

Defining the margin of terror

- Explaining the chilling effect of insult and defamation laws on the media and artists in Zimbabwe

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1 Introduction

Freedom of expression faces many challenges in Zimbabwe.

Public expressions are affected by a variety of pieces of legislation in combination with official practices. Legislation on insult and defamation is assumed to have a particular chilling effect on public expressions. However, we see that the compliance with these laws is far from absolute, indicating that the effect of the legislation is conditional. But what *is* the effect of the legislation, and what are the factors that make legislation chilling?

This study examines the effect that legislation on insult and defamation has on media practitioners and artists in Zimbabwe. The detailed research question is: How is the Zimbabwean legislation regarding insult laws and criminal defamation of public officials affecting critical voices (media, artists) – in which way can it be said that the legislation has a ‘chilling effect’ on public expressions?

In answering this question I have interviewed journalists, editors, artists and scholars in Zimbabwe. I will look at factors that have an impact on the deterring effect of legislation and apply these theories to the data from Zimbabwe.

This study will contribute to three different fields. First of all, it is a contribution to the growing literature on the situation in Zimbabwe when it comes to freedom of expression and freedom of the media. Although many reports from non-governmental and international organisations document the chilling on the media in Zimbabwe, I have not found academic studies looking at this specifically. Secondly, I hope to contribute to the understanding of what is meant by the chilling effect on the media within socio-legal studies; and thirdly, the study will also contribute to the more general question of which factors cause legislation to be effective.

1.1 Methodology

The main thrust of my data comes from interviews performed during a two week field visit to Harare in March/April 2014, combined with literature studies of already existing books, articles and reports. One of the advantages of doing personal interviews is that the researcher can get targeted information on the subject that he or she wants to learn more about. In this case, performing interviews also provided an opportunity to examine the effect of recent legal changes, which was relevant for my study. Also, issues related to freedom of expression and oppositional voices are complex in Zimbabwe, and in such a tense political situation the advantage of doing personal interviews is that people will feel more comfortable to talk about sensitive issues.

All the interview objects were promised anonymity in the published thesis. This was important to some of them, whereas others said that they did not mind being quoted, since they had already talked publically about these or related issues. All names were still kept confidential, to avoid that someone could be identified by them having had a meeting with me and not being among those named¹. Rumours about surveillance and infiltration of work places, universities etc. are constant in Zimbabwe, and it is very easy to get caught up in the habit of constantly looking over your shoulder to see if anyone is following you or listening to you. One of the informants put it this way:

The CIO² is the matter, although not as sophisticated as people are made to think, from my experience, but they play their role, sniffing out, they have to know that you are here, probably they do. They probably know that you are talking to me now. (Interview nr 2, Journalist 25.03.2014)

This was said on my second day in Harare, which made it quite unlikely that the CIO should have any knowledge about me being there, but even so it illustrates the constant

¹ The list of names and contact information of all informants is kept by author.

² Central Intelligence Organisation.

feeling of being under surveillance that affects the everyday of many Zimbabweans and that also affected the data gathering.

The majority of the interviews were semi-structured, based on an interview guide³ that served as a check list during the interview, which lasted between 40 and 90 minutes. In total there were 12 full interviews which were recorded and transcribed afterwards, and two informal interviews (the latter two were not recorded). The list of interviews is included in the table of reference. The interview subjects were not randomly sampled, but chosen because they had special knowledge on the situation (such as human rights lawyers working with defamation or scholars with specific knowledge on the situation) and because they had been referred to me due to their work as journalists and/or editors who had faced defamation charges. This is known as ‘purposive sampling’, whereby the selection process is guided by the study’s purpose and the researcher’s knowledge of the population (Tansey 2007:770). Some interview subjects were referred by other informants, so-called ‘snowball sampling’ (ibid). This kind of sampling necessarily creates a bias in the data gathered. Also, the number of people interviewed is very limited. In order to compensate for this, I have triangulated the data gathering methodology by combining the interviews of such primary sources with elite interviewing of human rights lawyers, media experts and scholars in addition to literature review. The different background of the interview subjects made it possible to double check information given by other informants and also to check some of the working hypothesis along the way. One of the characteristics of informal interviews is that data gathering and data analysis is a parallel process (Grønmo 2004:159). Some of the informants became both primary and secondary sources; primary sources on their own lived experience as journalists and public intellectuals, and secondary sources on the general picture, based on their research or professionally acquired knowledge on the situation.

³ Different interview guides were used depending on the informant’s status.

The biggest methodological challenge for this study is to identify and separate the effects caused by legislation and the effects caused by other factors. A society is not a laboratory where you can isolate some factors, and there is always an interrelationship between legislation, policies and politics and social factors, to mention some. However, the intention is not to identify all the factors that have an impact on freedom of expression. What I set out to do is to look at the Zimbabwean legislation in light of theories on what makes laws deterring, in order to define the degree of chilling that the legislation can be said to make. The recent legal changes in Zimbabwe, with a new Constitution and recent rulings by the Constitutional Court (in late 2013 and early 2014) gives a methodological advantage, since the changes creates a before-and-after scenario that can make it easier to identify the effects of the legislation per se. I will return to the details of these recent events below.

1.2 Outline of the thesis – a reader’s guide

This thesis is divided in four main chapters. Chapter 1 is the introductory chapter, introducing the area of research and explaining the research question and methodology. Chapter 2 gives the theoretical background for the study. Here I will present the human rights framework on freedom of expression and some background on defamation and insult laws. I then move on to present relevant theories on the chilling effect and on the factors causing legislation to have a deterring effect, and discuss how this theory can be applied to the data from Zimbabwe. Chapter 3 is the main chapter of the study. The first part of the chapter is an introduction to the situation in Zimbabwe, focusing on the relevant legislation and context for this study. I then present the data collected, and apply the aforementioned theories in a discussion on the effects of the legislation on public expressions by the media and artists. Chapter 4 is a summary of the conclusions.

2 Freedom of expression, defamation laws and the ‘chilling effect’

Before I move on to analyse the findings in Zimbabwe, it is necessary to present the theoretical framework that will be applied. In this chapter I will start by giving a brief presentation of the provisions on freedom of expression in international human rights law. I then examine the theoretical background on what is meant by the ‘chilling effect’ in relation to freedom of expression, and especially regarding criminal defamation or so-called “insult laws”. Finally I will present theories regarding the effects of criminal law on behaviour and the factors determining the compliance of rules, and show how these theories can be applied in my analysis to gain more understanding of the effect of Zimbabwean legislation.

2.1 Freedom of expression in international human rights law

Freedom of expression is a recognized human right enshrined in several regional and international instruments. The most important ones are the International Covenant on Civil and Political Rights (ICCPR) article 19, the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) article 10, the American Convention on Human Rights (ACHR) article 13 and the African Charter on Human and Peoples’ Rights (Banjul Charter) article 9. Freedom of expression is however not an unlimited right; it can be legitimately restricted in certain areas where freedom of expression comes into conflict with other rights or with other legitimate concerns of the authorities. The legitimate restrictions are often specified in the provisions.

Due to the wide-spread ratification of the ICCPR,⁴ its provisions in article 19 are the most widely recognized human rights provisions on freedom of expression. Article 19(3) states that the exercise of the rights within the article carries both duties and responsibilities and may therefore be subject to some restrictions. In order to avoid the abuse of limitations on freedom of speech, any limitation must be clearly defined and provided by law. Limitations

⁴ 168 countries have ratified the ICCPR as of May 2014 (UN 2014).

should not jeopardize the exercise of the right itself, they must be necessary and proportionate to the objective they seek to achieve and should include the least intrusive means possible, to prevent a chilling effect (La Rue 2009:para 40). Article 20 of the ICCPR further limits the freedom of expression, stating that propaganda for war shall be prohibited by law, and the same goes for any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence.

The Human Rights Committee (HRC), which has been given the task of monitoring the implementation of the ICCPR, has made a general comment on Article 19, General comment 34 (GC34).⁵ Here the HRC states that a reservation to article 19 is not compatible with the object and the purpose of the covenant (HRC 2011, GC 34:para5), thereby showing the importance of freedom of speech for the Covenant as a whole. They also specify the strong restrictions on the limitations provided for in subsection 3 of article 19, and include a section on “Limitative scope of restrictions on freedom of expression in certain specific areas” (paras.37-49) and on the relationship between articles 19 and 20 (paras.50-52). Here they touch upon some debated areas where freedom of expression can come into conflict with other rights, such as blasphemy, defamation and privacy, and hate speech (inciting discrimination). The general comment also discusses the role of the media. The HRC states that all restrictions on freedom of expression must be in line with subsection 3 of article 19. In the jurisprudence of the HRC, both as shown in General Comment 34 and in their various rulings regarding alleged violations of article 19, we see that the HRC has a strict interpretation of which limitations state parties can legally put on freedom of expression. I will come back to what HRC says on defamation and insult laws in the following section.

2.2 Criminal defamation and “insult laws”

Most, if not all, countries have some kind of defamation or libel laws, to ensure that individuals are protected against wrongful public allegations against them. The protection

⁵ GC34 replaced GC10.

against wrongful public accusations is also granted in human rights instruments. However, many countries go even further in protecting against insults or defamation, through some kind of “insult laws”. Insult laws differ a lot between countries and regions, but the essence of these laws is to criminalize expressions that are perceived as insulting or can be said to cause disrespect, offend or undermine the honour and dignity of authorities or public officials. In 2002 over 100 countries had such laws (Walden 2002:207). A number of countries have repealed such legislation since then, but McCracken (2012) documented examples from 59 countries in 2010. Although some countries have general laws that also cover expressions made about other individuals, high-ranking government officials, civil servants and politicians are the ones who invoke these laws the most (Walden 2002:207). Zimbabwe is one of the countries that also have general provisions on criminal insult and criminal defamation (sections 95 and 96 of the Criminal law (codification and reform) Act – hereafter referred to as the Criminal Code). The Zimbabwean legislation is examined in detail in chapter 3.

Insult laws are often considered part of criminal defamation laws, but there are some factors distinguishing between insult and defamation. Defamation legislation is designed to help people protect their reputation against libel (written defamation) or slander (oral defamation), and is concerned with the impact such expressions have on third parties (the public), whereas insult laws are concerned with the impact such expressions have on the feelings of the insulted person, on his or her honour and dignity (Walden 2002:208). This means that you will be freed from charges of criminal defamation if you can prove that the allegations are true, but this does not go for insult charges, as long as one can claim that the allegations or expressions undermined the dignity of the ‘insulted’ person. In addition, expressions of opinion are usually not legally actionable as defamation, whereas insult legislation can also cover truthful allegations, opinions, satire etc. (ibid:208). However, it is important to note that the distinctions between defamation and insult can sometimes be blurred in practice, and vaguely defined libel laws can lead to defamation convictions where the expressions uttered are in fact insults or disrespect (ibid:209).

2.2.1 Historical background

The roots of general insult laws can be traced as far back as the fifth century Roman Law of the Twelve Tablets' provisions on *iniuria* (Walden 2000:9), but the insult laws regarding heads of state and authorities come from the notion of *lèse majesté*, which meant an offence to the dignity of the sovereign (Ottaway and Marks 2000:1). Since the King was thought of as being ruler by divine right, these laws were related to blasphemy (ibid). Many monarchies still have *lèse majesté*-laws protecting members of the royal family, and some Islamic nations have blasphemy laws that mandates severe penalties for insulting religious leaders (Walden 2000:7). When the rulers of most states became presidents such laws changed into the protection of presidents or other authorities from insults. The classic form of these laws is the French press law of 1881, which has been replicated in various forms in a range of other countries (ibid). The modern insult laws are related to laws regarding 'seditious libel' in the old British common law; a law that was developed after the introduction of the printing press (ibid:9). Insult laws in African countries today are mostly a colonial legacy (Balule 2009:408), and many former British colonies still have laws criminalizing seditious libel.

