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A CRITIQUE OF THE KEY LEGISLATIVE FRAMEWORK GUIDING CIVIL LIBERTIES IN ZIMBABWE

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1 Introduction

The paper seeks to show the extent to which key legislative provisions have curtailed civil liberties, contrary to the constitutional provisions which seek in theory to promote civil liberties, human rights and citizens' participation in governance.[1] Additionally the paper highlights the gravity of the gross breach of legal provisions that are meant to promote human and civil rights. In addressing these aims the paper responds to the question:

To what extent have legal provisions provided for the protection and sustenance of human rights, civil liberties and citizens' participation in governance processes in Zimbabwe over the last two decades?

Zimbabwe is a country in the Southern African region and achieved political independence from Britain in 1980 amid much fanfare and pomp, as citizens were promised civil liberties by their political leadership. The constitution adopted then, the Lancaster House Constitution, was a proud document that articulated the civil liberties that people of the country had craved for, over the decades of colonial rule. The post-colonial state undertook several reforms that ranged from gender, constitutional, agrarian to electoral issues, seeking to respond to citizens' demands for the development of an egalitarian society in the country.[2] However, rampant corruption, the taking of arbitrary decisions by the ruling party, ZANU PF, and the commission of gross human rights violations resulted in a gradual disconnection between the ruling elite and the general citizenry. Increased demands for further

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1 Iman 1992 *Review of African Political Economy* 103.

2 Hyden "Study of Governance" 18.

reforms saw the emergence of a pro-democracy civil society movement that sought to engage the state towards the realisation of and respect for civil liberties.[3] Poor economic and political policy implementation increased ZANU PF's unpopularity among the electorate, as evidenced by the party's deteriorating performance in various elections, especially from the mid-1990s, when it became increasingly evident that democracy was under threat.[4] This activated pro-democracy organisations that sought to restore the nation's disintegrating democratic institutions.[5] Most of Zimbabwe's political woes emanated from skewed policy implementation against the backdrop of the ongoing rule of an increasingly despotic and desperate regime that utilised its mandate to govern by promulgating and enacting restrictive legislation to disenfranchise previously eligible members of society, by curtailing civil liberties, and by perpetuating gross human rights violations.[6] As a result several political and economic developments occurred as the regime fought for its political survival.[7] Consequently, successive and partisan constitutional amendments sought to legitimise controversial actions, notably the expropriation of land in terms of the *Land Acquisition Act* (1985), which violated property rights.[8] Partisan constitutional amendments or new legal enactments made to the legislative environment in the country from 2000 involved the *Private and Voluntary Organisations Act* (PVO) of 1996; the *Broadcast Services Act* of 2000; the *Public Order and Security Act* (POSA) and the *Access to Information and Protection of Privacy Act* (AIPPA),[9] both enacted in 2002; the *NGO Bill* of 2004; the *Zimbabwe Electoral Act* of 2006; and the *Interception of Communications Act* of 2007. Consequently, these are some of the legal instruments that will form the objects of this critique. These pieces of legislation were implemented in the context of a country with a restless citizenry that demanded the restoration of the civil liberties that had gradually been eroded as the regime clung to power through whatever means possible.[10]

3 Mamdani 1990 *Africa Development 56.*
4 Moyo 1993 *Zambezia* 7.

5 Mutambara "One-party State" 15.
6 Makumbe 1994 *Human Rights Bulletin* 19.
7 Mutambara "One-party State" 17.
8 Mamdani "Democratic Theory" 35.
9 Du Toit *State Building and Democracy* 6.
10 Saunders *Never the Same Again* 18.

2 The background to the restrictive legislation

It has been noted that Zimbabwe has experienced tumultuous and unprecedented political, economic and social developments in the last two decades.[11] These developments have seen the enactment of new legislation and/or the amendment of existing legislation in order to facilitate the militarisation and politicisation of public institutions to the detriment of the civilian population of the country[12]. These constitutional developments showed the extent to which the political dispensation was striving for political survival against the backdrop of an increasingly restive population which was responding to the decay of democracy that characterised political developments from the mid-1990s.[13] The rise of a pro-democracy civil society movement in the country was in response to deteriorating democracy. Public participation in any facet of life became guided by partisan pieces of legislation that prescribe certain anticipated behaviours from the general populace.[14] Over the years, laws have been put in place to protect citizens, but in time these laws were amended to curtail human rights and hurt the very people that they were intended to protect.

To understand why the government reneged on its wartime promises of creating a free society for its people, one needs to reflect on recent developments,[15] starting with the growth in prominence of the Zimbabwe Congress of Trade Unions (ZCTU) and the subsequent formation of a broad-based opposition political party, the Movement for Democratic Change (MDC). The popularity of the MDC is reflected by the fact that it commands a lot of support from almost the whole spectrum of civil society, ranging from labour and student movements, religious groups, and independent media houses.[16] Additionally, it has been able to amass the most electoral support since 2000, which has given rise to electoral disputes with ZANU PF. The MDC has performed impressively in municipal and parliamentary elections

11 Saunders *Never the Same Again* 21.
12 Mapuva 2010 *Journal of Legislative Studies* 469.
13 Sachikonye (ed) *Democracy, Civil Society and the State* 28.
14 World Bank *Governance and Development* 24.
15 Saunders *Reconfiguring Civil Society* 65.
16 Sachikonye (ed) *Democracy, Civil Society and the State* 29.

and has dominated most local authorities in the country. The success of civil society in mobilising citizens[17] to reject the endorsement of the government-sponsored Draft Constitution in a referendum in 1999 dealt a heavy political blow to the ZANU PF government and exposed the illegal manner in which the government had dealt with the issue of constitutional reform. The results of the Referendum also indicated that civil society had a stronger voice than the state. The "farm invasions" that came hard on the heels of the formation of the MDC and the results of the Referendum were acts of revenge against white commercial farmers who had bank-rolled the formation of the MDC and had also influenced farm workers to vote against government's intended endorsement of the Draft Constitution. The government began to perceive the white commercial farmers, civil society and the MDC as "enemies of the people," who should be disempowered by uprooting them from their sources of livelihood, in this case, their farms.[18] To the government, Britain, the former colonial master, was behind the funding of the opposition political parties and various civic groups in order to effect regime change.

The unfolding of the above events led government to adopt a hostile view of civil society groups, Britain and its western allies, as well as opposition political parties, especially the MDC. The pretext for the attempt to bring civil societies into the sphere of the state is often given as their inept financial mismanagement, their lack of control of their funds.[19] But the reality behind the attempts is the government's fear of the potential NGOs have for organising people outside state structures, and also the change in donor policies, which now emphasise the building of the institutions of civil society, so that NGOs now receive funds which earlier would have gone to government projects.[20] Thus civil society can be seen to be in direct competition with government over donor funds[21]. New legislation and the amendment of existing laws reflects vindictiveness on the part of government towards NGOs, for the laws are now geared at restricting citizens' participation in governance and policy

17 Keulder *State, Society and Democracy* 17.
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18 Mapuva 2010 *Journal of Legislative Studies* 463.
19 Stephenson 2005 www.beyondintractability.org. Also see Raftopoulos and Phimister *Keep on Knocking* 56.
20 World Bank *Governance* 4.
21 Mapuva 2010 *Journal of Legislative Studies* 467.

processes.[22] While the laws should protect the populace, in this context the amendments to key existing laws and the enactment of new laws have provided government with tools with which it can deal with the perceived "enemies of the state" and the proponents of "regime change."

