriate for prohibitions on speech to be used to prevent or punish criticism of religious leaders or commentary on religious doctrine.⁵⁶

(iii) National security

Regarding national security, it should be noted that this has been one of the grounds seen to be most vulnerable to abuse by states and other actors. This is due, in part, to states refusing to disclose complete information about the content and extent of the national security threat, and courts and other institutions being somewhat deferent to the state and allowing it significant leeway in determining what constitutes national security.

It is important, therefore, that national security laws – whether they relate to, for instance, official secrets, sedition or treason – should be framed narrowly to ensure that they comply with the international law provisions. According to the ACHPR Declaration of Principles: “Freedom of expression shall not be restricted on public order or national security grounds unless there is a real risk of harm to a legitimate interest and there is a close causal link between the risk of harm and the expression.”⁵⁷

As set out in General Comment No. 34, the following is not compatible with article 19(3) of the ICCPR:⁵⁸

- To suppress or withhold information from the public on matters of legitimate public interest where such disclosure would not harm the public interest
- To prosecute journalists, researchers, environmental activists, human rights defenders, or others for having disseminated such information
- To include categories of information relating to the commercial sector, banking or scientific progress under the remit of national security
- To restrict the issuing of a statement in support of a labour dispute, including for the convening of a national strike, on the basis of national security.

54 HRC. (2011, 12 September). General Comment No. 34 at para 32. Op. cit.

55 Ibid., para 48.

56 Ibid.

57 Principle 22(5) of the ACHPR Declaration of Principles.

58 HRC. (2011, 12 September). General Comment No. 34, paras 30-31. Op. cit.

The Johannesburg Principles on National Security, Freedom of Expression and Access to Information⁵⁹ (Johannesburg Principles) offer useful guidance when considering the difficult questions that arise in the context of national security. According to the Johannesburg Principles, a restriction sought to be justified on the grounds of national security is not legitimate unless its genuine purpose and demonstrable effect is to protect a country's existence or its territorial integrity against the use or threat of force, or its capacity to respond to the use or threat of force, whether from an external or internal source.⁶⁰ In particular, a restriction sought to be justified on the grounds of national security is not legitimate if its genuine purpose or demonstrable effect is to protect interests unrelated to national security, including, for example, to protect a government from embarrassment or exposure of wrongdoing, or to conceal information about the functioning of its public institutions, or to entrench a particular ideology, or to suppress industrial unrest.⁶¹

This is in accordance with the ACHPR's decision in *Media Rights Agenda and Others v Nigeria*, in which it stated that:

It is important for the conduct of public affairs that opinions critical of the government be judged according to whether they represent a real danger to national security. If the government thought that this particular article represented merely an insult towards it or the Head of State, a libel action would have been more appropriate than the seizure of the whole edition of the magazine before publication.⁶²

In that case, the African Commission found that the limitation could not be justified on the grounds of national security, and that there had consequently been a breach of article 9(2) of the African Charter.

NECESSITY AND PROPORTIONALITY

The third leg of the test is that the restriction must be necessary for a legitimate purpose and proportionate. A restriction will not meet the necessity threshold if the protection it could be achieved in other ways that would not restrict the right to freedom of expression. In *Zimbabwe Lawyers for Human Rights and Another v Republic of Zimbabwe*, the ACHPR has explained that even if a state is striving to ensure respect for the rule of law, it must respond proportionately, which seeks to determine whether, by the action of the state, a fair balance has been struck between the protection of the rights and freedoms of the individual

59 <https://www.article19.org/data/files/pdfs/standards/joburgprinciples.pdf>

60 Principle 2 of the Johannesburg Principles.

61 Ibid.

62 https://www.humandignitytrust.org/wp-content/uploads/resources/Media_Rights_Agenda_and_Others_v_Nigeria_2000_AHRLR_200_ACHPR_1998.pdf

and the interests of the society as a whole.⁶³ In that case, the ACHPR identified five key questions to be answered when assessing this leg of the test: whether there were sufficient reasons supporting the action; whether there was a less restrictive alternative; whether the decision-making process was procedurally fair; whether there were any safeguards against abuse; and whether the action destroyed the very essence of the African Charter rights in issue.⁶⁴

This approach has similarly been followed by the Lesotho Court of Appeal, which has stated that:⁶⁵

There are, in my view, three important components of a proportionality test. First, the measures adapted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. Secondly, the means, even if rationally connected to the objective in this first sense, should impair as little as possible “the right or freedom in question ... Thirdly there must be a proportionality between the effects of the measures which are responsible for limiting the Charter right or freedom, and the objective which has been identified as of sufficient importance”.

The principles relating to proportionality have been distilled in General Comment No. 34 to include the following:⁶⁶

- Restrictive measures must be appropriate to achieve their protective function
- They must be proportionate to the interest to be protected
- The principle of proportionality must be respected both in law and by the authorities applying the law
- The principle of proportionality must take into account the form of expression and the means of dissemination, for instance if it pertains to a public debate concerning figures in the public and political domain.

PROHIBITED SPEECH

Not all speech is protected under international law. Article 20 of the ICCPR provides for certain categories of speech to be prohibited by law, and states as follows in this regard:

63 <https://africanlii.org/afu/judgment/african-commission-human-and-peoples-rights/2008/86>

64 Ibid.

65 *Attorney-General v Mopa*. [2003]. 1 LRC 224, para 33. <https://lesotholii.org/ls/judgment/high-court/2002/3>

66 HRC. (2011, 12 September). General Comment No. 34 at para 34. Op. cit.

- (1) Any propaganda for war shall be prohibited by law
- (2) Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.

General Comment No. 34 states that articles 19 and 20 of the ICCPR are compatible and complement each other.⁶⁷ Accordingly, the prohibited grounds listed in article 20 of the ICCPR are also subject to restriction in accordance with article 19(3), and must also be capable of justification in terms of the three-part test.⁶⁸ The key distinction, therefore, is that article 20 provides for a specific response to such speech: it must be prohibited by law.⁶⁹

Article 20 of the ICCPR is not alone in this regard. In similar – although not identical – terms to article 20 of the ICCPR, article 4(a) of the International Convention on the Elimination of All Forms of Racial Discrimination requires that the dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, must be declared an offence that is punishable by law. There are therefore six activities under article 4(a) that must be declared as offences punishable by law:

- Dissemination of ideas based on racial superiority
- Dissemination of ideas based on racial hatred
- Incitement to racial discrimination
- Acts of racially motivated violence
- Incitement to acts of racially motivated violence
- The provision of assistance, including of a financial nature, to racist activities.

The criminalisation of incitement for certain forms of speech is also well-established under international criminal law. In this regard, article III(c) of the Convention on the Prevention and Punishment of the Crime of Genocide states that “direct and public incitement to commit genocide” shall be punishable. Similarly, the Rome Statute of the International Criminal Court criminalises the incitement to

commit international crimes, including a prohibition on incitement to commit genocide as contained in article 25(3)(e) thereof.

Also, regard article 3(1)(c) of the Optional Protocol to the Convention on the Rights of the Child relating to the sale of children, child prostitution and child pornography. This requires that states must ensure that their criminal laws cover

67 Ibid., para 50.

68 Ibid.

69 Ibid.

“producing, distributing, disseminating, importing, exporting, offering, selling or possessing ... child pornography”.

While the provisions above refer to hatred, they do not use the term “hate speech”. This, however, has become a popular term used in domestic contexts, although it has proven difficult to define. Central to the question of whether hate speech rises to the threshold of being criminal is the severity of the speech in question. The Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence proposes the following six-part threshold test to establish whether expression is criminally prohibited.⁷⁰ This includes consideration of the social and political context; the position or status of the speaker; the intention of the speaker; the content and form of the speech; the extent and reach of the speech; and the degree of risk of resulting harm.⁷¹

⁷⁰ https://www.ohchr.org/_layouts/15/WopiFrame.aspx?sourcedoc=/Documents/Issues/Opinion/SeminarRabat/Rabat_threshold_test.pdf&action=default&DefaultItemOpen=1

⁷¹ Ibid.

**PART III: CASE
STUDIES FROM
SOUTHERN AFRICA**

MALAWI

COUNTRY RESEARCHER: Aubrey Chikungwa, MISA Malawi

RELEVANT CONTEXT

Malawi's current democracy dates back to 1993, when Malawians, through a landmark referendum, voted for change from a single to a multiparty system of government. The country's new governance structure was based on the 1994 Republican Constitution, renowned for its explicit provision for human rights, including media freedom, freedom of expression and access to information. The adoption of the 1994 constitution required government to undertake reforms necessary to transform Malawi into a democracy with respect for human rights, the rule of law and popular participation in public decision-making.

Freedom of expression is not only necessary but indispensable to achieve popular participation in public decision making and promotion of democracy. It is important to note, however:

The Constitution of 1994 was introduced into a legal context in which there were many laws which did not reflect the same support for freedom of the press and expression as the Constitution. On the contrary, various legislation, regulations, rules and other subsidiary laws, as well as judicial precedents, imposed significant restrictions on the right to freedom of expression significantly.⁷²

As it stands, Malawi has enacted other restrictive laws adding to the litany of colonial laws that limit media freedom and freedom of expression.

It is also important to note that although section 36 of the Malawi Constitution talks of press freedom, the right applies to both print and electronic media, including online publishing. Similarly, provisions on freedom of expression and access to information, as provided for under sections 35 and 37 respectively, cut across the board. One would therefore argue that the legal restrictions on freedom of expression also apply to all media, including the internet.

Malawi's legal framework should be understood within the broader historical and socio-economic context the country has gone through since the colonial era. Most of the colonial era laws were enacted largely to serve and protect the interests of the ruling elite by suppressing dissent and criminalising speech deemed critical of established authority. Similarly, recent laws, including

72 Gloppen, S., & Kanyongolo, F. (2007). Courts and the Poor in Malawi: Economic Marginalization, Vulnerability, and the Law. *International Journal of Constitutional Law*, 5. https://www.researchgate.net/publication/228286487_Courts_and_the_Poor_in_Malawi_Economic_Marginalization_Vulnerability_and_the_Law

amendments to old colonial laws, have been enacted to meet the demands of the new political dispensation. This serves to protect the interests of particular groups, mostly those in power, at the expense of the majority of Malawians who are predominantly rural, poor and cut off from urban life and traditional media.

Malawi has a population of around 18 million people, a third of which is illiterate and excluded from mainstream discourse on matters of national importance, save for once in five years when they get to cast the ballot. Few Malawians also get to enjoy and celebrate constitutional guarantees on human rights, including freedom of expression and access to information, due to various factors such as unawareness, fear or lack of readily available means of communication. The most readily available means of communication is through radio, which is also not available in some parts of the country. Urban dwellers are slightly more privileged: they enjoy limited or full access to newspapers, radio, the internet and other forms of communication not available to the rural masses, albeit at varying degrees depending on their level of education, disposable income and social standing. Urban dwellers have also over the years freely participated in mass demonstrations and other forms of protests, as expressions of dissatisfaction with certain government policy directions or general socio-economic developments in the country.

It is important to note, however, that poverty remains the predominant feature of life for the majority of Malawians, and respect for human rights – including media freedom and freedom of expression, citizen participation in the governance process and good governance more broadly – are seen as central in the promotion of democracy and the fight against poverty. Promotion of democracy and poverty reduction have partly shaped and influenced the enactment of laws in democratic Malawi, beginning with the Republican Constitution in 1994, which has a Bill of Rights with clear guarantees on media freedom and freedom of expression. This is further evinced through Malawi’s overarching medium-term national development strategy framework, the Malawi Growth and Development Strategy, which is currently in its fourth and final stage of implementation for the period of 2017 to 2022. The Malawi Growth and Development Strategy seeks to promote sustainable development in line with the SDGs and the AU Agenda 2063.

CONSTITUTIONAL GUARANTEE OF THE RIGHT TO FREEDOM OF EXPRESSION

Freedom of expression is guaranteed under section 35 of the Malawi Constitution, which states that: “Every person shall have the right to freedom of expression.” The constitution also provides for the right to freedom of opinion in section 34; press freedom in section 36; access to information in section 37; and freedom of assembly in section 38. All of these rights could be considered part and parcel of the right to freedom of expression, and central in the exercise thereof.

Apart from the explicit provision of freedom of expression and related human rights, the Malawi Constitution also provides a framework within which such rights could be limited. Section 44(2) states that rights may only be limited if the limitation is prescribed by a law of general application; reasonable; recognised by international human rights standards; and necessary in an open and democratic society. This is in line with international instruments and standards, including the ICCPR and the African Charter. The constitution further states that limitations of human rights must not amount to a denial of the right.

Section 5 of the Malawi Constitution also provides that: “Any act of Government or any law that is inconsistent with the provisions of this Constitution shall, to the extent of such inconsistency, be invalid.” Further, section 199 provides for the supremacy of the constitution in the following terms: “This Constitution shall have the status as supreme law and there shall be no legal or political authority save as is provided by or under this Constitution.”

As such, any law, policy or regulation that limits freedom of expression, but does not meet the conditions as provided in section 44(2), is inconsistent with the constitution and therefore invalid when read with section 5 and section 199 thereof. In other words, restrictions on the right to freedom of expression and the associated rights must be reasonable, recognised by international human rights standards, and necessary in an open and democratic society.

ANALYSIS OF RESTRICTIONS TO FREEDOM OF EXPRESSION

This section looks at three laws that affect freedom of expression, namely the Cyber Security and Electronic Transaction Act 33 of 2016;⁷³ the Protected Flag, Emblems and Names Act 10 of 1967 (as amended by Act 11 of 2012);⁷⁴ and section 60 of the Penal Code.⁷⁵ As discussed below, it is argued that these laws are inconsistent with the constitution and unduly limit fundamental provisions that Malawi is trying to promote to eradicate poverty and promote democracy.

The Cyber Security Act is a relatively new law that seeks to regulate online transactions, and in the process limits online expression. The legislation has explicit clauses that provide a basis for the limitation of online expression. The Protected Flag, Emblems and Names Act and section 60 of the Penal Code are old laws, enacted before the 1994 Republican Constitution, and largely in favour of protection of the interests of the state at the expense of the majority of Malawians. These continue to be used to limit freedom of expression and the press, and thereby undermine the potential of human rights to contribute to national development and poverty reduction.

73 <https://malawilii.org/mw/legislation/act/2016/33>

74 <https://malawilii.org/mw/legislation/act/2012/11>

75 https://malawilii.org/system/files/consolidatedlegislation/701/penal_code_pdf_14611.pdf

(i) Cyber Security and Electronic Transactions Act

The Cyber Security and Electronic Transactions Act is a criminal law that was enacted in mid-2016, and assented to by the president on 20 October 2016. It was gazetted on 4 November 2016.

The Cyber Security Act has several sections that deal with freedom of expression. The notable ones include section 24 on freedom of expression and its limitations; section 31 on online content editors; section 32 on the right of reply and penalties for contravening provisions of the section; section 69 on the appointment of cyber inspectors; and section 70 on the powers and functions of cyber inspectors. Although section 24 is specific to freedom of expression, the other sections also have a chilling effect on online users, and can be abused to directly limit expression.

Section 24 provides that online public communication may be restricted in order to prohibit child pornography; prohibit incitement of racial hatred, xenophobia or violence, prohibit justifications of crimes against humanity; promote human dignity and pluralism in the expression of thoughts and opinions; protect public order and national security; facilitate technical restrictions; and enhance compliance with the requirements of any other written law. It is generally agreed that there may be valid reasons for limitations of rights, but such limitations must be circumscribed in order to avoid abuse.

The limitations to online public communication provided for in section 24 of the Cyber Security Act would not pass the test for a justifiable limitation in terms of the constitution or international law. While some of the protections are valid, the danger is that such clauses are broad and open to abuse. In addition, the limitation to freedom of expression based on the promotion of human dignity and pluralism, the protection of public order and national security, the facilitation of technical restrictions and the enhancement of compliance with any other written law creates more problems in a country that already has approximately a dozen laws that limit freedom of expression. These provisions could also be abused to protect the interests of specific groups of people in society at the expense of the majority of the population. Assessed against both the Malawi constitutional framework on limitations on rights and the international instruments and standards, it does not appear that these provisions would pass the test of reasonableness or be found to be necessary in an open and democratic society.

Of particular concern, the identified sections of the Cyber Security Act have a chilling effect, particularly regarding online users. For example, section 31 requires online content producers and editors to publish their identity and other details of their publication. This promotes self-censorship on a platform that offers hope to societies with restrictive environments. In addition, section 32 criminalises freedom of expression; in this regard, section 32(5) states that a person who

fails to publish an apology or right of reply within 24 hours of receipt of a request commits an offence and is liable to a fine of MWK one million (USD 1,360) and imprisonment for twelve months. Furthermore, the presence of cyber inspectors and their mandate to search and confiscate computers and other devices also has the potential to instil fear and promote self-censorship.

The Cyber Security Act generated considerable debate during the period leading up to its enactment. Civil society organisations as well as the private sector raised concerns on the speed with which it had been drafted, and it was ultimately referred back to the Legal Affairs Committee of Parliament for further consultation. However, few changes were made after the consultations, and as it stands, the concerns about the limitations to freedom of expression were not considered. This calls for a robust monitoring of the implementation of the legislation to build a case for reform, and even litigation to test the constitutionality of the limitations on the right to freedom of expression.

(ii) Protected Flag, Emblems and Names Act

This is a 1967 criminal law that was last amended in 2012. This legislation is still applied to silence critics, including journalists and opposition political figures.

Section 4 makes it an offence for a person to “do any act or utter any words or publishes or utters any writing calculated to insult, ridicule or to show disrespect” towards the president, the national flag, armorial ensigns, the public seal or any other protected emblem or likeness. According to the law, it seeks to protect the dignity of the head of state, the national flag, armorial ensigns and the public seal from improper use. Further, it seeks to guard these symbols from professional or commercial use.

However, these reasons do not hold water in an open and democratic society, and limit freedom of expression. Critical narratives about the president and national symbols must be encouraged, not suppressed. The provisions of the current legislation are vague and overly broad, thus rendering them open to abuse. Words such as “disrespectful”, “insult” or “ridicule” can easily be abused, and cannot stand a constitutional test against section 44 (2) of the Malawi Constitution or international human rights standards.

Insulting the president or the armorial ensigns attracts a fine of GBP 1,000 (USD 1,323) and imprisonment for two years. This provision and the penalties have the potential to instil fear in people. For instance, journalists and content producers may think twice before commenting or writing anything that involves the president and the protected symbols, for fear of arrest. This provision has been used several times over the years against opposition political figures: Gwanda Chakuamba was taken to task for a speech in which he was allegedly disrespectful of President Bingu wa Mutharika, by claiming that the president

would be out of office within a few months;⁷⁶ and most recently, a former member of parliament, Bon Kalindo, was arrested for behaving in a disorderly manner and insulting the president.⁷⁷

This legislation has generated debate over the years, including a constitutional challenge by private media house Capital Radio in 2006. At present, the legislation is still applied and is a cause for concern to a lot of stakeholders. MISA Malawi is currently lobbying government to repeal the law.