This is the case in Zimbabwe, which inherited insult laws in the form of sedition laws from Britain in the now repealed Law and Order (Maintenance) Act of 1960 (Balule 2009:425). In current legislation, we find these laws in the Criminal Code, section 31 on "Publishing or communication false statements prejudicial to the State" and section 33 on "Undermining authority of or insulting President", which are the ones examined in this study.

2.2.2 Insult laws and freedom of expression

There is a fear that insult and defamation legislation can undermine the free public expression of opinions and ideas, and the media's possibility to disseminate opinions and to hold the government accountable. Insult laws are perceived by many as being especially harming to democratic rights in a country. As Walden (2002:207) puts it:

Regardless of what the laws are called or how they are worded, the result is the same: they are used to stifle and punish political discussion and dissent, editorial comment and criticism, satire, and investigative journalism. They constitute one of the most pervasive, repressive, and dangerous forms of media regulation.

Criminal defamation and insult laws are widely used to stifle legitimate criticism of government institutions and public officials, and there is widespread use of such laws in countries facing political crisis or civil conflict (Balule 2009:406). Due to such abuse of insult laws all the major human rights bodies have acknowledged the need to be cautious with such legislation to ensure that it does not come in conflict with democratic principles of transparency and public scrutiny of government and public officials (ibid:410-411). The African Commission on Human Rights has adopted Resolution 169 on Repealing Criminal Defamation Laws in Africa, where they express their “concern at the deteriorating press freedom in some parts of Africa, and in particular: restrictive legislations that censor the public’s right to access information; direct attacks on journalists; their arrest and detention; physical assault and killings, due to statements or materials published against government officials” (ACHR 2010). The Special Rapporteur on Freedom of Expression and Access to Information in Africa, Commissioner Pansy Tlakula, is also appealing to African states to abolish laws that restrict freedom of expression, and has launched a campaign for this purpose (Shyllon 2012:9). The Inter-American Commission on Human Rights (IACHR) states in its *Declaration of Principles on Freedom of Expression*, article 11, that insult laws (known in Latin America as ‘desacato laws’) “restrict freedom of expression and the right to information” (OAS 2000).

In Europe, the Council of Europe’s *Declaration on Freedom of Political Debate in the Media* does not declare insult laws a violation of freedom of expression *per se*, but urges governments to apply protection of government institutions, where such protection exists, in a restrictive manner (Balule 2009:411). The European Court on Human Rights has also limited the discretion of governments in defamation cases involving politicians, stressing that politicians should have to accept more criticism than private individuals (Kozlowski 2006:141-142).

The former Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Ambeyi Ligabo, also urged states to decriminalize defamation in his report to the Human Rights Council in 2007 (Ligabo 2007: paras44-57).

The Human Rights Committee states their concern regarding laws that criminalize defamation of heads of states and urges states to consider decriminalization in General Comment 34 (HRC 2011, GC 34, paras 38 and 47). Paragraph 38 says:

Moreover, all public figures, including those exercising the highest political authority such as heads of state and government, are legitimately subject to criticism and political opposition. Accordingly, the Committee expresses concern regarding laws on such matters as, lese majesty, *desacato*, disrespect for authority, disrespect for flags and symbols, defamation of the head of state and the protection of the honour of public officials, and laws should not provide for more severe penalties solely on the basis of the identity of the person that may have been impugned. (GC 34:38)

They have also commented on these issues in their concluding observations on state parties' reports, such as the concluding observations on Zambia in 2007. Here the HRC states their concern that defamation against the president is still a criminal offence, and that arrests and charges are used "as harassment and censorship techniques" against journalists who publicize articles that are critical of the Government (HRC 2007:para19). The HRC has also commented on this issue in the consideration of an individual communication under the Optional Protocol. In *Adonis v. The Philippines*, the HRC, referring to GC 34, concluded that the Philippines had violated article 19(3) by convicting Mr. Adonis for defamation. Since Zimbabwe has not ratified the first additional protocol to the ICCPR, the HRC has not dealt with any individual complaints regarding the legislation of Zimbabwe, but the general comments, although not legally binding, give instructions on the interpretation of the Covenant that should be followed by all ratifying states.

2.3 The ‘chilling effect’

As mentioned above, there are many voices of concern regarding the stifling effect that libel and defamation laws can have on public debate and democratic principles in a country. This concern is especially strong regarding the media, and many human rights, legal and media commentators argue that defamation laws or libel laws ‘chill’ media speech (Dent and Kenyon 2004:1).⁶ Before I proceed with analysing the situation in Zimbabwe in more detail, I will discuss the concept of ‘chilling effect’ to give a theoretical background that will enable us to assess the effect of the legislation in Zimbabwe.

2.3.1 The legal concept

The idea of something having a ‘chilling’ effect implies that it deters someone from doing something they otherwise would have done. The reasons behind why people act as they do are complicated, and legislation is but one of the factors that frame our behaviour. However, in law we can say that the deterring factor is the fear of punishment, whether this punishment is imprisonment, fines or other sanctions (Schauer 1978:689). Related to freedom of expression, the ‘chilling effect’ is when the media or individuals impose a self-censorship on what they say or publish in fear of being criminally charged (Steiner, Alston and Goodman 2007:654). You can distinguish between the *direct* chilling effect, which is when expressions are specifically altered due to legal considerations, and a *structural* chilling effect, which works in a more subtle manner, preventing the creation of certain kind of material or mentioning certain issues (Barendt 1997:191-192).

As a legal concept, the term ‘chilling effect’ is of US origin, developed by the Supreme Court in various cases regarding free speech and libel laws (Barendt 1997:189-190). The first mentioning of the concept by the Supreme Court in a First amendment case was in 1963.⁷ In this legal context, the ‘chilling effect’ refers to “the effect of the rules of law,

⁶ Page numbers added by author, the original document does not have page numbers.

⁷ “While, of course, all legitimate organizations are the beneficiaries of these provisions, they are all the more essential here, where the challenged privacy is that of persons espousing beliefs already unpopular with their

whether criminal or civil, and of official practices on the exercise of freedom of speech and of the media” (Barendt 1997:190). Whereas administrative censorship and court injunctions will have an immediate and straightforward effect in preventing publication or other expressions, the fear of criminal or civil prosecution can have a chilling effect deterring people from publishing a story or making an expression even in the cases where they could have been able to defend the action if prosecuted (ibid). This means that the chilling effect refers to the deterrence of activities and expressions that are in fact protected by either the national constitution or by international human rights provisions, due to the fear of prosecutions. In other words, “[t]he danger of this sort of invidious chilling effect lies in the fact that something that ‘ought’ to be expressed is not. Deterred by the fear of punishment, some individuals refrain from saying or publishing that which they lawfully could, and indeed, should”(Schauer 1978:693).

The danger of chilling speech and expressions that are lawful is an argument for avoiding broad and vague legal provisions, and also for not narrowing down the scope of lawful expressions, since the most difficult expressions to judge the legality of are the expressions that lie on the borders between legal and illegal (ibid:696). Implicit here is notion that it is more harmful to wrongfully limit expressions than to overextend them, since the harm to society is considered graver by the first than by the latter. Where this is probably most clearly expressed is in the US legal tradition, where the ‘chilling effect doctrine’ has evolved “into a major substantive component of first amendment adjudication”(Schauer 1978:685). Here the fear of unintended chilling of speech has opened up for an extensive and broad legal interpretation of the freedom of speech provision in the first amendment.

It is important to note that a deterring effect is an intended effect behind legislation and regulations (Schauer 1978:689); they are in fact designed to regulate people’s behaviour,

neighbors and the deterrent and ‘chilling’ effect on the free exercise of constitutionally enshrined rights of free speech, expression, and association is consequently the more immediate and substantial” (Gibson v. Florida Legis. Investigation Comm, 372 U.S. 539, 556-57,1963 (referred to in Schauer 1978:685)

whether it is to make us not drive past the speeding limit, refrain from violently attacking other citizens or from cheating on our taxes. In this sense, legislation in itself is intended to have a ‘chilling effect’. This also affects freedom of expression, for instance where legislation makes it illegal to publish certain forms of pornography, thus restricting people’s ability to legally publish such expressions. Frederick Schauer labels this intended effect as a “*benign chilling effect*” (1978:690). He also underlines that all restrictions will in fact run the risk of deterring someone from doing something that the regulation does not intend to deter (ibid:700-701), which is a non-benign effect. In other words, any law used for its original purpose will have an *intended* chilling effect that is to deter people from violating the provision provided in the law, but is also at the risk of having an *unintended* chilling effect by deterring people from doing something that will in fact not violate the provision in the law.

2.3.2 What determines the chilling effect of legislation?

Above I have discussed how legislation can have a chilling effect, both intended and unintended. But what determines when people abide by the rules and when they ignore them? In this section I will present the theoretical framework that I will use in the analysis of the effects that insult and defamation legislation has on public expressions in Zimbabwe, combining the theories regarding the chilling effect with theories on the factors that determine the deterring effect of legislation.

There is a lot of literature in criminology, law and philosophy on the variables that determine the effects of legislation and the compliance with rules. I will not explore this subject in full detail, but have chosen to limit the presentation to what is relevant for my analysis.

First of all, it is of course necessary to distinguish between rules that are legally enforced, for example by legal sanctions, and rules and norms that are only socially enforced, where the ‘offender’ might experience social sanctions but that are not illegal per se. Often these are related; people who commit acts such as theft and murder face the risk of facing both legal and social sanctions, and people’s attitudes towards certain activities are also shaped

by legislation and vice-versa (there are for example several studies on the interrelationship between attitudes and legislation regarding smoking).⁸ However, the factors that determine compliance will have similarities regardless of what kind of rules we are talking about. If a rule is to deter people from breaking it, there are three prerequisites that must be satisfied: The rule must be known to the possible offender; the perceived costs of violating the rule must be considered to be higher than the perceived benefits; and the person must be able and willing to let this knowledge decide his or her conduct at the time of the potential violation (Robinson and Darley 2003:953), meaning that he or she is able and willing to act rationally at the time.

These three prerequisites are only at the top of a complex dynamic process, and I will elaborate a little bit on each of them to show some of the complexities. Knowledge of the rule in question seems like an easy prerequisite to satisfy. However, the detailed knowledge of the contents of legislation can be quite limited, and people often have a tendency to assume that the law is as it should be, according to their perception of justice (ibid:952).⁹ Also, even given that there is knowledge about the rule in question, the deterrence effect of this rule would depend on, among other factors, that the people targeted by the rule are rational and able to act rationally in the given circumstances; that there is a high chance of detection; and that there is a reasonable certainty of punishment after detection (ibid:976). Studies show that the *likelihood* of being detected is the most important factor in this deterrence equation, more important than the severity of the punishment (Zimring and Hawkins, cited in Kagan and Skolnick 1993:78). So if the risk of being caught is perceived as almost non-existent, the prospects of strict punishment will not in itself be enough to deter people from committing an act that they want to commit. This will, of course, depend on the context, and on the degrees of severity. If the *possible* punishment is life threatening or extreme in other ways, this can have a deterring impact even in situations where the probability of

⁸ See for instance Rabin and Sugarman (1993).

⁹ Probably this applies most to countries where the population perceives that there is rule of law and there is a general trust in the fairness of the laws.

being punished is limited. The perceived severity of the punishment is also determined by the time that passes between violation and sanction. If there is a long time laps, the perceived cost will be dramatically reduced (Robinson and Darley 2003:954).

The perceived benefit to be gained from the rule violation is of course central in the cost-benefit analysis. If the benefits to be gained are quite limited, the cost factors will become more important.