This paper mainly deals with legal enactments and amendments that took effect soon after the formation of the MDC, which was the result of a concerted effort by the generality of the Zimbabwean citizenry, and was achieved mainly through civil society organisations (CSOs). This is so because the formation of the MDC reflected the extent of citizens' participation and the new political formation enjoyed broad support. The following are the key legislative framework that this paper attempts to critique and how the content of these pieces of legislation reflected the existence of an authoritarian state.

2.1 The Constitution of Zimbabwe (1979)

The *Constitution* is the supreme law of the land. All national legislation emanates from and should conform to it.[23] Graham, Amos and Plumptre (2003) note that "...the formal constitution of the state should in principle provide the ultimate legal framework through which rational-legal behaviour is defined and is not to be used as a punitive measure against citizens."[24] However "constitutions lay down the overall nature and the characteristics of political institutions in elaborate detail, and hold promises of institutionally guaranteed civil liberties and political democracy".[25] Constitutional provisions include civil and political rights, which all citizens are entitled to, irrespective of religion, colour or political affiliation.[26] Through registering and allowing the institutions of civil society a continued existence, the state is creating an avenue for civil participation in national programmes that help in realising societal objectives such as poverty alleviation, the observance of human rights, the upholding of democratic principles, and even environmental and HIV/AIDS

22 Bidi "Multi-party democracy in Zimbabwe" 6.

23 Mapuva *Role of Civil Society* 27.
24 Graham, Amos and Plumptre 2003 iog.ca 4.
25 Kamrava 2000 *Third World Quarterly* 13.
26 Lasswell *Politics* 6.

awareness campaigns.[27] The opposite of this would be constitutions that "are tailor-made to fulfil specific political purposes and to present a mere cloak of legitimacy to norms and practices otherwise the considered as unpopular and illegitimate".[28] In the Zimbabwean context this is exemplified in the *Constitutional Amendment* 17 of 2006,[29] which authenticated the expropriation of formerly white-owned commercial farms without taking cognisance of property rights that the then owners had over their properties. From 2002, several pieces of legislation of the same nature and sophistication were enacted to fulfil specific political ambitions.[30] The *Constitution* realised this political motive through legal provisions such as Acts and Bills, some of which are identified below:

2.2 The Private Voluntary Organisations (PVO) Act[31]

The *Private and Voluntary Organisations Act* (PVO) of 1996 requires all organisations that provide welfare services or treatment or "any activities that uplift the standard of living of persons or families" to register with the government[32]. Registration is not automatic, and the government has a right to deny an organisation's right to exist after examining the organisation's financial books and records. Until recently this last provision had not been enforced, but from November 2002 government required that all organisations not registered under the PVO Act should immediately cease operations or face arrest. Under the PVO Act the Minister

27 Mapuva *Role of Civil Society* 46.
28 Meerkotter 2012 www.kubatana.net.
29 *Land (Consequential Provisions) Bill* 2006*,* under the proviso to section 5(1) of the *Land Acquisition Act* [Chapter 20:10], and which is itemised in Schedule 7, being agricultural land required for resettlement purposes.
30 *Public Order and Security Act* 2002, seeking to curtail civil liberties and the freedoms of movement, expression and assembly, eg Part II regards the following as offences against constitutional government and public security: causing disaffection among members of the Police Force or Defence Force (s 12); publishing or communicating false statements prejudicial to the State (s 15); undermining the authority of or insulting the President (s 16). Part III regards the following as offences against public order: gatherings conducive to riot, disorder or intolerance (s. 19); assaulting or resisting a police officer (s. 20); undermining police authority (s. 21); intimidation (s. 22). Part IV sets the procedure that needs to be followed in order to be allowed to have a public gathering: organisers are to notify the regulating authority of their intention to hold a public gathering (s. 24); regulation of public gatherings (s. 25); prohibition of public gatherings to avoid public disorder (s. 26); temporary prohibition of the holding of public demonstrations within particular police districts (s. 27); civil liability in certain circumstances of organiser of public gathering (s. 28); dispersal of unlawful public gatherings (s. 29); disrupting public gatherings (s. 31).
31 World Bank *Governance* 4.
32 *Private Voluntary Organisations Act* 1996 [Chapter 17:05] General Notice 99 of 2007.

of Public Service is tasked to oversee the registration/deregistration of civic and private/voluntary organisations and their compliance with the various sections of the Act. The Act allows for the formation of a civil society umbrella body, the National Association of Non-Governmental Organisations (NANGO), to oversee the running of all civic organisations, under the strict supervision of the Minister of Public Service.[33] However, the Minister of Public Service is involved in the appointment of Board members; an issue that civil society has said undermines the autonomy of the whole spectrum of civil society and compromises their decision-making processes. The PVO Act makes specific reference to and enunciates reservations about foreign funding to civic groups, with the latest amendment to the Act[34] banning all foreign funding to civic organisations. NGOs have reportedly expressed concern about the amendment of the Act since it "signalled the eagerness of the state to control the growing NGO sector and, in particular, the funding being channelled into these organisations at a time when its political legitimacy was being undermined by a growing economic crisis".[35]

2.3 Urban Councils Act (1996)

The World Bank (2007:195) argues that "local government has the power to manage its own fiscal revenues and expenditures, subject to national framework conditions." On the effectiveness of local government institutions, it suggests that local government institutions are "a desired and natural outgrowth of trends towards fiscal decentralization, intended to reduce central [government] control in favour of local preferences that foster allocative efficiency."[36] An appropriate legal framework

33 NANGO *Directory* 19.

34 *Private Voluntary Organisations Act* 1996 [Chapter 17:05] General Notice 99 of 2007 – Code of Procedure for the Registration and Operations of Non-Governmental Organisations in Zimbabwe; The *Zimbabwe Electoral Commission Act* 2005 (*ZEC Act*) prohibits the receipt of foreign funding for conducting voter education. S 16 provides that "No foreign contribution or donation for the purposes of voter education shall be made except to the Commission, which may allocate such contribution or donation to any person referred to in section 14(3) or subsection 15(1)". Other than this specific prohibition, there are no legal limitations more broadly limiting the ability of CSOs to obtain funding from any particular source.

35 Raftopoulos *NGOs, the State and Politics* 36.

36 Leach *et al Understanding Governance* 5.

should be "used as a guide to measure progress in promoting administrative autonomy, fiscal autonomy, public property rights and decentralization of services".[37] The attainment of political independence in Zimbabwe in 1980 brought with it a number of local government constitutional reforms. Through the amendment to the *Urban Councils Act* (1973) in 1996, Chapter 214 of the Act was effected, which provided for the decentralisation and democratisation of the Local Government system by removing racial discrimination pertaining to representation and tenure in urban areas.[38] The *Urban Councils Act* of 1973 had provided for local authorities based on racial lines and was highly centralised. The resultant amendment to the Act led to the incorporation of former local government areas (African townships) into Urban Council areas.[39] The democratisation of the Urban Councils also resulted in the enfranchisement of rent-paying lodgers, who did not have the vote under the colonial Local Government system.[40] The decentralisation of the decision-making processes from central government to urban councils resulted in increased public participation in policy formulation and development.[41] However it has been noted that "the policy formulation process in Zimbabwe is largely top-down in nature, thereby rendering citizen participation in the process a reaction to policy proposals from the top".[42] The top-down approach practised by some governments has been defended by the statement that "government officials are the ones who have the information on what resources the central government will make available for the implementation of development programmes and projects, so they are justified to make critical decisions regarding these programmes and projects if they are to be funded".[43] However, the democratisation of urban councils has been frustrated by "the relatively stronger hand from central government which gives the Minister of Local Government and Urban Development the right and powers to remove an elected Urban Council where it is felt that the elected officials are not in line with people's wishes."[44]

37 Smith 2003 *Journal of Public Administration* 25.
38 Chris 1994 *Review of African Political Economy* 240-307. Also see Wekwete 2000 *Public Administration and Development* 97-110.
39 Kamrava 2000 *Third World Quarterly* 13.
40 Kamrava 2000 *Third World Quarterly* 13.
41 Makumbe 1996 *Human Rights Bulletin* 21-25.
42 World Bank *Governance* 4.
43 Hyden and Braton (eds) *Governance and Politics* 45.
44 MLGRUD *Report* 16.

