CHAPTER 1

INTRODUCTION

1.1 Background to the study

One of the most disputed areas in contemporary human rights law is that of freedom of expression.[1] It has sparked a myriad of controversies not only in Zimbabwe but in many other democratic states in the world. Despite the controversies surrounding this right, it is regarded as a fundamental right that safeguards the exercise of all other rights and is critical in underpinning democracy.[2] This right is instrumental in facilitating other important rights because it is essential for the well-being and growth of the human personality.[3] Brandeis J captures the essence of this view by stating that freedom to think as you will and to speak as you think are matters indispensable to the discovery and spread of political truth. [4] This is the ideal in as far as the protection of the right to freedom of expression is concerned.

Burns advances three reasons for the protection of this right. The first is, individual self-fulfilment.[5] This means that in order to achieve self fulfilment an

[1] This is according to Welch C. E. Jr, "The African Charter and Freedom of expression in Africa," *Human Rights Law Review*, 1998, at pgs 103 – 122.
[2] Callamard A, "Prophetic Fallacy," in the Guardian Unlimited – Thursday February 2, 2006, <http://www.guardian.co.uk/religion/Story/0,,1700653,00.html>.
[3] Devenish G. E, The South African Constitution, Butterworths, 2005.
[4] *Whitney v California* 274 US 357 (1927), 375.
[5] See also *Retail, Wholesale and Department Store Union v Dolphin Delivery Ltd* [1986] 2 SCR

individual has to develop his/her mind and personality, and to form his/her own opinions and to express them. Secondly, sound and rational judgment is advanced as another reason. In order to arrive at a sound and rational judgment an individual must consider all the facts and arguments for and against a proposition. Finally, the market-place of ideas, which implies that truth will emerge out of free and ongoing exchange of free expression. These justifications all highlight the importance of the right to freedom of expression. It is therefore crucial that the right to freedom of expression be protected because representative democracy, which is in great part the product of free expression and discussion as well as accommodation of varying ideas, depends upon its maintenance and protection.[6]

The right to freedom of expression is explicitly recognised as a right in the Zimbabwean Constitution. It is guaranteed in section 20 of the Constitution.[7] The right to freedom of expression is by no means absolute and is subject to certain limitations. The right is limited by, among others, public safety or public order to an extent which is reasonably justifiable in a democratic society. What is

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573 where Justice McLachlan of the Canadian Supreme Court identified the following in *R v. Keegstra*[5], as the reasons for the protection of the right to freedom of expression: (1) free speech promotes "the free flow of ideas essential to political democracy and democratic institutions" and limits the ability of the state to subvert other rights and freedoms; (2) it promotes a market-place of ideas, which includes, but is not limited to, the search for truth; (3) it is intrinsically valuable as part of the self-actualisation of speakers and listeners; and (4) it is justified by the dangers for good government of allowing its suppression.

[6] *Retail, Wholesale and Department Store Union v Dolphin Delivery Ltd* [1986] 2 SCR 573.

[7] Section 20 (1) provides that “except with his (sic) own consent or by way of parental discipline, no person shall be hindered in the enjoyment of his (sic) freedom of expression, that is to say, freedom to hold opinions and to receive and impart ideas and information without interference, and freedom from interference with his (sic) correspondence.”

'reasonably justifiable in a democratic society' is however an elusive concept.[8] This requires the dispassionate examination by the judiciary as it weighs competing and conflicting interests and values. This delicate task of weighing and balancing enables the judiciary to ensure equilibrium between the prescription of the legislature and the desire of the executive as well as the wider society. In addition to the permission of limitations in the Zimbabwean Constitution, legislation has further been enacted which greatly narrows the enjoyment of the right. Examples of such legislation include the Access to Information and Protection of Privacy Act as well as the Official Secrets Act.[9] This has been seen in some circles as giving the right with one hand and taking it away with the other. It has also been argued to be outside the limitations allowed under the Zimbabwean Constitution and to be a violation of international obligations under regional and international human rights treaties.

The judiciary in dispensing justice, has a review function which means that the court reviews the lawfulness of acts and government administration. The judiciary also has the function of interpreting the law, adjudicating on rights and obligations and in this regard, be in a position to determine whether there has been a breach of any provision of the Declaration of Rights.[10] In *Zimnat Insurance v Chawanda*,[11] the Supreme Court stated:

[8] *Woods and others v Minister of Justice, Legal and Parliamentary Affairs and others* 1995 (1) SA 703 (ZS) at pg 703H.
[9] See Chapter 2 for further discussion of these pieces of legislation.
[10] Parliament Debates of Zimbabwe 5 June, 1990.
[11] SC 107/90 (unreported).

> The judiciary can and must operate the law as to fulfill the necessary role of molding and developing the process of social change. It is now acknowledged that judges do not merely interpret the law, but they also make law. They take part in the process of creation. Law-making is an inherent and inevitable part of the judicial process.

This admission is not always apparent or so readily admitted by the courts, given the separation of powers and the function of the three arms of government. This may breed a conflict between the legislature and the judiciary. The governing body of Zimbabwe is not immune to this conflict and, in fact, the Minister of Justice responded to this case by stating that Parliament makes the laws and the judiciary is just there to interpret them.[12] This assertion was reinforced by Act 10 of 1990 which also substantially limited the powers of the Supreme Court with regard to the Declaration of Rights. The Act ousted the power of the judiciary to determine the amount of compensation for property that has been compulsorily acquired by the state.[13]

The Constitution of Zimbabwe empowers the Supreme Court to hear and determine applications concerning alleged breaches of the Declaration of Rights.[14] The judiciary has the right and duty to interpret the scope of the rights in the Declaration. The judiciary also has a related task of deciding upon the

[12] Parliament Debates of Zimbabwe 6 December, 1990.
[13] According to the executive, the court's power was limited with regard to one particular right for particular socio-political reasons. Such inroads, however into the powers of the judiciary may be indicative of a general limitation to the powers of the courts by the executive.
[14] Section 89 of the Zimbabwean Constitution as Amended by section 13 of Act 25 of 1981.

constitutionality of Acts of Parliament where such cases are brought before it. The proper functioning of the judiciary, however, largely depends on measures that are taken to ensure its independence and impartiality. According to Apple,[15] there can be no protection of human rights without an independent and impartial judiciary.

The above description of the functions of the judiciary is also the ideal situation as envisaged by the then national legislators. It cannot however be overemphasized that the judiciary protects the right of freedom of expression through passing of judgments which are then to be enforced by the executive and made law by the legislature. The question then arises, what happens where both the legislature and the executive ignore the decisions of the judiciary. All this, it must be noted, is occurring in a volatile political environment where the rule of law will not always prevail. The legislature as has been done several times in Zimbabwe can simply reverse court decisions by amending the Constitution or passing legislation that is contrary to the ruling, which is definitive of the separation of powers, that is checks and balances. The executive may also choose not to enforce court rulings. These are some of the challenges the judiciary faces in the performance of their duties and what this research intends to highlight.

[15] Apple J, "The Role of Judicial Independence and Judicial Leadership in the Protection of Human Rights", in Cotran E, and Sherif A. O, The role of the Judiciary in the Protection of Human Rights. Martinus Nijhoff Publishers, 1997.

Zimbabwe may be viewed as a democratic state as it posses certain democratic characteristics. The holding of periodic and regular elections, which are the main features of a democratic society, amply testify to this. Examples of recently held elections are the 2005 parliamentary elections, the November 2005 Senate elections and the 2002 Presidential elections, although these were pronounced by the international community not to have been free and fair. Zimbabwe also has a parliament, which comprises of elected representatives of the people who, among other things, meet in parliament and pass laws. The Constitution of Zimbabwe is yet another element which categorizes Zimbabwe as a democratic state. Other democratic characteristics that Zimbabwe possesses are that it has a government largely comprised of representatives elected by the majority, there is separation of powers and there is an active opposition. It is however important to mention that Zimbabwe is a society in transition and therefore the above "democratic" tendencies are not always strictly adhered to. Indeed it also ought to be noted that Zimbabwe is in a phase which is extraordinary and hence the protection of rights is not as clear cut as international and regional standards require.

The theory behind the right to freedom of expression provides for the ideal standards to not only the right of freedom of expression but also the role of the judiciary in protecting the right. This however is not always easily achievable on the practical level. There is among other things politics which to a great extent hinder the protection of fundamental rights. This comes in the appointment of the

judiciary as well as other administrative structures which are put in place to serve as a vehicle towards the achievement of fundamental rights.

Human rights in Zimbabwe, like any other poor and developing country, have gone through progressive crisis which have manifested in different ways. Soon after independence, for instance, there were farm invasions and consequent forced evictions shortly followed by Operation *Gukurahundi*. [16] In the same period, the government established the closest an African country has ever come to a welfare state through the provision of, among other things, free education and health care. In the 1990s, economic, social and cultural rights were given preference over civil and political rights. There has been an attack on the institutions of governance, which should in any democratic state uphold the human rights of people. From the year 2000 to the present, virtually every single institution responsible for maintaining the rule of law and protecting human rights has been undermined and, in many cases, completely subverted.[17]

The police have been politicized and this is shown by their taking political sides and making political statements. One of the means used for the politicization of the police has been the giving of farms to senior ranking police officers. The politicization of the police is also brought to light by the statement of the

[16] *Gukurahundi* means the early rain which washes away the chaff before the spring rains. The chaff, i.e., "hundi" remains after the corn has been removed during the process of thrashing the corn, "kupura mhunga kana rukweza". It originates from the peasant population of Zimbabwe. The term is a euphemism used for the actions of Robert Mugabe's Fifth Brigade in the Ndebele provinces of Matabeleland and the Midlands during the early to late 80s.