Another factor in the cost-benefit analysis that a (rational) person will perform is related to the social reactions that the act will lead to. This is of course related to individual context, such as social status, economic background etc. The cost of a criminal prosecution would be perceived differently depending on who the person is, whether he or she has a previous criminal record etc. The social support for the actions is also of crucial importance. People will more easily defy norms and rules if there is social support for their acts within their social group, even in situations with considerable risk of punishment (Kagan and Skolnick 1993:78).

This leads us to the last factor to consider, namely the ability and willingness of the potential offender to act rationally in the relevant circumstances. A rule or law will not in itself deter people who find themselves in circumstances where they cannot be expected to act rationally according to a cost-benefit analysis, for instance due to extreme stress, intoxication, illness or other factors.

One factor is the ability to act rationally. The other factor is willingness. Determining the willingness to act rationally of course implies that the rational thing to do is to *not* break the law. However, if a law is considered unconstitutional or unjust, violating the law conscientiously could also be a rational act of civil disobedience; a deliberate and rational act as a political protest to bring the issue to the attention of the public or with the aim of getting the issue before the courts by creating what is referred to as a test case (Hall 2007:2085-86, Olsen 2005:213). In this case, the rule violation is considered the rational thing to do by the

offender. Many people will find it easier to violate a law if they consider it to be unconstitutional as well as unjust (Olsen 2005:217), and the support from the public is much easier to get if you have good arguments that the law in question is unconstitutional (ibid:222). In fact, some people do not even consider it to be civil disobedience if the law that is being violated is unconstitutional (ibid:213).¹⁰ Anyway, we see that the possible deterring factor of a rule or law is a lot weaker if the rule in question is perceived as being illegitimate or unjust, and especially if it is perceived as being unconstitutional. Also, if the issue is perceived as being highly important to several people, the ability to organize and mobilize people in mutual support for anti-compliance would weaken the deterring effect of the law.

If we are to determine the deterring, or chilling effect of a law or a rule, it is necessary to understand that such processes are very complex, dynamic and depending on context and individual circumstances. Even in situations that may seem similar, two people might assess the perceived costs and benefits quite differently, due to individual differences and different assessment of the context. Individual factors that can increase (perceived) vulnerability are gender, age, socio-economic standing, ethnicity etc. Also, the degree of uncertainty surrounding the situation will make the assessment more complicated.

2.3.3 A theory of the chilling effect of Zimbabwean legislation

Based on the theories I have presented above, what can we expect to find when we analyse the effects of the current legislation in Zimbabwe? If the legislation is supposed to have the intended chilling effect, which is to prevent people from making expressions that violate the law, there are some factors that need to be considered.

¹⁰ Then of course the question is: who decides if a law is unconstitutional and how do you punish people who have acted in good faith doing what they believed to be in line with the Constitution? I will not go further into the debate on civil disobedience here, but see Hall (2007) for a proposal as to how criminal law can deal with civil disobedience through introducing a “Guilty but civilly disobedient” verdict.

First, if the legislation is to have a deterring effect on public voices, there must be knowledge about the law among people in the media and art world. On the other hand, the ability to evade the law would also depend on the knowledge of the laws in question. Lack of detailed knowledge could therefore increase the unintended chilling effect of the law.

Second, the perceived costs of breaking the law must be higher than the perceived benefits that would come with a violation. To establish if this is the case, I must look at the factors related to costs and benefits, such as the probability of detection and a response from the authorities, the severity of the possible consequences and the time laps between a violation and the sanction. Sanctions could also apply to third parties such as family, friends or professional relations. Given the special role of the media, professional media ethics require journalists and editors to take special care not to cause harm to third parties. This includes the protection of sources. I would therefore expect a cost-benefit analysis to include perceived costs also for third parties. Given that these factors are important in establishing the deterring effect of a law, we can expect to see a change in behaviour due to the recent changes such as the provisions in the new constitution and the rulings by the Constitutional court regarding certain sections of the current legislation. We would also expect to see strategies to avoid detection, such as anonymity, and other ways of hiding violations.

Ultimately I will look at the perceived legitimacy of the current legislation to assess whether it can be deemed rational and socially acceptable to violate the legislation, thereby increasing the willingness to violate the law. Such willingness could reduce the deterring effect of the legislation. By analysing the data obtained in light of all these factors, hopefully we can approach a deeper understanding of the effect of legislation on public expressions.

One note of caution must be mentioned before I proceed with the analysis: In a politically polarized society such as Zimbabwe, all data must be analysed with extra care because the perceptions of the situation will vary depending on which side you identify with. There is also the possibility of issues being exaggerated or downplayed according to the political

(and personal) views of the informant, or of the state department or human rights organisation behind a report or study. Previous victimization, such as imprisonment or torture, or other individual experiences could also colour an informant's perception of the government policies or practices even though he or she is interviewed as an expert. It is important that any researcher is aware of this, so that we don't end up being mouth pieces for any one side of a conflict. I have tried to be aware of this throughout my work.

3 The effect of legislation in Zimbabwe

Before I proceed with presenting and analysing the data I have collected, I will give an introduction to the situation in Zimbabwe when it comes to freedom of speech and media freedoms, and present the relevant legislation on insult and defamation. I will then present and analyse my findings in light of the theory presented above.

3.1 Zimbabwe – introduction

3.1.1 Zimbabwe and human rights

Zimbabwe was established as an independent nation in 1980, putting an end to white minority-ruled Rhodesia led by Ian Smith. Southern Rhodesia had unilaterally declared itself independent from the former colonial ruler United Kingdom in 1965. The independence in 1980 put an end to a civil war that had lasted for about a decade, and installed the leader of the independence movement, Robert Mugabe, as Prime Minister. Robert Mugabe remained Prime Minister until the Constitution was changed in 1987 and the head of state became the President (Vollan 2013:9). Since then, Robert Mugabe has been President of Zimbabwe, making him one of the longest serving heads of state in the world.

Zimbabwe has ratified a number of the most significant human rights treaties, such as the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), the International Convention on the Elimination of All Forms of Racial Discrimination (CERD), the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW), the Convention on the

Rights of the Child (CRC) and the African Charter on Human and Peoples' Rights (the Banjul Charter). They have not ratified the optional protocols to the ICCPR, the ICESCR or the CEDAW or article 14 of the CERD, nor have they ratified the Convention Against Torture (CAT).¹¹

Several Zimbabwean organisations report regular human rights violations within a wide range of areas. Alleged violations, especially regarding civil and political human rights, have increased in electoral processes, and politically motivated violence has been reported by many human rights organisations. The human rights situation has led to several European countries and the United States imposing economic and political sanctions on Zimbabwe.¹²

In 2013, Zimbabwe approved a new constitution, replacing the 1980 Lancaster house Constitution. The new constitution was approved in a referendum in March 2013 and entered into force in May 2013. The country then turned directly to an election process, with elections being held on 31st of July 2013. The elections ended the four years of co-ruling by the ZANU-PF and the two MDC-formations (Movement for Democratic Change, which was split in two factions in 2005)¹³ in the Government of National Unity (GNU). Although the election results are challenged by the MDC, the new ZANU-PF government took its seats in September 2013, headed by the then 89 years old President Robert Mugabe, and supported by a Parliament where ZANU-PF now holds a large majority. In fact, ZANU-PF

¹¹ The optional protocols and article 14 of CERD are individual complaints mechanisms.

¹² There have been developments during the first months of 2014 to ease the sanctions. The issue of sanctions and their effects has been the source of much debate in Zimbabwe.

¹³ The Morgan Tsvangirai-faction MDC-T and the Arthur Mutambara-faction MDC-M (later led by Welshman Ncube). The split came after the general elections in 2005, where ZANU-PF won a big enough majority to change the constitution and reintroduce the Senate. The MDC opposed this, but then split over whether or not they should participate in the elections for the senate (Vollan 2013:24). Currently (May 2014) there is the possibility of a further fractioning within MDC-T.

holds the sufficient two-thirds majority in both houses necessary to amend the Constitution if they should so desire.¹⁴

The new constitution is considered as a better framework for protecting human rights than the previous constitution, especially since it has a quite progressive Bill of Rights. It also includes specific provisions on the protection of academic freedom and freedom of artistic expression, and freedom of the media, explicitly stating that this includes the protection of sources (§61). There is an ongoing debate in Zimbabwe on the process of realignment of existing legislation to the new constitution, both in parliament and in the media, and the estimate of how many laws that need to be changed as a result of the new constitution varies from 100 to around 400, depending on the source. An inter-ministerial committee was set up in October 2013 to look at this issue (Sunday Mail 2013a), but the government is warning the public that the process might take a long time (Radio Dialogue 2014).

3.1.2 Zimbabwean legislation affecting freedom of expression

The traditional media environment in Zimbabwe consists of a relatively liberalized printed media and a state-dominated broadcasting sector (Chuma 2013:11). In addition there has been an increase in digital media and online publications during the last couple of years, most of them diaspora based; a development that has to some extent changed the media arena. I will return to this below.

The most relevant legislation in Zimbabwe related to public expressions are the Public Order and Security Act (POSA) and the Access to Information and Protection of Privacy Act (AIPPA), passed in 2002 and 2003 respectively, and Criminal law (codification and reform) Act (passed in 2005, entered into effect in 2006). The Zimbabwean government explained the reasoning behind introducing the AIPPA legislation in this way, in their period-

¹⁴ Requirement stated in §328 of the Constitution. Changes cannot be made to the Chapter 4 (which includes the bill of rights) or Chapter 16 (on agriculture and land) without a nationwide referendum being held first.

ic report to the African Commission on Human and People's Rights: "A highly disturbing development is that many of the private media organizations have been peddling deliberate falsehoods, which undermined the State and individual security in support of the British-orchestrated strategy of 'regime change', thus compelling Government to enact the AIPPA" (Republic of Zimbabwe 2006:xxxiii). The Criminal Code was supposed to consolidate and amend the criminal law of Zimbabwe, and as part of that it took some of the most criticized provisions from POSA and AIPPA such as the insult and defamation clauses, and in some instances introduced harsher penalties (Open Societies Foundation 2009:30-31).

Artists are affected by the Censorship and Entertainments Control Act, which sets down a Board of censors who shall make decisions regarding "undesirable" pieces of art, such as films, texts etc., and also prohibits all public entertainment unless it has been previously approved by the Board (section 16(1) of the Act). Other relevant acts regulating public expressions include the Postal and Telecommunications Act, the Broadcasting Services Act, the Official Secrets Act and the Interception of Communications Act. For a detailed presentation of the content of the different pieces of legislation affecting the media, see Open Society Foundation (2009) or see MISA (undated) for an analysis of amendments to media laws after 2005.

This study looks specifically at insult and defamation legislation. As mentioned in Chapter 2, the Zimbabwean laws on defamation and insult of public officials are a colonial inheritance (Balule 2009:425). Today we find the actual legislation in the Criminal code, section 31 on "Publishing or communication false statements prejudicial to the State" and section 33 on "Undermining authority of or insulting Preside (see annex 6.1 and 6.2 for the full wording of the sections). Section 31 is mostly applied against journalists or editors, since it involves publications or communications, whereas section 33 can be applied towards any individual who says something insulting about the President (see chapter 2 for the differences between insult and defamation).

As early as May 2003, the Supreme Court of Zimbabwe ruled that section 80 of the AIPPA – Abuse of journalistic privilege – was unconstitutional.¹⁵ The African Commission on Human and People’s Rights also found section 80 of AIPPA to be incompatible with article 9 in the Banjul Charter, in *Scanlen & Holderness v. Zimbabwe*. Section 80 of the AIPPA was repealed, but only because it reappeared in a very similar form in Section 31 of the Criminal Code, introducing a harsher penalty.