(iii) Penal Code

The Penal Code is an old criminal law enacted in 1930. It has undergone several amendments over the years, but the majority of the provisions have remained the same. The Malawi Penal Code defines conduct prohibited by the state and sets the penalties for such conduct. The law was enacted by the colonial administration and maintained by Malawi's new administration after independence in 1964, largely because it helped the new rulers maintain their hold on power. The Penal Code has several provisions that are inconsistent with the new constitutional order, including provisions on media freedom and freedom of expression.

Section 60 is of particular concern, and deals with false news. It provides that: "Any person who publishes any false statement, rumor or report likely to cause fear and alarm among the public or disturb public peace shall be guilty of a misdemeanour." Although this section does not specifically mention freedom of expression, it has a direct connection to media freedom and could directly limit both media freedom and freedom of expression, including on online platforms.

The provision raises key questions regarding how one knows whether the content would generate fear or public alarm, and who decides whether the content has actually generated such fear and alarm. This is clearly a limitation on the right to freedom of expression as provided for in the constitution and the international instruments to which Malawi is a party.

Section 60 of the Penal Code is a retrogressive piece of legislation and a nightmare for most journalists. Several journalists have paid the price based on this law. Between 2009 and 2010, MISA Malawi supported an online Journalists for the Zodiac Broadcasting Station group for those who had been arrested for allegedly publishing false news likely to cause fear and alarm. The case lasted two years, and was dismissed in 2010 for lack of evidence. However, the journalist suffered two years of mental anguish only to be released with no case against

76 IRIN. (2005, 19 September). Malawi: Opposition leader's arrest "miscalculated", say analysts. <https://www.thenewhumanitarian.org/news/2005/09/19/opposition-leaders-arrest-miscalculated-say-analysts>

77 The Times Group. (2019, 11 January). Police arrest Bon Kalindo. *The Times Group*. <https://times.mw/police-arrest-bon-kalindo/>

them.⁷⁸ The provision was also applied against journalists Raphael Tenthani and Mabvuto Banda for publishing an article that alleged that President Bingu wa Mutharika feared the New State House was haunted by ghosts. The two were arrested and spent a few days in custody.

Section 60 of the Penal Code promotes self-censorship both online and in traditional media, and is not necessary in an open and democratic society. It contains several aspects that require amendment or repeal. However, law reform is a lengthy process that requires resources and long-term advocacy plans and initiatives. MISA Malawi has been central in advocating for the reform of such laws, and so far the organisation has seen the repeal of section 46 of the Penal Code which empowered a cabinet minister to ban publications deemed not in the public interest. While that section was repealed in 2012, there remains a litany of such laws and the campaign is therefore ongoing.

CONCLUSION AND RECOMMENDATIONS

The Malawi Republican Constitution was founded on principles of participatory democracy and active citizen participation in the governance process. These principles are fundamental in Malawi's efforts to fight corruption and reduce poverty. Such principles and ideals can only be realised through meaningful enjoyment of human rights as provided for in the constitution, including the right to freedom of expression and media freedom.

It is therefore recommended that law reform should be a priority for Malawi to achieve meaningful participatory democracy. Laws enacted during the colonial era, which are inconsistent with the current constitution, should be updated and aligned to the new constitutional order. This will, however, not be easy, as such laws also serve and protect specific interest groups who would want to preserve the status quo. An independent judiciary is key in this realm and stakeholders need to monitor the application of restrictive laws and challenge the constitutionality of such laws. It is also important to set up a network of human rights lawyers to work with freedom of expression advocacy organisations in order to challenge such laws.

⁷⁸ *State v Kamlomo*. (2010), (unreported); see, also, *Republic v Mang'anda* (6) African Law Reports (Malawi), 448, in which the High Court ordered a trial of the accused under section 60 for publishing information alleging that there were bloodsuckers operating in Phalombe, a district in southern Malawi.

MOZAMBIQUE

COUNTRY RESEARCHER: Dércio Tsandzana, Global Voices

RELEVANT CONTEXT

Internet access in Mozambique has tripled in the last 10 years: in 2007, 146,805 citizens had access to the internet, while the 2017 census revealed that by then 1,607,085 used computers and mobile phones. However, there are still few Mozambicans with internet access. Most internet users live in Maputo Province. According to the National Institute of Statistics, 1,309,517 citizens accessed the internet via a mobile phone, with 297,568 accessing the internet via a computer or tablet. Most are based in urban areas, while in rural areas only 346,276 citizens use the internet.

Even though the last few years have seen an increase in the use of the internet in Mozambique, internet penetration remains low at 6.6%, trailing behind Southern Africa's average of 51%. However, the number of mobile phone users in Mozambique continues to grow.

On 25 October 2015, three local internet service providers (ISPs) hiked prices for internet access bundles by approximately 75%. This followed a resolution by the Mozambique National Communication Institute to cut subsidies for Mozambican ISPs, which include financial support for data service, text messages and voice, by 75%.⁷⁹ The cost of data remains one of the biggest barriers to online access in the country.

CONSTITUTIONAL GUARANTEE OF THE RIGHT TO FREEDOM OF EXPRESSION

Article 48 of the Constitution of Mozambique, 2014, encapsulates freedom of expression and information as a right. It stipulates that all citizens have the right to freedom of expression, as well as the right to information. Article 48(2) provides for freedom of the press, including freedom of expression and creation of journalists, access to sources of information, the protection of independence and professional secrecy and the right to create newspapers, publications and other tools to disseminate information.

There is no specific limitation in the constitution, but the right to information and expression is regulated within specific laws. According to the Human Rights Measurement Initiative, freedom of expression is under attack in Mozambique.⁸⁰

⁷⁹ Mozambique Communications Authority (ARECOM), Resolution No. 19/CA/INCM/2015.

⁸⁰ Human Rights Measurement Initiative. (2019). Mozambique.

<https://humanrightsmeasurement.org/tag/mozambique/>

Mozambique received a score of 3.6 out of 10 in 2019 for the protection of freedom of opinion and expression in the measurement data, while the country had previously received a score of 5.3 out of 10 in 2018.

ANALYSIS OF RESTRICTIONS TO FREEDOM OF EXPRESSION

(i) Licensing fees for media workers

In 2018, Mozambique introduced new licensing fees for media workers, which was seen as a threat to press freedom in the country. Approved by the government on 23 July 2018, the new fee structure was introduced with a legal decree setting fee rates for media accreditation that would affect news outlets and foreign correspondents,⁸¹ with a severe impact on those with small budgets. The decree defines the administration, licensing, renewal, endorsement and advertising for outlets of written press, radios, television, and digital platforms, as well as the accreditation for foreign and Mozambican journalists and freelancers. Since the measure was announced by Mozambique's Bureau of Information, it has been contested by many organisations, and described by Amnesty International as a "a blatant attempt to clamp down on journalists".⁸²

Following a complaint submitted by a group of journalists to the Bureau of Information against the decree, it is not yet known if this will be implemented. The decree came just a few months before the municipal elections in October 2018, and one year before general elections in October 2019. For the 2019 general elections, the Election National Commission accredited approximately 3,236 journalists across the country, of which 3,160 were nationals and 103 were foreigners.

(ii) Law on mobile communications

With regard to the internet, Mozambique introduced new mobile communications measures allegedly to protect privacy, but they could threaten freedom of expression. The Penal Code, passed by Parliament in July 2019, criminalises all types of invasion of privacy via mobile phones, as well as the publication of images or videos without authorisation.⁸³ The law is part of the Penal Code and was the initiative of parliament itself, but there is no clear information about the assumptions that were made in drafting the law.

The law punishes whoever "without consent and with the intention of invading people's private lives, namely the intimacy of family or sexual life: intercepts,

81 Decree No. 40/2018 of 12 June 2018.

82 Amnesty International. (2018, 14 August). Mozambique: Effectively closing the media space with exorbitant accreditation fees. <https://www.amnesty.org/en/latest/news/2018/08/mozambique-effectively-closing-the-media-space-with-exorbitant-accreditation-fees/>

83 Penal Code, approved by Law No. 24/2019 of 24 December 2019.

records, writes down, uses, transmits or divulges conversations, telephone communications, images, photographs, videos, audio, detailed billing, e-mail messages” with up to one year in jail and a fine. An equal penalty could also be imposed against whoever “captures, photographs, films, manipulates, records or disseminates images of persons or of intimate objects or spaces”, as well as against whoever “secretly observes or listens to persons who are in a private place”. The law also seeks to punish anyone who discloses “facts concerning the private life or serious illness of another person”.

The law is recent and has been the subject of debate on various platforms, and has yet to be fully implemented. There is currently no known case in which the new Penal Code has been applied.

(iii) Law on electronic transactions

Additionally, since 2017, Mozambique has had a law on electronic transactions, which penalises the use of the internet to denigrate another’s image.⁸⁴ The main objective of the law is to create legal security in electronic transactions (as a means of communication for rendering services) through the establishment of a legal framework, and to impose penalties for cyber offences, in order to promote public and private investment, the use of technologies, and to make the electronic transactions faster. The law also created the National Institute of Information and Communication Technologies (*Instituto Nacional de Tecnologias de Informação e Comunicação*).

In summary, the law covers the following aspects: grants legal effect to data messages or information in electronic format, provided that they satisfy certain legal requirements and formalities; sets out requirements for the certification of electronic signatures and the use of data messages as legal evidence; gives legal effectiveness to electronic messages in the process of contract formation; regulates e-commerce; assigns to the Bank of Mozambique the power to issue safety assurance standards for all payments made through electronic payment instruments; and assigns responsibility to the issuers of electronic payment instruments. The law also sets out the legal framework for consumer protection in contracts related to e-commerce; creates the legal framework for e-government, which gives legal effectiveness to the care and rendering of electronic services in public administration; and regulates the Digital Certification System and Encryption, which provides security mechanisms to ensure authenticity, confidentiality and integrity of information and documents used in electronic transactions.

The challenge regarding this law is in respect of access to information. At present, it is not known how it will be implemented in this regard. For instance, since it

⁸⁴ Electronic Transactions Act, approved by Law No. 2/2017 of 9 January 2017.

was created, it is not known which actions have already been taken or which electronic crimes have been solved. There are also concerns regarding a general lack of clarity and the vagueness of some of its provisions.

(iii) Surveillance measures

Surveillance remains a concern in the country. In 2016, Mozambicans learned that the government had been listening to telephone calls, reading text messages and monitoring social media and internet activity. The revelations published by independent media outlet @Verdade on 4 May 2016 also described how authorities intercepted and monitored communications between Mozambican citizens using a technical system.⁸⁵ In addition, in July 2016, it was reported that the government had begun installing 450 security cameras in the cities of Maputo and Matola, as part of the National Ordinance on Intercepting Information project, which reportedly includes plans to wiretap the general public.

Recently, the government has pushed for the registration of pre-paid SIM cards, despite concerns related to privacy and the potential interference with election monitoring efforts. On 28 June 2019, the Mozambican Communications Authority (ARECOM), a public entity that regulates the postal and telecommunications sectors and manages the radio frequency spectrum, launched a 10-day ultimatum for operators to urgently register all users of pre-paid SIM cards. This push dates back to 2010, when the government approved a ministerial decree that required users of mobile phones to register their SIM cards within a month.

The government maintains that the registration of SIM cards will help it fight crime and fraud. However, this raises serious concerns about the infringement of users' rights to communicate privately. The government's latest ultimatum came just a few months before the country's general election. Mobile phones have proved to be an essential tool for election monitoring in Mozambique, where citizen observers use them to send photos and videos that can illustrate issues on election day as well as contribute to the transparency of the voting process.

As a result, measures aimed at blocking unregistered prepaid SIM cards could affect citizen participation during the elections. Authorities will be able to identify owners of registered SIM cards, as well as infer or trace whoever is making a call or sending an SMS. In previous years, the use of mobile phones enabled electoral observation through digital and mobile platforms. Moreover, mobile and internet connections have been key tools for election monitoring efforts in Mozambique. Citizen observers have used their cameras to document any issues or irregularities on election day to contribute to the transparency of the voting process. Unlike some of its neighbouring countries, Mozambique does

⁸⁵ Tsandzana, D. (2016, 16 May). Mozambican government is spying on its citizens according to @Verdade. *Global Voices*. <https://advoc.globalvoices.org/2016/05/16/the-government-of-mozambique-is-spying-on-its-citizens-according-to-verdade>

not have a record of restricting access to networks at times of elections and political upheavals. However, in the 2019 general election, no electoral monitoring application was created, which may have been due to the limited capacity of civil society organisations, given the restriction on the registration of SIM cards or even difficulties in accessing the internet.

CONCLUSION AND RECOMMENDATIONS

Access to information is the major difficulty for implementing laws in Mozambique. There is little social and collective mobilisation of citizens to be part of the laws that have been discussed. Notably, there is no civic engagement. Therefore, there is an urgent need to create local committees of discussion to know how specific laws can affect rights on access to information and the right to expression. There is an urgent need to disseminate laws, especially in schools and communities. It is important to mobilize many other actors, and not just limit the process to public institutions or influential personalities.

There is also a lack of in-depth research that looks at the social, political, economic and legal contexts in which these measures are taking place. The work of advocacy organisations has an important function in increasing public awareness, but the debate on this complex issue requires more nuanced and time-consuming research than many advocacy organisations have the resources for. Such research could not only help advocacy organisations, but also policy-makers grappling with building regulatory frameworks to keep up with the rapid technological advancements happening around the world.

NAMIBIA

COUNTRY RESEARCHER: Frederico Links, Institute for Public Policy Research

RELEVANT CONTEXT

On 21 March 1990 Namibia was born as a constitutional democracy after decades of brutal rule by apartheid South Africa, which itself democratised in 1994. During apartheid rule, Namibia was administered as a province of South Africa, with South African law applying fully to the then South West Africa. At independence in 1990, Namibia inherited the body of apartheid South African law.

Over the 30 years since independence, many of the old apartheid-era laws have gradually been scrapped, but some still remain on Namibian statute books and have an influence on freedom of expression and access to information in the country. At the same time, over the years, Namibian authorities have also introduced various laws which have become worrisome in this context.

At the outset, it should be emphasised that Namibia is not an authoritarian state, and that repression of human rights, including freedom of expression, is by no means a usual or normal occurrence. Nevertheless, there are laws on the country's statute books which would allow or enable such repression if or when those with autocratic and securocratic tendencies or intentions were to come to power, either democratically or undemocratically.

Furthermore, in the context of freedom of expression, it should be noted that Namibia is considered the freest media environment on the African continent by Reporters Without Borders, which issues an annual global press freedom ranking. In the 2019 World Press Freedom Index, Namibia ranked 23rd in the world and first in Africa.⁸⁶

CONSTITUTIONAL GUARANTEE OF THE RIGHT TO FREEDOM OF EXPRESSION

The right to freedom of expression is enshrined in the Namibian Constitution,⁸⁷ which since its adoption at the dawn of independent Namibia, has been hailed as highly progressive in terms of its protections of human rights and freedoms on the African continent. Article 21 of chapter 3 of the constitution states that all persons shall have the right to freedom of speech and expression, which includes freedom of the press and other media.

⁸⁶ rsf.org/en/ranking.

⁸⁷ <https://www.un.int/namibia/namibia/chapter-3-fundamental-human-rights-and-freedoms>

In a public awareness raising booklet, the Legal Assistance Centre succinctly explains this right as follows:

This is the right of all people to speak freely, even if they criticise government or express unpopular views. It includes freedom of the press (newspapers, radio and television) and other media (which would include online platforms). Freedom of speech ensures that important issues can be freely discussed and debated by all Namibians.⁸⁸

In another awareness raising publication, the Legal Assistance Centre states:

Article 21 of our Constitution guarantees all persons in Namibia “freedom of speech and expression” and “freedom to assemble peaceably and without arms”. But the Constitution goes even further on the right to express public opinions. Article 17(1) gives all citizens the right to participate in peaceful political activity intended to influence the policies of Government, while Article 95(k) declares that government will promote policies aimed at “encouragement of the mass of the population through education and other activities and through their organisations to influence Government policy by debating its decisions”.⁸⁹

What these excerpts are meant to illustrate is that freedom of expression is fairly well established and protected in the Namibian Constitution. As to limitations to freedom of expression and the media, article 22 of the Namibian Constitution makes provision for limiting the absolute enjoyment of fundamental rights and freedoms, including freedom of expression and media freedom. Against this backdrop though, it has to be pointed out that a number of laws, from both the pre- and post-independence eras, have risen as potential threats to freedom of expression over the years, along with the conduct of state actors.

There have been two landmark cases testing the limits of constitutionally-enshrined freedom of expression in Namibia over the last 30 years: *Kauesa v Minister of Home Affairs and Others*;⁹⁰ and *State v Smith and Others*.⁹¹ The *Kauesa* case, in particular, set the tone for a very narrow limitation of freedom of expression that has stood the test of time, and the *Smith* case gave further weight to this interpretation. In this regard, the Legal Assistance Centre stated:

The court noted that the right to freedom of speech in Namibia is essential to the evolutionary process set up at the time of independence in order to rid the country of apartheid and its attendant consequences. In order

88 <http://www.lac.org.na/projects/sjp/Pdf/knowyourconstitution-eng.pdf>

89 Hubbard, D. (2003). Namibia: Land of the free? Police and public gatherings. *Legal Assistance Centre*. <https://www.lac.org.na/projects/grap/Pdf/dvfree.pdf>

90 1995 NR 175 (SC). <https://namiblii.org/na/judgment/supreme-court/1995/3>

91 1996 NR 367 (HC). <https://namiblii.org/na/judgment/high-court/1996/16>

to live in and maintain a democratic State the citizens must be free to speak, criticise and praise where praise is due. Muted silence is not an ingredient of democracy, because the exchange of ideas is essential to the development of democracy.⁹²

Despite this, the issue of how far freedom of expression legally stretches has never been satisfactorily resolved, and in 2018 the chairperson of Namibia's Law Reform and Development Commission and current justice minister Yvonne Dausab stated in an opinion-editorial:

Namibia, therefore, finds itself in a very unique position to determine which direction to take on freedom of expression, and what hate speech regulation will look like. We have laws and we have constitutional provisions, but they have never been seriously articulated in the courts to set clear precedents.⁹³

ANALYSIS OF RESTRICTIONS TO FREEDOM OF EXPRESSION

For present purposes, there are three laws on the Namibian statute books have been identified as being especially threatening to freedom of expression in this country: the Protection of Information Act 84 of 1982;⁹⁴ the Communications Act 8 of 2009;⁹⁵ and the Prevention and Combating of Terrorist and Proliferation Activities Act 4 of 2014.⁹⁶ However, these are not the only laws that stand as threats to freedom of expression in Namibia, as another also bears mention in this context: the Research, Science and Technology Act 23 of 2004.⁹⁷

(i) Protection of Information Act

This is an apartheid-era law which criminalises the possession and dissemination of state information that is deemed secret, thus having a negative bearing on freedom of expression and media freedom. The two sections of the law of particular relevance are section 3 regarding the prohibition of obtaining and disclosure of certain information, and section 4 regarding the prohibition of disclosure of certain information.