This is an enabling Act of Parliament, which empowers ratepayers in urban areas to form residents' associations that would represent ratepayers' interests. These can even summon political leadership to address ratepayers on issues affecting them, such as the unwarranted hiking of rates, as well as poor service delivery.[45] The *Urban Councils' Act* facilitates citizens' participation in the affairs of urban councils through involving ratepayers in such civic matters as the design and implementation of the budget process. However, through the Act government retains much of the decision-making power. The Minister of Local Government is empowered to decide on the suitability of an elected Mayor and to dismiss him/her as well as to appoint a Commission to run the affairs of a given Town or City.[46] This has frustrated residents as the Minister of Local Government has the power to overturn public decisions, eg dismissing elected mayors and councillors and arbitrarily making personal appointments of public officials.[47]

In April 2008, the *Urban Councils' Act* was amended to empower the Minister of Local Government, Rural and Urban Development to appoint special interest councilors for each ward in every urban area,[48] thus adding to the normal local council complement. This was after the realisation that ZANU PF was performing badly in almost all local government elections. To counter the MDC majority in these local councils, the Minister would make additional arbitrary appointments, which could not exceed 25% of those democratically elected by residents.[49] The additional hand-picked councillors would enjoy the same benefits as their elected counterparts.[50] This new legislative provision presented an additional financial burden to the already poverty-stricken rate payers. What has further angered residents (the electorate) has been cases where losing ZANU PF candidates in the same local government elections were appointed by the Minister as special interest councillors.[51] Additionally, the special interest councillors shall *hold office during the*

45 Section 152(2) *Urban Councils Act* 1996 [Chapter 29:15].
46 Section 152(2) *Urban Councils Act* 1996 [Chapter 29:15].
47 Karimakwenda 2010 www.swradioafrica.com.
48 Section 4A(1)(a) *Zimbabwe Urban Councils' Act* 2008.
49 Section 4A(1)(b) *Zimbabwe Urban Councils' Act* 2008.
50 Section 4A(2) *Zimbabwe Urban Councils' Act* 2008.
51 Shumba 2010 www.swradioafrica.com.

pleasure of the Minister,[52] which makes them accountable to the Minister and not to the residents who are supposed to foot the bill for the salaries of these appointees. This development in urban governance has been viewed by critics as punishing the urban electorate for voting for candidates of their choice in local government elections.[53] Such provisions and the subsequent behaviour of the Minister in appointing such councilors is a blatant human rights violation, given that citizens have a right to govern themselves through elected representatives.[54]

2.4 NGO Bill (2004)

The Bill seeks to ban foreign NGOs concerned principally with "issues of governance", and NGOs receiving foreign funding for the "promotion and protection of human rights and political governance issues" are to be denied registration.[55] The changing context of state and NGO relationships will be adversely affected, especially in cases where international tourism is a revenue generator for both the private sector and government.[56] Environmental NGOs, which have been carrying out feasibility studies on environmental conservation programmes, would also be negatively affected and environmental programmes stalled. The bill provides for the establishment of a regulatory council that can decide whether a particular NGO will be registered or not.[57]

Meanwhile, NGOs likely to face closure after the law is enacted have said they will oppose the enactment of the Bill.[58] If the government proceeds with some aggressive amendments to the Bill, some humanitarian NGOs such as those working to address the needs of disabled persons in Zimbabwe will be affected.[59] The projected effect on the beneficiaries is of concern, because government alone cannot sustain most of these programmes. It needs input from civil society. Even

52 Section 4A(1)(b) *Zimbabwe Urban Councils' Act* 2008.
53 Anon 2010 www.zimbabwesituation.org (Ignatius Chombo is the Minister of Local Government in Zimbabwe).
54 Article 21(1) *Universal Declaration of Human Rights* (1948).
55 Section 9(4) *NGO Bill* 2004, cited in Mapuva *Role of Civil Society*.
56 Dorman "NGOs and the State in Zimbabwe" 35.
57 IBA *Critical Additions to the NGO Bill* 3, cited in Mapuva *Role of Civil Society*.
58 Naidoo and Doube 2007 *Journal of Civil Society Law* 89.
59 Karimakwenda 2010 www.swradioafrica.com.

relations between the Zimbabwe government and many UN agencies will be strained, since most poverty-alleviation, environmental and HIV/AIDS programmes are being funded by UN agencies.[60]

2.5 The Public Order and Security Act (POSA) (2002)

POSA, which was passed in January 2002, replaced the *Law and Order Maintenance Act* of 1960 (LOMA), one of the few pieces of legislation retained from the Rhodesian era. LOMA generally outlined police powers, state security measures, and the limits of personal freedom as they related to state security.[61] LOMA was considered to be a draconian piece of legislation that served the interests of the white minority. Ironically, the Rhodesian regime often invoked this statute to inhibit the revolutionary forces and their supporters, who now rule Zimbabwe. Mugabe kept LOMA in place after independence mainly due to its effectiveness in suppressing dissent against the government.[62] The decision to replace LOMA came after years of public criticism over its colonial roots and the Mugabe regime's desire to restrict opposition to the government beyond the boundaries of LOMA.[63] The Act severely restricts freedom of assembly and movement, and provides the police with wide discretionary powers.

POSA comprises a number of sections which prescribe certain expectations and compliances. Sections 19 and 20 of the Act refer to voices of dissent as "offences against constitutional government and public security", which include sabotage, acts of terrorism, and the possession of dangerous weaponry, as well as undermining the authority of or insulting the President.[64]

According to POSA it is an offence to "cause disaffection among Police Force or Defence Force",[65] to "publish or communicate false statements prejudicial to the

60 Dorman "NGOs in Zimbabwe" 18.
61 Legal Resources Foundation 2008 *Paralegal Bulletin* 2.
62 Mapuva *Role of Civil Society*.
63 Jafari 2003 *Human Rights Brief* 6-15.
64 Mashiri 2011 www.zimbabwesituation.com.
65 Section 12 *Public Order and Security Act* 2002.