The constitutionality of sections 31 and 33 of the Criminal Code has been questioned by the Supreme Court (sitting as the Constitutional Court) in two different cases in October 2013. The Court declared both sections unconstitutional, but invited the State to present its arguments for sustaining the sections. The State presented its arguments on section 31 to the Constitutional court, but withdrew the charges in the case related to section 33, thereby avoiding the final judgement on the constitutionality of this section. The final ruling on section 31 is still to be made public (as of May 2014). According to a lawyer at Zimbabwe Lawyers for Human Rights, who represented the defendant Owen Maseko in the section 33-case, the state continued to withdraw charges in three more section 33-cases between January and April 2014, impeding the possibility of getting a final decision that could strike down the section as unconstitutional once and for all (Interview nr. 14, Human Rights lawyer, 03.04.2014). It remains to be seen what will happen with these sections (as of May 2014). Many of the informants expressed a lack of faith in the effect that the new constitution would have on the existing legislation, because of the government’s previous disregard of court decisions regarding constitutionality.¹⁶

In addition to section 31 and 33, the Criminal Code also has a provision on criminal defamation, section 96 (see Annex 6.3 for the full wording of this section). Criminal defamation charges are frequently being used against media, both journalists and editors, often by poli-

¹⁵ In the case of *Zvakavpano Mudiwa v The State* (Interights 2010:24).

¹⁶ There are at least 12 cases between 2000 and 2008 where the State ignored court rulings on various issues (Ginsberg and Moustafa 2008:253).

ticians. The defamation provisions is currently (May 2014) being challenged by many in Zimbabwean society, including Zinef - The Zimbabwe National Editors' Forum (NewsDay 2014a). The Information, Media and Broadcasting Services minister, Jonathan Moyo, has also made recent public statements saying that these laws will be repealed, and are probably unconstitutional:

Even so, I am happy to say without any equivocation and without any fear of being contradicted that based on the views we have heard from our engagement with the media industry, given the progressive nature of the new Bill of Rights in our new Constitution and particularly based on the values and ideals of our heroic liberation struggle whose recognition is now enshrined in our new Constitution, I honestly believe that the time has come to remove criminal defamation from our system of justice in the national interest.

(Minister Jonathan Moyo, quoted in Sunday Mail 2013b).

This is an interesting turn of events, since Minister Moyo was central to the drafting of both POSA and AIPPA, and has also previously filed many defamation claims against media companies. For instance, in the two years between 2001 and 2003, Minister Moyo himself filed more than 20 defamation cases against *The Zimbabwe Independent* (Professor Geoff Feltoe, quoted in Open Society Foundation 2009:32). Currently the Minister of Justice, Legal and Parliamentary Affairs, Emmerson Mnangagwa, is claiming defamation damages from the media company *Alpha Media Holdings* for 1 million US dollars (NewsAfrica 2013).

The legislation restricting freedom of speech in POSA, AIPPA and the Criminal Code has been criticized by both national and international media and human rights organisations in the more than ten years they have been in existence. During her visit to Zimbabwe in May 2012, the UN High Commissioner on Human Rights, Navi Pillay, commented on the use of section 33, and her concern regarding the “corrosive effect of these laws” (OCHCR 2012).

3.2 The chilling effect of existing legislation in Zimbabwe

As mentioned above, many countries have some form of insult or defamation laws, but the use of such laws is prevalent in countries facing some kind of political or civil conflict (Balule 2009:406). In Zimbabwe there has been a reported increase in the laws used against media and other public voices during the last decade or so, since the political and economic crisis started at the end of the 1990s (ibid). In this main section of the thesis, I will see if I can approach an answer to the initial question: How is the Zimbabwean legislation and official practices regarding insult laws and criminal defamation of public officials affecting critical voices (media, artists) – in which way can it be said that the legislation has a ‘chilling effect’ on public expressions? I will look at the effects of this legislation on public expressions, including what alternative strategies are being employed as a reaction to the state legislation and practices. Does the legislation affect public voices, and under what conditions to these effects materialise? I will have a main focus on the media, due to its important role in society, but I will also look at artistic expressions.

3.2.1 The media

I started out with the assumption that media in Zimbabwe is not operating freely. I have already presented briefly some of the Zimbabwe legislation that restricts media operations. The country is placed as number 135 out of 180 on The World Press Freedom Index 2014 (Reporters without borders 2014:31). A report from the Committee to Protect Journalists (CPJ) documents that 49 journalists have fled Zimbabwe since 2001 for political reasons (CPJ:2011), the big majority of them during the first half of the decade. But there are many factors contributing to media restrictions. What are the effects of legislation on the media, and which strategies do journalists, editors and media houses use in this environment?

The Zimbabwe society is politically divided, and this is also reflected in the media. The media is highly polarized, with the state-controlled media on one side and the so-called

independent or privately owned media on the other. There are of course individual differences, but independent media studies show that both sides have a bias in their reporting.¹⁷ A study published in June 2013 based on interviews with key media actors concludes that “there was unanimity [sic] among both journalists and civil society respondents that the journalism profession in Zimbabwe is currently saddled with a serious ethical and credibility deficit” (Chuman 2013:19). The study also states that “[t]he gap between the journalist observer and the political activist/commissariat officer has all but vanished” (Chuma 2013:6), describing how some representatives from the media are actively taking a partisan political role in their reporting.

The effect of the current legislation would of course differ depending on which media house or newspaper you work for. Since I have focused on the effect that legislation has on *oppositional* voices, I have not interviewed representatives from the state-controlled media.

3.2.1.1 Self-censorship

Before starting the interviews, I assumed that self-censorship among journalists takes place, since this has been documented in several studies and reports (see for example Open Society Foundation 2009 and African Media Barometer 2012). As Skjerdal points out, self-censorship in Zimbabwe is related to the strong political control that the state has over the media (Skjerdal 2010:100), but due to the repressive media regulation it is an issue not only present in state media but also categorical in the private media (ibid:102). Even though I assumed that self-censorship was an issue, I was still interested in learning more about the characteristics of self-censorship and to which degree it still takes place.

¹⁷ See for example Media Monitoring Project Zimbabwe’s report Media Credibility Index on the elections 2013, concluding that “Both the state-owned media and some sections of the private media were biased in their coverage of the July 31 elections” (MMPZ 2013:16).

Self-censorship can take different forms. One form of it is that a journalist simply does not investigate something that could lead to a story; another form is that the journalist has the information but fails to publish anything on it. Another form of self-censorship is that he or she alters the story by not giving all the information that has been obtained or by twisting the focus of the news story so as not to cause offence. Due to the specific legislation protecting the President, several of the informants said that special attention was given to articles where the president himself was implied in a story in a negative way, which indicates that special caution must be taken when publishing a story where the president is involved. Section 33 is not invoked in many cases involving media expressions; however comments regarding the President can lead to charges of violation of Section 31 (since criticism of the President can be deemed as being prejudicial to the State).

The situation for media practitioners is perceived by all the informants to be difficult, causing self-censorship. There was a general agreement that the situation had been especially grave during the period from 2000 until 2009, when the Government of National Unity (GNU) was established.¹⁸ Even though the situation became easier after 2009, the repression was still felt, and several journalists told me that they had experienced a cross-pressure during the GNU, because representatives from the MDC had also reacted to critical coverage. Therefor the current situation, after the elections in 2013, was perceived as being radically improved. “Now, in the last six months or so you see a relaxation”. (Interview nr 6, Editor/journalist 27.03.2014).

However, all the informants were absolutely clear on the fact that self-censorship is still being practiced in Zimbabwean media, both by journalists and editors.

¹⁸ There were also accounts of media repression before 2000, and arrests and defamation charges under legislation that existed prior to POSA, AIPPA and Criminal Code, but this is outside of the scope of the investigation. “Journalism here has been a hard road, you know. There has never been a free press here.” (Interview nr 8, Media expert/journalist 28.03.2014).

I find the effects to still exist up till today, with such a huge blow of fear and even paranoia were part of it, I will never forget that period. [...] I would really think more than twice before I started typing a story, where would this story take me. (Interview nr 2, Journalist 25.03.2014)

Self-censorship is not performed by the journalist in isolation. The role of the editors is important, and also in some instances the owners. One journalist commented in this way on the new role that editors and owners took in the exercise of media censorship:

We were like, we had turned into a fraternity under siege. We would go to the newsroom, and before you would do anything or try to think about it, editors, our editors, and even the owners, had turned into arch rivals for journalists in the newsroom, instead of them aiding and playing their role in the newspaper to get good stories, they were now the first gatekeepers playing the role of the state [...] It had a significant impact in as far as our freedom to report on issues. There was a palpable change in the dynamics in reporting, for journalists, including foreign journalists.

(Interview nr 2, Journalist 25.03.2014)

One journalist informed me that he had written an article anonymously and was arrested and ‘disappeared’ for a couple of days before he was returned to his home. According to him, it was his editor who had given his name and full access to his files, to the police, due to the editor’s close relationship with people within the ZANU-PF government and the police force.¹⁹

Quite a few editors were arrested during these years, from 2000 – 2009, alongside with journalists, and editors are still being arrested in Zimbabwe on charges related to defamation and insult. Therefore it is no wonder that some editors take on the role as ‘gate keepers’, as the informant calls it, self-censoring the content of their news product. However, the interviews also show that some editors take on the opposite role and support journalists

¹⁹ Interview nr 6, Editor/journalist 27.03.2014

who try to do investigative journalism, and some even push journalists to investigate and publish articles. One former journalist, now editor, showed me one of the last editions of his newspaper and commented:

You look at this story [...], the first thing that you want to notice is, it's written "staff reporter". But the person who wrote that story is [name of reporter], who is in there. She didn't want to use her name, and that becomes a statement in itself [...]. So, the mere thing that she doesn't want her name in there means that she has already, to some extent she has already censored herself. I actually had to take out the whip for her to write the story because she was so scared, right, she didn't want to write the story. But I think it's because you know, of what she has seen happening in the past when you write, you know, information on stuff like this.

(Interview nr 6, Editor/journalist 27.03.2014)

3.2.1.1.1 Reasons for self-censoring

I have established that self-censoring is being practiced in Zimbabwe even at the time of the field work (March – April 2014), although to a lesser degree than in earlier years. In order to assess the effects of the legislation, it is necessary to look at the reasons behind self-censoring and analyze to which extent they are related to the legislation. In the anonymous story by the frightened journalist, the self-censorship hadn't stopped at excluding the reporter's name from the published story:

The investigating didn't go as far as it was supposed to go, One: because of the self-restriction that the reporter puts on herself, you know she didn't go out and talk to [...] and other things. Right, so this is self-restriction. [...] So, they are scared that either they could be harmed, or, as in the case of the lead story here, the person who actually incited the story is a person who was supposed to be a contact, a source of information. Now there's a fear that, you know, if I bring up my name, and maybe I take it further, you know, I might prejudice my relations with the source. That has always been a dilemma with journalists: to what extent do you write in a negative way about a source, [...] or the organization for that matter, for which that particular source works for. So the self-restriction once again, because you say, you ask yourself: am I going to prejudice my relationship with the source.

(Interview nr 6, Editor/journalist 27.03.2014)

The fear of jeopardizing the relationship with sources would be a well-known dilemma for journalists doing investigative journalism all over the world, and is not necessarily related to the particular situation in Zimbabwe. However, several journalists referred to the fear for the physical safety of sources as a factor leading to extra caution. The same journalist/editor who had “taken out the whip” to have his reporter do a story had also allowed for the story not to go as far as it could have done due to her worries, thereby acknowledging their relevance. He also told me about a story that he never wrote even though he considered it to be breaking news, due to his concerns for his source’s safety as well as his own.

I got a story, quite interestingly, and it has never seen the light of day. [...] But when it comes to a crunch, you can either be obliged to reveal your source in court, or these guys may use other means, extra-judicial means, to make you talk and tell on who actually gave you the information. And then I said to myself, you know, what are the implications on the source, you know, imagine he might have said it to me as a friend and stuff like that, you know, but it would harm his job and everything, and, you know, he could get killed at the end of the day, so, finally I put it aside. So, because of those two fears; I was considering his fate, but I was also considering my fate.