[17] Coltart D, "Under Siege: Human Rights and the Rule of Law in Zimbabwe," Castan Centre for Human Rights law lecture held at the Monash University Law Chambers, 27 July 2005.

Commissioner of Police of Zimbabwe, Augustine Chihuri, who described the poor people who have been displaced in Operation Murambatsvina as maggots.[18] The police have been sidetracked, they no longer protect the rights of citizens but they are one of the principal weapons used against individuals.

There has been an attack on the judiciary by the executive. This led to the resignation of the then Chief Justice, Anthony Gubbay who was threatened by the Minister of Justice. The Minister simply stated that he "couldn't guarantee his safety" anymore.[19] The clash with the judiciary is mainly over cases that give rulings against the government. Justice Michael Majuru, President of the Administrative Court, illustrates an example of government pressure on the judiciary in Zimbabwe. In 2004 he resigned from his post and fled from Zimbabwe fearing for his safety due to harassment by the government in connection with his ruling in favor of *The Daily News*. Majuru ruled that the state-run Media Commission had unfairly relied on its political motives in declining to renew *The Daily News'* operating license.[20] *The Daily News* was one of the independent newspapers in Zimbabwe and despite court rulings in its favor it was shut down. The police carried out the implementation of the government command to shut down *The Daily News*, which is yet another example of the use of the police by the executive to perpetrate human rights abuses. Ray Choto states:

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[18] Lamb C, Priests told: don't aid 'filth', *The Sunday Times Online*, <http://www.timesonline.co.uk/article/0,,2089-1660059,00.html>.
[19] Mugabe appoints his judges, http://www.zic.com.au/updates/2001/2august2001.htm.
[20] Zimbabwe: Importance of an independent judiciary, http://www.humanrightsfirst.org/defenders/hrd_zimbabwe/hrd_zim_19.htm, not dated.

> Practicing independent journalism in Zimbabwe is like walking through a minefield. You do not know how dangerous your next step might be.[21]

The above conditions describe the environment prevailing in Zimbabwe, which has led to a decline in the protection of human rights and has negatively affected the country's image as a democratic state. As the African Commission has stated in *Constitutional Rights Projects and Civil Liberties Organisation v. Nigeria*,[22] 'no situation justifies the wholesale violation of human rights. In fact, general restrictions on rights diminish public confidence in the rule of law and are often counter-productive.' It therefore concluded that 'the competent authorities should not override constitutional provisions or undermine fundamental rights guaranteed by the constitution and international human rights standards.'

1.2 **Research Problem**

The protection of the right to freedom of expression depends on the capability of the judiciary to make decisions which protect this right. Consequently, the entrenchment of this right in international instruments and the national constitution is useless if individuals cannot rely on the courts to enforce this right. This study seeks to address the following questions:

a) What is the role of the judiciary in the protection of the right to freedom of expression in a difficult political environment such as the one prevailing in Zimbabwe?

[21] Lurie J, "Like Walking Through a Minefield: Zimbabwean journalist Ray Choto lived to tell about it," http://www.anchoragepress.com/archives/document209d.html.
[22] Communication 102/93.

b) How does legislation impact on the right to freedom of expression in Zimbabwe?

c) What steps has the judiciary taken to protect the right to freedom of expression in Zimbabwe and does the judiciary have any recourse where the executive refuses to enforce its decisions?

d) What practical solutions can be suggested to help enhance the protection of the right to freedom of expression?

1.3 Aim and Objectives

The research aims to expose the role of the judiciary in the protection of the right to freedom of expression in difficult political environments. The research will reveal the difficulty that the judiciary faces in balancing the interests of government and those of the wider society, for example, the media or the general public. The focus of the research will be on Zimbabwe.

In carrying out the research, the following will be elucidated:

- exposition and exploration of freedom of expression in its theoretical and historical context and the interests and values that converge on this freedom;[23]
- the difficulties that volatile political environments present to a number of political freedoms, such as freedom of assembly, expression and

[23] This objective is fully explored in chapter I Part B.

information and the central role of these freedoms in a free democratic society;[24]

- analyze the government's intervention through legislation and other measures against the impartiality and independence of the judiciary, and document and analyze through case law where the right to freedom of expression has triumphed or not triumphed;[25]
- make appropriate recommendations on how the judiciary can be made more effective in discharging its role of protecting human rights in general and freedom of expression in particular, when faced with similar situations.[26]

1.4 Assumptions

- States parties to international human rights treaties provide mechanisms for the enjoyment of the rights under such treaties at the national level.
- The judiciary in an ideal democracy (utopian democracies) is independent and impartial, and has absolute powers to interpret all laws and pass judgments without interference from the other organs of state.

[24] This is discussed in chapter 2.
[25] This is discussed in chapter 3.
[26] Recommendations are discussed in chapter 5.

- The press has the sole responsibility to keep the public informed on matters of public interest regardless of the political situation that prevails at a given time.

1.6 **Research Methodology**

The research was conducted mainly by way of literature search. The library was used extensively due to easy access. The major sources of information came from the 'Oliver Tambo' Human Rights Documentation Centre, which houses comprehensive human rights documentation. The Centre has a good collection of textbooks, which allowed the researcher to make a comparison of the past and present view points on the subject, and draw lessons for the future. The University of Fort Hare library (Alice and East London), was also utilized due to the availability of journals which contain relevant information on the research topic. The researcher found useful and up to date information on the subject from the articles that have been compiled by the Rhodes Journalists at the University of Rhodes Library. The literature brought in different perspectives from different authors on how the freedom of expression has been dealt with in other jurisdictions and the problems that surround this area of human rights law. Since there are different interpretations of freedom of expression, a look at these different views ensured that the research is well nuanced and balanced.

The case law of Zimbabwe on the right to freedom of expression was one of the major sources of information.[27] The judiciary speaks through the cases it has decided; this is how messages are conveyed from the judiciary to the public. It is through case law that the practical measures taken by the judiciary in upholding the right to freedom of expression are revealed in the research. The research looks at some of the judgments made during the period prior to independence and compares them with present case law in order to see any progression for better protection the right to freedom of expression.

Since the internet is a reserve of vast amounts of information, it proved to be of great value to the research. Websites like the Article 19[28], the Media Institute of Southern Africa[29] and the Freedom of Expression Institute of South Africa[30] were a great resource to this research. These institutions contain up to date information on the right to freedom of expression. They are able to carry out accurate investigations due to the vast resources at their disposal.

Legislation was also examined as a major source of information. Zimbabwean legislation dealing with freedom of expression and powers granted to the courts, as well as the Zimbabwean Constitution was relied upon. An examination of

[27] Case law is fully explored in chapter 3.
[28] www.article19.org.
[29] www.misa.org.
[30] www.fxi.org.za.

international instruments like the Universal Declaration of Rights[31] and regional instruments like the African Charter on Human and Peoples' Rights[32] was made.

Comparison, though to a limited extent, was made with other jurisdictions more especially South African legislation and case law. This allowed for an evaluation of freedom of expression and an overall view of the judiciary in the Southern African region to be made.

At the inception of this research it was not envisaged that the researcher would go to Zimbabwe due to time and financial constraints. During the course of the research the opportunity however did arise for traveling to Zimbabwe. Through interaction with professionals working in the field of human rights, the information received through unstructured interviews gave the researcher broader scope. These have been accordingly incorporated in the research to fill the gaps in the published sources.

1.7 **Literature Review**

Whereas consensus exists with regard to the definition of the right to freedom of expression there is a lot of disagreement on the scope or limitation of the right. Several international instruments define this right. Article 19 of the International Covenant on Civil and Political Rights (ICCPR) states that "the right to freedom of

[31] Article 19.
[32] Article 9.

expression includes, freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art or through any other media of his choice".

The African Charter on Human and Peoples' Rights, unlike the ICCPR, only has a general definition of the right to freedom of expression. This was done in order to allow African governments some flexibility in the interpretation and application of this right. Article 9 of the Charter states that "every individual has the right not only to receive information, but also to express himself and disseminate his opinion". Due to the ambiguity caused by this provision, the African Commission on Human and Peoples' Rights at its 29th session resolved to adopt a Declaration of Principles on Freedom of Expression to elaborate and expound on the nature, content and extent of Article 9, drawing on international standards and interpretations. From the Preamble of this Declaration, freedom of expression is regarded as an essential attribute of human existence, and its role in human progress and development as well as in the maintenance of democracy is recognized.[33]

Burns[34] sees the terms 'expression' and 'communication' as interchangeable. She states that the right to freedom of expression encompasses rights like freedom of speech; and freedom of expression via the activity of viewing, producing or being otherwise engaged in films, public performances etc. The

[33] Heyns C, (ed), Human Rights Law in Africa. Volume 1, Martinus Nijhoff Publishers, 2004, pg 405.
[34] Burns Y, Communications Law. Butterworths, 2001, pg 35.

author acknowledges that freedom of expression is not just restricted to oral communication but also includes symbolic acts such as picketing, pictorial and musical communication.