State"[66] and to "undermine the authority of or insult the President".[67] It is not difficult to see how these sections can easily be used by the state to silence voices of legitimate criticism, despite the fact that freedom of expression is guaranteed in the constitution. And indeed they have been used, section 15 especially against journalists, and section 16 against both journalists and individuals.[68]

Part 4 of POSA, entitled "Public Gathering" is most commonly used against opposition campaign meetings, including the activities of civil society bodies. Sections 24-31 lay down conditions for the holding of public gatherings. Under section 24 anyone who wishes to organise a public gathering must notify the police four days in advance. Under section 25 the police are authorised to place restrictions on the gathering or prohibit it entirely as stipulated under section 26 if they have "reasonable grounds for believing" the gathering will result in public disorder, a breach of the peace, or obstruction of any thoroughfare. These provisions are regularly misunderstood or deliberately misapplied by the police. The organisers of a gathering are required to "notify" the police; the section does not state that the police must "give permission". Having been notified the police then have the power to prohibit the event, but only on the specified grounds. If no prohibition is made by the responsible authority, then the law is that the gathering is not prohibited and may proceed.[69] The excuses given by the police for prohibiting gatherings are entirely flimsy. They have even been known to claim that the responsible authority is not available. Other reasons have been that ZANU PF has booked the same venue, or that the gathering is likely to provoke disorder. Where disorder has been caused on a previous occasion by ZANU PF militias, trumped-up charges are laid against other political parties, especially the MDC. The other sections of Part IV provide for general prohibitions on all gatherings in a specific district, for the civil liability of the organiser of gatherings for any damage caused, the dispersal of unlawful gatherings, and the prohibition of the carrying of weapons at gatherings, which by definition includes "any stone". In practice it is not surprising that ZANU PF gatherings are

66 Section 15 *Public Order and Security Act* 2002.
67 Section 16 *Public Order and Security Act* 2002.
68 Sokwanele 2004 www.sokwanele.com.
69 Section 4A(1)(b) *Zimbabwe Urban Councils' Act* 2008; Anon 2010 www.zimbabwesituation.org

virtually never prohibited while others are regularly blocked.[70] Ironically the numbers required to constitute a public gathering are nowhere specified, which leaves the police with the leeway to manipulate the law, with many people and organisations transposing the "two or more persons" mentioned in sections 17 and 19 to apply to public gatherings. Furthermore, a schedule to the Act exempts a list of "classes of public gathering to which section 24 does not apply". Those exempted from the obligation to notify the police include organisers of religious, educational or sporting events, weddings, funerals, and professional meetings, as well as gatherings of organisations "not of a political nature" and specifically, "registered trade unions when meeting for bona fide trade union purposes".[71]

Cumulatively these sections (17-24)[72] have been used to decline or shut down several public meetings, including those held by elected MDC officials to report to their constituencies. The police are not required to give reasons why meetings are considered threats to public order nor do they suggest conditions under which the meetings could be held, a recent example being the abortive campaign rally of the MDC which was denied by the partisan police on the pretext that the same venue had been booked by ZANU PF.[73] Upon further inquiry it was discovered that ZANU PF neither held nor had booked the venue.[74] The Act gives the police arbitrary powers such as the authority to change the venue or other logistical aspects of a meeting, prohibit the meeting entirely, or prohibit all public meetings in a particular police district for up to three months. In practice the police do not sanction any meeting presumed to threaten public order, the organisers being referred to Section 19, which discourages "gatherings conducive to riot, disorder or intolerance". Section 32 of POSA empowers the police to cordon off areas and search individuals and residences, to stop people in public places at random, to search them and to demand the production of identity documents. Those that are found without documents could be detained. Section 25(5) authorises the Attorney-General to prosecute those suspected of having breached any section of POSA and calls upon

70 Anon 2010 www.zimbabwesituation.org.
71 Anon 2010 www.zimbabwesituation.org.
72 Anon 2010 www.zimbabwesituation.org.
73 Shumba 2010 www.swradioafrica.com.
74 Karimakwenda 2011 www.swradioafrica.com; Ndou 2011 bulawayo24.com; Matenga 2011 www.newsday.co.zw.

the defence forces to assist the police when the need arises. It also gives the police powers of search, seizure and forfeiture, notable examples being the seizure of radio equipment as happened in the Capitol and Bulawayo Dialogue, two radio stations that had initially been licensed to broadcast.[75] In the face of this legislation, many civic organisations and opposition political parties have found it very difficult to reach out to their constituencies without committing a breach of one of the sections of POSA. The freedoms of speech, movement and association have also been curtailed notably by sections 15-19 of POSA. This has made the work of much of civil society difficult as activists come under scrutiny in the context of POSA and AIPPA.[76] Some sections of civil society,[77] notably the ZCTU and the MDC, have been affected by the restrictions of POSA, as they frequently attempt to hold meetings with their members.

2.6 Access to Information and Protection of Privacy Act (2005) (AIPPA)

Enacted during the same period, POSA and AIPPA complement each other to further entrench ZANU PF and curtail voices of dissent. AIPPA aims to control the free flow of information as the government has been empowered to determine what type of information eventually reaches citizens. Media freedom and independent newspapers have been under threat as many of their staff have been arraigned before the courts of law for publishing what the state views as prejudicial to state security, which under sections 23-30 of AIPPA is a criminal offence. The selective application of sections of AIPPA to intimidate the independent media has resulted in the development of suspicion between the state and the independent media, with *The Daily News* being bombed and eventually closed in 2003. The closure on 12 September 2003 of Associated Newspapers of Zimbabwe (ANZ), publishers of *The Daily News* and *The Daily News on Sunday*, ranks as AIPPA's severest blow against the freedom of the press in Zimbabwe.[78] Consequently access to information as a human right has been violated in these and numerous other occasions. Zimbabwe silently witnessed a major assault on human rights as courts of law were used to

75 Section 4A(1)(b) *Zimbabwe Urban Councils' Act* 2008.
76 Mapuva 2007 *Role of Civil Society 76*.
77 In many cases ZCTU and MDC have ostensibly been found to be on the wrong side of the law for holding meetings with their members without police clearance.
78 Article 19 2004 www.kubatana.net.

silence or shoot down any legal challenges against certain sections of the law, insofar as these promote or restrict the freedoms of expression, movement and association. The Supreme Court dismissed ANZ's (the publishers of the Daily News) application challenging the constitutionality of certain sections of the Access to Information and Protection of Privacy Act (AIPPA). The application was dismissed on the basis of the "Clean Hands" doctrine, in that the company had failed to comply with the Act that requires all newspaper companies to be registered by the Media and Information Commission (MIC). That decision is remarkable because it represents a major setback to the protection and enjoyment of human rights in Zimbabwe. With all due respect the Supreme Court (the Court) may have erred in its reliance on the controversial "Clean Hands" doctrine in a matter involving fundamental constitutional rights.[79] Magaisa (2003) concludes that the decision marks a dangerous precedent in human rights jurisprudence in Zimbabwe.[80]

Countries "which are committed to democratic good governance should adopt a legal regime that promotes access to information".[81] Access to information is "the ability of the citizen to obtain information in the possession of the state."[82] AIPPA is a legal instrument that enables the government to monitor and control the flow of information in the country. In enacting the legislation, the government argued that it wanted to prevent the publication of information that is "manufactured and can be manipulated into a lethal weapon for our downfall".[83] Under sections 38, 39 and 42 the Act prohibits the publication of unverified stories and is empowered to register and deregister journalists or deny them a licence to practise without giving reasons. This implies that journalists can be co-opted or taken advantage of in order to retain their licences, in contravention of the ethics of their profession. These ethics are further compromised in that the government can determine what should be reported and what should not. Prohibitive punishment for the breach of these laws has seen many journalists getting arrested and independent newspapers closed down, as in the case of *The Daily News,* which was closed in 2004 after it was accused of