(Interview nr 6, Editor/journalist 27.03.2014)

Here the journalist shows the intended chilling effect of the legislation (if the article was found to be in violation of the law he could be obliged to reveal the source in court), but he also refers to the fear of extra-judicial sanctions. This incident had happened about two years earlier, i.e. under the previous Constitution that did not explicitly provide for the confidentiality of sources.

Stories from other journalists show that the fear of being forced to reveal the source is a well-grounded fear. It appears that arrests on charges of defamation or publishing falsehoods are often accompanied by different kinds of pressure to make journalists reveal their sources.

Our charge was publishing falsehoods. But that wasn’t the minister’s intention. I will show you what they really were trying to do under the guise of the law. Through a whole year, this thing lasted a whole year until we were

acquitted, but what he really wanted to do, they made it clear at the police station, he wanted to force us into revealing our sources.

(Interview nr 2, Journalist 25.03.2014)

This is corroborated by stories told by other journalists (MISA 2013). Journalists can also find themselves in a squeeze, where they are given the options either to reveal their sources to substantiate the allegations that they have made, or to be charged under section 31 in the Criminal Code (or previously under the similar provisions in the POSA or AIPPA legislation) for publishing a false statement prejudicial to the state. Given such alternatives the journalist finds him –or herself in a real dilemma between journalistic ethics and personal wellbeing and security.

The journalist who had refrained from writing a story due to his and his source's safety also referred to the 'extra-judicial' practice used by the police to force journalists to reveal their sources. This was confirmed by several of the journalists, who had either experienced police brutality and threats themselves or who narrated specific incidents where this had happened to colleagues (see also MISA 2013 for stories from journalists who experienced violence and torture by police or other state agents). Even though the law now provides for the confidentiality of a journalist's sources, there is no confidence that the law in itself gives enough safety for journalists.

But even in the past, the Supreme court has ruled that journalists are not obliged to reveal their sources, which is of course another reason why [the police] subject them to interrogation, and, well, physical interrogation if that's what you call it, so it doesn't go on the record anyway, it's just, you know, they'll use that all the time as well.

(Interview nr 8, Media expert/journalist 28.03.2014)

This fear of third persons' security was also mentioned by a publisher as a reason not to publish a book, even though people had been eager to participate in the book project.

And everybody was passionate to tell their story, under their name, but I was fearful that perhaps they didn't realize the implications, especially if they

were very vulnerable people, they could be just set upon at night by war vets and that would be the end of them” (Interview, nr 11, publisher 01.04.2014).

The experience and level of professional training of the journalists can also have an impact on their self-censoring. Talking about the major challenges of investigative journalism in Zimbabwe today, one of the editors (and experienced journalist) commented:

But then also there is an issue of the capacity of the investigative reporters themselves, in which case I think a lot of training has to be done, and it also comes with experience. If I was to talk about myself, I’m working with fairly junior guys, right, and because of their inexperience, sometimes they are just too scared. Sometimes they self-censor themselves, and they don’t want to go out there and do their story, sometimes they lack the capacity to go out and do the stories. (Interview nr 6, Editor/journalist, 27.03.2014)

I have no empirical evidence to sustain the argument that younger and less experienced journalists self-censor more than older journalists do, but the same thing is said by several of the informants, and it is also said about younger scholars by more experienced academics. It is also one of the findings of the African Media Barometer Zimbabwe 2012, that “Amongst the younger journalists there is a culture of fear and they are unable to deal with intimidation” (p 53). This indicates that age is one of the individual factors that have impact on the perceived chilling effect of the legislation. Young age can increase the perceived vulnerability due to lack of experience and because young people could have less networks and be more vulnerable. Given that the media restrictions increased from around year 2000 and onwards, it is plausible that younger journalists who have not experienced the less restricted working environment would self-censor more than those old enough to have been trained and having worked under less restrictive conditions.

I think it will be fair to say that the environment post-2000, and particularly post-2002 with that AIPPA and POSA were enacted, freedom of speech, and other freedoms and liberties, have been constrained, and I wouldn’t know what the situation was like before 2002 in respect of the media, but it’s very clear that post the enactment of POSA and AIPPA there was a lot of self-

ensorship that did not diminish with the GNU²⁰, and I think it became embedded, it became institutionalized, and also when the products that were produced, the media products, in the sense of journalists trained after those repressive pieces of legislation, they were trained by those who were also fearful of what to say. (Interview nr 10, Scholar, 31.03.2014)

Journalism training has been affected by the post-2000 repressive environment (Banda et.al. 2007:167), as has the working environment for journalists, leaving new journalists without many good practices to lead them in their pursuit of a career in media. This comes in addition to other challenges facing the media, such as the lack of sufficient funding, time pressure and not good enough journalism training (African Media Barometer Zimbabwe 2012:53). All these will affect investigative journalism especially hard.

3.2.1.2 Other strategies employed by the media

Self-censorship is one of the strategies employed by the media in the face of strict government control. Another strategy is anonymity, which is very common in Zimbabwean newspapers. Quite a few of the articles you read in both printed and online publications will not have a name in the byline, just “staff reporter”. This is a common way of not drawing attention to yourself as a journalist, but it is not a completely safe mode. Above we saw one example of a journalist being arrested after having written an anonymous article because his editor gave him away. The fact that editors will always be responsible for the content of the media production makes it impossible for them to stay anonymous, and both media owners and editors have faced criminal charges due to the content that has been published in their product.

Another strategy that is being employed by Zimbabwean journalists and media owners is to move the publications out of the country, either by printing abroad or by publishing stories online. The introduction of the new restrictive legislation after 2000, and the closing down

²⁰ GNU = Government of national unity, the joint government of ZANU-PF and the two MDC-parties.

of several newspapers in 2003, triggered “an unprecedented mushrooming of news websites on Zimbabwe across the internet” (Moyo 2007:84). Although online newspapers had been in existence since the 1990s, these events led to the establishing of a huge number of new websites, some of which still exist today. Also, quite a few of these new websites differed from the old ones in that they were not linked to existing print publications, but were stand-alone news websites (ibid). The form and quality of the online publications vary a lot. Some of them are online newspapers who produce their own material following ordinary journalistic professional guidelines, others don’t practice independent journalism but only links up to other online articles, and some produce their own material without following journalistic principles and ethics. One of the informants, who had been involved in the establishment of one such online publication, tells the following on how such publications came about:

We ended up, as media practitioners, as part of the media, finding ways out, and it led to a rise in the establishment of, if I may use, if I may abuse, that word: off-shore media outlets. Around that period, I will give you a personal experience, now I can testify about it, it’s no longer a secret, around that period Zimbabwe witnessed a huge influx of, a huge surge of the establishment of shadowy online publications, by us. Operating there in the newsroom, writing stories daily, but going away to establish anonymous, they were faceless, online publications. [...].

Journalists [...], as we found ourselves in this trap, and apparently like you say, working out daily and getting some powerful and juicy stories, we circumvented the whole situation by establishing these faceless, by faceless I mean nobody knew who was behind, it was our secret, it was just something on the internet, running sensational, very hard-beating, you know. When someone is under restriction and they get some freedom elsewhere they will go berserk, they will exploit. Including now blatant falsehoods, clearly meant to hit at the regime.

(Interview nr. 2, Journalist, 25.03.2014)

The establishment of such online publications confirms the assumption that the legislation in itself has a chilling effect, since stories are published online that could not have seen the light of day in traditional Zimbabwean publications. On the other hand, the story also shows that such online publications have a risk of falling into the trap of unprofessionalism

and gossip. “Far removed from the arm of the Zimbabwean law, some have published unsubstantiated stories bordering on defamation” (Moyo 2007:91). The possibility of absolute anonymity that is offered by online publications due to the perceived threat to journalists’ personal security also fuels such unprofessionalism (ibid). This mirrors Barendt’s suggestion that one of the structural chilling effects of libel laws in the UK is that the media becomes more polemical as opposed to factually-oriented (1997:193). Thus, when the government regulates the media so strictly, one unintended effect is that the government exposes itself to more false anonymous stories.

That aside, there is no doubt that online publications are offering information to Zimbabweans, both inside the country and in the diaspora, that would not have been available without these, thus reducing the gate-keeping role of the state controlled media in Zimbabwe (Moyo 2007:101). As was pointed out to me by several of the informants, there is also an interrelationship between the traditional media inside Zimbabwe and such online publications, where the one will follow up on stories published in the other. However, online publications still have a limited reach in Zimbabwe today. Although internet is becoming more available with the spread of mobile phones, especially smart phones, the cost of internet is in itself a limitation even for those who have possible access.

The restrictive legislation also caused some media owners to move the printing of their news product out of the country, to avoid having to apply for registration by Zimbabwean authorities (the most criticized content of the AIPPA is its registration requirements, that extends from media houses to individual journalists, refusing people to practice as journalists unless they have been lawfully registered and have received their certificate). Some publications are still printed abroad (in South Africa), but my impression is that this is now more due to financial reasons than political, since it has become easier to obtain legal registration in Zimbabwe for print media. When it comes to radio, there are strict restrictions on radio licenses which continue up until today (as of May 2014), despite the campaigning of

several community radios and other media organisations in Zimbabwe. However, the internet has also here provided new options, and several radios broadcast online.²¹

3.2.2 Other public voices - artistic expressions in music, theatre and literature

In this section I will look at how the legislation affects artists in present-day Zimbabwe, and what their strategies are to cope with the situation. I will start by introducing the case of Owen Maseko, which is mentioned above, as an example of how the government is using legislation to restrict artistic expressions.

On the 25th of March 2010, the Zimbabwean visual artist Owen Maseko opened his exhibition entitled *Sibathontisele*²² in the National Art Gallery in Bulawayo, Zimbabwe. The next day the exhibition was shut down and banned, and Mr. Maseko was arrested and charged with contravening section 33 of the Criminal Code: Undermining authority of or insulting President. The charges were dropped after the Constitutional Court had ruled the section unconstitutional. The Maseko-case has gotten much attention both internationally and within Zimbabwe.

3.2.2.1 Artistic censorship and self-censorship

Artists are affected by different legislation and in a different way than the media. Section 31 is not an issue for most artists, whereas the insult law in section 33 is more relevant.

²¹ The most popular ones are Voice of America Zimbabwe (available on www.voazimbabwe.com) and SW Radio Africa (available on www.swradioafrica.com).

²² This is an Ndebele word, meaning ‘we drip on them’ or ‘let’s drip on them’, which is referring to a torture technique of dripping hot, melted plastic on victims. This torture was used by the Fifth brigade in the operation in the Matabeleland-region in the 1980s known as the *Gukurahundi*; a Shona word, meaning ‘the rain that washes away the chaff’ (Maseko 2011:93). Between 10 000 and 20 000 people are estimated to have been killed in this violence that lasted from 1983 to 1987. The aim of the operation was to crush political dissidents from ZAPU, but the massacre also had an ethnic aspect, since most members of the Fifth brigade were Shona and their victims were Ndebele (Sachikonye 2011:16)

According to the Censorship and Entertainments Control Act, all public performances are prohibited unless approved by the Board of Censors (article 16:1), but according to my information it is very rare that artists apply for approval for shows or performances, unless they are forming part of a larger event such as the annual HIFA (Harare International Festival of the Arts).

They're supposed to approve, that's what they say. [...] Before you even put it on. But I mean, most artists have been kind of ignoring that process, because we thought it is fraud and really irrelevant to our processes, so a lot of theatre shows have been going around the country without being even going to the censorship board. (Interview nr 9, Theatre director/actor, 31.03.2014)

Musicians also seem to be either unaware of, or to largely ignore the requirement of registering and pre-approval that the Censorship act sets down (see Nyathi 2005). However, self-censorship is reported to be very wide-spread among Zimbabwean musicians (Eyre 2005). This is also what the informants told me, both regarding musicians and theatre/drama artists.