92 Legal Assistance Centre. Key judgments 1990-2000. <http://www.lac.org.na/index.php/news/cases/>

93 Yvonne Dausab, Y., & Dennis, E. (2018, 22 June). Hate speech in Namibia - where do we draw the line?. *Action Namibia*. <https://action-namibia.org/hate-speech-namibia-draw-line/>

94 https://laws.parliament.na/cms_documents/protection-of-information-77ac09a8f9.pdf

95 https://laws.parliament.na/cms_documents/communications-86425fd24c.pdf

96 https://laws.parliament.na/cms_documents/prevention-and-combating-of-terrorist-and-proliferation-activities--9bb88f2083.pdf

97 https://laws.parliament.na/cms_documents/research,-science-and-technology-0c956b2b37.pdf

As leading Namibian governance expert, emeritus professor Andre du Pisani explained:

The Protection of Information Act, 1982 restricts the information civil servants can release to the public and the absence of a freedom of information law makes it difficult for the public, and particularly the media, to gain access to public information held by the State.⁹⁸

Further, the Media Institute for Southern Africa observed that:

While the rationale behind this law is national security, it can easily be argued that it provides a (too) wide ranging framework, restricting media access to official government documents – even on issues of no relevance to national security. It could thus easily be (mis-)used for the wrong purposes, such as censoring the media.⁹⁹

Similarly, the Access to Information in Namibia (ACTION) Coalition has also stated with regard to this law:

That this law, which stands as a threat to freedom of expression and media freedom, is allowed to remain on the statute books is highly concerning and communicates a lack of commitment to transparency and accountability in the state sector and undermines political pronouncements about increasing openness.¹⁰⁰

The ACTION Coalition – a coalition of civil society, media and activists pushing for an access to information law – has called on the Namibian authorities to repeal the law, stating: “It is high time that the body of Namibian laws is cleansed of this apartheid law and replaced by an access to information law.”

In 2018, the Protection of Information Act was used to attempt to muzzle the media reporting on alleged corrupt activities happening under the cloak of secrecy that shrouds the activities of the Namibia Central Intelligence Service.¹⁰¹ This attempt ultimately failed as both the Namibian High Court and Supreme Court found in favour of the media organisation and against the state security agency. According to the High Court: “Article 21(2) of the Constitution allows for reasonable limitations of the Article 21(1)(a) rights and freedoms. Any limitation that would lend itself to unlawful purposes could clearly not be considered as

98 <https://www.right2info.org/resources/publications/pretoria-finalization-meeting-april-2013-documents/national-security-and-rti-in-namibia/view>

99 https://ippr.org.na/wp-content/uploads/2017/12/AccessDenied_WEB01122017.pdf

100 <https://action-namibia.org/apartheid-information-law-not-to-be-repealed/>. Disclaimer: At the time of writing, the author was the chairperson of the ACTION Coalition.

101 The Patriot. (2018, 23 June). Intelligence extravaganza... as NCIS threatens to appeal. *The Patriot*. <https://thepatriot.com.na/index.php/2018/06/23/intelligence-extravaganza/>

reasonable. In such a scenario the relied upon art 21(1)(a) of the respondents would have to prevail.”¹⁰² Further in this regard, the Supreme Court ruled as follows:¹⁰³

Although the High Court was satisfied that the appellants have the constitutional competence to protect sensitive information compromising national security, it highlighted the importance of freedom of speech and the press in an open and democratic society. The court *a quo* held that in this case The Patriot acted responsibly and with integrity by seeking to verify the information obtained from source(s) and to obtain comment thereon from the NCIS before publication. The court *a quo* was, however, not satisfied that sufficient evidence was tendered to justify the conclusion that the information possessed by The Patriot, and its publication, would harm national security.

As it stands, despite repeated calls from civil society and the media for this law to be repealed, Namibian legislative and executive authorities have yet to heed the call.

(ii) Communications Act

Part 6 of the Communications Act enables the interception of telecommunications. The constitutionality of this part of the law is highly contentious. In particular, what is concerning about this part of the law is that it has never been gazetted since the law was passed in 2009, and most of the law’s provisions were officially operationalised in 2011. Furthermore, no provision is made for privacy protections, or for appropriate regulatory and oversight mechanisms. At the time of writing, Namibia currently does not have a privacy or data protection law, even though privacy is enshrined as a fundamental human right in article 13 of the constitution.

In a presentation in front of a parliamentary committee in 2009, before the Communications Act was enacted, in opposing part 6 of the proposed law at that stage, Namibian Ombudsman John Walters stated:

My understanding of Part 6 of the Communications Bill is that law enforcement agencies will be entirely free to decide whether circumstances justify recourse to surveillance and having so determined, be allowed unlimited discretion in determining the scope and duration of the surveillance. If Part 6 is left unamended, it will result in our courts being called upon to decide whether the risk of warrantless surveillance may be imposed on the Namibian people at the sole discretion of the

¹⁰² <https://namiblii.org/na/judgment/high-court-main-division/2018/174>

¹⁰³ <https://namiblii.org/na/judgment/supreme-court/2019/7>

law enforcement agencies. If the State is allowed to arbitrarily intercept our private correspondence, it will no longer be possible to strike a reasonable balance between the citizen's right to privacy (to be left alone) and the right of the State to interfere in that right to pursue a legitimate objective, notably the need to combat crime and national security.

It was because of this and similar interventions, from various other civil society and media stakeholders, that part 6 has never been gazetted and operationalised. Even so, over the years, there has been strong anecdotal evidence that despite the enabling framework not being in place, state security actors have been engaging in invasive and potentially human rights violating surveillance activities. In a 2019 briefing paper that lays out a circumstantial narrative case for surveillance overreach and abuse by the Namibia Central Intelligence Service (NCIS) over the last decade or so, the Institute for Public Policy Research noted that:

Thus, it can plausibly be argued, communications interception and surveillance overreach and abuse characterise whatever interception and surveillance activities and practices are being carried out by state security and intelligence services. This presents a challenge and a threat to the rule of law, Namibia's constitutional order – as the right to privacy is constitutionally enshrined – and ultimately to a still emergent democracy. Unchecked surveillance, if suspicions about such activities and practices are prevalent enough in society, has a “chilling effect” on freedom of expression and association and could potentially lead to widespread self-censorship and a silencing of legitimate political expression.¹⁰⁴

That said, to date, part 6 of the law has not been challenged in a court of law, given that officially it is not in operation.

(iii) Prevention and Combating of Terrorist and Proliferation Activities Act

Of concern in this law are part 1 on the introductory provisions and part 4 on the investigating powers and other anti-terrorism and proliferation measures. More specifically, the problematic provision in part 1 is section 1 on the definitions and interpretation, and most of the section of part 4, particularly section 40 that deals with the interception of communications and admissibility of intercepted communications.

With regard to part 1(1), the Institute for Public Policy Research, on behalf of the ACTION Coalition, has stated:

¹⁰⁴ Links, F. (2019, 11 June). Spying on Speech, The Threat of Unchecked Communications Surveillance. IPPR. <https://ippr.org.na/publication/spying-on-speech>. Disclaimer: The author also authored the briefing paper.

In terms of the definition in the 2014 Act, the scope of “any act committed by a person with the intention of instilling terror” is very wide and hard to pin down. For example, a media report could have a frightening effect on the public, but this may be because the events being described in the report are frightening. If a media report induces feelings of fear in a readership or audience could a journalist or editor be accused of “instilling terror”? The possibility of such broad interpretations by law enforcement officers and the courts raises the spectre of the law being abused to persecute journalists or other members of the public who may publish or post contentious material.¹⁰⁵

Concerns about the broadness and vagueness of the definition are also prompted by the notion that terrorist activity includes “any act which is calculated or intended to intimidate, instil fear, force, coerce or induce any government, body, institution, the general public or any segment thereof, to do or abstain from doing any act, or to adopt or abandon a particular standpoint, or to act according to certain principles.” The laxity in this wording is of such magnitude that it could be interpreted as applying to any protest or demonstration aimed at influencing the government, any other body, or the public. Robustly applying public pressure, for example through a noisy but peaceful demonstration, for a change in policy could be interpreted as an attempt to “force” or “induce” such a change. Even a demonstration that may turn violent would not necessarily constitute “terrorist activity” and should be dealt with under public order laws.

Similarly, an act that seeks to change an established position of any institution could also conceivably be in the form of a newspaper article, radio broadcast, or social media post. While it may not have been the intention of the legal drafters to target demonstrators, journalists or citizens expressing themselves, definitions in law should be worded with extreme care and in a manner that rules out the possibility of loose or even malicious interpretation. All such clauses should be measured against the constitution to ensure they do not transgress the Bill of Rights.

With regard to part 4 of the law, the Institute for Public Policy Research states:

The application of the various sections of Part 4 may be appropriate when dealing with well-grounded suspicions of terrorist activity. However, since the various actions and interventions outlined in Part 4 are predicated to a large extent on the extremely broad definition of “terrorist activity” in Part 1, there is a possibility that they can be abused to target the media, civil society, opposition groups and others.

¹⁰⁵ <https://ippr.org.na/wp-content/uploads/2015/06/Anti-terror%20Paper%20Final%20h.pdf>

As these assessments indicate, the issue is to what extent the actions and activities of law enforcement and state security actors can have a chilling effect on freedom of expression, both on- and offline.

CONCLUSION AND RECOMMENDATIONS

The highlighted laws pose a considerable potential threat to freedom of expression, both on- and offline, in Namibia. Given this potential threat to Namibians enjoying freedom of expression as promoted by principle 3 of the African Declaration on Internet Rights and Freedoms, it would be best if these laws are either all repealed or significantly amended to cull the threat or to bring them in line with best practice and to remove the perceived incongruity with constitutionally protected freedom of expression and media freedom and Namibia's extensive international obligations to build out and enhance freedom of expression. Advocacy efforts – both in Namibia and beyond – should thus be sharpened and focussed towards this end.

SOUTH AFRICA

COUNTRY RESEARCHER: Avani Singh, ALT Advisory

CONSTITUTIONAL GUARANTEE OF THE RIGHT TO FREEDOM OF EXPRESSION

The right to freedom of expression is firmly established in the constitutional dispensation in South Africa. As a point of departure, section 16(1) of the Constitution of the Republic of South Africa, 1996 provides for the general protection of the right, stating that:

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

- (a) freedom of the press and other media;
- (b) freedom to receive or impart information or ideas;
- (c) freedom of artistic creativity;
- (d) academic freedom and freedom of scientific research.

The wide formulation of the right applies regardless of the medium through which it is conveyed, and includes certain forms of conduct, such as protests.¹⁰⁶ The Constitutional Court has described freedom of expression as “a *sine qua non* for every person’s right to realise her or his full potential as a human being”,¹⁰⁷ and has emphasised that:¹⁰⁸

Freedom of expression lies at the heart of a democracy. It is valuable for many reasons, including its instrumental function as a guarantor of democracy, its implicit recognition and protection of the moral agency of individuals in our society and its facilitation of the search for truth by individuals and society generally. The Constitution recognises that individuals in our society need to be able to hear, form and express opinions and views freely on a wide range of matters.

The right to freedom of expression is not absolute, and also does not automatically trump the enjoyment of other rights, such as the rights to dignity or privacy, which are also constitutionally enshrined. This requires a balance to be struck amongst the competing rights and interests at stake. There are two key provisions in the constitution that deal with the limitation of the right to freedom of expression, against which any restriction of the right must be tested.

106 *South African Transport and Allied Workers Union and Another v Garvas and Others*. [2012]. ZACC 13, paras 62-66.

107 *Case and Another v Minister of Safety and Security and Others; Curtis v Minister of Safety and Others*. [1996], ZACC 7, para 26.

108 *South African National Defence Union v Minister of Defence and Another*. [1999]. ZACC 7 (SANDU), para 7.

The first is section 16(2) of the constitution, which identifies those types of speech that do not enjoy constitutional protection: propaganda for 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 Constitutional Court has explained this as follows:¹⁰⁹

We are obliged to delineate the bounds of the constitutional guarantee of free expression generously. Section 16 is in two parts: the first sub-section sets out expression protected under the Constitution. It indeed has an expansive reach ... The second part contains three categories of expression which are expressly excluded from constitutional protection. It follows clearly that unless an expressive act is excluded by section 16(2) it is protected expression. Plainly, the right to free expression in our Constitution is neither paramount over other guaranteed rights nor limitless ... In appropriate circumstances authorised by the Constitution itself, a law of general application may limit freedom of expression.

The second provision of relevance to the limitation of the right to freedom of expression is section 36 of the constitution, which is the general limitations clause. Section 36(1) provides that a right in the Bill of Rights may be limited only in terms of a law of general application “to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom”. The provision goes on to state that any assessment of a limitation must take into account all relevant factors, including the nature of the right; the importance of the purpose of the limitation; the nature and extent of the limitation; the relationship between the limitation and its purpose; and less restrictive means to achieve the purpose.

Section 36(2) goes on to make clear that, except as provided for in sub-section (1) or any other provision of the constitution, no law may limit any right entrenched in the Bill of Rights.

In sum, therefore, a three-part test can be distilled when assessing whether a limitation of the right to freedom of expression can pass constitutional muster:¹¹⁰

- Step 1: Is the expression excluded in terms of section 16(2) of the constitution? If yes, that is the end of the enquiry. If not, then the expression is protected under section 16(1) and it is necessary to move on to the next step.
- Step 2: Is there a common law rule or statutory provision that limits the protection of freedom of expression? If yes, then it is

109 *Laugh It Off Promotions CC v SAB International (Finance) BV t/a Sabmark International*. [2005]. ZACC 7, para 47.

110 Milo, D., & Singh, A. (2018). Freedom of expression. In J. Brickhill (Ed.), *Public interest litigation in South Africa*. Cape Town: Juta.

necessary to move on to the next step. If not, that is the end of the enquiry.

- Step 3: Is the limitation of freedom of expression reasonable and justifiable, as contemplated under the general limitations clause in section 36 of the constitution? If yes, the law permissibly limits freedom of expression. If not, then the law is an impermissible limitation of freedom of expression.

ANALYSIS OF RESTRICTIONS TO FREEDOM OF EXPRESSION

(i) Promotion of Equality and Prevention of Unfair Discrimination Act

While the constitution does not use the term “hate speech”, section 16(2)(c) of the constitution does proscribe advocacy of hatred that is based on race, ethnicity, gender, or religion, and that constitutes incitement to cause harm. This has been colloquially interpreted as the hate speech provision.

The prohibition on hate speech has further been codified under domestic law in terms of section 10 of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (PEPUDA). Section 10(1) of PEPUDA is broader than section 16(2)(c) of the constitution, and provides as follows:

- (1) Subject to the proviso in section 12, no person may publish, propagate, advocate or communicate words based on one or more of the prohibited grounds, against any person, that could reasonably be construed to demonstrate a clear intention to-
 - (a) be hurtful;
 - (b) be harmful;
 - (c) promote or propagate hatred.

It bears mention that this provision has created significant uncertainty, because it is unclear whether the provisions of sub-sections (a) to (c) should be read cumulatively or disjunctively. This is because the provision does not contain the word “and” or “or” between sub-sections (a) to (c), which makes it unclear whether all three stipulations must be present in order to constitute hate speech.

Section 10(1) of PEPUDA creates a civil remedy. PEPUDA does not go as far as to create a criminal offence of hate speech, but does provide in section 10(2) thereof that a court may refer any case dealing with the publication, advocacy, propagation or communication of hate speech to the relevant Director of Public Prosecutions to institute proceedings in terms of the common law or any legislation.

In seeking to balance the hate speech provision with the right to freedom of expression, section 12 of PEPUDA contains an important proviso. It provides that the following will not be prohibited as hate speech: *bona fide* engagement

in artistic creativity, academic and scientific enquiry, fair and accurate reporting in the public interest or publication of any information, advertisement or notice in accordance with section 16 of the constitution. In respect of the media, this makes it clear that journalists reporting on incidences of hate speech will not themselves be guilty of hate speech.¹¹¹

While it may be argued that the prohibition on hate speech serves an important underlying purpose, and in a generalised sense is consonant with the position under international law,¹¹² this must, however, must be balanced against the importance of the right to freedom of expression. In the South African context, the Equality Court has explained that, at a social level, hate speech is prohibited for four main reasons: to prevent psychological harm to targeted groups that would effectively impair their ability to positively participate in the community and contribute to society; to prevent both visible exclusion of minority groups that would deny them equal opportunities and benefits of society and invisibly exclude their acceptance as equals; to prevent disruption to public order and social peace stemming from retaliation by victims; and to prevent social conflagration and political disintegration.¹¹³

However, it is also a significant limitation on the right to freedom of expression. In the light of the importance of the right of freedom of expression, the question to be determined is whether section 10(1) of PEPUDA constitutes a justifiable limitation of the right.

The issue of whether the hate speech provision contained in section 10(1) of PEPUDA constitutes a justifiable limitation of the right to freedom of expression has received some attention from the domestic courts in recent years. Of particular relevance is the case of Mr Qwelane, who wrote a column for the Sunday Sun titled “Call me names – but gay is NOT okay”. The column contained various offensive references with regard to homosexuality and was accompanied by a cartoon depicting a man on his knees alongside a goat, appearing in front of a priest to be married. The caption read: “When human rights meet animal rights”.

The South African Human Rights Commission (SAHRC) – the national human rights institution in South Africa – instituted proceedings against Mr Qwelane in the Equality Court, arguing that his column constituted hate speech in terms of section 10(1) of PEPUDA. In response, Mr Qwelane challenged the constitutionality of section 10(1) of PEPUDA, arguing that the prohibition is inconsistent with the right to freedom of expression. Mr Qwelane further argued that the provision is vague and overbroad, and goes beyond the scope of unprotected speech covered by section 16(2)(c) of the constitution.

111 Ibid., 312.

112 See, for example, articles 19 and 20 of the International Covenant on Civil and Political Rights.

113 *Afri-Forum and Another v Malema and Others*. [2011]. ZAEQC 2, para 29.

The matter was first heard by the Equality Court. The Equality Court was not persuaded that section 10(1) of PEPUDA was unconstitutional. In dealing with the arguments regarding the vagueness of the provision, the Equality Court explained as follows:¹¹⁴

The first words in s 10(1) of [PEPUDA] are clear that the section imposes an objective test in order to determine whether the words in question reflect the requisite intention. Furthermore, the proviso in s 12 is not susceptible to any uncertainty. It is plain that speech that falls within the proviso is not prohibited by s 10, more so that no case has been made out to place the offending statements in the proviso. Furthermore, the words hurtful and harmful are capable of easy and intelligible meaning. Hurt connotes hurt to feelings and harmful relates to physical harm of whatever nature.

Furthermore, with regard to the arguments regarding the overbreadth of the provision, the Equality Court was of the view that the provision did not suffer from overbreadth or fail to meet the requirements of the limitations clause under section 36 of the constitution, merely because it prohibited more speech than section 16(2) of the constitution.¹¹⁵ Instead, the Equality Court was of the view that section 10(1) of PEPUDA constitutes a reasonable and justifiable limitation of the right to freedom of expression, particularly because the harm that could be caused by hate speech “by far outweighs the limited interests of speakers in nevertheless communicating such speech.”¹¹⁶

Accordingly, the Equality Court found that the hate speech provision under section 10(1) of PEPUDA constituted a justifiable limitation of the right to freedom of expression. On appeal, however, the Supreme Court of Appeal (SCA) reached a different view.