79 Magaisa 2003 www.landofsixpeoples.com.
80 Section 16 *Public Order and Security Act* 2002.
81 Martin and Feldman 1998 www.transparency.org 2.
82 Martin and Feldman 1998 www.transparency.org.3.
83 Magaisa 2003 www.landofsixpeoples.com.

reporting in favour of anti-government forces.[84] The government has also taken advantage of AIPPA to deny prospective independent newspapers and radio stations licenses to practise, arguing that "the local media should not be owned by foreigners".[85] This is in breach of citizens' right to information, which according to Section 20 of the *Constitution of Zimbabwe* (guaranteeing access to information and freedom of expression) "every citizen has a right to information". AIPPA has also adversely affected relationships with other countries because it prohibits foreign diplomats from making speeches at their National Day events. Section 79(4) prohibits foreign diplomats from making political statements unless such statements support the status quo or the existing political dispensation. Section 90 of AIPPA makes the practice of journalism without accreditation a criminal offence punishable by up to two years in prison. Civic organisations are also not allowed to be involved in the politics of the country or to make political statements or to leak any information outside the country. Civic organisations are also not allowed to be involved in the politics of the country, to make political statements, or to leak any information outside the country.[86]

Under AIPPA, practising journalism should be by registration under the Media and Information Council (MIC), which gives or denies licences to both journalists and media stations alike. It also licenses or refuses to license radio stations. Under MIC many prospective radio stations have been denied the chance to operate. Journalists operating without licenses are subject to heavy fines and/or imprisonment. These restrictions on journalism also apply to non-journalists collecting information for private purposes.[87]

2.7 Interception of Communications Act (2007)

The Act seeks to "establish an interception of communication monitoring centre whose function shall be to monitor and intercept certain communications in the course of their transmission through a telecommunication, postal or any other related

84 Magaisa 2003 www.landofsixpeoples.com.
85 MISA 2004 *Article 19* 27.
86 World Bank *Governance* 4.
87 World Bank *Governance* 4.

services system". Through the *Interception of Communications Act*[88] the government strives to regulate the interception of communications through constitutional provisions protecting the privacy of communications, and requisite laws and regulations to implement the constitutional requirements regards the Act with apprehension. The Act violates the human rights of Zimbabweans and many international Conventions such as the Universal Declaration of Human Rights (UDHR), which states: "No one should be subjected to arbitrary interference with his privacy, family, home or correspondence, or to attacks on his integrity or reputation"[89] and that "Everyone has the right to the protection of the law against such interferences or attacks".[90] Various civil society groups have rejected the *Interception of Communications Act*, citing its infringement on fundamental human rights and contravention of Section 20 of the *Constitution of Zimbabwe*, which prescribes that every individual has a right to privacy.[91]

2.8 The Broadcast Services Act (BSA) (2000)

The world over, countries that are called democracies insist on the independence of the media, both in principle and in practice. Frequency allocation, the licensing of broadcasters and the technical administration of broadcasting are usually the prerogative of a broadcasting authority. Political control of broadcasting has always been regarded as an abridgment of the right to freedom of expression in any society that claims to be a democracy.[92] Section 2 of Act 30 of 1990 – Amendment No. 11 of the Constitution of Zimbabwe - proclaims that it is a republic. The absolute or significant control of the broadcasting media by government has often resulted in the monopolisation of the media by government. The watershed elections of 1980, which resulted in ZANU PF's ascendance to power, were an exercise of the right to freedom of expression. Notwithstanding all its other weaknesses, Zimbabwe's Lancaster House Constitution contained a justifiable bill of rights. The right to express one's views and opinions without interference is vital to the nurturing and

88 *Interception of Communications Act* 2007.
89 Article 9 UDHR (1948).
90 Article 7 UDHR (1948).
91 World Bank *Governance* 4.
92 Magaisa 2003 www.landofsixpeoples.com.

growth of a sustainable democracy.[93] It is a common acknowledgement that the freedom of information is a cornerstone upon which the very existence of a democratic society depends. The government has deemed it necessary to control information dissemination, an issue which was challenged by the Capital Radio (Private) Limited. In Zimbabwe, the electromagnetic transmission of audio and video signals and the available frequency spectrum are the preserve of the Zimbabwean Government, as prescribed by the *Broadcasting Services Act* (Chapter 12:01).[94]

Until 2000 broadcasting in Zimbabwe was legally a State monopoly pursuant to section 27 of the *Broadcasting Act* 1957. Capital Radio sought to obtain a broadcasting licence and, as part of this process, challenged the State broadcasting monopoly before the Supreme Court of Zimbabwe. In the Capital Radio judgment of 22 September 2000 the Court held that the monopoly violated the constitutional right of freedom of expression by unduly limiting the public's right to receive and impart information.[95] The Court lamented the fact that the parties had failed to agree on a regulatory framework for broadcasting and, in the light of this, ordered that the applicant be allowed to proceed to set up a broadcasting service. Capital Radio started broadcasting on 28 September 2000 but the government quickly responded by raiding its offices and closing it down.[96] It promulgated the *Presidential Powers (Temporary Provisions) Broadcasting Regulations*, under the *Presidential Powers (Temporary Measures) Act* lasting for a duration of six months. These Regulations set up a framework for broadcast regulation, including the requirement that broadcasters be licensed, and establish a regulatory authority to undertake this task, the Broadcasting Authority of Zimbabwe (BAZ), under effective government control. Up until the present, no private broadcaster has been licensed under this legislation.[97]

Capital Radio challenged the Act in a hearing before the Supreme Court in July 2002. Judgment was rendered in the case only over a year later, on 19 September

93 Magaisa 2003 www.landofsixpeoples.com.
94 Magaisa 2003 www.landofsixpeoples.com.
95 *Capital Radio (Private) Limited v The Broadcasting Authority of Zimbabwe* Case No SC 162/2001.
96 AfriMAP, OSISA and OSIMP 2009 www.afrimap.org.
97 Section 16 *Public Order and Security Act* 2002.

2003. The Court, under a new Chief Justice since the 2000 broadcasting judgment had been rendered, struck down some of the more egregious provisions of the Act, including the following:

- section 6, providing that the Minister, and not BAZ, should be the final licensing authority;
- section 9(1), limiting to one the number of national free-to-air broadcasting services for each of radio and television;
- section 9(2), providing that only one signal carrier licence could be issued; and
- section 9(3), providing that only a public broadcaster could hold both a broadcasting and a signal carrier licence.[98]

Until the judgment in the Capital Radio case it was a criminal offence for any person to broadcast both radio and television signals.[99] The Supreme Court declared the exclusive broadcasting monopoly of the ZBC invalid. The Supreme Court declared that Capital Radio could begin to broadcast as the legislation entrenching Zimbabwe Broadcasting Corporation's monopoly was declared unconstitutional. Capital Radio and other persons with broadcasting equipment began radio broadcasts.[100] But political control of broadcasting, which the Supreme Court had struck down in the Capital Radio case, was reintroduced through the *Broadcasting Services Act*.[101] Section 7.2 of the *Broadcasting Services Act* allows for the creation of a façade of liberalisation, yet cedes total control over all broadcasting to the government. The prevailing political and economic situation in Zimbabwe markedly affected the contents of the *Broadcasting Services Act*.[102] Apart from the print media it is with electronic broadcasting, radio and television that in a modern society the right to freedom of expression is forcefully, collectively and purposefully exercised. The unlawful Radio Zimbabwe broadcast from Mozambique by ZANU PF was pivotal in

98 Sokwanele 2004 www.sokwanele.com. Also refer to *Capital Radio (Private) Limited v The Broadcasting Authority of Zimbabwe* Case No SC 162/2001.
99 Mashiri 2011 www.zimbabwesituation.com.
100 Magaisa 2003 www.landofsixpeoples.com.
101 Mashiri 2011 www.zimbabwesituation.com.
102 Section 16 *Public Order and Security Act* 2002.

the party's electoral victory in 1980.[103] It is rather ironic that the same government that ascended to power in part due to the influence of the media should be seen denying opposition political parties slots to campaign on radio and television.