The real challenge that I see in terms of freedom of speech in this country is, first and foremost, people end up practicing serious self-censorship because of what has happened in the past. I know for a fact that I've, I think for singing my music my shows have been, I have not been allowed to do shows, as and when I want to do them. [...] I think on a couple of occasions, I went to perform and I was told I couldn't perform, because I don't sing what is acceptable.

And there are so many other musicians, who when they hear or read this, they start practicing self-censorship on their own. Because, at the end of the day, you know, these musicians are professional people, they survive through the trade. Now, if you're going to sing things that are going to be called unacceptable, you kill your profession, and you kill your life, and you kill your children, you kill your survival kit. So, at the end of the day, I'm convinced this is why, in this country, a lot of people are not going to be found singing confrontational music.

(Interview nr. 4, Musician, 26.03.2014)

Although official censorship of music occurs very rarely (Eyre 2004:94), the most common way that the authorities apply censorship seems to be unofficial, by people not being able

to book a place for their events or by songs being ‘banned’ from being played on the national broadcaster ZBC (Zimbabwe Broadcasting Corporation).

There is a censorship board, but the real problem is, the music is not necessarily censored by that board, it is censored by some people sitting somewhere, and all they do is they sit there and they say: This is not acceptable, and therefore it will never get air played.

(Interview nr. 4, Musician, 26.03.2014)

Due to his albums not being played on the radio, this musician gave out several albums under a pseudonym, and then these songs were played:

Ultimately I then had to devise a plan of changing my name, and changing the name, and the music started playing on the radio. Which means it’s purely about the name. Not the music. [...] Yes, it’s actually played now, on radio, and I hear it actually played every day, every other day that I switch on to the Zimbabwe radio stations, I come across my music, and they celebrate that: It’s that guy, and I say to myself: So really...

(Interview nr. 4, Musician, 26.03.2014)

The informality of this kind of censorship makes it hard to challenge in the courts, because it can be hard to prove that a song has in fact been banned. It is not easy to ‘prove’ that a song has sufficient musical qualities to earn its right to be played on national radio. It is also hard to establish where the orders to ban music come from, and there is seldom official confirmation that an album has been banned.

The example of Thomas Mapfumo can illustrate the unofficial censorship. Thomas Mapfumo is one of the most famous singers in Zimbabwe, and also known for his protest music. After having been one of the most important musicians supporting the new government throughout the 1980s, Mr. Mapfumo started to sing more critical songs from 1989 and onwards. His falling out with the Zimbabwean government led to him leaving Zimbabwe, and he still lives abroad. He moved to the US in 2000, and gave his last performance in Zimbabwe in 2004 (Eyre 2012). Apparently he faces criminal charges in Zimbabwe; he was accused of buying stolen cars. The informants perceived these to be phony charges, made up

by the authorities to frame Mr. Mapfumo, but I don't know the status of these charges today. He is still a very popular musician in Zimbabwe. In fact, the state-controlled newspaper The Herald carried a story about him having arrived in Harare the previous night as their April fool's day prank in their print edition on April 1st 2014, leading to "scores of people [calling] the newsroom enquiring" (The Herald 2014).²³ In an interview in 2002 Mr. Mapfumo talked about the banning of his album *Chimurenga Rebel*:

Well, I was a bit concerned, but I wasn't afraid. I knew a lot of ears were listening. A lot of people liked it, though as you know, Chimurenga Rebel was banned from being played on the radio. And this, I can confirm with you, because I spoke with one of the DJ's who is working with ZBC, and he said they were called to a meeting by this Minister of Information, Jonathan Moyo. They discussed about my music, especially this recently released one, Chimurenga Rebel. He was saying a lot of things about the music. "This is why this guy named his music Chimurenga Rebel, because he's a rebel. He's just like a terrorist." They were trying to deny, to say that the music was not banned, but it was banned. (Freemuse 2002)

The same experience of music being banned, but where the ban was unofficial and denied by the authorities, was narrated in 2013 by Leonard Zhakata, another popular Zimbabwean musician:

No one would confirm the ban, but at the same time you didn't hear the music," he recalls. [...] The first time the singer found out his music could not be heard on the radio was in 2003, when he released his album 'Hodho'. He tried to engage with the authorities, but to no avail. Of all of the songs on the album, only one was played on the radio: a love song. (Roosblad 2013)

Even the previous Prime Minister, Morgan Tsvangerai, has told publically about how his autobiography (Tsvangerai and Bango 2011) has been unofficially banned and that the pol-

²³ In fact, Thomas Mapfumo sent a public message to Zimbabweans for the 2014 Independence day (April 18), where he announced that he will be returning to Zimbabwe in September 2014 to perform for his fans (Mapfumo 2014). It will be interesting to see how he will be received by politicians, and how this event will be covered in the different media.

ive have raided bookshops that were selling his book (Sibanda 2012). In December 2011 a female book shop owner was arrested and charged with a violation of Section 33 of the Criminal Code (Undermining authority of or undermining the President) because she sold copies of Tsvangerai's book (ZLHR 2013).

Recording studios have also received threats, leading to some musicians going to South Africa to record, and sellers of music have been targeted the same way as book sellers have:

If you travel around Harare, you won't find anywhere where they are selling my music, because nobody accepts. If you go with your music and you say: Can you please sell it? The next thing they will tell you is: The police will come and confiscate everything, so... Somebody then has to make a decision to say, can I then lose all these other CDs because of these ten? So it then becomes a problem. (Interview nr. 4, Musician, 26.03.2014)

As narrated above, musicians can also experience that they receive a visit before a performance, by the police or other state officials, telling them which songs they should not perform that night, or being told that they are not allowed to do a show. Since the Censorship Act prohibits all public performances that doesn't have a pre-approved censorship certificate, the law can be used at any point in time to stop a performance. This means that the legislation is an effective threat the police can use against an artist to instruct the artist on which songs he or she can or cannot perform in the show. Due to the economic crisis in Zimbabwe, and increasing piracy of records, public performances are the main income generation for most artists. This means that they are very vulnerable to the threat of closing down or stopping their shows.

This vulnerability leads to artists self-censoring, either by avoiding certain political subjects altogether, or by being careful how they express themselves. I already mentioned that anonymity, as in recording or publishing under pseudonyms, is a strategy that some artists

use. Also art itself offers wide opportunities to express things in a more subtle way than news reporting and media work does.

And then the beauty of the theatre is, you can say things on, you can talk about anything, I mean, in such a way that doesn't really provoke people. Because, I mean, my intention with my plays and stuff that I do is not really to provoke directly, I want people to think and then act on, because also [...in]an oppressive system that we're operating under, you wouldn't want to do that because you'll just end up in jail and then you rot in jail, you won't be performing in jail, so it's better then to find strategies to go out to the people, disseminating information while you're staying alive and out of prison, so I mean that's one goal that we've tried to do is to make our play relevant and accepted within our communities so that they are not even afraid to watch the show.

(Interview nr. 9, Theatre director/actor, 31.03.2014)

A theatre performance possesses a wider range of possible forms of communication than a song, and can communicate multiple messages. However, this strategy is also used by musicians as an alternative way of self-censoring:

Yea, they tend to sing in parables, like if they sing in Shona, they use proverbs that can be interpreted in many ways. But those who are in the opposition will say: oh, he's the one that said this, therefor he is with us. ZANU-PF will say: actually this meant that.... So, there are lots of parables that are used. They speak in tongues, it's up to you to interpret. So again, that's self-censorship. It's not because of the richness of the Shona language or the Ndbele language, but they are trying to avoid making explicit statements for or against. Many musicians have, their careers have collapsed.

(Interview nr. 10, Scholar, 31.03.2014)

It is important to note that artists find themselves in a squeeze between the different political sides in this polarized society, and self-censoring is not only being used to suppress political opinions that could be deemed critical of the ZANU-PF. Artists would also want to avoid being labelled as too sympathetic to the governing party, because this could lead to them loosing income from fans on 'the other side'.

Self-censoring will also have a geographical aspect to it. Several of the informants said that there was a big difference in what could be publically expressed in urban centers such as Harare and Bulawayo, which are known to be MDC-T strongholds, and what could be expressed in more rural districts.

There are certain places where we won't... Like, we had one show, you know, touring the nation and then we were to say: in this particular area we're not even going to mention so-and-so-and-so, we have to really censor ourself and really trim the information [...] but try to stay true to the story that we had, but there are certain areas where we just have to cut things out, because it's not like they are educated well enough to understand, their leaders just come and say: [person's name] is a criminal, so whenever [he] shows up, [he] is a criminal. So even if I try to explain: I am not a criminal, I am just trying to freely express myself and this and that, but no no no, you're a criminal, you get us into trouble for listening to your play.

(Interview nr. 9, Theatre director/actor, 31.03.2014)

However, the strongest self-censorship appears to be regarding the mentioning of the President. Even when artists don't see the need to censor the content of their work, there is widespread self-censorship regarding mentions of the President:

These are social and political issues. There's no way that I can try to, you know, to polish them or to you know, to cover them in chocolate and stuff like that. They are there, if you don't have water, from where I come from, I have to tell people, I don't have water, we don't have electricity. But I mean, when you want to mention names now, that's when I just have to, you know, kind of censor myself. Sometimes you're also censoring yourself, you know, long before they even censor you, because you know that they will censor you definitely, and then it won't be so nice, the picture won't be so nice.

(Interview nr. 9, Theatre director/actor, 31.03.2014)

This is something that is present in everyday life in Zimbabwe, where people are careful to not make any comments on the President. Almost any critical comment about the President in the presence of at least one more person could lead to a criminal charge of violating section 33 of the Criminal code. The use of this section has increased since 2010, and between 2010 and June 2013 the human rights organization Zimbabwe Lawyers for Human Rights

had attended to 63 cases of individuals that had been charged with violating section 33 (ZLHR 2013), including the Owen Maseko-case mentioned above.

It appears that writers have been under less official scrutiny than musicians, which can be explained by the limited reach that literature has compared to music. However, there seem to have been an increased awareness by the authorities that all cultural spaces can be used for political expressions:

I think, you know, that in the last 5-6 years, literature, I mean fiction, that had always been a very neutral terrain, had suddenly become a very political, was politicized, became a very political terrain, and maybe the CIO had woken up to the fact, maybe because of HIFA²⁴, CIO had woken up to the fact that culture was an intensely political arena, and not the soft arena they had thought it was, or not really thought about at all.

(Interview nr. 11, Publisher, 01.04.2014)

3.2.2.2 Other strategies employed by artists

In addition to self-censoring in different ways, as shown above, there are also other strategies that artists use to avoid negative reactions. I mentioned that one of the musicians had given out music under a pseudonym to avoid his songs from being banned by the radio. Anonymity or pseudonyms can be used as a way of avoiding legal repercussions. However, since income comes from public performances this would not be a viable strategy for most musicians who need their work to be income generating as well. Based on my information, the use of pseudonyms in published literature does not seem to be common. The publisher I talked to said that she had never had an author approach the publishing house asking to use a pseudonym:

Never. There is no censorship. I can say that honestly. But it's also partly, if I'm printing a book, I may be printing 300 nowadays, the quantity is very

²⁴ HIFA = Harare International Festival of the Arts. An annual arts festival in Harare that has caused controversy during the last couple of years.

small. And most people don't read. You're printing a newspaper, you might be printing 10 000. If we were printing in Shona, and printing 25 000, it would be different. (Interview nr. 11, Publisher, 01.04.2014)

The same was said about publishing theatre manuscripts; that there would be no problem in publishing almost any manuscript under a full name, but the main challenge was financial and the lack of a market. However, in the 2014 HIFA (Harare International Festival of the Arts), one of the controversial plays that was performed did not credit the writer in the festival program. The state-controlled newspaper *The Herald* commented on the anonymity in this way: "For some obscure reason, HIFA organisers chose not to put the name of the writer of the play but *The Herald* understands the play was based on a book an on [sic] army general who was a homosexual." (Mbiriya 2014).²⁵ I do not know the festival's reason for omitting the writer's name, but homosexuality is a very controversial and sensitive issue in Zimbabwe, which could indicate that this was an intended act.