Before the SCA, following an analysis of the constitutional provision of the right to freedom of expression, the court went on to note that the constitutional standard involves an objective test: a primary assessment of whether the expression complained of comprises advocacy of hatred based on one of the prohibited grounds, and then a further assessment of whether the advocacy of hatred constitutes incitement to cause harm.¹¹⁷ On the other hand, section 10(1) of PEPUDA commences by considering whether a person published, propagated,

114 *South African Human Rights Commission v Qwelane; Qwelane v Minister for Justice and Correctional Services*. [2017]. ZAGPJHC 218, para 58.

115 *Ibid.*, para 64.

116 *Ibid.*

117 *Qwelane v South African Human Rights Commission and Another*. [2019]. ZASCA 167, para 62. For a summary of the judgment, see Power Singh Incorporated. (2019, 3 December). Supreme Court of Appeal declares hate speech provision unconstitutional. <https://powersingh.africa/2019/12/03/supreme-court-of-appeal-declares-hate-speech-provision-unconstitutional/>

advocated or communicated words based on one or more of the prohibited grounds against any person, and then looks to see whether the words complained of could “reasonably be construed to demonstrate a clear intention to be hurtful, harmful or to incite harm, promote or propagate hatred”.¹¹⁸ Before the SCA, all parties conceded that the provisions of sub-sections 10(1)(a) to (c) of PEPUDA must be read disjunctively.¹¹⁹

According to the SCA, the disjunctive interpretation of section 10(1) of PEPUDA departed significantly from the objective constitutional test, and replaced it with the subjective opinion of a reasonable person hearing the words.¹²⁰ The SCA described this as “an extensive infringement on the right to freedom of expression”.¹²¹

In respect of the issue of justification, the SCA stated as follows:¹²²

In the present case, in interpreting the legislation in question, one should be aware that one is dealing with competing for constitutional rights and with the Legislature’s understandable concern that hate speech should not be allowed to threaten the constitutional project. It is clear, as observed by commentators, that it wanted to regulate hate speech as broadly as possible. Unfortunately, it did not do so with the necessary precision and within constitutional bounds.

In sum, the SCA held that the provisions of section 10 of PEPUDA could not be saved by an interpretive exercise, finding that “[t]he problems ... in relation thereto are too extensive and s 10(1) of PEPUDA cannot be interpreted so as to render it consistent with, rather than inimical to, the Constitution.”¹²³ Accordingly, the SCA held section 10(1) of PEPUDA to be unconstitutional and referred the matter to the Constitutional Court for confirmation of the order of constitutional invalidity.

It will now be for the Constitutional Court to make a final determination on the constitutionality of section 10(1) of PEPUDA. This will be a significant case in South Africa, as it will be the first time that the Constitutional Court is directly called on to make such an assessment regarding hate speech. It will also likely serve as a key consideration for law-makers in the current process that is underway to criminalise hate speech in terms of the proposed Prevention and Combatting of Hate Crimes and Hate Speech Bill¹²⁴ (Hate Speech Bill).

118 Ibid., para 63.

119 Ibid., para 64.

120 Ibid., para 66.

121 Ibid.

122 Ibid., para 87.

123 Ibid., para 88.

124 Parliamentary Monitoring Group. Prevention and Combatting of Hate Crimes and Hate Speech Bill B9-2018. <https://pmg.org.za/bill/779/>

(ii) Prevention and Combatting of Hate Crimes and Hate Speech Bill

As mentioned above, section 10(1) of PEPUDA creates a civil remedy. In terms of section 10(2), matters may be referred to the relevant Director of Public Prosecutions for possible prosecution, which thus far in South Africa has typically taken the form of a charge of the common law offence of *crimen iniuria*. At present in South Africa, there is no criminal offence of hate speech per se.

There are, however, proposals to change this position. In April 2018, the Minister of Justice and Correctional Services introduced the Hate Speech Bill in the National Assembly of Parliament. As set out in the long title of the Hate Speech Bill, its objects include:

To give effect to the Republic's obligations in terms of the Constitution and international human rights instruments concerning racism, racial discrimination, xenophobia and related intolerance, in accordance with international law obligations; to provide for the offence of hate crime and the offence of hate speech and the prosecution of persons who commit those offences; to provide for appropriate sentences that may be imposed on persons who commit hate crime and hate speech offences; to provide for the prevention of hate crimes and hate speech; to provide for the reporting on the implementation, application and administration of this Act; to effect consequential amendments to certain Acts of Parliament; and to provide for matters connected therewith.

Section 4(1) of the Hate Speech Bill sets out the criminal offence of hate speech in the following terms:

- (1)(a) Any person who intentionally publishes, propagates or advocates anything or communicates to one or more persons in a manner that could reasonably be construed to demonstrate a clear intention to—
- (i) be harmful or to incite harm; or
 - (ii) promote or propagate hatred, based on one or more of the following grounds:
 - (aa) age;
 - (bb) albinism;
 - (cc) birth;
 - (dd) colour;
 - (ee) culture;
 - (ff) disability;
 - (gg) ethnic or social origin;
 - (hh) gender or gender identity;
 - (ii) HIV status;
 - (jj) language;
 - (kk) nationality, migrant or refugee status;

(ll) race;
(mm) religion;
(nn) sex, which includes intersex; or
(oo) sexual orientation,
is guilty of an offence of hate speech.

Section 4(1)(b) expressly deals with electronic communications. It provides that it is an offence to intentionally distribute or make available an electronic communication – that a person knows constitutes hate speech – through an electronic communications system that is either accessible by a member of the public, or is accessible by or directed at a specific person who can be considered to be a victim of hate speech. Presumably, this would include posts on social media, such as Facebook or Twitter, as well as private communications, such as WhatsApp messages.

Importantly for the exercise of freedom of expression, section 4(2) of the Hate Speech Bill contains the following proviso:

- (2) The provisions of subsection (1) do not apply in respect of anything done as contemplated in subsection (1) if it is done in good faith in the course of engagement in—
- (a) any *bona fide* artistic creativity, performance or other form of expression, to the extent that such creativity, performance or expression does not advocate hatred that constitutes incitement to cause harm, based on one or more of the grounds referred to in subsection (1)(a);
 - (b) any academic or scientific inquiry;
 - (c) fair and accurate reporting or commentary in the public interest or in the publication of any information, commentary, advertisement or notice, in accordance with section 16(1) of the Constitution of the Republic of South Africa, 1996; or
 - (d) the *bona fide* interpretation and proselytising or espousing of any religious tenet, belief, teaching, doctrine or writings, to the extent that such interpretation and proselytisation does not advocate hatred that constitutes incitement to cause harm, based on one or more of the grounds referred to in subsection (1)(a).

The Hate Speech Bill has been met with mixed responses. Some have welcomed it, contending that there is an urgent need to address, among other things, racist speech in South Africa that rises to the level of hate speech. Others, however, have argued that the criminalisation of speech will undoubtedly have a chilling effect on the exercise of freedom of expression.

At present, the Hate Speech Bill is pending before parliament, with various public consultation processes that must still be undertaken. It therefore remains to

be seen whether the Hate Speech Bill will pass in its current form, and further whether it will be deemed to pass constitutional muster when tested in line with section 16 of the constitution.

CONCLUSION AND RECOMMENDATIONS

Principle 3 of the African Declaration on Internet Rights and Freedoms makes clear that everyone has the right to freedom of expression, which includes “freedom to seek, receive and impart information and ideas of all kinds through the Internet and digital technologies and regardless of frontiers”. The same principle goes on to stipulate that the exercise of freedom of expression should not be subject to any restrictions, except those which are provided by law; pursue a legitimate aim as expressly listed under international human rights law (namely the rights or reputations of others, the protection of national security, or of public order, public health or morals); and are necessary and proportionate in pursuance of a legitimate aim.

In the context of hate speech, PEPUDA and the Hate Speech Bill would be the two pieces of legislation which proscribe hate speech, in addition to reliance on certain aspects of the common law. Arguably, the right to freedom of expression would need to be balanced against the aims of protecting the rights or reputations of others, which is permissible under international human rights law.

However, it is particularly the third step of the limitations analysis – whether the limitations are necessary and proportionate in pursuance of a legitimate aim – that bears emphasis. Given that prohibitions on speech are a severe encroachment on the right to freedom of expression, these should be narrowly construed to ensure that this does not result in an unjustifiable limitation of the right. Caution should be taken, in particular, to the criminalisation of speech, and other restorative and rehabilitative measures should be considered instead.

With hate speech, careful regard should be had to ensure that the emotive nature of the issues do not trump the legitimate exercise of the right to freedom of expression. In the absence of a universally-accepted definition of hate speech, laws of this nature should be narrowly framed to ensure that they comply with the requirement of being the least restrictive measure available to achieve the desired purpose.

Building on South Africa’s apartheid-era past, and bearing in mind the ongoing systemic inequality that persists, it is understandable that there would be a need for efforts to address hate speech domestically. However, the current laws – both PEPUDA and the Hate Speech Bill – raise serious concerns of unduly encroaching on the right to freedom of expression and unjustifiably limiting the right.

In the light of the above discussion, it is necessary to distinguish between the following categories of hate speech:¹²⁵

- Speech that must be prohibited: This would include speech that falls into the category of unprotected speech in terms of section 16(2)(c) of the constitution – namely, advocacy of hatred that is based on race, ethnicity, gender, or religion, and that constitutes incitement to cause harm – that does not enjoy constitutional protection.
- Speech that may be prohibited: This would include other types of prohibitions on hate speech that are prescribed by law, such as that which is sought by section 10 of PEPUDA and section 4 of the Hate Speech Bill (if passed into law), provided that these limitations are reasonable and justifiable when tested against the limitations analysis. Notably, this should also reach a clear severity threshold in order to be prohibited,¹²⁶ with appropriate exceptions for certain types of speech, such as artistic expression or satire.
- Lawful speech: This would include speech that falls within the bounds of a legitimate and justifiable exercise of the right to freedom of expression, but may nevertheless show intolerance or be controversial in the views expressed. While such speech may warrant a critical response, the expression is nevertheless permissible within the bounds of the right to freedom of expression.

With hate speech currently a central tenet of debate in the freedom of expression realm in South Africa, there are a number of opportunities for civil society, the media and other stakeholders to engage. This includes through interventions and coverage of the Constitutional Court proceedings in Mr Qwelane’s matter, as well as submissions on the Hate Speech Bill. Importantly, in the face of ongoing instances of what may constitute hate speech, the publication of counter narratives is also a much needed arrow in the quiver that both safeguards the exercise of freedom of expression and resists the hurtful nature of the offending speech.

125 ARTICLE 19. (2019, 23 December). Hate speech explained. 2015, 18. <https://www.article19.org/resources/hate-speech-explained-a-toolkit/>

126 Ibid., 78-81.

TANZANIA

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RELEVANT CONTEXT

Tanzania has been described as one of the most diverse in Africa, and this is reflected in the fact that there are more than 120 local languages spoken in the country. Swahili is the national language that is widely spoken, while English is the official language of education; administration and business. According to the National Bureau of Statistics, Tanzania in Figures 2018 report of June 2019, the population of Tanzania has increased more than four times from 12.3 million in 1967 to 54.2 million in 2018. According to the 2012 Population and Housing Census, the average annual intercensal growth rate is 2.7 percent.¹²⁷

Generally, Tanzanian culture is a product of African, Arab, European and Indian influences. Traditional African values are being consciously adapted to modern life, although at a much slower pace among the Maasai.¹²⁸

Tanzania is a party to a number of international and regional agreements which provide for commitments and obligations to freedom of expression and access to information. These agreements recognise the right to information as a tenet of democratic governance. This includes the UDHR, the ICCPR and the African Charter.

In terms of Tanzania's legal system, this is governed by the common law system since its introduction by the Tanganyika Order in Council of 1920. The system has been customised with some exceptions and modifications to suit the local circumstances. It traces its historical background mostly from the British rule administration during the colonial period. Being a British protectorate, Tanzania's law was imported into Tanganyika (as it was then) via India by the British administration, where it had been long established. As such, the basic structure of the present legal system is influenced by the English legal system structure and it is much the same from when it was first introduced into the territory in the early 1920s. To date, Tanzanian's legal system remain fundamentally an adversarial legal system.¹²⁹

The Constitution of the United Republic of Tanzania, 1977 provides in its preamble that Tanzania aims at "building a democratic society founded on the principles of freedom, justice, fraternity and concord". This preamble requires

127 https://www.nbs.go.tz/nbs/takwimu/references/Tanzania_in_Figures_2018.pdf

128 <https://www.embassyoftanzaniarome.info/en/about-tanzania/country-profile>

129 <http://www.tanzania.go.tz/administrationf.html>

the executive to be accountable to the people. In the same way, the legislature is supposed to be accountable to the people since it represents them. To ensure equality before the law, the judiciary is independent to dispense justice without fear or favour to anybody.

There have been a number of developments regarding the press in the country. It was during the British administration that significant development in print media laws appeared. The first main law controlling print media activities was the Newspaper Ordinance, which came into operation on 1 November 1928, and was aimed at enacting provisions for registration and regulation of newspapers.¹³⁰ In August 1952 an amendment to the Newspaper Ordinance was passed by the Legislative Council, in terms of which all periodicals considered newspapers by the government were only exempted when they were regarded as supportive to the government.¹³¹

The growth of nationalism, led by Tanganyika African National Union (TANU), forced the colonial government to mobilise its newspapers, like the Tanganyika Standard, to influence public opinion against TANU. On the part of the indigenous people, this was met by a rise in the number of nationalist publications, both party and non-party. The first and most important among these was the TANU-sponsored Mwafrika, which started in 1956.¹³²

In 1970, the National Security Act came into force. It had its origin in the English Official Secrets Act, 1911. It makes provisions relating to state security, espionage, sabotage and other activities prejudicial to the interests of the state. Arguably, the law's major aim was to prevent journalists and other people from the publication of information on Tanzanian defence and security arrangements, which might be of interest to an aggressor. However, the law contains provisions which suppress the print media, including giving the government absolute powers to define what should be disclosed to, or withheld from, the public.¹³³

The main law controlling the operations of newspapers in Tanzania, the Newspaper Act, was enacted on 3 April 1976. This law aimed at providing for the registration and regulation of newspapers. It is a modification to the Newspaper Ordinance of 1928, dating back to the colonial days, with cumbersome and restrictive provisions impinging upon freedom of expression and freedom of the media.

130 Sturmer, M. (1998). *The media history of Tanzania*. Ndanda Mission Press.
https://www.academia.edu/22172734/The_Media_History_of_Tanzania

131 Ibid.

132 Ibid.

133 Bakari, G. (2010). *Freedom of expression and freedom of the media in Tanzania*. LL.M. thesis. University of Dar es Salaam.

CONSTITUTIONAL GUARANTEE OF THE RIGHT TO FREEDOM OF EXPRESSION

In line with Tanzania's international commitments, the right to freedom of expression is guaranteed under article 18 of the constitution. Article 18 provides that:

Every person –

- (a) Has a freedom of opinion and expression of his ideas;
- (b) Has a right to seek, receive and/or disseminate information regardless of national boundaries;
- (c) Has the freedom to communicate and a freedom with protection from interference from his communication; and
- (d) Has a right to be informed at all times of various important events of life and activities of the people and also of issues of importance to the society.

However, the right to freedom of expression is not absolute, and may be limited in terms of section 30(1) of the constitution, which provides that: "The human rights and freedoms, the principles of which are set out in this Constitution, shall not be exercised by a person in a manner that causes interference with or curtailment of the rights and freedoms of other persons or of the public interest."

ANALYSIS OF RESTRICTIONS ON THE RIGHT TO FREEDOM OF EXPRESSION

The internet and new information and communication technologies (ICTs) are now an integral part of everyday life for many people around the world, giving more and more people a voice and improving openness and public debate in society. On the internet, there are different avenues for freedom of expression that allow people to share their thoughts. Notably, social networks have become mass communication tools and vehicles for mobilisation, and are being used by activists and citizens to relay information that is not always accessible through traditional media. The internet has opened up new possibilities for the realisation of the right to freedom of expression due to its unique characteristics which include speed, worldwide reach and relative anonymity. Any person with access to the internet can exchange communications instantaneously, and such communications can be directed to specific individuals, a group of people or the world at large.

While the internet shows such tremendous developments, restrictions on the right to freedom of expression in relation to ICTs are on the increase: there have been many warnings that more and more states are trying to increase their grip on the growing flow of data and how people express themselves online. In Tanzania for example, several laws which are considered to have a negative impact on online users have also been established to portray the same message. These laws have had a negative impact on the right to freedom of expression,

and have led to an increased control of journalists and bloggers, on print and online publications, any data published and online posts of private citizens.

Specifically, the Statistics Acts and the Access to Information Act criminalises the publication of any statistical information without prior authorisation from the National Bureau of Statistics, and allows the government to withhold information for “the public interest”. Furthermore, the Cybercrimes Act and the Media Services Act contains the provisions most susceptible to be used to repress dissenting voices.

(i) Cyber Crimes Act

The Cybercrimes Act, 2015, which was passed before the general election in October 2015, is aimed at “criminalizing offences related to computer systems and Information Communication Technologies”. It has raised serious concerns, as it was pushed through parliament under a certificate of urgency, without public consultation taking place. Since its enactment, a number of Tanzanians have fallen foul of the law.

The law contains vague and overbroad provisions that empower the government to arbitrarily ban and sanction the dissemination of newspaper articles or social media posts which it deems critical, including insulting the president. Of particular concern, section 16 criminalises the publication of all information deemed “false, deceptive, misleading or inaccurate.” It provides as follows:

Any person who publishes information or data presented in a picture, text, symbol or any other form in a computer system knowing that such information or data is false, deceptive, misleading or inaccurate, and with intent to defame, threaten, abuse, insult, or otherwise deceive or mislead the public or concealing commission of an offence, commits an offence, and shall on conviction be liable to a fine of not less than five million shillings or to imprisonment for a term of not less than three years or to both.

The law gives too much power without meaningful oversight to police, bestowing on the state the ability to arrest any person who publishes so-called “false information”, and powers to search offices and homes of suspected violators of law, seize their electronic equipment and even demand their data from online service providers. As a consequence, activists and people in general exercise considerable self-censorship.

Since the Cybercrimes Act was effected without enabling regulations detailing implementation procedures, the law remains open to interpretation by enforcement officers, who purportedly act in the interests of influential individuals and not according to the law. The law gives a police officer in charge of a police station

the power to issue an order for the collection of data relating to information subject to a criminal investigation.¹³⁴

Another controversial aspect is section 31 of the law, which gives extensive powers to law enforcement officers to search and seize electronic devices and computer systems, and to order wiretapping of persons' electronic communications where it could reasonably form part of evidence. Therefore, if one is somehow connected to the investigation, without proof of direct involvement in a crime, the affected person can be subject to orders of search and seizure and targeted surveillance. In terms of section 37, this also includes use of intrusive surveillance methods, such as key logging (using software to record keyboard strokes of personal computers in real time).