The constitution of the administration of the broadcasting authority is such that it shows the desire of the government to control the dissemination of information.[104] Section 4(2) of the ZBSA stipulates that all members of the Broadcasting Authority of Zimbabwe Board shall be appointed by the Minister after consultation with the President, and in accordance with any instructions that the President, which leaves the Minister of Information and the subsequent subordinates at the mercy of the President and/or his political party.The Minister himself is a presidential appointee, answerable, as are all Cabinet ministers, to the President. Further, the Minister's powers under the ZBSA are not reasonably justifiable in a democratic society. Sections 8(1)(2)(5) make the Minister the sole licensing authority, with wide and arbitrary discretionary powers. Very restrictive conditions make it virtually impossible to invest in broadcasting.[105] At law, the restrictive and cumulative powers of the Minister in terms of the *Broadcasting Services Act* and deliberate delays in issuing licences to prospective broadcasters, which delays have arisen as a result of those powers, indicate that the Minister's powers violate Section 20(1) of the *Constitution*. Additionally, sections 8(1)(2)(5), and 22(2) stipulate that a licence will be issued only to citizens ordinarily resident in Zimbabwe, which limits ownership to locals or residents. Also that no one should own more than 10% of the station. The licensing period is too short and according to Section 12(2) and (3) of the ZBSA, community licences last for one year only, which is a big discouragement for investors to put their work or funding into such a project. In South Africa community licences are issued for four years. The restrictions are further exacerbated by the fact that according to section 9(3) stations shall not transmit their own signals, nor are they allowed to own transmitters, masts, antennae etc. They have to send their signal to another company, which will then beam the signal on their behalf. This impinges on the potential broadcasters' and citizens' freedom to determine what type of information they want to broadcast or listen to.

103 World Bank *Governance* 4.
104 Mutharika *One Africa, One Destiny 18.*
105 Magaisa 2003 www.landofsixpeoples.com.

Comparisons may be drawn with South Africa and Malawi.[106] To its credit, the BSA makes no pretence that the licensing authority is independent. It has been stated that the licensing authority should be independent. A law creating a licensing authority susceptible to control and interference by the government falls foul of Section 20(1) of the *Constitution*. In the case of Zimbabwe, the licensing and regulatory authority is in a sense the government itself. There can be no suggestion therefore that the licensing and regulatory authority (the Minister of State for Information and Publicity in the President's office) is independent.[107]

In South Africa community broadcasting licences are valid for four (4) years, television broadcasting licences for eight years, radio broadcasting licences for six years, a common signal carrier licence for fifteen years and a signal carrier licence given to a commercial broadcaster for eight years.[108] The State President consults widely before appointing a Broadcasting Council. The President appoints members

106 MACRA Date unknown www.macra.org.mw: The Malawi Communications Regulatory Authority (MACRA) was established pursuant to Section 3 of the *Communications Act* 1998 of the Laws of Malawi to assume the regulatory functions of the communications sector, which had been performed by the Malawi Telecommunications Corporation Limited. MACRA is among the three institutions established following the dissolution of the former Malawi Posts and Telecommunications Corporation (MPTC). NAB Date unknown www.nab.org.za: Prior to the advent of constitutional democracy in South Africa in 1994, broadcasting was primarily regulated by the *Broadcasting Act* 1976. The effect of this legislation's provisions was government's exclusive control over the formulation of broadcasting policy and regulation of broadcasting. The government also had exclusive rights over the provision of broadcasting services through the South African Broadcasting Corporation (SABC). The *Independent Broadcasting Authority Act* 153 of 1993 (the *IBA Act*) established the Independent Broadcasting Authority (the IBA) on the 30th March 1994. In granting the IBA its public interest mandate and powers, enunciated in sections 2, 28 and 78 of this Act, it proclaimed a new system of regulating broadcasting in South Africa. In addition it gave policy directives to various broadcasting policy areas, including; licensing and the creation of public, community, and commercial broadcasting sectors; South African television content and music; the broadcasting frequency plan; subscription and multichannel services; media and equity ownership rules; black economic empowerment; the promotion of media diversity; and marginalised languages.

107 Section 16 *Public Order and Security Act* 2002.

108 ICASA Date unknown www.icasa.org.za: The Independent Communications Authority of South Africa (ICASA) is the regulator for the South African communications, broadcasting and postal services sector. ICASA was established by an Act of Parliament, the *Independent Communications Authority of South Africa Act* 2000. ICASA's mandate is spelled out in the *Electronic Communications Act* for the licensing and regulation of electronic communications and broadcasting services, and by the *Postal Services Act* for the regulation of the postal sector. Enabling legislation also empowers ICASA to monitor licensee compliance with license terms and conditions, develop regulations for the three sectors, plan and manage the radio frequency spectrum, and to protect consumers of these services. Section 2 of the *Independent Broadcasting Authority Act* 153 of 1993 provides for and enjoins the Independent Broadcasting Authority to ensure that broadcasting licensees adhere to a Code of Conduct acceptable to the Authority, in accordance with terms of s 56(1) of the Act.

of the Council on the advice of the National Assembly. Being the appointing authority, the President is empowered after due inquiry to remove a Councillor from office. There is a difference between the South African position and that obtaining in the *Broadcasting Services Act* in this regard. The President in South Africa has no unfettered discretion to appoint Council members. He may appoint members only from a short list of candidates who would have been interviewed by Parliament. The President is not at liberty to appoint party functionaries. In Zimbabwe the Minister almost single-handedly and in consultation with his superior, the President, determines the identity of the board members to appoint. In addition the Minister has the power to suspend and terminate the employment of the Board members.[109] A very late entry to democratic practice, Malawi set up the Malawi Communications Regulatory Authority (MACRA). In section 4(3) the MACRA Act states "The Authority shall be independent in the performance of its functions".[110]

In Zimbabwe the *Broadcasting Services Act* is glaringly unconstitutional. It appears that the purpose of the Act is not to regulate the transmission of radio and television signals but to control the information that is broadcast by independent broadcasting stations.[111] The government still abuses the broadcasting facilities of the Zimbabwe Broadcasting Corporation, using the corporation as a propaganda tool for the ruling party.

In an effort to facilitate citizen participation in the provision and promotion of relevant information and programmes, the SA *Independent Broadcasting Authority Act*[112] has made provision for the establishment of the Broadcasting Complaints Commission (BCC). The BCC is an avenue given to the public for their input. In South Africa local content is not legislated in terms of an Act of parliament. The Independent Broadcasting Authority Act states that the regulator shall set local content quotas. In practice, and in terms of regulations promulgated, most private broadcasters are required to carry at least 20% South African content and are given two years to implement this quota. Subscription television is usually required to carry 15% South

109 Section 16 *Public Order and Security Act* 2002.
110 MACRA Date unknown www.macra.org.mw s 4(3).
111 Mashiri 2011 www.zimbabwesituation.com.
112 *Independent Broadcasting Authority Act* 153 of 1993; *Independent Broadcasting Authority Amendment Act 4* of 1996.