In addition to using artistic expressions and subtleness to avoid criminal charges or being labelled politically, theatre practitioners can also use different strategies to avoid the censorship laws and other regulations:

When we go to the communities we use what we call guerrilla theatre, you know, where you just go into the community and you round up people, and then within an hour, or within 30 minutes, you perform the show, and then you disappear. So sometimes there's no need for clearance. So we've never had a show been stopped.

(Interview nr. 9, Theatre director/actor, 31.03.2014)

²⁵ The biggest controversy of HIFA 2014 was when the South African band Freshlyground were denied entrance to Zimbabwe when they were coming to perform at the closing show. The band made a critical song and music video about President Robert Mugabe in 2010, and the entry denial was linked to this by several media and the band itself, even though Zimbabwe authorities claimed it was due to the lack of valid work permits (NewsDay 2014c).

The same strategy of giving unannounced shows was also mentioned as a strategy used by some musicians, who would do unannounced jam sessions at cafés or bars and play songs that were not possible to play in pre-announced shows. This however requires that you don't have financial needs to be met by performing your art, either because it has been funded from elsewhere or because you have income from other sources.

3.2.3 The current situation

All my media informants stated that the environment was perceived as being freer now than it had previously. However, their references were to the post-election state and the government formation and not the constitution or the legislation.

But I would say, from last year, when we had general elections, which led to the formation of a new government, the situation is quite interesting. The legislation still remains as it is, but it is now in the enforcement and the attitudes of those in power, I'll tell you with confidence, as of right now, I think as journalist I'm feeling at my most free, even though not completely free because – I think later we'll talk about the technical restrictions that will always come some on these things, and the cultural restrictions that come with that. (Interview nr 6, Editor/journalist 27.03.2014)

Multiple references were also given to the role that Information Minister Moyo has taken since he was re-appointed Minister in September 2013, where he has given vocal support to the freedom of the media and the abolition of criminal defamation. The Minister himself frequently refers to the new constitution when he argues for increased media freedoms (see for instance NewsAfrica 2013 and SundayMail 2014). Minister Moyo is known as the architect behind both the POSA and the AIPPA before he was removed from the minister-post in 2006. The legislation gives the Minister a wide range of authorities, and the informants often placed the Minister in central positions when narrating previous incidents, such as being personally responsible for detention of journalists or the banning of songs.

Although the media perceives the situation as being freer, there is much uncertainty in Zimbabwean society as to what will happen now. One uncertainty is related to the constitution and the realignment of other laws.

It's comparatively less restrictive, less dangerous, but in as far as nothing has changed, legislatively speaking, what could have changed? A long time, the media [...], even civil society, in Zimbabwe have gone through that transition also, whereby the more you get used to something the more you devise mechanisms to resist, to avert, to circumvent, and to find your ways around, if I may put it that way. (Interview nr 2, Journalist, 25.03.2014)

Uncertainty is also related to the larger political context. It is harder to assess the situation, for example by artists:

[S]o in terms of operating, I won't say it's safer or it's safe to put up a show because we're post election date, I mean, this is kind of the most dangerous time, because in election time we'd know what to say, before election you'd know what to say, but now, nobody's saying anything, and you're not so sure who's watching you and you're not so sure who's going to say what. [...] so for me it's a little bit of a challenge to really put up a show without knowing who is going to respond to me and how they are going to respond to me.

If you know that your father can beat you for stealing sugar, you know, when he's around you would not steal sugar. You'll be a nice and obedient son. And if he's not around, you know also how to behave. So for me this is kind of tricky phase, for anyone, even the civil society groups, they don't know what kind of position they're in, they don't say anything, because of where we're coming from, from the election period, we don't know what the other opposition party is planning to do, we don't even know the same structures that have been put in place with the current government, so for me it's a little bit of a tricky phase. [...] Especially dealing with those kind of thematic issues that we talked about, I mean, good governance, democracy, you know, you don't want to be found on the wrong side.

(Interview nr. 9, Theatre director/actor, 31.03.2014)

3.3 The effect of legislation on public voices in Zimbabwe

I have now presented my findings on how representatives from the media and the art world in Zimbabwe perceive their situation, and their different strategies to cope with the restric-

tive legal environment. I believe that I have shown clearly that there is in fact a ‘chilling’ of public expressions in Zimbabwe, both in the media and the art world, where people do not feel completely free to express themselves. I will now use the theories presented in chapter 2 to discuss to which degree we can say that the legislation itself is behind this chilling. To do so I must look at the factors mentioned there; Knowledge of the legislation; Perceived costs and benefits from a violation, including the probability of detection, the severity of possible sanctions and the time laps between the violation and the sanction; and The willingness to violate the law, based on the legitimacy of the legislation and social support for violation.

3.3.1 Defining the ‘margin of terror’

The first criteria that needs to be met if we are to conclude that legislation in fact has the intended chilling effect is that the legislation needs to be known to the potential offenders. Based on my data I would say that Zimbabwean journalists and editors are very familiar with the existing legislation that affects them, especially the AIPPA and sections of the Criminal Code (the provisions in sections 31 and 33 were mentioned frequently, but also criminal defamation). They were also familiar with several concrete cases of arrests on charges of violation of these provisions, and this in itself has a chilling effect. Members of the media community often have a high degree of professional allegiance, which also means that the media writes about incidents involving other journalists or editors. This way, and through the work of human rights and media organisations, all arrests and charges are quickly publically known (at least in the urban areas or for those with access to internet). The media, especially the independent media, also write quickly about other arrests and charges related to violations connected to freedom of expression. On one hand this is important to put pressure on the government to release the person(s) arrested or charge him or her properly, but on the other hand such publicity can also contribute to chilling other people’s expressions.

Precise knowledge of the legislation can also be used to avoid the unintended chilling effect of legislation, i.e. that legislation chills expressions that are in fact not prohibited by

the actual legislation. The importance of knowing the legislation was pointed out by one of my informants:

There are certain practitioners who are not aware of certain laws and certain, you know, policies that are in place, so they will tend to just withdraw, because they don't want to cause trouble, but when you know these particular laws, like I know this will never affect me, this will never affect me, you go ahead with it, and you put up a show [...]. I think as a citizen it's good also to be aware that there are certain structures in place, so either you know how to avoid them, or to really confront them, knowing where you are standing. But if you don't know where you are standing, they can just say: Hey, get out of here, and you'll be like: Okay, I'm running away.

(Interview nr. 9, Theatre director/actor, 31.03.2014)

The knowledge of legislation can protect you against lawful attacks, but the same informant also mentioned how his theatre group would self-censor in certain areas to avoid that they would call him 'a criminal' and accuse him of getting them in trouble, because not all people would know when a performance was legal. This is but one example of the fear of unlawful attacks that were mentioned by several informants, especially when talking about the situation in certain rural areas. Some of this violence bears resemblances with vigilante violence, which is often related to legislation, or at least people's perception of what the legislation says, because it aims to control crime or other social infractions (Johnston 1996:220). Politically related violence has been widespread in Zimbabwe during the last decade, and longer (Sachikonye 2011), and the fear of extrajudicial sanctions such as violence, either by organized or more ad hoc groups, creates an extra chilling effect on expressions. Even in the urban areas of Harare the informants told me how they would be afraid of, or had experienced, war veterans or unidentified people coming to their gate wanting to get in.

Having established that there is knowledge about the legislation among media practitioners and, although to a lesser degree, artists, we now turn to look at the perceived costs related to violations of the law. The first thing to look at is the probability of detection, which is a major deterring factor. The probability of detection is of course also about knowledge and perception – the deterring effect in each individual case will depend on that person's

knowledge about how many other people have been detected for similar offenses. In a discussion on self-censorship in replying to surveys and polls, a scholar told me that they found a larger ‘margin of terror’ in responses from urban areas than from rural, defining ‘margin of terror’ as fear-induced answers that had to be taken into account when analyzing the survey results.²⁶ His speculation regarding this was:

Perhaps they know, there’s more interaction and more knowledge about the police and what they can do, than in the rural areas. [...] On your way here you’ll meet the police, you know, on your way back you will meet the police. In the rural areas, in some remote areas, even a month before they come across a police man or a police woman. So they don’t have that kind of live experience [...] about people who have been arrested or charged or who have been tortured because of certain, you know... Torture one, or kill one [...], kill one and you scare a thousand. As long as you do it publically, you see, so arrest one, and the one thousand they fall in line. But in the rural area, if they don’t see anyone being shot or being arrested, they have, you know... And of course the hold of the ZANU-PF in the rural areas, they tend to say the rights things, so they have nothing to fear, you see?

(Interview nr. 10, Scholar, 31.03.2014)

If his theory is correct, we see that knowledge about the possible consequences has a deterring effect on people’s willingness to reply to questions in surveys and polls. I argue that the same deterring effect applies to legislation regarding freedom of expression, if the possible ‘offenders’ perceive the probability of being detected as high enough. Perception of own vulnerability and knowledge about how other people have faced consequences for similar violations contribute to the chilling effect of the legislation, and enlarges the ‘margin of terror’ of the legislation.

Above I have shown how different strategies are being applied to avoid detection; Journalists write anonymously as ‘staff reporter’ or write in faceless online publications; sources used in media articles are anonymous and therefore impossible to hold accountable, musi-

²⁶ It appears that the term ‘margin of terror’ was first used in this way in the Zimbabwe context by the late Zimbabwean scholar Masipula Sithole (Bratton, Chikwana and Sithole 2005:106).

cians record music under pseudonyms and theatre groups perform 'guerrilla theatre'. The use of such avoidance strategies indicates that the legislation in fact has a chilling effect.

The severity of the sanctions is another element. The legislated sanctions if convicted of violating the different legislation I have discussed varies from up to one year imprisonment for violating Section 33 to up to 20 years imprisonment for violating Section 31. Criminal defamation (section 96) carries a possible sentence of up to 2 years imprisonment. However, the length of the sentence is not the only consequence. The judicial system in Zimbabwe has a tendency of working slowly in these cases, and several of the informants said that their arrests were caused by motives other than a genuine belief that they had violated a law and could be convicted in court.

In short, our arrest and the whole year on remand, going to court every month, standing in the dock for maybe three minutes and told: Come back on this date; was tactically meant to keep us under siege and to be available to these guys [the CIO, who wanted them to reveal the sources and how they operated as a newspaper], because of this case we would be available to these guys. (Interview nr. 2, Journalist, 25.03.2014).

I would argue that the Zimbabwean authorities consciously use detention as a way of chilling expressions both by the media and by individuals, even when they know that there might not be reasonable grounds to believe that the case could end in a conviction. As a human rights lawyer I talked to put it "Here the police arrest people to investigate, instead of investigate first and then arrest" (Interview nr. 12, Human rights lawyer, 02.04.2014).