According to section 36, these powers can be exercised without a court order, but where the recording, while section 37 provides that a court order may be discretionally applied for where the preservation and disclosure of such data cannot be done without the use of force or resistance from the holder of the data. Generally, the law infringes on the right to privacy and freedom of expression online, and does not provide for the protection of human rights.

Although social media practitioners and human rights groups contended that the law aimed to stop people from expressing their views and sharing information, the government maintained that the main objectives behind the enactment of the Cybercrimes Act was to fill the gap in regulatory and legal framework on cybercrimes in Tanzania. The government claimed that for a long time the country was a safe haven for offenders who did not face any legal implications in cybercrime offences.

However, a few days after the enactment of the Cybercrimes Act, the general public, including civil society organisations, political parties, bloggers and journalists, started to experience the consequences of the law. For example, on 25 October 2015, the police invaded the opposition party's assembling polling centre and arrested 38 people who were collecting election results from across the country. During the arrest, police also confiscated the opposition party's laptops. These people were charged, *inter alia*, under section 16 of the Cybercrimes Act for publishing "inaccurate and unverified data" over Facebook, Twitter and the party's election management system.¹³⁵

A similar incident occurred against the Legal and Human Rights Centre, when on 29 October 2015 the police ambushed the Election Observers Data Centre, alleging that it was counting, tallying and disseminating election results contrary to law. A number of data clerks and officers were arrested and equipment was

134 Media Council of Tanzania. (2019). *State of the media in Tanzania: 2017-2018*.

135 Ibid.

seized. The seized items were returned 18 July 2016 following the expiration of the 90 days' notice by the Legal and Human Rights Centre to sue the Inspector General of Police and the Attorney General.¹³⁶

In November 2015, four people were charged under section 16 of the Cybercrimes Act for publishing false, election-related information on WhatsApp. The four appeared before the court in Dar es Salaam on 6 November 2015. Public prosecutors alleged that the accused published audio information on a WhatsApp group called the "Soka Group", that was intended to mislead the public during the October general elections.¹³⁷

Further to the above, the Cyber Crimes Act has already been an annoyance to social media users. In October 2015, Benedict Angelo Ngonyani was charged for "spreading misleading information" after he posted on Facebook that Tanzania's Chief of Defence Forces had been hospitalised following food poisoning. In the same month, Sospiter Jonas was charged with "misuse of the internet" after posting on Facebook content stating that the Prime Minister "will only become a gospel preacher". In one of the latest incidents, a lecturer at Mkwawa University College of Education was arrested in September 2016 for allegedly insulting President Magufuli in a Whatsapp message. While confirming the detention of the lecturer, police declined to reveal the content of the message he was accused of sending.¹³⁸ This also happened to another journalist charged for "spreading misleading information", Joseph Gandye, who was arrested in Dar es Salaam after airing a story about the police in Iringa forcing six young detainees to sodomise each other.¹³⁹

The Cyber Crimes Act has been the subject of a court challenge by Jamii Media. This platform has more than 2.4 million users, 28 million mobile subscribers and up to 600,000 people using its online forum every day, and has become Tanzania's top social platform as well as a safe forum for whistle-blowers, where several corruption scandals were unveiled or alleged. The increasing allegations made the government eager to control and eventually stop the forum. In January and February 2016, and in terms of section 32 of the Cyber Crimes Act, the police issued eight letters asking Jamii Media to disclose the IP address of several of its users linked to the allegations of corruption scandals in the oil and banking sectors.

In April 2016, Jamii Media went to court to challenge these demands, as well as the constitutionality of sections 32 and 38 of the Cyber Crimes Act for infringing the right to be heard, the right to privacy and the right to freedom of expression.

¹³⁶ Ibid.

¹³⁷ Ibid.

¹³⁸ CIPESA. (2016). *State of internet freedom in Tanzania*.

¹³⁹ <https://www.voanews.com/africa/tanzanian-journalist-arrested-publishing-false-news>

It was further argued that this constituted a breach of the rights of Tanzanians to use the internet as stipulated in article 30(3) of the constitution. However, in March 2017, the High Court declared sections 32 and 38 to be constitutional. Jamii Media has indicated that it intends to appeal the decision.

(ii) Electronic and Postal Communications (Online Content) Regulations, 2018

These regulations published by the government in March 2018 mainly focus on regulating activities undertaken by bloggers, online forums, online video and audio producers, as well as social media. The regulations have attracted public debate, given that they are controversial and perceived to be a threat to freedom of expression. The regulations were strongly criticised from public and international communities, and have been challenged in court by bloggers and activists. Although the government won the case to impose online regulations, the fact remains that the regulations have not been well received well by the public and international community.

The regulations outline a number of requirements which online service providers must fulfil. The regulations seek to regulate the conduct of private companies and individuals in relation to the publication of and access to online content. They prohibit a wide range of content and create new obligations and offences, which constitute a serious interference with the rights to freedom of expression and privacy. The obligations and offences created by the regulations are so wide-ranging that it is deeply inappropriate to use subsidiary legislation (such as these regulations) rather than statute to create them. Among other things, the prohibitions contained in the regulations are framed in such overbroad language that would inevitably lead to the removal of legitimate expression.

Regulation 4 sets out the powers of the Communications Regulatory Authority. These include the keeping of a register of bloggers, online forums, online radios and televisions; and actions against non-compliance with the regulations, such as ordering the removal of prohibited content. It is argued that the legal basis for these powers is contained in section 103(1) of the Electronic and Postal Communications Act, 2010, which grants powers to the minister responsible for communications to create regulations on content-related matters. However, the powers laid down in regulation 4 seriously interfere with the fundamental rights to freedom of expression and privacy. Under international law, powers to order the removal of content should rest with the courts. At a minimum, removal orders should be made by independent authorities, and should be subject to judicial review.

(iii) Media Services Act

Media stakeholders had all along expressed reservations about the Media Services Act, 2016 on the grounds that it contradicts the guarantee of freedom

of expression contained in article 18 of the constitution. The Media Services Act, which came into force in November 2016, introduced a mandatory accreditation for journalists and gave powers to the Board of Accreditation to withdraw accreditation; it criminalised defamation, false news and rumours and seditious statements; and it conferred absolute power on the minister to prohibit importation of publications and sanction media content. Under the law, the government-run Accreditation Board is empowered to “suspend or expunge journalists” for committing “gross professional misconduct as prescribed in the code of ethics for professional journalists.” The penalties for violating provisions of law are severe. According to the law, anyone found guilty of acting with a seditious intention is liable to a fine of not less than 5 million shillings (USD 2,150) or three years in prison or both.

The law has been the subject of a court challenge before the East African Court of Justice (EACJ).¹⁴⁰ It was brought by three non-governmental organisations: the Media Council of Tanzania, the Legal and Human Rights Centre and the Tanzania Human Rights and Defenders Coalition. The organisations raised challenges regarding the law’s use of criminal offences for defamation, false news and other conduct by the media; the restrictions imposed on the publication of conduct; and the requirement of media accreditation. It was argued that these provisions infringed on freedom of expression and media freedom in Tanzania, and violated articles 6(d), 7 and 8 of the Treaty for the Establishment of the East African Community (EAC Treaty).

The EACJ unanimously held that numerous provisions in the Media Services Act violated the EAC Treaty, as they infringed on the right to freedom of expression. The EACJ found that the Tanzanian government had failed to demonstrate that the limitations to the right in the law were legitimate, and held that the impugned provisions also violated the right to freedom of expression protected by the African Charter. The EACJ directed Tanzania to bring the Media Services Act into compliance with the EAC Treaty.

(iii) Statistics Act

In September 2018, the Tanzanian parliament passed amendments to the national Statistics Act, 2015, which included a provision for criminal penalties for anyone who publishes information that does not comply with the National Bureau of Statistics methodology or that challenges official statistics.¹⁴¹ Amendments to the Statistics Act introduce new procedures for publishing non-official information and create an offence of dissemination of statistical information that criminalises

¹⁴⁰ *Media Council of Tanzania and Others v Attorney General of the United Republic of Tanzania*, Reference No. 2 of 2017, EACJ.

¹⁴¹ Nyabola, N. (2018, 4 November). Freedom of expression in Tanzania slowly eroded. *Al Jazeera*. <https://www.aljazeera.com/indepth/opinion/freedom-expression-tanzania-slowly-eroded-181104131453497.html>

fact checking by making illegal the publication of data that invalidates, distorts or discredits official government statistics.

Section 37(4) and (5) of the act provides as follows:

(4) Any communication media, which publishes false or misleading statistical information...commits an offence and shall be liable to a fine of not less than ten million shillings (USD 4,300) or to imprisonment for a term of not less than twelve months or to both.

(5) Any person or agency, which without lawful authorization of the Bureau publishes or communicates statistical information which may result to the distortion of facts, commits an offence and shall be liable on conviction to a fine of not less than ten million shillings or to imprisonment for a term of not less than twelve months or to both.

These provisions have significantly affected the opinions and findings of other organisations or agents doing research in the country.

(iv) Other laws

Apart from the laws mentioned above, on 27 June 2019 parliament passed the contentious Written Laws (Miscellaneous Amendments No. 3 of 2019) Bill into law, and further adopted amendments to eight laws, including the Companies Act, the Non-Governmental Organisations (NGO) Act, the Societies Act, the Statistics Act and the Films and Stage Plays Act. These amendments introduced sweeping restrictions on the country's already precarious human rights situation. For example, the proposed amendments to the Companies Act will give the Registrar of Companies broad new powers and wide discretion to deregister a company on the basis of undefined and vague terms such as "terrorism financing" or "operating contrary to its objectives".

The proposed amendments to the Non-Governmental Organisations (NGO) Act likewise give the registrar of non-governmental organisations sweeping and wide discretionary powers to suspend an organisation, and to evaluate and investigate their operations. The law will also require such organisations, including community-based and self-help groups, to publish their annual audited financial reports in mainstream media, thereby imposing a cost burden that could bankrupt small grassroots organisations. The government adopted new regulations in 2018 requiring non-governmental organisations to publicly declare their sources of funds, expenditures and intended activities or face deregistration.

In addition, the 2002 Political Parties Act was amended in 2019 to restrict the space in which political parties can independently operate in Tanzania.

(v) Attacks, killings, misplacement and detention of journalists

Journalists, and especially investigative journalists, have been in a great danger while executing their duties. There are several incidents where either the journalists or others have been attacked or detained for exercising their right to freedom of expression.

For example, in March 2013, the chair of the Tanzania Editors Forum, Absalom Kibanda, was physically assaulted while on his way home from work, and his vehicle was vandalised. He was taken to hospital in Dar es Salaam, and later transferred to Johannesburg, South Africa for treatment. Kibanda was attacked because of his journalistic activities. He had previously been accused of sedition following the publication of an article in the Tanzania Daima newspaper in which he criticised the authorities for preventing a protest organised by an opposition political party.¹⁴²

On 5 March 2013, Eliah Ruzika, a Channel Ten reporter, was harassed and arbitrarily arrested by police officers while on duty gathering information in Dar es Salaam. The photographer was shooting video clips at a meeting by the Tanzania-Zambia Railway Authority employees.

In June 2015, the Coconut FM radio station was raided by people who covered their faces. This raid was targeted at arresting a journalist, Ali Mohamed, who had prepared a special programme discussing the chaos and intimidation in the voter registration centres in Zanzibar.¹⁴³

On 18th September 2014, three journalists suffered injuries while on duty at the police headquarters in Dar es Salaam. The police used excessive force as they barred journalists from covering the summoning of the chairman of the main opposition party at the police headquarters.¹⁴⁴

On 14 July 2016, the editor of Mwananchi and a journalist were summoned by the police to make a statement concerning an article published in the newspaper with regard to the way police officers conduct their duties. Similarly, on 20 June 2016, journalists Mussa Robinson Mkama and Prince Newton were arrested by police and charged under section 36(1) of the Newspaper Act for publishing news that was likely to cause fear and alarm to the public or to disturb peace because of an article they published.¹⁴⁵

142 Greenslade, R. (2013, 7 March). Tanzanian journalists under attack. *The Guardian*. <https://www.theguardian.com/media/greenslade/2013/mar/07/journalist-safety-tanzania>

143 NOLA et al. (2016). Universal Periodic Review: Joint report for submission to the Human Rights Council on the United Republic of Tanzania.

144 Ibid.

145 Ibid.

(v) Media house attacks and closure

In January 2016, Mawio, Tanzania's biggest weekly investigative newspaper, was banned under the Newspaper Act only two months after President Magufuli reached power, for allegedly inciting violence in some of its articles. Jabir Idrissa and Simon Mkina, two of Mawio's editors, were briefly detained, which led the owner of the newspaper to denounce the government's use of force and attempts on freedom of speech. Saed Kubenea, the distributor of the newspaper, indicated that "Mawio has been writing a number of analytical and investigative news about what is happening in Zanzibar, and the government is not happy with that". While a court overturned the ban in March 2016, Mawio got banned again in June 2017 under the Media Services Act, which allows authorities to "prohibit or otherwise sanction the publication of any content that jeopardizes national security or public safety".¹⁴⁶

In August 2016, the Information Minister announced the immediate and indefinite ban of Radio Five and Magic FM, on the grounds that they had aired seditious content, without giving further details. They were later able to resume broadcasting.

In March 2017, Dar es Salaam Regional Commissioner, Paul Makonda, went to the headquarters of Clouds Media with six armed men to pressure the staff into airing a video undermining a popular local pastor opposed to him. The station refused to air the video, and the Information Minister ordered an investigation and advised sanctions against Makonda. Instead of following this necessary measure of accountability for an attack on the freedom of the press, President Magufuli fired the Information Minister, and warned the media in a speech that: "I tell media owners: be careful, watch it! If you think you have that kind of freedom ... not to that extent."

This effort to silence the media might result in an increasing self-censorship from the journalists, out of fear of being harassed or of the media outlet being banned or suspended.

CONCLUSION AND RECOMMENDATIONS

Tanzania has been considered by a wide range of people as a country with media and civic freedom, and has been known to champion democracy in Africa. This consideration was proven by a diversity of newspaper, radio and broadcasting stations and people's right to freedom of expression which was guaranteed over the last two decades.¹⁴⁷ However, this has been interfered with by a number of

¹⁴⁶ Kaijage, P. (2017, 18 June). MCT condemns Mawio's ban. *The Citizen*. <https://www.thecitizen.co.tz/news/MCT-condemns-Mawio-s-ban--/1840340-3975872-10ujbf3/index.html>

¹⁴⁷ Tenga, S., & Jesse, J. (2016). An in-depth accountability review of the Cyber Crime Act, Statistics Act and Access to Information and Media Services bills: stakeholders' perspective on the law making process, and

laws that have raised serious concerns. Although the internet and social media have proven to be conducive platforms for knowledge-sharing, increased access to information and freedom of expression, the platforms seem to have been affected by various laws which curtail rights online and offline. The critical issue with these laws is the apparent absence of establishing a balance between civil liberties and the powers of the law enforcement agencies.

In this regard, a clear balance between national security and the right to freedom of expression should be expressly stipulated in the laws in order to bring harmony and peace among citizens. Although the ICCPR requires states to take positive steps to ensure that rights, including freedom of expression, are realised, Tanzania does not have any specific law to safeguard this right, despite the occurrence of various incidents that infringe it. Moreover, the constitution is silent on the medium through which the right to freedom of expression can be exercised. Although the constitution guarantees the right to freedom of expression, it does not explicitly provide for the freedom on the internet.

It should be considered that there is an intrinsic link between freedom of expression and democracy, and therefore laws which curtail freedom of expression could naturally affect democracy. In the case of *Charles Onyango-Obbo and Another v Attorney General*, it was stated that:¹⁴⁸

Protection of the fundamental human rights therefore, is a primary objective of every democratic constitution, and as such is an essential characteristic of democracy. In particular, protection of the right to freedom of expression is of great significance to democracy. It is the bedrock of democratic governance. Meaningful participation of the governed in their governance, which is the hallmark of democracy, is only assured through optimal exercise of the freedom of expression.

In *Constitutional Rights Project and others v Nigeria*, the ACHPR recognised the importance of the right when it held that “freedom of expression is a basic human right, vital to an individual’s personal development and political consciousness, and participation in the conduct of the public affairs of his country.”¹⁴⁹ In addition, in *Ghazi Suleiman v Sudan*, the ACHPR described freedom of expression as “a cornerstone of democracy and ... a means of ensuring respect for all human rights and freedoms.”¹⁵⁰ The High Court of South Africa has commented that

implications for CSOs space in Tanzania. Accountability in Tanzania Programme. <http://www.accountability.or.tz/sites/default/files/300816%20Act%20Report-Accountability%20Review%20of%20Bills%20for%20Act.PDF>

148 *Obbo and Another v Attorney General*, Constitutional Appeal No. 2 of 2002. [2004]. UGSC 1, 10 February 2004. <https://ulii.org/ug/judgment/supreme-court/2004/1>

149 *Constitutional Rights Project v Nigeria*. (1999). Communication Nos 140/94, 141/94 and 145/95.

150 *African Commission Law Offices of Ghazi Suleiman v Sudan*. (2003). Communication No. 228/99.

freedom of expression “is the freedom upon which all others depend; it is the freedom without which the others would not long endure.”¹⁵¹

The benefits of freedom of expression are not only in the sphere of democratisation and politics. The Nobel prize-winning economist Amartya Sen even went as far as to say that countries with a free press do not suffer famines. Whether or not the claim is literally true, the general point is that freedom of expression, encompassing media freedom, is a precondition for the enjoyment of other rights.¹⁵² As described by the Constitutional Court of Colombia, citing the Inter-American Court:

Without effective freedom of expression, materialized in all of its terms, democracy vanishes, pluralism and tolerance start to break down, the mechanisms of citizen oversight and complaint start to become inoperable, and, in short, fertile ground is created for authoritarian systems to take root in society.¹⁵³

As described above, it is apparent that internet freedom in Tanzania is to a large extent limited by the government through a number of laws that impede the use and access of ICTs. While the internet offers great opportunities for citizens to engage and express their views instantaneously, there is inadequate protection of the right to privacy which is essential for individuals to express themselves freely. The trend shows that the government has changed the modality and technicalities of closing the mouths of journalists, human rights activists and bloggers by detaining them and charging them under different laws. This situation is motivated by the fact that the relevant offences are bailable.

Government requests for disclosure of subscriber information, especially on leading forums for discussion of political matters, are among the control mechanisms in place. The requests by law enforcement agencies to service providers are facilitated through the Cybercrimes Act and the Electronic and Postal Communication Act, among other laws which have vague provisions for interception of communications and procedures for compliance with disclosure orders. There is also a lack of transparency in the procedures to warrant the interception of communications, which may lead to the abuse of powers and violation of individual rights. The laws enacted by the state need to respect the constitution and other international instruments on freedom of expression.

151 *Mandela v Falati*. (1994) (4) BCLR 1 (W) at 8.

152 Southern Africa Litigation Centre and Media Legal Defence Initiative. (2016). Freedom of expression: Litigating cases of limitations to the exercise of freedom of speech and opinion, 13.