Cheadle et al[35] concede that the right to freedom of expression is heavily dependent on the manner in which the right fits within a particular constitutional scheme. The authors also concur with the notion that the right to freedom of expression is not restricted to speech but is a far much wider concept which includes symbolic acts which are intended to convey an idea, for example, burning of a national flag. They agree that freedom of expression is universally recognized as being central to democracy, although it is not absolute. The limitation of freedom of expression is dependent on the nature of the expression and the purpose that it is intended to achieve. For example, the authors contrast free political expression that is necessary to enable people to make informed choices from explicit portrayal of sexual intimacy, which is likely to receive less protection by the courts. They, however, argue that we all should be entitled to make up our own minds about what is good life; because our dignity is preserved when we insist that nobody has the right to decide on whether we are mature or fit to consider an opinion or idea. Thus, the importance of the right to freedom of expression and its resistance to limitations depends on the context within which the right is invoked.

[35] Cheadle, Davis, Haysom, South African Constitutional Law: The Bill of Rights. Butterworths, 2002 at pg 221.

Jones[36] asserts that there are two conflicting schools of thought that create two divergent conceptions of the right to freedom of expression. One theory advanced by Plato declares that there is a group of individuals to whom truth, goodness and virtue are known and anything that is incongruent with this must be controlled or suppressed. Aristotle, on the other hand, avers that human freedom is found in an individual's ability to make choices in the exercise of free will.[37] Therefore, an individual's choice should not be prescribed by another's judgment of what truth and goodness is, because the individual choice is the essence of freedom. Montesquieu added to Aristotle's theory that censorship should only be allowed where writings contain high treason.[38] Jones reconciles these two theories by stating that although the right to freedom of expression is a fundamental right, it is not absolute and it may be subjected to limitation in certain circumstances. He asserts that the principle of free expression must at times give way to certain paramount state interests.[39]

Since it is generally agreed that the right to freedom of expression is by no means absolute, the right raises complex problems that require the balancing of competing interests. According to Cheadle and others,[40] the outcome of disputes on the guarantee of free expression will depend on the value that a court is prepared to place on freedom of expression and the extent to which the court will

[36] Jones T. D, Human Rights: Group Defamation, Freedom of Expression and the Law of the Nations. Martinus Nijhoff Publishers, 1998 at pg 35.
[37] *Ibid*; at pg 36.
[38] *Ibid at* pg 36.
[39] *Ibid at* pg 36.
[40] Supra Note 35; at pg 217.

be inclined to subordinate other interests. Sorajbee[41] declares that issues of the permissible limits of restrictions on the freedom of expression involves consideration of the nature of the restriction, its scope and extent, its jurisdiction and the presence or absence of an efficacious corrective machinery to challenge the restriction. He goes on to say that it is the judiciary that performs the task of reconciling freedom of expression with certain imperatives of public interest such as national security, public order, public health or morals, and individual rights such as the right to reputation and the right to privacy. The court therefore performs the delicate role of being a peacemaker between the state and its citizens.

Hatchard underlines the importance of the judiciary being protected by the Constitution and being independent. He states that there have been potential confrontations between the judiciary and the executive. Hatchard mentions how the Zimbabwean government has sought to restrict the powers of the judiciary by introducing ouster clauses. The author also describes how the government has enacted legislation that has effectively reversed the decisions of the Supreme Court. Hatchard identifies the perennial problem of distinguishing between the judicial task of implementing the words and spirit of the Declaration and the executive role of determining policy. Justice Anthony Gubbay writes that the Supreme Court is empowered to make such orders, issue such writs and give

[41] Sorabjee S. J, "The Importance of the use of International and Comparative Law: The Indian Experience" in The Article 19 Freedom of Expression Manual. 1993.

such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of the Declaration of Rights.[42]

This research aims to analyze the above and other works written about Zimbabwe with regard to the right to freedom of expression in order to chart a way forward that would address the Zimbabwean dilemma and possibly draw lessons for other countries that are in danger of going down the same treacherous path. The research will also bring together literature dealing with freedom of expression and the role of the judiciary. This area of law is fraught with a number of contentious issues for which clarity is wanting. It is for this reason that this research is undertaken.

1.8 **Importance of the Research**

One of the most important functions of freedom of expression is that decision-making at all levels is preceded by discussion and consideration of a representative range of views. A decision made after adequate consultation is likely to be a better one, and one that would mirror the opinions, interests and needs of all concerned, rather than a decision taken with little or no consultation.[43] Freedom of speech is also important to government because when criticisms against the government are freely voiced, the government has

[42] Gubbay R. A, "The Role of Courts in Promoting Human Rights: The case of Zimbabwe" paper presented for the Bergen Seminar on Development 2001 held on 19 and 20 June 2001.
[43] Cooray M, "Freedom of Expression: The Australian Achievement," at <www.ourcivilisation.com/cooray/btof/chap211.htm>.

the opportunity to respond, and answer, to unfair comments and criticisms about its actions or inactions.

Without free speech, political action is restricted and no resistance to injustice or resistance to oppression is possible. Without free speech, elections would have no meaning at all. Policies of contestants become known to the public, and become responsive to public opinion only by virtue of free speech.[44] Between elections, the freely expressed opinions of citizens help to restrain oppressive rule. Without this freedom it is futile to expect political freedom or, consequently, to enjoy economic freedom or democracy. It can therefore be stated that the right to freedom of expression is the *sine qua non* of a democratic society.[45] This, it must be noted, is the ideal situation with the more politically mature governments. The same is not true for many insecure governments that see any form of negative expression against the government as a declaration of war.

Since the right to freedom of expression is so important, it is the duty of the judiciary to ensure that this right is protected. The judiciary must be the peacemaker in any democratic society. This means that the judiciary must ensure that the government does not trample on the rights of its citizens. At the same time, the judiciary must also ensure that the citizens are not unruly in the exercise of their rights, more especially the press. The judiciary is there to balance competing interests in society thereby ensuring a peaceful coexistence

[44] *Ibid*.
[45] *R v. Keegstra* 1990 (3) SCR 697.

between the government and its people. Without this important balancing act of the judiciary, peace and stability cannot be ensured. This research aims to bring out the exact responsibility of the judiciary, which will determine the continued realization of the right to freedom of expression. Since one cannot separate freedom of expression from democracy it is imperative that this right be properly articulated. In order for this to be feasible, an independent and impartial judiciary must be in existence.

This study is particularly relevant at this time when there is dispute between the government and its citizens in Zimbabwe as to what the right to freedom of expression entails. While the government maintains that this right ought to be limited to maintain 'public order,' citizens and civil society feel that the reasons which the government relies on are *ultra vires* section 20 of the Constitution. The Zimbabwean judiciary is also battling to maintain its independence which leads to it making balanced decisions. But it has also been criticized for being pro-government. This study is therefore a topical issue at this time.

1.9 Limitations of the study

This research is being undertaken to meet the requirements for the LLM degree. Financial resources at the disposal of the researcher are limited and this also affects the scope of the research which will therefore be restricted to Zimbabwe.

Other factors are time constraints as the research has to be completed within the prescribed time of two years.

This research is an overview of the role of the judiciary in protecting the right to freedom of expression in politically volatile environments. It is not an in-depth analysis of the functions of the judiciary but an overview of what the right to freedom of expression is in the Zimbabwean context and what steps the judiciary has taken in protecting this right.

1.10 **Scope of Study**

In line with the above objectives, the thesis focuses on the following chapters:

CHAPTER 1

Introduction – This Chapter provides an introduction to the study, the research problem as well as the methodology used.

CHAPTER 2

Freedom of Expression in Zimbabwe: Historical and Theoretical underpinnings – This Chapter gives a history of freedom of expression in Zimbabwe and the theories justifying the importance of the right to freedom of expression.

CHAPTER 3

The Law and Practice of Freedom of Expression in Zimbabwe – This Chapter is a discussion of legislation impacting on the right to freedom and the practical issues surrounding the protection of the right by the relevant authorities.

CHAPTER 4

The Zimbabwean Judiciary: Scalpel or Sledgehammer – This Chapter provides an analysis of case law by the Zimbabwean judiciary impacting on the right to freedom of expression and the position of the judiciary within the state.

CHAPTER 5

Freedom of Expression: Comparative Perspective – This Chapter gives a comparison between the protection of the right to freedom of expression in Zimbabwe and South Africa.

CHAPTER 6

Recommendations and Conclusions – This Chapter provides a summary of recommendations to the issues brought out in the research and the conclusions thereof.

CHAPTER 2

Freedom of Expression in Zimbabwe: Historical and Theoretical underpinnings

2.1 Introduction

To understand why the right to freedom of expression is so important in a democratic society, it is important to know the justification of the right. Furthermore to understand the current position of the right to freedom of expression in Zimbabwe it is equally important to discuss the history of this right. It is in this context that this section deals with two important issues. Firstly, the theories of freedom of expression specifically in the context of Zimbabwe, and secondly the history of freedom of expression and how the judiciary has handled human rights issues. It must be noted that the study of history is a necessity in many disciplines and the legal discipline is no exception.