One thing you've got to remember is that the government is extremely good at creating a sense of fear and panic, and undermining people. They only need to use one person and set it up as an example, and they've done that. Now, the people who are well known [...], you know, they won't be touched, because they have an international reputation, they are acknowledged experts in their field. If they were going to touch somebody, they would take somebody small, scare the living daylight out of him or her, and probably then drop the case after 2,3 or 4 years of feeling that your phone is tapped and your computer watched and so on. And then, everybody in that

person's field, it has exactly the effect that they want – it makes everybody fearful and self-censor. (Interview nr. 11, Publisher, 01.04.2014)

Arrests often occur immediately after an article has been published or an expression has been made, meaning that the first sanction comes very quickly after the incident has taken place. This increases the chilling effect of the legislation. Few of the documented cases lead to conviction, but the immediate reaction by the police means that the sanction is felt almost immediately. MISA (Media Institute of Southern Africa, Zimbabwe) documented 58 cases involving alleged violations on laws used against journalists and the media during the last couple of years, of which only 6 had resulted in convictions (MISA 2013:5-6). The police have also continued to apply Section 31 after the rulings of the Constitutional Court. On April 28 2014 a Newsday editor and reporter were detained by the police for an article that was published on April 24, and charged with violating Section 31 (NewsDay 2014b). Out of 64 documented cases of alleged violations of section 33 of the Criminal Code between 2010 and 2013, none of them had standing convictions by June 2013 (ZLHR:2013).

As mentioned above, the general attorney decided to withdraw the charges against Owen Maseko when the constitutionality of the section was challenged by the Constitutional Court, and they have proceeded to withdraw charges in at least three other cases between January and April 2014, seemingly to avoid a final decision by the Constitutional court regarding the constitutionality of section 33. This indicates that the Zimbabwean authorities want to avoid that this piece of legislation is repealed, which again indicates that the legislation is perceived to have the intended effect. Since the actual conviction rate on this section is low, it can be argued that the *intended* effect of this legislation is in fact to avoid *any* critical comment about the President in day-to-day communication. I would argue that the chilling effect of this particular section is pervasive throughout Zimbabwean society. People are scared to mention even the smallest comment about the president in the presence of other people. It is also important to note that the President, with his legacy as a liberation hero and the founding father of Zimbabwe, has a very high standing among many Zimbabweans, and many people react very vehemently to any critical comment against him. Many of the section 33-cases are in fact reported by civilian bystanders such as work col-

leagues (although it is impossible to know if any of them are in fact agents for the authorities). The President himself has not commented on this piece of legislation publically (Mail&Guardian 2013). Interestingly, this legislation is not used against the media.

You look at the papers today or any day, and you see cartoons of Robert Mugabe, half asleep in a little boat [...], mocking him every day, and they don't prosecute [...] them. [...]

Newspapers don't have a rural penetration at all, so 90 percent of the population don't ever see these newspapers. It's the urban population, that they know that they don't vote for ZANU-PF, so they leave them half of the time. It would cause a terrible stir if they started prosecuting people over cartoons being critical of the president, but individuals who are making comments...
(Interview nr 8, Media expert/journalist 28.03.2014).

Here we see that the geographical aspect is raised again; that the government is more concerned about their reputation in rural districts. This does however not fully explain the discrepancy in the application of section 31 and section 33 on the media, and the 'margin of terror' in rural versus urban areas. It is also interesting that the application of section 33 increased during the joint government, as documented by ZLHR (2013). My data does not give me sufficient information to conclude on this, but it is a very interesting issue that warrants further studies.

To sum up, we see that the consequences of the legislation goes beyond the court procedures and legal sanctions, and it appears that the legislation is used consciously as a chilling factor by the authorities, even when there are no real legal grounds for applying it.

You see, the real challenge is, it's not necessarily us scoring victories in the courts. It's then about what then after that. Very few people will want to do what Owen [Maseko] did, because the real tragedy is, you do it and you pay the price, at a personal level. Which is what the government then is good at.
(Interview nr. 4, Musician, 26.03.2014)

The last factor that I will look at is related to the willingness of violating the law. As I showed in chapter 2, people are more willing to violate a law that they consider unjust or

even unconstitutional. There was unanimity among my informants that the legislations of POSA, AIPPA and several sections of the Criminal Code were not legitimate and should be repealed. I noted a high sense of willingness to violate the laws due to them not being legitimate. Journalists and media practitioners have established or form part of several coalitions and organisations such as MISA-Zimbabwe, The Media Alliance of Zimbabwe, The Voluntary Media Council of Zimbabwe, the Zimbabwe Union of Journalists and Zimbabwe National Editors' Forum (Zinef). These organisations are active and vocal in their criticism of the mentioned laws. This creates a strong social support for journalists and editors who violate the legislation. MISA-Zimbabwe also administers a Media Defense Fund, to help media practitioners cover legal fees related to violations of the laws. The strong social support among media practitioners is an enabling environment that reduces the deterring effect of the legislation.

One last empirical test of the effect of legislation is to look at if the present and see whether the new Constitution and the Constitutional Court rulings is perceived as having an effect on media and artists. I would have expected more of the informants to make active references to the new constitution or the recent rulings by the Constitutional Court regarding sections 31 and 33 of the Criminal Code, but among media and art practitioners this was not highlighted much. Whereas media activists and human rights lawyers were eager to talk about these changes, there was less optimism among the media and art practitioners that I talked to regarding the imminent changes that would follow from these recent developments. This would indicate that the legislation itself is not so important. However, I believe this to be closely linked to skepticism of the government's willingness to abide by court rulings and the constitution.

You must be aware of this: Here is a piece of legislation, here's AIPPA. When the court rules against AIPPA or strikes off a section of AIPPA, that's just one step. Because the legislation is administered by government. So the next step should be government taking that up and implementing the court ruling. They don't do it! [...] The issue then in short: Here is a political leadership which overrides everything and anything when push comes to shove. Basically, obtaining court rulings against the Mugabe regime is a waste of time.
(Interview nr. 2, Journalist, 25.03.2014)

In conclusion, there is high willingness, especially in the independent media, to violate the legislation that is perceived as being illegitimate. This is probably strengthened by the joint efforts of organizations and coalitions. On the other hand, there is a strong feeling among the people I talked to that the legislation in itself was only half the picture: It all depends on the political will in the ZANU-PF and the government, and that will is perceived as being very small or non-existing. This interplay between legislation and lawlessness can be seen in an argument for why civil defamation legislation was to be preferred instead of criminal defamation:

Unlike in the case of criminal defamation where state agents can use extra-judicial measures to deal with journalists, which tends to scare a journalist before he even starts writing his story, you don't have to face imprisonment there and then, it's more or less like civil, as it says, you are summoned to come and go, and the hostility might be there, but not within the court process, not within the prosecutorial process, if I may call it that.

(Interview nr 6, Editor/journalist, 27.03.2014)

Summing up, we see that the deterring factors that are necessary for legislation to be complied with are present to a large degree in the case of legislation affecting public expressions in Zimbabwe. First of all, the legislation is known among the possible offenders, especially in the media. Also, the perceived costs of violating the legislation are quite high, caused inter alia by knowledge of previous reactions to others who have violated the legislation. This increases the perceived probability of being detected. The possible sanctions are also quite high, both in terms of sentencing if found guilty (up to twenty years in prison for violations on Section 31) but also in the fear of extra-judicial sanctions such as the threat of violence. The fact that detention comes almost immediately after an expression has been made contributes to the chilling effect of the legislation. The chilling is also enhanced by the fear of sanctions affecting third parties, such as sources.

On the other hand, there is much willingness to violate the law, especially among media practitioners, who perceive these pieces of legislation as being illegitimate and unconstitu-

tional. This willingness is increased by the social support within the media and human rights community, which in turn should contribute to the legislation being less chilling. However, I find that this effect is being countered by the perception that the government will not respect the legislation or court rulings if it goes against them. This creates an uncertainty; a ‘margin of terror’, that increases the chilling effect of the legislation, causing a fear that the legislation can be used against you even when you are in fact not violating it.

4 Conclusion

In this study I have looked at the effect that insult and defamation legislation has on public expressions by the media and artists. I have applied theories on the factors causing legislation to have a deterring effect to data gathered in personal interviews of Zimbabwean media and art practitioners, as well as human rights and media experts, in order to determine the actual chilling effect of the legislation.

A law or rule is most effective when the law is known, the perceived costs are greater than the benefits and there is a high risk of detection of the violation. The likelihood of being detected (here: arrested or prosecuted), the severity of the sanctions and the time span between violation and reaction are factors that increase the perceived cost of a violation, thereby making the law more effective as a deterring factor. All these factors are present in the Zimbabwean case, making the legislation more deterring. The last factor that I looked at is the ability and willingness of the potential offender to act rationally and not violate the law. Here I have shown that there is in fact a high willingness among media practitioners to violate this legislation, which is considered illegitimate and unconstitutional. This indicates reduced effectiveness of the legislation. However, I have also shown that official practices such as immediate detention after an expression has been made, the use of violence or threats of violence either by police officials or unofficial groups, and the lack of trust in the government’s willingness to abide by the law, increase the deterring effect of the legislation and outweighs the social support. In short, the legislation in itself does have a real

chilling effect on public expressions; however it is the combination of the legislation with the (real or perceived) lawlessness that makes it freezing.

The media and art practitioners apply multiple strategies to cope with the restrictive legislation. One is self-censorship, which is widely practiced and can take different forms. Other strategies include anonymity, the use of metaphors or multi-layered communication, spontaneous performances known as 'guerrilla theatre' and faceless online publications. The concern is that these avoidance strategies are contributing to the media being less professional and less ethical, which might in fact be the most corrosive unintended effect of the legislation.

In order to ensure full freedom of expression in Zimbabwe, it is necessary to revise the existing pieces of legislation that I have looked at. The legislation has in fact a chilling effect that needs to be reduced. The combination of legislation with extra-judicial measures means that merely changing the laws is not sufficient. But it is a necessary start.

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4. NN, Musician, 26 March 2014
5. NN, Scholar and music expert, 26 March 2014
6. NN, Editor and journalist, 27 March 2014
7. NN, Journalist, 27. March 2014
8. NN, Media rights expert and journalist, 28 March 2014
9. NN, Theatre director and actor, 31. March 2014
10. NN, Political scientist, 31. March 2014
11. NN, Publisher, 1 April 2014
12. NN, Human Rights Lawyer, 2. April 2014
13. NN, Scholar, 23 March 2014
14. NN, Human rights lawyer, 3 April 2014

6 Annexes

6.1 Section 31 of the Zimbabwe Criminal Law (Codification and Reform) Act

31 Publishing or communicating false statements prejudicial to the State

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—

(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 Prison 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.

6.2 Section 33 of the Zimbabwe Criminal Law (Codification and Reform) Act

33 Undermining authority of or insulting President

(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.

6.3 Section 96 of the Zimbabwe Criminal Law (Codification and Reform) Act

Criminal defamation

(1) Any person who, intending to harm the reputation of another person, publishes a statement which

(a) when he or she published it, he or she knew was false in a material particular or realised that there was a real risk or possibility that it might be false in a material particular; and

(b) causes serious harm to the reputation of that other person or creates a real risk or possibility of causing serious harm to that other person's reputation;

shall be guilty of criminal defamation and liable to a fine up to or exceeding level fourteen or imprisonment for a period not exceeding two years or both.

(2) In deciding whether the publication of a statement has caused harm to a person's reputation that is sufficiently serious to constitute the crime of criminal defamation, a court shall take into account the following factors in addition to any others that are relevant to the particular case

(a) the extent to which the accused has persisted with the allegations made in the statement;

(b) the extravagance of any allegations made in the statement;

(c) the nature and extent of publication of the statement;

(d) whether and to what extent the interests of the State or any community have been detrimentally affected by the publication.

(3) Subject to subsection (4), a person accused of criminal defamation arising out of the publication of a statement shall be entitled to avail himself or herself of any defence that would be available to him or her in civil proceedings for defamation arising out of the same publication of the same statement.

(4) If it is proved in a prosecution for criminal defamation that the defamatory statement was made known to any person, it shall be presumed, unless the contrary is proved, that the person understood its defamatory significance.