153 First Chamber of the Constitutional Court of Colombia, Judgment T-904/13, December 3 2013, citing the judgment of the Inter-American the First Chamber of the Constitutional Court of Colombia, citing the judgment of the Inter-American Court in *Ulloa v Costa Rica*, 2 July 2004.

ZAMBIA

COUNTRY RESEARCHER: Jane Chirwa, MISA Zambia

RELEVANT CONTEXT

Geographically, the Republic of Zambia is landlocked. It is situated in Southern Africa and is surrounded by eight countries. In terms of governance and political context, the country practices multiparty democracy and has maintained peace and political stability as public institutions continue to mature. The country has continued to record peaceful transition of power from one party to the next while the opposition has sought legal means to address electoral grievances more than any other means.

Zambia continues to be a peaceful nation, save for incidents of intolerance to divergent views among political stakeholders and contestations on proposed laws, such as Bill 10 that seeks to amend sections of Zambia's constitution, including aspects to do with the electoral process. The opposition consider it to be a law seeking to perpetuate the stay of the ruling party in government. Further, there have been incidents of gassing. According to Home Affairs Minister, Stephen Kampyongo, 370 households on the Copperbelt Province were suspected to have been gassed between 22 January and 14 February 2020, out of which a total of 1,198 people were affected.¹⁵⁴ The reasons for gassing ordinary citizens was unknown, although the state was calling them acts of terrorism with some suspects having been apprehended.

The population of the country is estimated at 17,885,422 according to projections by the Central Statistical Office of Zambia.¹⁵⁵ Poverty levels nationally stand at 54.4%, while rural areas face 76.6% poverty levels and urban poverty is at 23.4%.¹⁵⁶ Economically, the debt levels¹⁵⁷ and currency depreciation are pushing inflation up, while the state keeps introducing various taxes to meet the debt obligation, thereby putting a further financial strain on citizens and businesses.

For more than a decade, between 2000 to 2010, Zambia had attained mac-

154 Chabala, M. (2020, February 2020). 370 households, 1198 people affected by gassing so far - Minister tells Parley. *Diggers*. <https://diggers.news/local/2020/02/20/370-households-1198-people-affected-by-gassing-so-far-minister-tells-parley/>

155 Central Statistical Office of Zambia. (2013). 2010 Census of population and housing: Population and demographic projections 2011-2035.

156 Central Statistical Office of Zambia. (2016). 2015 Living conditions monitoring survey. https://www.zamstats.gov.zm/phocadownload/Living_Conditions/2015%20Living%20Conditions%20Monitoring%20Survey%20Report.pdf

157 Fitch Ratings. (2020, 9 March). Zambia's 2019 debt crisis rise highlights fiscal challenges. *African Markets*. <https://www.african-markets.com/en/news/southern-africa/zambia/fitch-ratings-zambia-s-2019-debt-rise-highlights-fiscal-challenges>

roeconomic stability and achieved impressive real growth averaging 7.7% per annum, which lifted Zambia above the threshold to become a lower-middle income country.¹⁵⁸ However, since the peak of copper prices in 2011 and the recent rising fiscal deficits, the economy has slowed down. Zambia has been facing some of its worst economic hardships with copper prices at their lowest, as well as a significant energy crisis resulting in 10 to 14 hours of load-shedding a day. Growth has largely been subdued by the energy crisis. Furthermore, the recent agriculture season saw a decline in maize output due to drought.¹⁵⁹

There were 4.43 million internet users in Zambia in January 2020. The number of internet users in Zambia increased by 595,000 (approximately 16%) between 2019 and 2020. Internet penetration in Zambia stood at 24% in January 2020, although urban areas have a higher percentage of internet users.¹⁶⁰ This low figure is owed to the high cost of living, high poverty levels and poor infrastructure. In response to this, the government has developed a statutory instrument to address universal access to the internet.

Of significant concern, restrictive laws such as the Information Communication Technologies and Electronic Communications and Transactions Acts of 2009 criminalise certain online activities that impede the right to freedom of expression. Furthermore, older archaic laws like the Penal Code criminalise any activities that have an impact on order, security or public health. This limiting legislative environment, coupled with increased surveillance, has impacted on the levels of effective use of online platforms for the exercise of freedom of expression.

The right to freedom of expression is provided for in article 20 of the Zambian Constitution under the Bill of Rights. It provides for the protection of freedom of expression and association in the following terms:

- (1) Except with his own consent, a person shall not be hindered in the enjoyment of his freedom of expression, that is to say, freedom to hold opinions without interference, freedom to receive ideas and information without interference, freedom to impart and communicate ideas and information without interference, whether the communication be to the public generally or to any person or class of persons, and freedom from interference with his correspondence.
- (2) Subject to the provisions of this Constitution, a law shall not make any provision that derogates from freedom of the press.
- (3) Nothing contained in or done under the authority of any law shall

158 African Development Bank. (2016, February). Country profile: Republic of Zambia. *African Development Bank Group*. https://www.afdb.org/fileadmin/uploads/afdb/Documents/Generic-Documents/Zambia_Country_Profile.pdf

159 Ibid.

160 Kemp, S. (2020, 18 February). Digital 2020: Zambia. *Data Reportal*. <https://datareportal.com/reports/digital-2020-zambia>

be held to be inconsistent with or in contravention of this Article to the extent that it is shown that the law in question makes provision –

- (a) that is reasonably required in the interests of defence, public safety, public order, public morality or public health; or
- (b) that is reasonably required for the purpose of protecting the reputations, rights and freedoms of other persons or the private lives of persons concerned in legal proceedings, preventing the disclosure of information received in confidence, maintaining the authority and independence of the courts, regulating educational institutions in the interests of persons receiving instruction therein, or the registration of, or regulating the technical administration or the technical operation of, newspapers and other publications, telephony, telegraphy, posts, wireless broadcasting or television; or
- (c) that imposes restrictions upon public officers; and except so far as that provision or, the thing done under the authority thereof as the case may be, is shown not to be reasonably justifiable in a democratic society.

The importance of these provisions lies both in their content and effect. According to the constitution, any laws that are inconsistent with the provisions of the constitution are void to the extent of their inconsistency, and can if challenged in court be declared unconstitutional.

In the context of the right to freedom of expression, this has been tested in the courts before. For example, the High Court of Zambia found that section 67 of the Penal Code – which prohibited publication of false information likely to cause public fear – violated the constitution as it did not amount to a reasonable justification for limiting the freedom of expression.¹⁶¹ The background to the case was that on 10 December 2013, Macdonald Chipenzi and others published an article in the Daily Nation, alleging that Zambia’s secret police had recruited a number of foreign militia into the mainstream of the police service. The government subsequently arrested Mr Chipenzi and others, and charged them with having violated section 67 of the Penal Code. Mr Chipenzi successfully challenged the constitutionality of section 67, arguing that the law was inconsistent with article 20 of the constitution.

¹⁶¹ Columbia Global Freedom of Expression. (2014). *Chipenzi v The People*. <https://globalfreedomofexpression.columbia.edu/cases/chipenzi-v-the-people/>

ANALYSIS OF RESTRICTIONS TO FREEDOM OF EXPRESSION

(i) Information Communication Technologies Act

The Information Communication Technologies Act 15 of 2009 has the following objectives: to continue the existence of the Communications Authority, and rename it as the Zambia Information and Communication Technology Authority; to provide for the regulation of ICTs; to facilitate access to ICTs; to protect the rights and interests of service providers and consumers; and to repeal certain laws. It was passed on 26 August 2009, and contains provisions for both civil and criminal offences.

In terms of section 65, the minister may prescribe standards for the performance and operation of any equipment or electronic communications apparatus. Section 65(2)(e) provides that this standard must be aimed at protecting public safety and health. This has resulted in the Statutory Instrument on the Registration of Electronic Communication Apparatus No. 65 of 2011, which requires all mobile phone subscribers in Zambia to register their SIM cards. Of concern, this increases the ability of the state to easily carry out surveillance on citizens. This compromises the ability of citizens, especially human rights defenders, to mobilise and claim citizens' rights from the state, because the registration of SIM cards makes it easy for the state to surveil such people and charge them on trumped up charges.

In 2015, the Lusaka High Court ordered Airtel Zambia to produce the phone and SMS records for two journalists, Clayson Hamasaka and Thomas Zgambo.¹⁶² In this case, Hamasaka and Zgambo have sued the second largest mobile service provider in the country for hacking, blocking and diverting their phones and messages to unknown persons. The matter was expected to be heard on 22 July 2020. The petitioners argue that the interception of their communications is in violation of both domestic and international law. The petitioners seek compensation on the basis that this has endangered their personal, financial and other safety. This case has raised awareness, as well as fear, among citizens of the extent of state surveillance, and has resulted in some members of the public practising self-censorship.

Another section of concern is section 85, which provides that a person who uses any electronic communications apparatus, radio apparatus or radio station for purposes of an offence against public order or public morality, contrary to the provisions of the Penal Code, commits an offence. However, the terms "public order" and "public morality" are vague, and could be used to include any communication that criticises the government or urges protest action against the

¹⁶² *Zambian Watchdog*. (2013, 3 October). State drops charges against Zgambo. *Zambian Watchdog*.
<https://www.zambianwatchdog.com/state-drops-charges-against-zgambo/>

state. As such, this provision compromises democratic rights, such as freedom of expression, as people may be afraid of the intimation and custodial sentence that such offences carry.

For instance, in April 2019 one of Zambia's leading and influential media Facebook pages, KOSWE, was deleted. According to reports, members of the administration submitted complaints to Facebook, claiming that KOSWE was leaking sensitive government documents to the public and threatening the security of the country. The petitions - which were signed by the Presidential Spokesperson, Minister of Defence, Minister of Home Affairs and Minister of Justice - complained to Facebook that if KOSWE was not restricted, the security of the country would be at great risk. This had a significant bearing on the ability of state agents to whistle-blow wrongdoing in state departments, as well as on the ability of citizens and the media to hold government accountable and play an effective watchdog role.

Sections 90(1) and (2) also raise concern. These provisions allow for the Zambia Information and Communication Technology Authority to demand information from a licensee or other person. In terms of sub-section (2), it is an offence not to provide this information. Of concern, this makes it possible for the Zambia Information and Communication Technology Authority to demand and access information, which in turn compromises the rights to freedom of expression, privacy and confidentiality. An example of the impact of this provision is the Mutinta Lushoma Haabasune case, in which Haabasune was an administrator and editor of the Facebook page, Zambia Accurate News Services. Haabasune was placed in police custody and her site was brought down following access to the page's password. The page has since been restored.

Moreover, section 9(1), (2) and (3) of part I of schedule I prohibits the publication or disclosure of information to an unauthorised person. In practice, this has the potential to threaten the privacy rights of citizens and human rights defenders, particularly regarding the ability to conduct covert work or whistle-blowing activities as part of the exercise of freedom of expression.

(ii) Electronic Communications and Transactions Act

The Electronic Communications and Transactions Act 21 of 2009 aims to develop a safe, secure and effective environment for the consumer, business sector and government to conduct and use electronic communications; to promote legal certainty and confidence, and encourage investment and innovation, in the electronic communication systems and networks; to establish the Central Monitoring and Coordination Centre and define its functions; and to repeal certain laws.¹⁶³ It was enacted on 31 August 2009, and provides for civil and criminal sanctions.

¹⁶³ https://www.zicta.zm/Downloads/The%20Acts%20and%20SIs/ICT%20Acts/ect_act_2009.pdf

Section 22(4) requires the registration of all persons based in Zambia providing cryptography services and products. It states that: "A person who intends to provide a cryptograph service or product shall apply to the Authority for registration in the prescribed manner and form upon payment of the prescribed fee." Those who fail to register are liable upon conviction to a fine or imprisonment for a period not exceeding seven years, or to both. This provision threatens investigative journalism, freedom of expression and whistle-blowing activities.

Sections 41 and 42 provide for the protection of personal information, and outline the principles governing the collection of personal information. Section 42 states that a collector must disclose the specific purpose for which any personal information is being requested, collated, processed or stored. Of concern, however, is that authorised persons can request the data and track down online users. For example, in April 2019, the Daily Nation reported that the administrators of the KOSWE Facebook page were arrested for allegedly publishing false and malicious articles and insulting the ruling party. As mentioned above, the government also alleged that the Facebook page was a threat to national security because it published sensitive government information. The page was deleted from Facebook. It is notable that the Zambia Information and Communications Technology Agency and Huawei assisted law enforcement officers in identifying and tracking the suspects. The page has been restored.

Similarly, section 61 allows persons to request the takedown of any data or activities infringing their rights or containing unlawful materials or activities. This threatens freedom of expression because websites can be taken down through such a request. For instance, *Zambian Accurate and Balanced News* was reportedly shut down after it accused the ruling party of rigging the elections and bribing judges.

Section 62(1) bars service providers from active monitoring of users' activities. However, in terms of sub-section (2), the minister is empowered to issue a statutory instrument to prescribe procedures for service providers to inform the competent public authorities of alleged illegal activities undertaken, or information provided, by recipients of their service; and communicate to the competent authorities, at their request, information enabling the identification of recipients of their service." This section therefore contemplates interception and constant monitoring, and threatens the right to freedom of expression as members of the public will be concerned about their communications being monitored.

There have been various concerning examples in this regard. For instance, the Zambia Police Service confirmed that they had arrested administrators of *Zed Hule*, *Zambian Watch* and a WhatsApp group for offences of proposing violence, libel and pornography, in contravention of the Penal Code and the Electronic Communications Act. It was further confirmed that between February and March 2020, the police had arrested four other persons for similar offences

relating to Facebook posts. According to the police, the charged persons would be appearing in court soon and charged with the applicable offences.

Also of relevance in this regard is section 65, which establishes the Central Monitoring and Coordination Centre and is legally permitted to intercept communications. It poses a threat to the right to freedom of expression, because it gives rise to fear among the public of their communications being monitored. As mentioned above, two journalists are currently suing Airtel Networks Zambia Plc. for the unlawful interception of their communications.

Equally, section 66 permits authorised enforcement officers to intercept communications or to obtain evidence. The officer is expected to apply, on an *ex parte* basis, to a judge of the High Court in order to conduct the interception. This renders journalists and human rights defenders susceptible to surveillance, which impacts on their privacy and ability to carry out advocacy in a discrete manner. In the same way, sections 67(1) and 68 permit enforcement officers to intercept communications to prevent harm of property and persons. Whilst it seems innocent on face value, this has the potential to be abused to spy on persons with dissenting views.

In terms of sections 77 and 79, service providers are required to assist with interception by installing the necessary equipment, and by allowing law enforcement officers to install hardware and software for interception and real-time interception assistance. Continued surveillance affects the ability to freely express oneself, and may render persons subject to intimidation or arrest. Section 78 also requires a service provider to obtain the full identification and address of persons with whom they are entering into a contract for the provision of services, which diminishes privacy and anonymity online and thereby compromises the right to freedom of expression.

Section 81 permits the disclosure of customer information to law enforcement officers and others to facilitate the protection of rights or property. It reduces privacy and anonymity, and consequently compromises the right to freedom of expression. In December 2018, a member of the Zambia Police Service warned police and immigration officers spreading falsehoods on social media and urged immediate disciplinary action against officers who do so. The groups were deleted and the state is still appealing to citizens and civil servants not to be peddlers of what they describe as “fake news” on online platforms. Of similar concern is section 82, which permits law enforcement officers to access communications in electronic storage. As with section 81, this raises concerns of infringing on the rights of freedom of expression, privacy and anonymity. In March 2020, the police arrested a teenager for insulting the president, and charged the 15-year-old boy with defamation for manipulating the president’s image. The matter is still pending in court.

Also of relevance are sections 83 and 84, which provide for access to communications in remote computing services and access to records of electronic communication services or remote computing services; and section 89, which prevents the obstruction of law enforcement officers by using encryption; and section 95, which empowers a cyber inspector without prior notice, on the authority of a warrant, to enter any premises or access any information system. These provisions have the potential to compromise the rights to freedom of expression, privacy and anonymity, including the duty on journalists not to reveal their sources.

CONCLUSION AND RECOMMENDATIONS

Principle 3 of the African Declaration on Internet Rights and Freedoms provides for the right to freedom of expression. Furthermore, the preamble of the declaration emphasises that the internet is an enabling space and resource for the realisation of all human rights. It also notes that in order to fully benefit from its development potential, the internet must be accessible, available and affordable for all persons in Africa. In addition, it affirms the internet as a vital tool for the realisation of the right of all people to participate freely in the governance of their country, and to enjoy equal access to public services.

It is apparent that the laws referred to in this case study have the ability to compromise the right to freedom of expression as provided for in article 20(1) of the constitution and in principle 3 of the African Declaration on Internet Rights and Freedoms. These laws together make it legal for the state to conduct interception and surveillance of citizens, and to demand digitally-stored information and passwords. This has a major bearing on the exercise of the right to freedom of expression by individuals, corporations and the media. It is of further concern that Zambia does not have a data protection law to protect the privacy rights of the public.

More advocacy needs to be conducted to challenge the constitutionality of certain sections of the identified laws, in order for Zambia to attain the desired aspirations outlined in the African Declaration on Internet Rights and Freedoms.

ZIMBABWE

COUNTRY RESEARCHER: Kuda Hove, Privacy International (formerly MISA Zimbabwe)

RELEVANT CONTEXT

Zimbabwe is a country with an estimated population of 17 million people.¹⁶⁴ The country has a supreme constitution, thus theoretically making it a constitutional democracy. A separation of powers exists in Zimbabwe with government structures divided into the executive, legislative and judicial branches.¹⁶⁵ The country has an executive president who assents to bills and other legislation received from the bicameral National Assembly, thereby making the president a part of the national law-making process.

Section 61 of the Constitution of Zimbabwe, 2013¹⁶⁶ clearly provides for the right to freedom of expression and freedom of the media. This right is one of several fundamental rights found in the Declaration of Rights contained in the constitution. The Declaration of Rights, as set out in Chapter 4 of the constitution, entrenches the fundamental rights that are recognised and protected in Zimbabwe.

Section 44 of the constitution states that the provisions of the Declaration of Rights place an obligation on every natural and juristic member of Zimbabwean society, by stating that: “The State and every person, including juristic persons, and every institution and agency of the government at every level must respect, protect, promote and fulfil the rights and freedoms set out in this Chapter.”

Furthermore, section 45(1) of the constitution bears a stark reminder that the Declaration of Rights “binds the State and all executive, legislative, and judicial institutions and agencies of government at every level.”

In addition, section 2 of the constitution states that the constitution is the supreme law of Zimbabwe. This means that any laws, policies, customs and practices that contravene the spirit and letter of the constitution are unconstitutional to the extent of the deviation from the relevant constitutional principles.

However, despite these clear constitutional pronouncements that call for the protection and promotion of fundamental rights, such as the right to freedom of expression, Zimbabwe still scores poorly on various regional and global state of the freedom of expression matrices. For example, according to Freedom House,

¹⁶⁴ Country Meters. Zimbabwe population. https://countrymeters.info/en/Zimbabwe#population_2019

¹⁶⁵ Chapters 5, 6 and 8 of the Constitution, respectively.

¹⁶⁶ <http://www.veritaszim.net/node/1170>

Zimbabwe is only partially free, scoring a poor 29 points out of a possible 100.¹⁶⁷ This report assesses a country's overall freedom ranking by measuring a number of civil liberties and political rights within the given country.