In order for one to advance reasonable recommendations for the future, they must look at the mistakes of the predecessors and build on such mistakes. History will also show where a people have gone wrong and future generations can then learn from such mistakes and avoid them.

2.2 Free Speech: Theories

There are several theories that have been advanced to justify the constitutional protection of freedom of expression.[1] In the Zimbabwean context the courts have explored four such theories, based on Emerson's theory. These are: the individual self-fulfilment theory; the sound and rational judgment theory; the democratic process theory; and the balance between stability and social change theory. These theories are discussed below.

2.2.1 Individual Self-fulfilment - Self Realization Theory

Freedom of expression and opinion is typically a first generation human right with very classical individual emphasis.[2] In any liberal democracy, freedom of expression serves as a guarantee to the self-realization of the individual. Accordingly, a free responsible citizen is protected from any outside intervention in order to enable him/her to form and express his/her opinions without any outside threat or coercion.[3]

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[1] The freedom of expression is based on a theory expounded by the American writer, T.I. Emerson. This theory encompasses a value which forms the substratum upon which the American doctrine of human rights is based in which individual values are recognised and protected. See Emerson T. I, "Toward a general theory of the First Amendment," (1963) 72 *Yale Law Journal* 877 879.

[2] Alfredsson G, and Eide A, The Universal Declaration of Human Rights. Kluwer Law International, 1999, at pg 394.

[3] *Ibid*.

The theory of individual self-fulfilment suggests that free speech is an integral aspect of each individual's right to self-development. It argues that the objective of the human being is the realization of his/her character and potential. Burns states that in order to achieve self-fulfilment, the human being has to develop his/her mind and in developing his/her personality, a person has the right to form his/her opinions and to express them.[4] An unrestricted right to freedom of expression leads a person to achieve self-realization. Restrictions on what a person is supposed to hear, say, read or write restricts the growth of his/her personality.[5] According to this theory, there is a right to free speech even where the speech is not in the best interests of society. The emphasis is therefore on the individual and not on society.

One of the attributes to human nature is the desire to communicate, to express feelings and thought and to contribute to discussion and debate. To unreasonably restrict the above is to deny an individual his/her basic dignity and autonomy as a human being. Speech is an expression of the self and it can be effected in several different ways, namely, writing, pictures, face to face, etc. On this Richards[6] states that:

> People are not to be constrained to communicate or not to communicate, to believe or not to believe, to associate or not to associate. The value placed on this cluster of ideas derives from the notion of self-respect that comes from a mature person's full and untrammelled exercise of capabilities central to human

[4] Burns Y, Communications Law. Butterworths, 2001, at pg 39.
[5] Barendt E, Freedom of Speech. Oxford University Press, 1985.
[6] Richards D. J. A, Free Speech and the Politics of Identity. Oxford University Press, 1999.

> rationality. Thus the significance of free expression rests on the central human capacity to create and express symbolic terms such as speech, writing, pictures and music. Freedom of expression permits and encourages the exercise of these capacities.

Freedom of expression is therefore one of the basic conditions for the development of the individual. The government has to treat all its members except those who are incompetent[7] to make decisions which are not detrimental to society, as responsible moral agents who are free to choose what they can and cannot listen to and express themselves accordingly.[8]

The protection of free speech raises philosophical and legal difficulties especially where the justification of self-fulfilment is advanced.[9] Several questions arise in this regard, namely: - why is free speech particularly important to a person's self-fulfilment? And why is there more emphasis on it than other rights, for example, the right to education? According to Barendt,[10] there are understandable practical reasons why freedom of speech should be singled out for constitutional protection and distinguished from other freedoms similarly related to intellectual property and moral growth. He states that freedom of speech is primarily a liberty

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[7] In Dworkin and Baker's Freedom's Law, 200 this point is explained as follows: "That requirement [that government treat all its adult members, except those who are incompetent, as responsible moral agents] has two dimensions. First, morally responsible people insist on making up their own minds about what is good or bad in life or in politics, or what is true or false in matters of justice and faith. Government insults its citizens and denies their moral responsibility, when it decrees that they cannot be trusted to hear opinions that might persuade them to do dangerous or offensive convictions. We retain our dignity as individuals only by insisting that no one - no official and no majority – has the right to withhold an opinion from us on the ground that we are not fit to hear and consider it."

[8] *Holomisa v Argus Newspapers* Ltd 1996 (2) SA 588 (W) at 6081.

[9] Greenawalt K, Speech, Crime and the uses of language. Oxford University Press, 1989, at pg 15.

[10] Supra Note 5.

against the state, or in other words a negotiable right. Due to this reason it is more capable of judicial interpretation than positive rights. Barendt goes on to state that there are legitimate doubts on the competence of the courts to fashion appropriate remedies to secure social rights, while on the other hand, free speech can be secured by the restrictive interpretation or amendment of laws infringing the freedom.

Another reason for the constitutional protection of freedom of expression is that, as communication is so closely tied to our thoughts and feelings, suppression of communication is a more serious impingement on our personality than many other restraints of liberty.[11] It is important to note that expressions of beliefs lie closer to the core of our persons than most actions we perform. On this note Emerson[12] states that expression relies upon a distinction between expression and action, depending on whether expression or action is the dominant element.[13]

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[11] Supra Note 6, at pg 27.

[12] As quoted in Martson J. E, "Racial Hate Speech in a Changing Society: From Racial Oppression to Democracy," LLD Thesis University of Pretoria, 1997.

[13] Emerson puts forth five factors which ought to be taken into account when drawing the distinction between expression and action:-

(a) whether the conduct is intended to communicate information, ideas or emotions;
(b) whether the conduct promotes the values underlying the system of freedom of expression;
(c) the nature of the impact upon people; whether it is essentially mental or physical, non-coercive rather than violent, and of such a nature that a democratic society, seeking orderly change, can survive it;
(d) whether protection of the conduct is necessary to safeguard other, qualified conduct; other factors which can be developed as the theory grows.

From the above factors it can be deduced that the key to determining whether conduct is protected lies in the manner in which the speech, verbal or non-verbal, promotes the values underlying the system of freedom of expression. The speech must be neither physically violent nor destructive in order for it to be protected. Although there are some philosophical weaknesses to the argument there is a case to giving constitutional protection to free speech, because of its role in encouraging intellectual maturity for individuals.

The courts encounter problems where the justification of self-fulfilment is relied on. These problems/difficulties occur in distinguishing between genuine assertions of a right to free speech and claims to other freedoms, which may equally be supported by reference to this background right. There is particularly a problem with regard to defining what speech is. This difficulty was faced in *Retrofit (Pvt) Ltd v PTC and Anor*[14] where the court stated that the purpose of the application was commercial self-interest and not so much the desire to vindicate the right to freedom of expression.

The question may also be asked if claims to be free to advertise goods and services or to make unlimited donations to political campaign funds are really free speech claims or only assertions of economic or associated freedoms. At a first glance, these assertions might appear to be supported by arguments about self-fulfilment in a material sense, but at closer inspection they have very little connection with the particular view of intellectual and moral development underlying a right-based view of free speech. Redish[15] advocates for judicial discretion that favours expression rights. He supports a case-by-case discretion because there is less to fear from the application of broad values, than the rigid application of rules that have no regard for the special facts or circumstances of each case. It is therefore preferable that judges make decisions on a case by case basis rather than applying rigid rules to all cases.

[14] 1995 (2) ZLR 199 (SC) at pg 209.
[15] Redish M. H, "The Value of Free speech" [1982] 130 *University of Pennsylvania Law Review* 591 at pg 597.

According to Burchell,[16] Dworkin's theory of free speech based on individual dignity focuses on governmental inroads into the individual's speech and emphasizes the individual's right to make up his or her own mind on political matters. Like Scanlon, the emphasis is again placed on political speech. Scanlon's theory, however, is to some extent not sound due to weaknesses of the notion of personal autonomy. It is bizarre, for instance, to protect the interests of the speaker to a totally unreceptive audience or a non-existent readership. Scanlon's main argument is that the substantive evils, which the legislature seeks to prevent, must be of a highly special kind and that there must be no alternative way to prevent these evils than the restriction of free speech.[17]

The individual's right to free speech is to some extent limited; hence autonomy of speech does not exist. On this point Baker submits

> The liberty model holds that the free speech clause protects not a market place, but rather an area of individual liberty from certain types of governmental restriction. Speech or other self-expressive conduct is protected not as a means to achieve a collective good but because of its value to the individual. The liberty theory justifies protection of expression because of the way the protected conduct fosters the individual's self-realisation and self-determination without improperly interfering with the legitimate claims of others.[18]

It is apparent from this statement that Baker supports the liberty model of free speech. This theory denies constitutional protection of commercial speech and

[16] Burchell J, Personality Rights and Freedom of Expression: The Modern *Actio Injuriaru.* Juta and Co Ltd, 1998, at pg 14.
[17] Supra Note 1, at pg 395.
[18] Baker, Human Liberty 5. As quoted in Burchell J, Supra Note 16.

calls for a considerable range of value-based expressive action and these protective activities are crucial for a process of non-violent progressive change.[19] Baker concludes that protection of speech is not only justified due to the values that it serves but also because it serves them in a particularly acceptable and humane manner.