African local content and public television 50%. France is a country well known in Europe for its strict policy on French local content quotas[113]. It limits television broadcasting to 40% French material and 60% European material. The local content requirements are very restrictive and prevent investment. In Zimbabwe, the existing legislation has pegged local content at 75% for both television and radio, and plans are under way to put local content at 100%. Local content requirements must not be pedantic. It seems rather obvious that the government is aware of the pathetic state of the broadcasting industry and that the mandatory requirements are deliberately aimed at ensuring that very few companies invest in broadcasting. Yet ironically, Zimbabwe is a county that is desperately in need of investment.

The above critique of the Zimbabwean *Broadcasting Services Act* seeks to show that the *Broadcasting Services Act*:

* is inherently unconstitutional, violating sections 20 and 16 of the constitution of Zimbabwe, which guarantee the rights to freedom of expression and private property respectively;
* places absolute and discretionary power upon the Minister;
* prevents all nature and forms of investment in the broadcasting sector; and
* in bad faith creates an absolutely useless and irrelevant Broadcasting Authority.[114]

2.9 Electoral legislation[115]

Electoral legislation in Zimbabwe is categorised as operational and institutional. Institutional legislation provides for the creation of institutions that conduct elections. Operational legislation provides for the *modus operandi* of elections in the country. The Zimbabwe Electoral Commission would represent the institutional framework while the Electoral Court would be an example of the institutional aspect of elections in the country. Although these legal provisions have sought to create an atmosphere for the conduct of free, fair and credible elections, the politicisation and militarisation

113 World Bank *Governance* 4.
114 World Bank *Governance* 4.
115 The *Electoral Act* 2006 [Chapter 2:13] and the Zimbabwe *Electoral Commission Act* 2005 [Chapter 2:12] are the primary illegal instruments that have been used since 1980 to conduct elections.

of the electoral process by ZANU PF has led to the conduct of disgraceful elections that produced disputed results. Pursuant to the ECA, two complementary electoral laws were passed during the last quarter of 2004, the *Electoral Act* and the *Zimbabwe Electoral Commission Act* (ZECA). The *Electoral Act* is the overall law that governs the conduct of elections in Zimbabwe. The *Zimbabwe Electoral Commission Act* created the Zimbabwe Electoral Commission (ZEC), which is in charge of preparing for and conducting House of Assembly (formerly parliamentary), senatorial, presidential, and council elections, as well as referenda, as provided for in the *Electoral Act*.[116]

2.9.1 The Electoral Commission Act (ECA)

The primary purpose of the ECA has been to ensure that elections "are conducted efficiently, freely, fairly, transparently and in accordance with the law", which is a responsibility conferred upon ZEC by section 61(4)(1) of the *Constitution*. Established as a result of a *Constitutional Amendment* in 2005 (2) it consists of a chairman and six other members (Section 61(1) of the *Constitution*). The chairman must either be a judge or a person qualified for appointment as a judge (Section 61(1)(a) of the *Constitution*). The appointment of the chairman is made by the President after consultation with the Judicial Service Commission (JSC).[117] The recommendation of the JSC is not binding on the President who must, however, inform the Senate if he appoints someone other than the person recommended by the JSC (Section 61(1)(b) of the Constitution). The six other members – of whom at least three must be women – are also appointed by the President.[118] However, his discretion is limited – at least in a formal sense – by the requirement that he must choose from a list of nine nominees submitted by the Parliamentary Committee on Standing Rules and Orders.[119]

2.9.2 Zimbabwe Electoral Act (2006)

116 World Bank *Governance* 4.
117 Matyszak 2010 www.kas.de 76.
118 Section 61(1) *Constitution of Zimbabwe*.
119 Section 61(1) *Constitution of Zimbabwe*.

The Act provides a window of opportunity to the electorate to exercise their right to vote. All this has tended to put the Zimbabwean electoral process into the limelight. The paper therefore intends to establish whether the electoral system can conduct a free and fair electoral process. This paper will also seek to establish the extent to which it abides by the dictates of the *SADC Guidelines on the Conduct of Democratic Elections*,[120] a set of guidelines that all SADC member states should follow when conducting elections.[121]

The Zimbabwean *Electoral Act* has been at the centre of all the disputed elections over the years.[122] ZANU PF has militarised and politicised the electoral process, giving it the leeway to rig the results, to buy votes, and to manipulate the electorate by politicizing food aid to rural communities.[123] The continued abuses of the *Emergency Powers Act* has continued, a development which has tended to erode the independence of the Judiciary as well as the doctrine of the separation of powers as enshrined in the *Constitution of Zimbabwe*. But its edicts are often ignored (for instance, the High Court order instructing ex-combatants to vacate commercial farms has been challenged by both the government and the Attorney-General (*Zimbabwe Independent*, March 24, 2000)); the tendency of government to ignore criticism and negotiate only with politically useful groups; and the placing of the ruling party's political survival above national economic survival. All of these elements are familiar from the days of the Rhodesian Front regime.[124] Even the Electoral Court, which had been staffed with ZANU PF operatives and functionaries, was not spared from manipulation, with numerous unsuccessful attempts by political parties failing to secure any verdict on their appeal for a recount of votes.[125] This tendency by government to ignore court rulings was equally applied by the ZANU PF government when it came to election petitions by other political parties, notably the MDC, which has in numerous cases challenged electoral results in court. The Constitution of

120 Linington 2010 www.kas.de 101-103.
121 Mapuva 2010 *Journal of Legislative Studies* 469.
122 *MDC v President of the Republic of Zimbabwe* HH 28-2007; *Shumba v ZEC* Judgment No SC 11/08; *MDC v Chairperson of the Zimbabwe Electoral Commission* HH E/P 24/08; *Forum Party of Zimbabwe v Minister of Local Government, Rural and Urban Development* 1996 1 ZLR 461; *Tsvangirai v Registrar General* 2002 1 ZLR 268 (S).
123 Timberg 2005 news.google.com; Human Rights Watch 2003 www.unhcr.org; MDC 2012 www.mdc.co.zw.
124 Tapera Knox 2000 www.ccr.uct.ac.za.
125 Jafari 2003 *Human Rights Brief* 11.

Zimbabwe specifically gives citizens the right to approach the court to challenge the legislation, but this legal provision has been applied selectively in favour of ZANU PF, leading to despondency among the agrieved parties. Without the help of the court the citizens have been left at the mercy of the party with a parliamentary majority, in this case ZANU PF, over the years from 1980 up to 2007. This manipulation of legislative loopholes by ZANU PF has tended to effectively close the door to challenges against the law.[126]

This has rendered the whole electoral process not only prone to manipulation but flawed, thereby eventually short-changing the electorate. The Zimbabwe Electoral Act (2004) is a constitutional provision that provides guidelines on the conduct of elections at national, provincial and municipal levels alike. The Act provides for the creation of the Zimbabwe Electoral Commission, whose mandate is to conduct elections. This Act establishes an independent authority, the Zimbabwe Electoral Commission, to administer all elections and referenda in Zimbabwe. The Act empowers the State President to appoint members of the Commission. It administers Presidential, Parliamentary, Senatorial and Municipal elections.[127]