CONSTITUTIONAL GUARANTEE OF THE RIGHT TO FREEDOM OF EXPRESSION

Zimbabwe's current constitution came into effect on 22 August 2013. The right to freedom of expression is enshrined in Section 61 as follows:

- (1) Every person has the right to freedom of expression, which includes –
 - (a) freedom to seek, receive and communicate ideas and other information;
 - (b) freedom of artistic expression and scientific research and creativity; and
 - (c) academic freedom.
- (2) Every person is entitled to freedom of the media, which freedom includes protection of the confidentiality of journalists' sources of information.
- (3) Broadcasting and other electronic media of communication have freedom of establishment, subject only to State licensing procedures that –
 - (a) are necessary to regulate the airwaves and other forms of signal distribution; and
 - (b) are independent of control by government or by political or commercial interests.
- (4) All State-owned media of communication must –
 - (a) be free to determine independently the editorial content of their broadcasts or other communications;
 - (b) be impartial; and
 - (c) afford fair opportunity for the presentation of divergent views and dissenting opinions.
- (5) Freedom of expression and freedom of the media exclude –
 - (a) incitement to violence;
 - (b) advocacy of hatred or hate speech;
 - (c) malicious injury to a person's reputation or dignity; or
 - (d) malicious or unwarranted breach of a person's right to privacy.

The right to freedom of expression is widely defined to include the right to seek, receive, and communicate ideas. It rightfully also includes the right to exercise artistic expression as well as the expression of scientific research findings. Section 61(3) brings in the element of freedom of the media as a

¹⁶⁷ Freedom House. (2020). *Freedom in the world report: Zimbabwe*. <https://freedomhouse.org/country/zimbabwe/freedom-world/2020>

way of ensuring balanced coverage of events in a way that enables the public to receive accurate, timely information. This constitutional provision is in line with international instruments that guarantee the freedom of expression, such as article 19 of the UDHR, article 19 of the ICCPR and article 9(2) of the African Charter. These instruments highlight the different contexts within which the right to free expression may be enjoyed, and are catered for in section 61 of the Zimbabwe Constitution.

What sets freedom of expression apart and makes it such a vital right? According to Justice Gubbay, the right to freedom of expression has four broad special objectives to serve:¹⁶⁸

- (i) it helps an individual to obtain self-fulfilment;
- (ii) it assists in the discovery of truth, and in promoting political and social participation;
- (iii) it strengthens the capacity of an individual to participate in decision making; and,
- (iv) it provides a mechanism by which it would be possible to establish a reasonable balance between stability and social change.

This statement shows how the right to free expression is an enabling right that contributes to participation in public life and to overall human development. Unfortunately, in practice, laws that suppress the right to freedom of expression still exist in Zimbabwean legislation. These laws have the cumulative effect of restricting the right to freedom of expression by legalising tactics that include censorship of individuals and the press, as well as the continued harassment of journalists, activists, human rights defenders and creative artists.

ANALYSIS OF RESTRICTIONS TO FREEDOM OF EXPRESSION

(i) Criminal Law (Codification and Reform) Act

Section 31 of the Criminal Law (Codification and Reform) Act [Cap 9:23]¹⁶⁹ criminalises the publication or communication of false statements prejudicial to the state. It provides that:

Any person who, whether inside or outside Zimbabwe –

- (a) publishes or communicates to any other person a statement which is wholly or materially false with the intention or realising that there is a real risk or possibility of—

¹⁶⁸ *Chavunduka and Others v Minister of Home Affairs and Another*. [2000]. JOL 6540 (ZS). <https://globalfreedomofexpression.columbia.edu/cases/chavunduka-v-minister-home-affairs/>

¹⁶⁹ <http://www.veritaszim.net/node/225>

- (i) inciting or promoting public disorder or public violence or endangering public safety; or
 - (ii) adversely affecting the defence or economic interests of Zimbabwe; or
 - (iii) undermining public confidence in a law enforcement agency, the Prison Service or the Defence Forces of Zimbabwe; or
 - (iv) interfering with, disrupting or interrupting any essential service;
- shall, whether or not the publication or communication results in a consequence referred to in subparagraph (i), (ii), (iii) or (iv); or
- (b) with or without the intention or realisation referred to in paragraph (a), publishes or communicates to any other person a statement which is wholly or materially false and which –
- (i) he or she knows to be false; or
 - (ii) he or she does not have reasonable grounds for believing to be true;
- shall, if the publication or communication of the statement –
- (A) promotes public disorder or public violence or endangers public safety; or
 - (B) adversely affects the defence or economic interests of Zimbabwe; or
 - (C) undermines public confidence in a law enforcement agency, the Prisons and Correctional Service or the Defence Forces of Zimbabwe; or
 - (D) interferes with, disrupts or interrupts any essential service;
- be guilty of publishing or communicating a false statement prejudicial to the State and liable to a fine up to or exceeding level fourteen or imprisonment for a period not exceeding twenty years or both.

The COVID-19 pandemic has given the government of Zimbabwe another opportunity to criminalise the publishing of false information, this time in the form of the Public Health (COVID-19 Prevention, Containment and Treatment) (National Lockdown) Order, 2020 (published as Statutory Instrument 83 of 2020). It refers specifically to section 31 of the Criminal Law (Codification and Reform) Act, and criminalises false reporting during the national lockdown virus in the following terms:

For the avoidance of doubt any person who publishes or communicates false news about any public officer, official or enforcement officer involved with enforcing or implementing the national lockdown in his or her capacity as such, or about any private individual that has the effect of prejudicing the State's enforcement of the national lockdown, shall be liable for prosecution under section 31 of the Criminal Law Code ("Publishing or communicating false statements prejudicial to the State") and liable to the penalty there provided, that is to say a fine up to or exceeding level fourteen or imprisonment for a period not exceeding twenty years or both.

The laws that criminalise the publication of false information are all phrased to protect the reputations of office holders such as the president and public authorities. The same laws are overly ambiguous to the point that any legitimate criticism of government may be classified as an attempt to undermine the authority of a public official or an attempt to publish false statements.

Another section of concern is that of section 33, which criminalises the undermining of the authority of the president, providing that:

- (1) In this section -
'publicly', in relation to making a statement, means -
 - (a) making the statement in a public place or any place to which the public or any section of the public have access;
 - (b) publishing it in any printed or electronic medium for reception by the public;'statement' includes any act or gesture.
- (2) Any person who publicly, unlawfully and intentionally -
 - (a) makes any statement about or concerning the President or an acting President with the knowledge or realising that there is a real risk or possibility that the statement is false and that it may -
 - (i) engender feelings of hostility towards; or
 - (ii) cause hatred, contempt or ridicule of the President or an acting President, whether in person or in respect of the President's office; or
 - (b) makes any abusive, indecent or obscene statement about or concerning the President or an acting President, whether in respect of the President personally or the President's office;shall be guilty of undermining the authority of or insulting the President and liable to a fine not exceeding level six or imprisonment for a period not exceeding one year or both.

These two provisions are framed in terms that are ambiguous and that are easily interpreted in a way that promotes persecutory arrests of government critics and any dissenting voices. Most of the arrests in the past have been in terms of section 33, although MISA Zimbabwe has yet to record an instance where such an arrest in terms of either sections 31 or 33 have led to any convictions.

In 2016, in the case of *S v Mwonzora*, the Constitutional Court had cause to consider section 33(2) with regard to the criminalisation of undermining the authority of the president.¹⁷⁰ The case involved a member of an opposition party, Douglas Mwonzora, who had made inferences that he had dreamt of former President Mugabe taking the form of a goblin. The Constitutional Court ruled that the statements uttered by Mwonzora did not amount to undermining the

¹⁷⁰ *S v Mwonzora*, CCZ 17/2016. <https://zimlii.org/zw/judgment/constitutional-court-zimbabwe/2016/17>

authority of the president since a reasonable person could tell that President Mugabe was not and could not be a goblin. However, the court did not explore the constitutionality of the provision when acquitting Mwonozora.

This law was also used against an American citizen working with Magamba Network Trust, Martha O'Donovan, who was arrested in November 2017 and charged under section 33(2) with subversion and insulting former President Mugabe through a retweet that allegedly called the president a "sick man."¹⁷¹ O'Donovan spent seven days at Chikurubi Maximum Prison in Harare before being granted bail by the High Court. O'Donovan was eventually acquitted of all criminal charges in January 2018. This was after the state prosecutors failed to lead any solid evidence supporting the charges laid against the accused.

Another incident was the arrest of the leader of the #ThisFlag movement, Pastor Evan Mawarire, in January 2017 on his return from the United States of America.¹⁷² Mawarire had an outstanding warrant of arrest from 2016, and was charged with breaching the Criminal Law (Codification and Reform) Act in his efforts to "subvert a democratically elected government". He was arrested again in September 2017 after publishing a video that was viewed as critical of the government. Like O'Donovan, he was eventually acquitted and released.

In the run-up to the 2018 election, a representative of the Zimbabwe Republic Police indicated at a press conference that the police had arrested four (unnamed) individuals for using social media to spread false information and hate speech.¹⁷³ At the time, the police also claimed that they were following up on other possible incidents involving the abuse of social media. No further specifics were given either about the arrest of the four individuals or the investigations.

It is apparent that the arrests based on anti-freedom of expression laws, such as undermining the authority of the president, do not necessarily result in the conviction of the accused. However, such arrests are meant to harass and intimidate both the accused and other online users. The targets of the arrests are typically people who have a significant online presence.

(ii) Access to Information and Protection of Privacy Act

Section 64 of the Access to Information and Protection of Privacy Act [Cap 10:27]¹⁷⁴ criminalises the abuse of freedom of expression in the following terms:

171 Moyo, J., & Onishi, N. (2018, 4 January). Zimbabwe releases American charged with insulting Mugabe. *New York Times*. <https://www.nytimes.com/2018/01/04/world/africa/zimbabwe-martha-odonovan-twitter.html>

172 Chidza, R. (2017, 2 February). #ThisFlag's Mawarire returns, arrested. *Newsday*. <https://www.newsday.co.zw/2017/02/thisflags-mawarire-returns-arrested/>

173 Spotlight Zimbabwe. (2018, 17 July). Four arrested For "abusing" social media. <http://spotlight-z.com/news/four-arrested-abusing-social-media/>

174 <http://www.veritaszim.net/node/240>

A person registered in terms of this Part who makes use, by any means, of a mass media service for the purposes of publishing –

- (a) information which he or she intentionally or recklessly falsified in a manner which—
 - (i) threatens the interests of defence, public safety, public order, the economic interests of the State, public morality or public health; or
 - (ii) is injurious to the reputation, rights and freedoms of other persons; or
- (b) information which he or she maliciously or fraudulently fabricated; or
- (c) any statement –
 - (i) threatening the interests of defence, public safety, public order, the economic interests of the State, public morality or public health; or
 - (ii) injurious to the reputation, rights and freedoms of other persons;in the following circumstances –
 - (A) knowing the statement to be false or without having reasonable grounds for believing it to be true; and
 - (B) recklessly, or with malicious or fraudulent intent, representing the statement as a true statement; shall be guilty of an offence and liable to a fine not exceeding level fourteen or to imprisonment for a period not exceeding three years.

This offence is broadly defined, and involves in part the publication or broadcasting of false information. Section 80 further criminalises what is described as abuse of journalistic privilege. This section again criminalises the publication of false information. Both sections 64 and 80 go against the letter and spirit of the guarantee of the right to freedom of expression.

(iii) Broadcasting Services Act

Section 3 of the Broadcasting Services Act [Cap 12:06]¹⁷⁵ establishes the Broadcasting Authority of Zimbabwe tasked with the drafting of licensing and broadcasting regulations and policy in Zimbabwe. It acknowledges the existence of a three-tier broadcasting system, whereby broadcasting services are divided into public, commercial and community broadcasting. The law makes provision for each of these respective categories of broadcasting.

However, the government is yet to license a community radio station – 19 years after the law came into effect. Zimbabwean commercial radio stations are owned by the government through state owned enterprises or by individuals who have

¹⁷⁵ <http://www.veritaszim.net/node/1777>

a strong connection to the ruling party. This inability to license deserving private sector players and community radio stations has the effect of curbing the kind of information shared over radio.

(iv) Broadcasting Services (Community and Campus Radio Broadcasting Regulations)

In February 2020, the government gazetted this statutory instrument to provide guidelines for the licensing of campus radio stations, these being stations owned and run by Zimbabwean universities and other institutions of higher education.¹⁷⁶ It does not provide for the licensing of community radio stations outside places of higher education.

Furthermore, Zimbabwe still has one national television station often accused of low quality programming. The biased nature of reporting in Zimbabwe's public print and broadcast media is a matter of public record. In June 2019 the Masvingo High Court ruled that ZBC and Zimpapers acted unconstitutionally during Zimbabwe's 2018 elections, as they failed to provide a fair opportunity for the presentation of divergent views and dissenting opinions. The judge further held that:

State media are national assets. They must be accessible to all. By virtue of the Constitution and the various pieces of legislation ... the applicants (Veritas), like any other citizen of this country, have a clear right to receive fair, unbiased and divergent views to enable them to make informed choices.

(iv) Broadcasting Services (Licensing and Content) (Amendment) Regulations, 2020

This statutory instrument was gazetted in terms of section 46 of the Broadcasting Services Act.¹⁷⁷ It sets out the various licensing categories and content requirements. One thing to note about this law is that it introduces a licensing fee for "webcasting". Webcasting is widely defined as a "computer-mediated broadcasting service". Webcasting licences are valid for three years, with the first year's licence fee being higher because it includes a once off, non-refundable application fee. A webcasting license costs an estimated USD 3,600 for the first year, and then approximately USD 2,500 per annum for two subsequent years.

This is of concern because section 11(1) of the Licensing and Content Regulations, 2004 states that any person providing the webcasting content must hold a webcasting license. Zimbabwe has experienced a growth in the number of creative artists who share their content via audio and visual media through web-based media services, including social media platforms. It is possible that these creatives

¹⁷⁶ Ibid.

¹⁷⁷ <http://www.veritaszim.net/node/3921>

will be required to apply for webcasting licences under the current definition, as is the case in Tanzania which levies exorbitant licensing fees against bloggers.

(v) Maintenance of Peace and Order Act

The Maintenance of Peace and Order Act [Cap 11:23]¹⁷⁸ came into effect in November 2019 to replace the restrictive Public Order and Security Act; however, the contents of the two laws are the same. The Maintenance of Peace and Order Act, like its predecessor, restricts the enjoyment of the right to assembly and association that is guaranteed in section 58 of the constitution. The right to assembly and association is closely associated with the right to freedom of expression, and the restriction of one right adversely affects the enjoyment of the other.

In *Chavunduka and Others v Minister of Home Affairs and Another*,¹⁷⁹ the editor and senior reporter at The Standard, a weekly newspaper, were arrested over a story in their paper on an alleged coup attempt. The pair was accused of breaching section 50(2)(a) of the Law and Order (Maintenance) Act, which makes it an offence to publish a false statement likely to cause fear, alarm and despondency among the public.

The section was tested against section 20(1) of the Lancaster House Constitution, which was the existing constitution at the time the case was heard. The court held that section 50(2)(a) of the Law and Order (Maintenance) Act was unconstitutional and should be struck off the statute books. In its ruling, the court held that: “The section is too widely expressed, too unclear as to its limitations, and too intimidating (because no one can be sure whether what he says or writes will or will not attract prosecution and imprisonment). That is why it cannot stand.”

It is unfortunate that when the government replaced the Law and Order Maintenance Act with the Public Order and Security Act, it reintroduced vague, widely expressed and intimidating provisions into the new law. Similar provisions in subsequent laws have not yet been tested in the Constitutional Court, although it is expected that the Constitutional Court would likely rely on precedents and similarly strike down the offending sections.

(vi) Surveillance laws and internet shutdowns

The Official Secrets Act [Cap 11:09]¹⁸⁰ restricts the information that civil servants and other government contractors may share. Furthermore, the Interception of Communications Act [Cap 11:20]¹⁸¹ promotes and legalises state-sponsored

178 <http://www.veritaszim.net/node/3810>

179 *Chavunduka & Another v Minister of Home Affairs & Another* 2000 (1) ZLR 552 (S).

180 <http://www.veritaszim.net/node/230>

181 <http://www.veritaszim.net/node/252>

surveillance. The knowledge that the state has the ability to listen in on private communications is enough to make people self-censor the opinions they express.

More importantly, in January 2019, the Interception of Communications Act was used to justify the six-day internet shutdown experienced in Zimbabwe in January 2019.¹⁸² The internet was shut down in response to mounting social unrest and public demonstrations motivated by a sharp increase in prices and inflation in Zimbabwe. Government ordered ISPs and mobile network operators to disrupt internet services. Service providers complied, and Zimbabwe experienced a six-day long internet shutdown, with the internet completely shut down for two of those days. During the other four days, internet traffic to popular social media sites and applications was disrupted and access was only possible using a VPN or application.

That same month, MISA Zimbabwe and Zimbabwe Lawyers for Human Rights mounted a challenge to restore internet connectivity, challenging the state's reliance on the Interception of Communications Act and arguing that internet shutdowns are a gross infringement of fundamental rights, particularly the right to freedom of expression and access to information.¹⁸³ The Harare High Court relied on a technicality that the order to shut down the internet was given by a minister, without the direct authority of the president. The High Court did not, however, examine the constitutionality of implementing internet shutdowns. That said, it is apparent that internet connectivity was only restored due to this court challenge.¹⁸⁴

(vii) Criminal defamation

The case of *State v Madanhire and Another* was initiated in 2011 when the editor and a reporter of The Standard published a story about a local businessman. The businessman took the pair to court, alleging that the article had defamed him. He relied on section 96 of the Criminal Law Code, which set out the offence of criminal defamation.

The case was escalated to the Supreme Court, and later to the Constitutional Court when it was eventually established in terms of the Constitution of 2013. The lawyer representing the accused applied to have section 96 of the Criminal Law Code struck down because of it being void and unconstitutional. The court ruled that the offence of criminal defamation was unconstitutional and an ex-

182 Al Jazeera. (2019, 18 January). Zimbabwe imposes internet shutdown amid crackdown on protests. *Al Jazeera*. <https://www.aljazeera.com/news/2019/01/zimbabwe-imposes-total-internet-shutdown-crack-down-190118171452163.html>

183 *Zimbabwe Lawyers for Human Rights and Another v Minister of State in the President's Office for Security and Others*, HH 265/19. <http://crm.misa.org/upload/web/zlhr-misa-vs-state.pdf>

184 MISA Zimbabwe. (2019, 18 January). Internet shutdown court challenge set down for hearing. *MISA Zimbabwe*. <https://zimbabwe.misa.org/2019/01/18/internet-shutdown-court-challenge-set-down-for-hearing/>

cessive, unjustifiable restriction on the right to freedom of expression. However, the ruling was made only in terms of the old Lancaster House Constitution that was in place when the alleged offence was committed in 2011. In its ruling, the court stated that:

[T]he harmful and undesirable consequences of criminalising defamation, viz. the chilling possibilities of arrest, detention and two years' imprisonment, are manifestly excessive in their effect. Moreover, there is an appropriate and satisfactory alternative civil remedy that is available to combat the mischief of defamation. Put differently, the offence of criminal defamation constitutes a disproportionate instrument for achieving the intended objective of protecting the reputations, rights and freedoms of other persons.