According to this theory the core meaning of self-government and freedom is the right of every individual to develop his/her mind and soul in the way of his/her own choice. The achievement of an adaptable and stable society as well as the value of speech to the individual is the premise of the self-realization theory. This theory is not only premised upon respect but it also emphasizes the integrity and autonomy of the individual. Free speech is therefore necessary for the individual not only to realize his/her potential but also to develop his/her character and personality to the full. It is the duty of the judiciary to ensure that the freedom of speech is protected within permissible limits.

In politically volatile environments such as the one prevailing in Zimbabwe, the governments however puts restrictions on the development of the individual. This is done by legislation which restricts what the public can and cannot hear. The legislation also restricts the avenues that are available for people not only to receive information but also to impart their ideas to other people. The emphasis in the Zimbabwean context is on society, or rather the best interests of the government. If any discussion or information is not in the interest of government,

[19] *Ibid*.

it is prohibited. An example is the prohibition of the expression of any information which insults the person of the President or Acting President.[20] There is further a great deal of restriction as to what a person can hear and/or read. This is due to the fact that there is only one broadcasting service and the requirement for accreditation of journalists essentially means that the Media and Information Commission controls what type of news the public reads.

2.2.2 The Sound and Rational Judgment / Argument for Truth / Market Place of Ideas Theory

John Milton first advanced this theory in his speech on the liberty of unlicensed printing before the English Parliament in 1644. In this speech he envisaged truth and falsehood grappling with each other in a free and open encounter. The theory was popularised by John Stuart Mill in his essay *On Liberty* where he argued that the function of society was to provide an individual with a framework in which to experiment. Within this framework, the individual requires absolute freedom of expression in order to express his/her ideas no matter how unacceptable they are to society.

In *On Liberty*, John Stuart Mill argued that even when the power of government is backed by near-unanimous public opinion, that power should not be used to suppress dissent. He recognised that truth does not always prevail against the

[20] Section 16 of the Public Order and Security Act 1 of 2002.

cruel refinements of repression and propaganda used by some dictators. Mill further stated that the suppression of expression harms the pursuit for truth. In his classical ideals, Mill[21] said:

> Even if the suppressed opinion would be false, it might still contain elements of truth. The prevailing public opinion is not usually the whole truth. It is only through the combination of contradictory opinions whereby one may achieve a more comprehensive understanding of truth.

It is not possible to have a reasoned personal conviction if the free formation of opinions is prevented. It can be rightly said that freedom of expression can be seen as a means of attaining truth. The theory of sound and rational judgment holds that the truth will emerge out of the competition of ideas,[22] that is, the truth will emerge out of free and ongoing exchange of free expression. Sound and rational judgment can therefore be reached once all the facts and arguments for and against a proposition have been considered. Access to information is imperative to this theory, as individuals have to test their judgement by sifting what is true from what is false information.

In democratic societies the voter is dependant upon a free flow of information on both political and government matters. The search for and attainment of truth is therefore essential. Government suppression of information, which is not in the

[21] Mill J.S, On Liberty, at pg 230-260.
[22] In *Abrams v US* 25 US 616 (1919) at 630 Justice Holmes held that "when man have realized that time has upset many fighting faiths, they may come to believe even more than they believe at the very foundations of their conduct that the ultimate good desired is better reached by free trade in ideas – that the best test for truth is the power of the thought to get itself accepted in the competition of the market; and that truth is the only ground upon which their wishes safely can be carried out."

interest of national security, should not be tolerated in democratic societies. According to this theory, the over-regulation and almost total prohibition of the publication of news on political matters relating to the safety of the state is considered unacceptable.

The argument from truth led to the market place of ideas theory, which emerged from America and was expounded by Justice Holmes in *Abrams v United States*.[23] Sound and rational judgment can therefore be best arrived at once all the facts and arguments for and against a proposition have been considered. This argument puts faith and optimism in the ability of individuals to distinguish right from wrong and it assumes that truth will emerge victorious. Even though those who do not advance the truth may succeed in the short term, they shall be unmasked and recognised for what they are, that is liars, in the long run.

The court in *New York Times Co v Sullivan*[24] alluding to the market place of ideas referred to 'unfettered exchange of ideas' and faith 'in the power of reason as applied through public debate.' The court further stated that erroneous statements must be protected to provide a breathing space needed for robust debate in the market place of ideas. It must be noted that the market place is not restricted to political speech. In *Virginia Sate Board of Pharmacy v Virginia Cit Cons Council*,[25] the United States Supreme Court extended free speech

[23] *Ibid*.
[24] 376 US 254 (1964) at 269, 270.
[25] 425 US 748 (1976) at 765.

protection to commercial speech. The Court emphasized the inherent worth of the speech in terms of its capacity for informing the public.[26]

According to John Stuart Mill, the state assumes an unwarranted assumption of infallibility by prohibiting the expression of true information. By proscribing conduct like unfair business practices the government acts on its view of what is right. John Stuart Mill argues that this is acceptable because the opponents of such measures are free to challenge the government. The right to challenge government practices is however only valuable if the government will carry out the judgments of the court. The government can therefore never be confident that its policies are right and that it is appropriate to legislate on such matters.[27]

Speech can also be prohibited because it is false. It is however wrong to take this step because people who hold 'true' beliefs will no longer be challenged and forced to defend their views. John Stuart Mill states that however true a proposition maybe, if it is not fully, frequently, fearlessly discussed, it will be held as a dead dogma, not a living truth.[28] This free speech debate can however be limited for the public interest and/or national security as well as for the protection of the privacy of individuals.

[26] *Ibid*; at 777.
[27] Mill, J.S, *On Liberty*, 81.
[28] *Ibid*; at, pg 95.

There are several criticisms that are laid against Mill's argument of truth. Baker[29] is one of the critics of the market place of ideas theory. He identifies lack of access by disfavored or impoverished groups as well as the non-existence of value free objective truths as major weaknesses, which impede the market-place theory from achieving the best results. Baker argues that truth is not objective and discoverable and it often contains value-oriented criteria, which are incapable of objective demonstration. Greenawalt however submits that the truth discovery argument can survive a substantial dose of skepticism about objective truth.[30] He asserts that the most obvious is in respect to factual matters.[31] This is because even in situations where the only truth for human beings is the set of propositions that serves them best, these propositions do not deny that people can learn from evidence and argument. This in some sense can lead them closer or farther to understanding what is true. For example evidence that the earth is round can lead us to say someone who believes that the earth is oval is closer to the truth than one who believes that it is flat. This is however dependant on the existence of old-style independent and competing media. In modern-day where media is commercially dependant on a small number of individuals "argument" as such disappears from the media itself. An example is the American media during the Iraq invasion which to a great extent showed the *negative* effect of the media on democracy.

[29] Baker, Human Liberty 5. As quoted in Burchell, Supra Note 16, at pg 17.
[30] Supra Note 9, at pg 19.
[31] *Ibid*.

Another question asked concerning Mill's argument for truth, is whether people can identify truth and regimes that promote it. As stated on the first question, truths are generally accessible to people and they are open to evidence about these truths although they can never be completely sure about anything.[32]

In 1907 Holmes went on to say that the purpose of the First Amendment was to prohibit prior restraint and stated that even true statements could be punished if they were harmful to the judicial process. His view was that political speech could be punished only when that speech posed a clear and present danger. In *Citlaw v New York*[33], Holmes further stated that "if in the long run the beliefs expressed in proletarian dictatorship are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they should be given their chance and have their way". In accordance with this dissent, Holmes argues that free-speech values should protect only those 'puny minorities'[34] unlikely to harm anyone and from whom something might be learned. If the benefits of a political speech were unclear and yet its threat to existing institutions and policies was clear then it would not be protected as free speech.[35]

People must have some basis for recognizing what social practices promote the discovery of truth. There is also inequality in the market place of ideas. Although the truth may be advanced people tend to believe messages that are already

[32] *Ibid*.
[33] 268 US 652 (1925)
[34] *Abrams v US* 250 US 616 U 1919.
[35] Supra Note 7.

dominant in society. It would be highly unjust to allow the government to suppress some forms of information due to this. For example, ordinary people accept as accurate a view that is widely agreed upon among scientists. In the example of scientists, freedom of communication promotes the advancement in understanding among persons capable of assessing scientific claims hence government intervention to suppress some scientific ideas in favor of others would not promote scientific truth. The dissenting scientific views must not be confined to the scientists or experts as the case may be but it must be aired in the public domain despite its potential to confuse the populace. What would be more acceptable is that the government provides alternative outlets for information that is less favored and restricts the frequency with which some messages are presented. Overall, no message should be denied an outlet altogether. Capitalist tendencies by the media ought also to be rejected.

It is not always the case that all will have access to a medium in which they can communicate their opinions and ideas. Capitalist ideals also do affect the flow of information. Those with the most money and/or influence will have the most access. Chomsky[36] states that in a well functioning capitalist society, everything becomes a commodity, including freedom; one can have as much as one can buy. He goes on to point out that those who occupy senior managerial posts in the media belong to the same privileged elite and have the same expectations and perceptions and hence they reflect a certain class of interests.