The provisions give the Commission far-reaching powers over voter education. The Act also bars all foreign support for voter education activities except through the Electoral Commission. Under the Act, the Commission would be empowered to require anyone other than a political party providing voter education to furnish it with detailed information, including its funding sources.[128] Failure to comply with any one of these laws would constitute a criminal offence liable to a fine or to up to two years of imprisonment. Much of civil society and many NGOs depend on foreign funding. Civil society has therefore tended to view the *Electoral Act* as government's attempt to flush them out of existence and to cause cash-flow problems for civic groups. A free election is one in which voters can freely vote for the candidates of their choice. The electoral laws themselves must create a set of rules that allow all contesting parties to compete fairly in the elections and all eligible voters who wish to do so to

126 Magaisa 2003 *International Journal of Civil Society Law* 94.
127 Chapter 2:13 Act 25/2004. *Zimbabwe Electoral Act* 2006.
128 Chapter 2:13 Act 25/2004. *Zimbabwe Electoral Act* 2006.

exercise their right to vote.[129] A fair election is one in which all of the processes of the election are fairly and impartially administered. These processes include the registration of voters and election candidates, the voting process, and the counting of votes and the announcement of the results. Election candidates and parties contesting the election must also be given a fair and substantially equal opportunity before the election to campaign and inform the electorate of their principles, policies and promises. This includes equal opportunity for airtime in the electronic and print media.[130]

2.9.3 Electoral Court

Linnington (2010:110) provides a discussion on the role of the Electoral Court in Zimbabwe's electoral processes and its envisaged propensity to deal with electoral disputes in the country. *The Electoral Act* established an Electoral Court "for the purpose of hearing and determining election petitions and other matters in terms of this Act."[131] The court has no jurisdiction in criminal cases.[132] Judges of the Electoral Court are the same recycled High Court judges who are appointed by the Chief Justice "after consultation with the *Judicial Service Commission* and the Judge President of the High Court."[133] Previously the *Electoral Act* did not involve the Judicial Service Commission in the appointment process, which makes such appointments unconstitutional since the system was not consistent with section 92(1) of the *Constitution*.[134] That provision says:

> The power to appoint persons to preside over a special court shall vest in the President, after consultation with the Judicial Service Commission: provided that Parliament may provide that the Chief Justice may, after consulting the Judicial Service Commission, appoint a person holding the office of Judge of the High Court to preside over a special court for such a period as he may specify.[135]

129 World Bank *Governance* 4.
130 World Bank *Governance* 4.
131 Section 161(1) *Zimbabwe Electoral Act* 2006.
132 Section 161(2) *Zimbabwe Electoral Act* 2006.
133 Section 1161(1) *Zimbabwe Electoral Act* 2006.
134 Section 16 *Public Order and Security Act* 2002.
135 Section 16 *Public Order and Security Act* 2002.

One might want to question the speciality of the "special court". According to section 92(4) of the *Constitution*, there are three types of special courts, namely The Magistrate's Court, The High Court and The Supreme Court.[136] The Electoral Court does not fall within the scope of these types.[137] That leaves only those courts or other adjudicating authorities that qualify as special courts, because there is no right of appeal from their decisions to the Supreme or High Courts.[138] Decisions of the Electoral Court on questions of fact are final,[139] but questions of law may be appealed to the Supreme Court[140] and must be determined within six months.[141] Because appeals on points of law are permissible, the question arises as to whether or not the Electoral Court qualifies as a "special court."[142]

3 Conclusion

Prior to the March 2008 elections, the Government of Zimbabwe had taken advantage of its mandate and parliamentary majority to enact laws that restrict and curtail citizens' participation in strengthening public policy. Amendments to existing laws had been vindictive and tended to dis-empower citizens from partaking in matters of public interest. The employment of laws to repress the citizenry has seen the government breaching and reneging on its obligations to serve the populace. However, recent development where the opposition has assumed a parliamentary majority have created a tense situation where the establishment does not want to relinquish power, with talk of a government of national unity becoming prevalent in political circles. Generally, the behaviour of the ZANU (PF) regime has been a slap in the face of democracy and all democratic and proactive forces. The results of the run-off elections have indicated that the ruling party has the audacity and capability to manipulate the electoral process for its advantage. The only problem that ZANU (PF) will have with its "electoral victory" is the recognition of its Presidency by pro-democratic forces in Zimbabwe, civil society and the regional and international

136 Paragraphs (a) and (c) of s 92(4) *Constitution of Zimbabwe*, 1979.
137 Paragraphs (a) and (c) of s 92(4) *Constitution of Zimbabwe*, 1979.
138 Section 92(4)(b) *Zimbabwe Electoral Act* 2006.
139 Section 172(1) *Zimbabwe Electoral Act* 2006.
140 Section 172 (2) *Zimbabwe Electoral Act* 2006.
141 Section 172(3) *Zimbabwe Electoral Act* 2006.
142 Section 16 *Public Order and Security Act* 2002.

community. This explains why the ZANU (PF) has set the recognition of Mugabe as the winner of the run-off elections and therefore the President of Zimbabwe as a condition for talks on the formation of Government of a National Unity.

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List of abbreviations

AIPPA	*Access to Information and Protection of Privacy Act*
ANZ	Associated Newspapers of Zimbabwe
BAZ	Broadcasting Authority of Zimbabwe
BCC	Broadcasting Complaints Commission
BSA	*Broadcast Services Act*
CSOs	Civil society organisations
ECA	*Electoral Commission Act*
IBA	International Bar Association
ICASA	Independent Communications Authority of South Africa
JSC	Judicial Service Commission
LOMA	*Law and Order Maintenance Act*
MACRA	Malawi Communications Regulatory Authority
MDC	Movement for Democratic Change
MIC	Media and Information Commission
MISA	Media Institute for Southern Africa
MLGRUD	Ministry of Local Government, Rural and Urban Development
NAB	National Association of Broadcasters
NANGO	National Association of Non-Governmental Organisations
POSA	*Public Order and Security Act*
PVO	*Private Voluntary Organisations Act*
SADC	Southern African Development Committee
SAPEM	Southern African Political and Economic Monthly
UDHR	Universal Declaration of Human Rights
ZANU PF	Zimbabwe African National Union (Patriotic Front)
ZBC	Zimbabwe Broadcasting Corporation
ZBSA	*Zimbabwe Broadcast Services Act*
ZCTU	Zimbabwe Congress of Trade Unions
ZECA	*Zimbabwe Electoral Commission Act*
ZEC	Zimbabwe Electoral Commission

A CRITIQUE OF THE KEY LEGISLATIVE FRAMEWORK GUIDING CIVIL LIBERTIES IN ZIMBABWE

J Mapuva[*] and L Muyengwa[**]

SUMMARY

The dynamic and controversial nature of Zimbabwean politics has manifested itself through several undemocratic practices, including restrictive legislation which sought to diminish participatory spaces and/or curtail civil liberties. Corruption, gross human rights violations and arbitrary decision-making processes have created a rift between citizens and the state. This has further created space for the establishment of pro-democracy civil society movements which have sought to mobilise citizens towards the restoration of democracy. The desire to cling to power by the ruling elites has seen the enactment of restrictive legislation that seeks to curtail and impinge on civil liberties and restrict the political landscape in favour of the ruling elites. Key legislative framework presented in this paper is within the areas of media and access to information, individual rights and freedoms, as well as legislation pertaining to the conduct of elections. In some cases, colonial legislation that politicians claimed to have repealed was reincarnated, as the post-colonial dispensation asserted its authority over its defenceless people.

KEYWORDS: Legislative framework; Zimbabwe; civil liberties; elections; human rights violations

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