Criminal defamation was formally struck off the statute books in 2016 after the Constitutional Court revisited the matter and made a ruling that criminal defamation was also unconstitutional in terms of the current constitution of 2013.

(viii) Extrajudicial abductions

The Zimbabwean government has been suspected of sponsoring the torture, abductions, and sometimes disappearances of individuals who are at the frontlines of criticising government. One such prominent case is the disappearance of Itai Dzamara on 9 March 2015.¹⁸⁵ Dzamara was abducted from a local barbershop in his local neighbourhood in Harare.

Further, on the night of 21 August 2019, a group of unidentified, masked and armed men abducted Bustop TV comedian, Samantha Kureya, popularly known as Gonyeti, from her home.¹⁸⁶ Bustop TV is a creative arts start-up that uses comedy and satire to comment on and encourage the discussion of current socio-economic issues. Kureya was tortured and abandoned in Harare's outskirts some three hours after her abduction.

Another example is that of Peter Magombeyi, a medical doctor who led the Zimbabwe Hospital Doctors Association's mass protests for better working conditions for medical staff. He was abducted by unknown assailants and released after five days in September 2019.¹⁸⁷

In all these instances of abductions, police reports were made but nothing materialised out of the pursuant police investigations. This further strengthens

185 BBC News. (2018, 24 May). Itai Dzamara: The man who stood up to Zimbabwe's Robert Mugabe and vanished. *BBC News*. <https://www.bbc.co.uk/news/world-africa-44209183>

186 BBC News. (2019, 22 August). Zimbabwean comedian Gonyeti "abducted and beaten" in Harare. *BBC News*. <https://www.bbc.co.uk/news/world-africa-49433387>

187 The Standard. (2019, 22 September). Magombeyi case acid test for police. *The Standard*.

the public's belief that the police do not investigate these abductions conclusively because fellow members of the national security forces or intelligence forces carry out the abductions. Continued abductions, reports of torture and disappearances have the cumulative effect of discouraging the exercise of the right to demonstrate and petition, as well as effectively silencing existing and would be dissenting voices.

CONCLUSION AND RECOMMENDATIONS

In a country with high calling rates, coupled with a political environment where freedom of association in offline spaces is restricted, social media has provided affordable and relatively safe platforms for Zimbabweans with similar interests to meet and share their views. This has significantly improved the flow and accessibility of information in the country. On the other hand, it has led to an increase in the number of people arrested for information they share online.

One major reason why the exercise of freedom of expression in Zimbabwe remains restricted is the slow progress of legislative reform. All the laws that have been discussed which still restrict freedom of expression were passed well before the introduction of the current constitution in 2013. Various state actors and organs still rely on the unconstitutional provisions contained in existing laws. The judiciary has similarly been slow in striking down offending pieces of statutes that contradict, for example, the constitutional provisions on the right to free expression. Even in the face of these slow reforms, the judiciary has given a number of significant rulings that show the importance of respecting the right to free expression.

Going forward, there is need to widen the discussion of the right to freedom of expression and the related right to access information beyond the media fraternity. Civil society has to make deliberate efforts to educate the public on these two important rights and illustrate how an exercise of free expression is directly linked to participation in the democratic process.

Related to this is the need to educate the public on how technology has made it easier for members of the public to express their opinions. However, there is need to be able to do this in a safe and secure environment. The safety and security on online communication platforms relies on technologies, such as encryption and tools such as VPNs. The UN Special Rapporteur on Freedom of Expression has connected the use of encryption and privacy enhancing tools with the exercise of the right to freedom of expression.¹⁸⁸

Furthermore, there is a need, especially in countries such as Zimbabwe, to

188 Kaye, D. (2015, 22 May). Report of the UN Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, A/HRC/29/32. https://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session29/Documents/A.HRC.29.32_AEV.doc

continue pushing for legislative reform that brings existing laws into line with the existing constitution. This push may be in the form of strategic litigation and education of policymakers on the importance of the right to freedom of expression and access to information.

PART IV: TRENDS AND RECOMMENDATIONS

OVERVIEW OF TRENDS

It is apparent from the case studies that there several trends that emerge. These trends are of concern, as they evince repeated efforts to encroach on the right to freedom of expression, and various laws, policies and measures appear to fall short of the three-part test for a justifiable restriction. These trends include the following:

NON-COMPLIANCE WITH THE PRINCIPLE OF LEGALITY

The principle of legality requires that limitations must be provided for by prior existing law in the domestic legal framework of the state, and must be issued by the legislative body of that state.¹⁸⁹ However, as seen in Namibia, for example, it appears that part 6 of the Communications Act is being used by the state to conduct surveillance activities, despite the fact that this has never been gazetted. This was also dealt with in Zimbabwe in 2018, when the Harare High Court found that the order to shut down the internet had been impermissibly given by a minister, without the direct authority of the president.

A further aspect of the law-making process is that of public participation, which requires all relevant stakeholders to be appropriately consulted prior to a law being passed. In the context of laws affecting the right to freedom of expression, this should include, at a minimum, media groups, journalists and civil society organisations engaged on these issues. Such public participation requires meaningful engagement on the procedural and substantive provisions of the proposed law, with lawmakers necessarily needing to be open and willing to make amendments. This has not been the case in Malawi and Tanzania, for instance, where laws that have significant impacts on the right to freedom of expression have been passed in a rushed manner, with little to no public participation preceding this.

Principle 9(2)(a) of the ACHPR Declaration of Principles provides that any law limiting the right to freedom of expression and access to information must be clear, precise, accessible and foreseeable. However, as is apparent from the case studies, various laws restricting the right to freedom of expression are drafted in vague language, and lack the necessary clarity to avoid these laws being subject to abuse. This is a trend that has been seen, for example, in Malawi, South Africa, Tanzania, Zambia and Zimbabwe. Laws must be drafted with sufficient precision to ensure that all affected persons are aware of whether they fall within the purview of the law, and are in a position to comply or challenge the law as may be appropriate in the circumstances.

¹⁸⁹ HRC. (2011, 12 September). General Comment No. 34 at para 25. Op. cit..

RELIANCE ON NATIONAL SECURITY AS A GROUND OF JUSTIFICATION

While national security is an important aim of any state, it is also susceptible to abuse. It has been noted that:¹⁹⁰

The use of an amorphous concept of national security to justify invasive limitations on the enjoyment of human rights is of serious concern. The concept is broadly defined and is thus vulnerable to manipulation by the State as a means of justifying actions that target vulnerable groups such as human rights defenders, journalists or activists. It also acts to warrant often unnecessary secrecy around investigations or law enforcement activities, undermining the principles of transparency and accountability.

As seen in Mozambique and Zambia, for example, national security has been relied on to justify wide-ranging surveillance measures, including SIM card registration and other invasive methods. It is of concern that these laws have not necessarily shown that there is a real risk of harm or a causal link between the risk of harm and the measure being implemented. These laws have been seen to have a chilling effect on the right to freedom of expression, resulting in self-censorship and a decrease in civic participation.

LACK OF NECESSITY OR PROPORTIONALITY

Various laws identified in the case studies fail to meet the threshold of necessity and proportionality, as required by the three-part test for a justifiable restriction of a right under international law. This has been seen in Malawi, Tanzania, Zambia and Zimbabwe, for example, where the identified laws raise serious concerns of being overbroad and designed to protect particular interest groups, and are neither necessary nor proportionate. It is important to note that the principle of proportionality must be respected both in law and by the authorities applying the law. Practically, however, as seen in Tanzania and Zimbabwe, various arrests and acts of intimidation have taken place at the hands of law enforcement officers claiming to be implementing the law, but these seldom result in further investigations or convictions.

LAWS NOT FIT FOR PURPOSE

Various countries, including Malawi, Tanzania, Zambia and Zimbabwe, continue to rely on outdated laws and codes that are not fit for purpose in line with the state's constitutional dispensation or the digital era. These laws are relied on to criminalise acts of legitimate expression, both online and offline, with a consequent result of stifling freedom of expression, press freedom and dissent.

¹⁹⁰ La Rue, F. (2013, 17 April). Report of the UN Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, A/HRC/23/40, para 60. https://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session23/A.HRC.23.40_EN.pdf

However, even more recent laws – some of which have been drafted specifically to address online content – fail to consider the exigencies of digital platforms. As seen in South Africa, for example, with the Hate Speech Bill, the law does not appropriately consider issues regarding the transnational nature of the internet, jurisdiction and the efficacy of the proposed enforcement measures.

COST TO COMMUNICATE

Across the region, the cost to communicate remains exorbitant, and is a significant barrier to realise the right to freedom of expression online. For many members of the public, access to the internet – both in terms of the cost of data and the cost of devices – is simply too expensive, and lies beyond their reach. While some steps have been taken to adopt universal service and access policies, the implementation of these policies has been slow, and Southern Africa continues to lag behind the rest of the world with regard to internet penetration for its people.

This is exacerbated by states imposing licensing and accreditation fees on media organisations and online users. For example, the accreditation process in Mozambique has a chilling effect on the ability of domestic and foreign journalists to conduct their duties in the public interest. In Tanzania, the state's requirement that bloggers and owners of other online forums register with the government and pay a licensing fee has been of significant concern, with those failing to register facing suspension of their websites or criminal prosecution. In Zimbabwe, the proposed webcasting licence fee remains a concern, as it is drafted in broad terms and potentially has a wide scope over a range of online users.

These fees heighten the cost to communicate, and impose a severe restriction on the right to freedom of expression. These measures appear to be aimed at shrinking the space for open discourse on the internet, and cannot be justified under international law.

STIFLING OF DISSENT

Efforts to stifle dissent present another common – and concerning – trend that is apparent from the case studies. In Zambia, the state has relied on public order offences to arrest and detain persons who speak out against the government. Similarly, in Tanzania and Zimbabwe, the enactment of laws aimed at curbing the exercise of freedom of expression online has resulted in arrests, detentions, threats, intimidation and acts of violence against journalists, members of opposition parties and activists. These acts serve to stifle the exercise of freedom of expression, and should not be countenanced.

STRATEGIES FOR CIVIL SOCIETY ORGANISATIONS AND ACTIVISTS

In seeking to realise the right to freedom of expression, both domestically and in the region, there are a number of strategies that civil society and other activists can engage in. These strategies include the following:

ADVOCACY

The importance of advocacy cannot be gainsaid. Such advocacy efforts should seek to involve as many affected stakeholders as possible; in this regard, social media and other online platforms can be a powerful tool to develop campaigns that reach a vast array of people. Advocacy efforts can be directed in a myriad of ways, including towards the state and parliamentary processes, in support of a litigation strategy, or to advocate for a particular outcome. In addition to domestic advocacy, regional and international forums should also be considered to apply pressure to states, including the ACHPR, the Human Rights Council and the Human Rights Committee. Furthermore, multi-stakeholder forums, such as the Internet Governance Forum, play an important role in shaping policy and discourse regarding freedom of expression online, and should not be ignored.

A number of resources have already been developed to assist in advocacy efforts. The ACHPR Declaration of Principles and the African Declaration on Internet Rights and Freedoms are particularly useful for persons seeking to advocate for the right to freedom of expression online.

TREATY-BODY REPORTING

Linked to the point above, providing shadow reports to treaty-body mechanisms, such as the ACHPR and the Human Rights Committee, can be useful to compel states to comply with their obligations under regional and international human rights law. Most treaties provide for some reporting mechanism. For example, principle 43 of the ACHPR Declaration of Principles requires that states, in accordance with article 62 of the African Charter, provide detailed information to the ACHPR on the measures taken to facilitate compliance with the provisions of the ACHPR Declaration of Principles.

This can be useful for several reasons. First, it requires states to provide relevant information on their compliance, including statistical information and other data, that might not otherwise be available to the general public. Through shadow reports, it is also possible to suggest questions to be posed to the states where there are gaps in the information provided or concerns regarding non-compliance with the provisions of the relevant treaty. Furthermore, through the recommendations made by the treaty-body mechanism, this can be used

as part of the advocacy strategy to urge the state to amend or reform certain laws or practices that infringe the right to freedom of expression.

RESEARCH

It is important to undertake both quantitative and qualitative research regarding the exercise of the right to freedom of expression and restrictions to this right. Such research can assist to inform policy positions, law reform processes and advocacy efforts. The research should have appropriate regard to the regional

and international human rights laws and standards, while also being cognisant of the relevant context to which it is applicable.

EDUCATION AND AWARENESS-RAISING

Firstly, efforts should be made to educate the public about the right to freedom of expression and the importance of this right, online and offline. This includes raising awareness about restrictions to the right and the impact that this has. The public should also be made aware of how to exercise this right safely and securely, and with due regard to the prescripts of justifiable restrictions in the exercise thereof. Marginalised groups – including women, children, the elderly, persons with disabilities and persons in rural communities – should be given due consideration and priority as part of this strategy.

Furthermore, efforts should be made to educate policy makers, judges, national human rights institutions and other public officials who have a direct role to play in the implementation of the right to freedom of expression. For many persons, the advent of technology is a relatively new concept, and they may lack the necessary expertise and understanding to ensure that they are able to make informed decisions. In this regard, training workshops, handbooks and other resources can serve as useful tools to assist in ensuring that the law relating to the freedom of expression is developed in a manner consistent with regional and international human rights standards.

STRATEGIC LITIGATION

As is apparent from the case studies, strategic litigation has been seen to be a useful strategy to achieve reform in various countries, including South Africa, Tanzania and Zimbabwe. The role of an independent and unbiased judiciary is an imperative one, and is deserving of being safeguarded. Strategic litigation in the region has seen various developments regarding, for instance, criminal defamation, hate speech and other speech-related offences, and has given further content to the right to freedom of expression.

In the case of Tanzania, the EACJ has taken a strong and positive stance in favour of the right to freedom of expression, and has compelled the government to reform its laws in order to comply with its regional and international obligations. It is unfortunate that, for SADC, the SADC Tribunal has been effectively rendered defunct, and cannot similarly provide such a forum at present for similar litigation to take place.

As suggested in the Malawi case study, a useful strategy could be the establishment of a network of regional lawyers to litigate the right to freedom of expression, both on- and offline. Such a network could share learnings, develop skills and coordinate litigation in the region. This could serve to enhance existing strategies and campaigns, and render litigation efforts more effective.

TECHNOLOGY DEVELOPMENT

Civil society and activists may also consider the development of rights-based, not-for-profit technology to assist the public in the exercise of the right to freedom of expression. This might include, for instance, community networks, encryption tools or other platforms that can be relied on for the exercise of this right. The development of such technology would stand in contrast to some of the options that are currently available insofar as they would be borne out of a fundamental realisation of the need to respect, protect and promote the right to freedom of expression and other associated rights. Civil society and activists may also be more resistant to attempts by the state to garner information about users or exploit users' information. While this would likely be a resource-intensive exercise, it may well be worth the reward.

RECOMMENDATIONS FOR STATES AND PRIVATE SECTOR ACTORS

Drawing on the guidance from regional and international human rights frameworks, the ACHPR Declaration of Principles, the African Declaration on Internet Rights and Freedoms and the findings of this report, the following recommendations are made to states and private sector actors:

RECOMMENDATIONS FOR STATES

- States should expressly recognise in their domestic frameworks that the right to freedom of expression – as contained in constitutional, regional and international human rights frameworks – applies equally both on- and offline.
- States should enable the realisation of the right to freedom of expression without discrimination of any kind, and should take specific measures to address the needs of marginalised groups

in a manner that guarantees the full enjoyment of freedom of expression and access to information on an equal basis with others.

- States should only impose restrictions on the right to freedom of expression to the extent that they comply with the three-part test for a justifiable restriction under international law, namely that the restriction must be prescribed by law, pursue a legitimate aim, and be necessary and proportionate.
- States should not engage in or condone any disruption of access to the internet and other digital technologies for segments of the public or an entire population.
- States should review and reform their legislation related to freedom of expression online, and ensure that this legislation fully complies with international standards, including by repealing all laws relating to criminal defamation, sedition and the publication of false news.
- States should not restrict the right to freedom of expression on public order or national security grounds, unless there is a real risk of harm to a legitimate interest and there is a close causal link between the risk of harm and the expression.
- States should create a favourable environment for participation and public debate by all persons concerned, enabling them to express their ideas and opinions without fear, and should respect the rights of all persons to express oppositional, dissenting, reactive or responsive views, values or interests, both on- and offline.
- States should take positive measures to promote a diverse and pluralistic media to promote the free flow of information and ideas, including by facilitating access to the media by poor and rural communities. In this regard, states should guarantee the right to establish various forms of independent media, including print, broadcast and online media, and facilitate the establishment of community media.
- States should refrain from imposing any registration system on the media, except for administrative purposes, and should not impose excessive fees or other restrictions on the media.
- States should not interfere with the right of individuals to seek, receive and impart information through any means of communication and digital technologies, through measures such as the removal, blocking or filtering of content, unless such interference is justifiable and compatible with international human rights law and standards.
- States should not adopt laws or other measures prohibiting or weakening encryption, including backdoors, key escrows and data localisation requirements, unless such measures are justifiable and compatible with international human rights law and standards.
- States should not hold anyone liable for content on the internet of which they are not the author.

- States have a positive obligation to prevent violent attacks against anyone on their territory, particularly when such attacks are directed at persons for the exercise of their right to freedom of expression. In the event of any such attack, states must launch an independent, speedy and effective investigation to bring the perpetrators and instigators to justice, and further ensure that victims can obtain appropriate and holistic remedies for the harms that they have suffered.
- States should be liable for the conduct of law enforcement, security, intelligence, military and other personnel that threaten, undermine or violate the safety of journalists and other media practitioners.
- States should work together with media bodies, journalists and civil society organisations to develop guidelines for the protection of those who gather and disseminate information to the public, including media professionals, women’s rights advocates and human rights defenders.
- States should not engage in or condone acts of indiscriminate and untargeted collection, storage, analysis or sharing of a person’s communications. Further, states should only engage in targeted communication surveillance that is authorised by law, that conforms with international human rights law and standards, that is premised on specific and reasonable suspicion that a serious crime has been or is being carried out or for another legitimate aim, and that contains appropriate safeguards.

RECOMMENDATIONS FOR PRIVATE SECTOR ACTORS

- Private sector actors, including ISPs and social media platforms, should not impose content filtering systems that are not end-user controlled.
- Private sector actors should ensure that products designed to facilitate end-user filtering are accompanied by clear information to end users about how they work and their potential pitfalls in terms of over-inclusive filtering.
- Private sector actors should cooperate with the state to develop laws, policies and other measures to provide universal, equitable, affordable and meaningful access to the internet without discrimination.
- Intermediaries should ensure that processes developed to make determinations on content and privacy issues pay due regard to the right to freedom of expression, are transparent and contain mechanism for appeals
- Private sector actors should not be complicit in complying with requests from states that unlawfully and unjustifiably restrict the right to freedom of expression.

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