[36] Chomsky N, Necessary Illusions: Thought Control in Democratic Societies. Pluto 1989, at pg 349.

In the Zimbabwean context it can be argued that there is inequality in the market place of ideas more so in the broadcasting sector. This is because the government owns the only broadcasting service in the country. It therefore has more privileges to air its own views at the expense of dissenting opinions. Individuals and organizations that have divergent views from those of government therefore are not given an opportunity to be heard by the public as a result of this monopoly. The independent media is however to some extent represented in the print media, namely, through *The Standard* and *The Zimbabwean Independent*. The state run daily newspapers and the weekly independent newspapers more often represent the extremes of both ends and the truth lies somewhere in between.

2.2.3 Democratic Process Theory

This theory was popularized by Meiklejohn who based it on a distinction of two kinds of speech, one, which was absolute, and the other, which could be regulated by law. Freedom of expression is an indispensable condition for a free democratic society. Members of society are able to make informed judgments on matters of national and private interest where there is free propagation of ideas, opinions and information together with the process of open debate and argument. Greenawalt states that a healthy democracy is enhanced if what one believes about politics can be communicated. Speech about injustice can help relieve frustration about an undesired course of political events. Communication

according to Burns[37] is essential in a democratic system for without the right to receive, impart and give expression to information and ideas there can be no talk of liberal democracy.

In democratic states, free speech helps to curb government abuse and corruption not only in public sectors but also in private spheres. There ought therefore to be protection of persons who expose any mismanagement of public resources in functional democracies. In Zimbabwe however government workers are not permitted to expose any government information as this will result in criminal sanction.[38] Ironically the same is also true for Britain which is viewed as one of the mature democracies.

The constitutional protection of speech does not depend upon the truth. Citizens are given the right to participate in government and its institutions. Governments that are not open to debate, scrutiny and criticism (whether the speech is true or false) tend to be autocratic. It is true that an informed citizenry will yield a better government and political decisions compared to uninformed citizens. Hence the core function of political speech is the protection of the democratic political process from the abusive censorship of political debate by the transient majority, which has democratically achieved political power.[39] In *New York Times v*

[37] Supra Note 4, at pg 42.
[38] Section 4 (1) (c) of the Official Secrets Act.
[39] Meiklejohn A, Political Freedom. Oxford University Press, 1965.

Sullivan[40] the court held that the government had no right to limit or interfere with, public criticism by the people of their elected representatives.

With regard to the democratic process, Baker advances two approaches: - (i) free debate about public issues will further democracy; and (ii) freedom of speech is part of the very definition of self-government: the process of free discussion is required no matter whether the process leads to the truth or not.[41] This approach by Baker summarizes freedom of expression as part of a democratic process. The scope of democratic debate ought to be broadly interpreted. Narrowly interpreted, it will only be confined to political speech, political debate and campaigns.[42] On the other hand, broadly interpreted it will include any matter, which is of public interest, which is not relating to self-government. In Zimbabwe, and indeed most mature democracies, however it would seem that this assertion is not true. The cabinet is given the right to carry out deliberations with no accountability to the people. Cabinet discussions are regarded as top secret issues which may not be subjected to public scrutiny.

[40] 376 US 254 1964.
[41] Supra Note 16 at pg 12.
[42] The narrow approach is restricted to speech, which is necessarily required for people to participate in self-government. Government officials are mere representatives of the people and derive their power from them. It is therefore necessary that the people receive as much information as possible with no interference. This will enable them to exercise their sovereign function in an informed and effective manner. The narrow approach trivializes free speech by restricting it to political speech and thereby excluding the dissenting discourse outside the political mainstream. See Meiklejohn A, "The First Amendment is an Absolute" [1961] *Supreme Court Review* 245.

It is indeed true that sometimes the exercise of free speech may in particular situations be contrary to the public welfare.[43] Barendt,[44] says that the maintenance of a confident democracy is best guaranteed by protecting freedom of expression in all or almost all circumstances, for restriction of speech may cause unrest. Speech must therefore not be restricted to politics for this allows for censorship that deprives persons of the undeniable liberties essential to moral self government of free people.[45]

In modern societies there is more to life than politics and protection of speech is therefore not restricted to politics but it also extends to literature, science, art, etc.[46] In support of the democratic process theory Holmes J., said that:

> Those who won our independence believed that freedom to think as you will and to speak as you think are means indispensable to the very discovery and spread of political truth; that without free speech and assembly, discussion would be futile that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the great menace to freedom is an inert people, that public discussion is a political duty; and that this should be a fundamental principle of the American government.

Justice Black also supported this view in his judgment in *Milk Wagon Drivers Union v Meadowmoor Dairies*[47] when he stated that:

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[43] Bevier argued that there were exceptions to the absolute protection of political speech. She identified the advocacy of violent overthrow of the government and the incitement to violent acts as exceptions. This is because these were inconsistent with the principles underlying the First Amendment. See Bevier L. R, The First Amendment and Political Speech: An Inquiry into the Substance and Limits of Principle, [1978] 30 *Stanford Law Review* 299.

[44] Supra Note 7, at pg 21.

[45] Supra Note 5, at pg 21.

[46] Supra Note 16, at pg 12.

> Freedom to speak and write about public questions is as important to the life of our government as is the heart of the human body...if the heart is weakened the result is debilitation; if it be stilled the result is death.

To this effect, free speech is not only valuable as an end but also as a means to an end. Some authors say that political democracy is simply a means to the broader value of self-realization.

John Hart Ely advances judicial review as protecting the integrity of democracy from the illegitimate attempt of a transient majority to entrench its own power by manipulating the agenda of political debate in its own favor. Since all forms of political power are corruptible, such powers must be subject to a system of institutional constraint, for example, judicial review. This is designed to tie together such power to the legitimate ends of government, like respect for human rights and the use of power to advance the public good. Ely says that the judiciary insists upon and monitors a view of democratic procedural fairness and does not illegitimately impose on democratic majorities a substantive value.[48] This is however only true where the judiciary is not biased towards the government. Ely's view shows that there are forms of political power that democratic majorities may and may not legitimately exercise.

The argument from democracy therefore does not sufficiently justify free speech although it can stand as a primary justification. This is due to the fact that

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[47] 312 US 287 (1941) at 301-2.
[48] Ely J. H, Democracy and Distrust: A theory of Judicial Review, Harvard University Press, 1980 at chapter 4.

government will be more inclined to suppress political speech and hence more constitutional protection of such speech may be called upon. This does not, however, mean that other forms of speech must not be protected but rather that more vigilance may be required in protecting political speech. As there is no clear-cut distinction between political and other types of speech in the Zimbabwean Constitution, it is deduced that the judiciary must accord equal protection to all types of speech. The United States Constitution on the other hand puts political speech protection in the First Amendment with absolute protection. Other types of speech are placed in the Fifth Amendment where protection is restricted in the interests of general public welfare.

Political speech, it is conceded, is given a special status and a more significant degree of protection than is accorded to other types of expression.[49] Barendt[50] states that the argument from democracy has been the most influential theory in the development of 20th century free speech law. Free speech therefore not only helps protect the power of the people to govern themselves but it also restricts the government from being corrupt.

The function of the press is considered by some to be twofold, with one function being the democratic process and the other the watchdog function. Meiklejohn and his followers expound the democratic process function. Under this function the press has the duty to inform the public. It has to impart independent

[49] *Buckley v Valeo* 424 US 1 [1976].
[50] Supra Note 5.

information and provide a forum for public debate through which ministers and other public figures can be interrogated in ways that are accessible to a mass audience. It also has to allow for contributions from ordinary citizens.[51] In fulfilling its watchdog function, the media has two functions, namely, investigative and informative. It must inform the people of what the government is doing without overstepping the boundaries of privacy. The free flow of information is not only necessary to inform the public, but also to inform different government departments of the activities of each other.

A typical example where the media plays an anti-democratic function in most circumstances is the South African scenario. The private media is owned by a few, mainly white families and hence there is no real reflection of the ordinary person's political and social issues.

[51] Beetham D, and Boyle K, Introducing Democracy – 80 Questions and Answers, UNESCO Publishing, 1995 at pg 11.

2.2.4 Balance between Stability and Social Change[52]

This theory of free speech was dealt with in *In Re Munhumeso and others*[53] and further enunciated in *Retrofit*.[54] The court in *Retrofit* stated that 'social stability is strengthened and advanced by freedom of expression' and its 'restraint impedes rational discussion and reduces society's ability to adjust to changing circumstances.' The court further stated that the experience of participation makes it easier for those whose views are rejected or criticized to accept and abide by decisions reached through and open objective and non-coercive process. Going back to the argument for democracy, the court stated that the uninhibited exchange of ideas, opinions and information is the very lifeblood of democracy.

Greenawalt states that a good answer to many social problems depends on accommodation of competing interests and desires.[55] He goes on to state that when social action is based on an assessment of empirical information and a

[52] Emerson, as quoted in Van Niekerk, The Cloistered Virtue: Freedom of Speech and the Administration of Justice in the Western World, Praeger Publishers, 1987, at pg 32-33, states that 'freedom of expression is a method of achieving a more adaptable and hence a more stable community, of maintaining the precarious balance between healthy cleavage and necessary consensus. This follows because suppression of discussion makes a rational judgment impossible, substituting force for reason; because suppression promotes inflexibility and stultification, preventing society from adjusting to changing circumstances or developing new ideas; and because suppression conceals the real problems confronting society, diverting public attention from the critical issue. At the same time the process of open democracy promotes greater cohesion in a society because people are more ready to accept decisions that go against them if they have a part in the decision-making process…Freedom of expression thus provides a framework in which the conflict necessary to the progress of a society can take place without destroying the society. It is an essential mechanism for maintaining the balance between stability and change.

[53] 1995 (1) SA 551 (ZS).

[54] 1995 (2) ZLR 199 (SC).

[55] Supra Note 9

sound resolution of value questions, we can still think of the decisions as working some kind of accommodation among affected interests. Hence a significant difference in approach remains between seeking stability and social change. It is important to note that failure to accommodate different social views is often a source of social instability. Those whose views are not accommodated may seek by radical changes in existing structures to make their interests heard.

2.2.5 Summary

Although the theories of freedom of speech are substantially different, they all agree, that the right to freedom of expression is to some extent limited. This is with the exception of the democratic process theory which states that political speech is absolutely protected, although this is not necessarily true. Some advocates of this theory state that the theory may be limited by speech that advocates the illegal overthrow of government and the incitement of violent acts or hate speech. Governments, in a bid to widen the scope of prohibited acts, manipulate the above terms used for limitation as explicit and narrow as they may seem. Governments that are autocratic tend to bring limitations of free speech even in circumstances, where citizens peacefully express themselves.

The other problem with the democratic process theory is that it does not clearly state what exactly political speech is. Can literature, art and science be included in political speech, since it contributes albeit to a limited degree, to political

thought? The theory also sees freedom of expression only functioning in democracies. Would this then mean that freedom of expression should not be recognized in non-democratic societies?

The sound and rational judgment theory is the ideal theory. This theory advances the intellectual faculties of people in society as they are free to make up their own opinions based on vast amounts of information presented to them. The theory advances the individual's interests as it gives the individual the right to determine their destiny and what is right and wrong. The problem with this theory is that the truth may not always prevail due to two main reasons. Firstly, people may have their own preconceived notions, which they wish to prove right by the information, which is made available to them. Secondly, there may be a popular view that is prevalent in society and, without sifting through information; people may just take this popular view.

Another weakness of the sound and rational judgment theory is that it assumes that the press is always independent and impartial, which in some instances may not be true. In capitalist states, capitalism affects even the media. It is only those who control the media and have financial means who can fully exercise their right to freedom of expression. In Zimbabwe where most of the media is state owned (and the independent media is often directly linked to positions in the political opposition), there is a danger that only the views which are acceptable to the government (or the opposition) are aired.

The self-realization theory arguably encompasses the three other theories and hence would be more ideal the advancement of the right to freedom of expression. It also encompasses a broad range of conduct and is not restricted to words. By recognizing the rights of the individual, it also indirectly advances the rights of the broader society. The Zimbabwean Constitution recognizes the rights of the individual in section 11.[56] The Constitution does not, however, state that the individual rights are absolute. They can be limited, among other things, by public interest and the rights of others.

These theories however agree that speech must not be restricted because it is false. Safeguards ought to be put in place for the protection of all types of speech, i.e. true and false. It is also important to note that limitations to the right to freedom of expression are permissible what is in question however is how the law deals with particular statements, e.g. false statements through for instance defamation.

2.3 Free Speech: History

The history of freedom of expression is inextricably tied with that of the development of human rights from Rhodesia to Zimbabwe. As Zimbabwe was

[56] "Whereas every person in Zimbabwe is entitled to the fundamental rights and freedoms of the individual, that is to say, the right whatever his race, tribe, place of origin, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest, to each …"

colonised by the British it is imperative that mention be made of the history of freedom of expression in that country. This part of the thesis is therefore going to briefly outline the history of human rights, and more particularly, freedom of expression in both Britain and Rhodesia/Zimbabwe. The section focusing on Zimbabwe will be divided into three parts, i.e. pre-colonial; 1980 to 2001; and 2001 to the present.

2.3.1 Freedom of speech in England

The concept of free expression is not a novelty; it has been recognized for many centuries. The importance of free speech can be traced to as long back as the creation of the world. As, the former Czech President, Vaclav Havel said:

> In the beginning was the word. So it says on the first page of the most important book known to us. What is meant is that the word of God is the source of all creation. But surely the same can be said, figuratively speaking, of every human action. But surely the same can be said to be the very source of our being, the substance of the cosmic life form we call people.

The Greek Philosopher, Socrates said 'the sun might as easily be spared from the universe as free speech from the liberal institutions of society.'[57] According to John Milton in his great essay The Aeropagitica, freedom of speech was respected in the ancient states, namely in the Republic of Athens and the Republic of Sparta.

[57] Patterson C. J, Free Speech and A Free Press. New York, Little Brown and Company, 1939 at pg 17.

In the Roman Empire Augustus was the first ruler to punish expression (i.e. written and spoken words), which was not accompanied by any action. This he did by ordering the burying of the writings of Libienus. When the Bishop of Rome was recognized as the head of the Christian Church there was a move towards the restriction of free speech and access to information. The Church made numerous orders prohibiting the reading of ancient books and in addition, Constantine and the Council of Nicaea issued edicts against the writings of Arius who was under the death penalty.

At the beginning of the 12th century learning began to improve.[58] During this century, the Council of Lateran excommunicated heretics from Southern France. Later on the system of the Inquisitor Generals was established to discover and chastise heretics. It was during this century that the church assumed control of all writings and suppressed all those that objected to its authority. In 1515 the Council of the Lateran decreed that no book could be printed without the permission of the Bishop. People like John Wyckliffe, John Huss and Martin Luther were victims of these censorship laws.

In 1476, William Caxton introduced the printing press and it was at this time that Henry VIII denied the authority of the Pope over the Church of England and recognized the political importance of the control of printing and assumed control of it by authority of his kingly prerogative.[59] Under the regime of Henry VIII,

[58] *Ibid;* at pg 19.
[59] Supra Note 2, at pg 27.

freedom of the press and of speech did not exist. The Court of the Star Chamber, which had no clearly defined jurisdiction, had the power to try offenders of the proclamations of the King, which had the force of an Act of Parliament.

Although free speech has been recognized for many centuries in the ancient civilizations, the modern roots of the right to freedom of expression began in England in the 17th century.[60] The modern concept of freedom of expression was promulgated in the English Bill of Rights 1688. It provided 'that the freedom of speech and debate or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament'. The English Parliament secured this right from William and Mary [during their reign the law of libel was relaxed] after the overthrow of James II.

With the ascension of Queen Elizabeth in 1559 the Court of the High Commission was to hear all matters concerning the crime of heresy. There was large scale censorship of books which were first examined to determine if they contained heresy. The court of the High Commission was abolished in 1641. Shortly after Oliver Cromwell came into power through a revolution and due to fear of a counter-revolution, he greatly restricted the freedom of speech. It was during Cromwell's time that the Licensing Act was enacted. This Act provided that no book, paper or pamphlet was to be printed except with the express consent of some person appointed by Parliament and thereafter it was to be

[60] Kortteinen J, Myntti K, and Hannikainen L, Article 19 in Alfredsson G, and Eide A (eds), The Universal Declaration of Human Rights. Kluwer law International, 1999, at pg 393.

entered into the register of the Stationer's Company. The Licensing Act was repealed in 1649 and re-enacted in 1650. Although the Licensing Act was still in effect during the reign of Charles II there was greater freedom of expression as illustrated by the establishment of many newspapers and publication of books. The Licensing Act expired in 1679 and Chief Justice Scroggs held that it was an offence to publish any news true or false without first obtaining a license. Lord Mansfield gave the definition of freedom of the press thus:

> As for the freedom of the press, I'll tell you what it is, the liberty of the press is that a man may print what he pleases without a license; as long as it remains so, the liberty of the press is not restrained.

Due to fear by the British government that similar conditions would ensue or prevail (as those in France during the French Revolution) in England there were stricter laws regarding sedition. In 1795 the Treasonable Practices Bill was passed and this protected the person of his Majesty and the government against treasonable practices and attempts, which included speech. It is important to note that even in the 18th century both acts and speech were regarded as part of expression.

2.3.2 The history of freedom of expression in Zimbabwe

2.3.2.1 The Colonial Period

The history of English law in the area of free expression is particularly relevant in the Zimbabwean context as in 1895 Rhodesia was colonized by the British. When Rhodesia was colonised, it was directly under the rule of the British crown and administered by the British South Africa Company (BSAC). All the laws of England were directly applicable to all the British citizens in the British colonies. When the British settled in Rhodesia through the BSAC they established a system of settler colonialism.[61] Initially the natives/blacks did not really have any manner of rights and were not respected as subjects of the vast British Empire.

The laws of England were only meant to protect the British citizens. This is well illustrated in the case of *R v Laidlow*[62] where the accused was found guilty of common assault and sentenced to six months imprisonment with hard labour for flogging Africans two of whom died. The natives were considered as objects (they did not have civil, political and/or social rights) whereas the settlers were considered as citizens in what Benedict Anderson has termed as the "imagined communities." It goes without saying that if the right to life is not respected there

[61] Utete C. M. B, The road to Zimbabwe: the political economy of settler colonialism, national liberation and foreign intervention. University Press of America, 1979. Utete states that settler colonialism is a system of exploitation of the labour and resources of the colonized peoples for the benefit of a racial minority transplanted from its home.

[62] Reported in the Rhodesian Herald of 8 May 1908.

will not be much respect to other rights as no rights can be ascribed to a dead person. Even among the British citizens speech was still greatly restricted.

As early as 1891 *The Mashonaland Herald* and *The Zambesian Times* had been established.[63] The white settlers complained that *The Mashonaland Herald* was an instrument of the BSAC as it was not permitted to print articles critical of the Company's administration. *The Bulawayo Chronicle*, established in 1894, pursued the same policy as the Rhodesian Herald. After a Referendum[64] held in 1922, the Rhodesian Printing and Publishing Company was established and it controlled these two papers. This company had a majority of Southern Rhodesia shareholders as well as Directors. This however did not lessen the restriction on the freedom of expression as the newspapers simply moved from the ownership of one government to another. Before the newspapers were published they had to be taken to the censorship offices for approval.[65] In order to draw attention to the fact that the newspapers had been subjected to censor, the editors left blank spaces where the censored matter had been removed.

In 1920 the British Parliament passed the Official Secrets Act. This Act prohibited the publication and dissemination of many kinds of information, namely

[63] Davies D. K, Race Relations in Rhodesia: A survey for 1972 – 73. Rex Collins, 1975 at pg 208.

[64] This Referendum was held to decide if Rhodesia was to become a fifth province of the Union of South Africa or acquire responsible government under the British crown. The majority opted for the latter.

[65] For Africans, newspapers such as the Rhodesian Herald were used as an effective means to consolidate colonialism. The newspapers did not cater for the Africans. They also did not give them an opportunity to make constructive contributions to thought and discussion on matters of public policy.

information relating to, among other things, security, intelligence and defence by crown servants or contractors, as well as any information which was obtained from Crown servants or contractors.[66] There was also the Law concerning blasphemy. Publications, which vilified Christ or the Christian faith, constituted the common law offence of blasphemous libel. Such publications were said to have a tendency to shake the fabric of society, which was based on the Christian faith. Libel and slander[67] were also regarded as offences. Freedom of expression was therefore greatly limited by these laws.

In 1923 Southern Rhodesia, by Letters Patent of 1 September 1923, was provided with a Constitution of responsible Government. This Constitution did not allow for self-government and it also did not contain a Bill of Rights. Broadcasting was introduced in Rhodesia in the 1930s and since then it has been a contested terrain. Since its introduction it has been characterised by its legal status as a state monopoly. Its location under the Ministry of Information also contributed to it being a tool in the hands of the government.[68] The most important reason why broadcasting was introduced to the colonies was to enable the settlers to be in touch with the motherland. It was only in 1941 that the media was extended to serve the natives. This was done for the purposes of interpreting the government

[66] Stevens I, Constitutional and Administrative Law. 3rd Edition, Pitman Publishing, 1996 at pg 117.

[67] Slander and libel - statement which tends to lower the plaintiff in the estimation of right thinking members of society. Where the statement was published in permanent form the plaintiff could sue for libel and where it was published in temporary form the plaintiff could sue for slander.

[68] Moyo D, From Rhodesia to Zimbabwe: Change without Change? Broadcasting Policy Reform and Political Control in Media, Public Disclosure and Political Contestation in Zimbabwe, Current African Issues No. 27, Nordiska Afrikainstitutet, 2004.

policy to the natives. Another reason was to make them employable in the new economies as skilled labourers.

In 1948 the Universal Declaration of Human Rights was proclaimed. This in no way however changed the life of the natives as the British government did not apply this declaration to them. They were still regarded as legal objects which had no rights vested on them. After the Unilateral Declaration of Independence (UDI) in 1965, the Rhodesian Broadcasting Corporation was staffed with party loyalists (that is the Rhodesian Front) who had little or no training in broadcasting. This was meant to ensure that resistance against the introduction of UDI was countered. Rhodesian Television was also swiftly brought under the control of the Rhodesian Front and no longer operated as a commercial company. Restrictive laws were introduced to counter any differing views from those of government. An example of such laws was the Law and Order Maintenance Act (LOMA) of 1960 which outlawed journalists, the media and individuals from making any statements which might cause fear and alarm or despondency. [69] This Act was also responsible for the closure of several publications such as the African Daily News, Moto Magazine and Umbowo.

[69] In *R v Mackay* 1964 (3) SA 176 (S.R.) a journalist who was found in possession of a letter from Rev N. Sithole was found guilty of possessing subversive material. The court held that the statement that the Europeans were prepared "to go to any lengths to oppress the African majority in order that the white minority might rule Southern Rhodesia indefinitely. They are the oppressors, the Africans are the oppressed," was subversive. In *Mukahlera v R* 1961 R. & N. 872 an accused was convicted for having told a political meeting of 400 -500 Africans, at which the police were present, that they must not have ill feelings against the police who had been sent to the meeting by others but that the police were 'small boys' and that the meeting must treat them as 'small boys'. Chapter 39 section 17 (1)(a) of LOMA allows a police officer to forbid any person from addressing such gathering…whenever he has reasonable grounds for believing that the breach of the peace is likely to occur or that a seditious or subversive

The Official Secrets Act of 1970 suppressed all information contrary to government policies and combated any resistance from black nationalists and white liberals. Other pieces of legislation which restricted freedom of expression were the Sedition Act of 1936, the Subversive Activities Act of 1950, the Public Order Act of 1955 and the Native Affairs Act of 1960. The purpose of all these Acts was to restrict/prevent the expression of competing political views both on air and in print.

The 1961 and 1965 Constitutions contained the Declaration of Rights and which protected the freedom of expression, unlike the 1923 Constitution.[70] The Declaration of Rights was however rendered ineffective for various reasons. Firstly, the rights granted were subject to such comprehensive exceptions that it would be accurate to define the Declaration as having provided freedom with one hand and annihilated it with the other. Secondly, the Constitution provided for the continual validity of laws inconsistent with it as long as such laws were enacted prior to it.

Finally, the constitution made no provisions for some basic human rights which were already regarded as standard in international law, e.g. the freedom of

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statement is likely to be made.

[70] 1961 Preamble to Chapter VI which read as follows: whereas it is desirable to ensure that every person in Southern

Rhodesia enjoys the fundamental rights and freedoms of the individual, that is to say, the right, whatever his race, tribe, place of origin, political opinions, colour or creed, but subject to the respect of the rights and freedoms of others and for the public interest, to each and all of the following namely; … (b) freedom of conscience, of expression, and of assembly and association.

assembly.[71] The rights in the Declaration were subject to limitations such as suspension during periods of public emergency which could last up to three months. This was regulated by the Emergency Powers Act which had very little safeguard against abuse. With regard to the Declaration, the International Commission of Jurists declared:

> The Constitution of Southern Rhodesia is a striking example of the futility of laying down human rights in the constitution and thereafter subjecting those same human rights to the sway of a legislature which does not adequately represent the people of the country; an examination of Southern Rhodesia legislation in relation to the human rights proclaimed in the Constitution makes one wonder why the trouble was ever taken to put those human rights in the Constitution.[72]

Although freedom of expression was generally greatly limited it was even more limited for Africans. There were about 24 Acts applying exclusively to Africans.[73] The Vagrancy Act and the Electoral Act set very high property qualifications for voting which most Africans did not posses hence they did not qualify to vote. This further restricted their freedom to express themselves by voting for the government of their choice.

The government did not respect the decisions of the courts. An example is the case of *Nkomo and others v Minister of Justice and others*[74] where the court held

[71] Bhebe N, and Ranger T, The Historical Dimensions of Democracy and Human Rights in Zimbabwe, University of Zimbabwe Publications, 2001, at pg 109.
[72] Southern Rhodesia – Human Rights and the Constitution, *Bulletin of International Commission of Jurists*, No. 18, March 1964, at pg 44.
[73] Supra Note 61, at pg 613.
[74] 1965 (1) SA 498 (S.R.A.D.) at 503.

that the detention of Mr Nkomo and other African nationalists was unlawful but this was ignored by the Minister of Justice who refused to release them. There was also inconsistency by the courts in the interpretation of the Constitution which showed that it was treated as an ordinary statute. For instance in *Musururwa v Attorney-General*, *Southern Rhodesia*, [75] a wide interpretation of the Constitution was given. On the other hand, in *R v Mackay*[76] a narrow meaning was given as taking the wide meaning of the Constitution would defeat the purpose of Chapter 9 of LOMA. Mr Justice Jackson is of the view that "the attitude of a society and of its organised political forces, rather than its legal machinery, is the controlling force in the character of free institutions."[77] In Rhodesia, the independence of judicial officers was affected by the freedom of the government to promote, transfer or dismiss them.[78] The Rhodesia government enacted 'brutal legislation which was enforced by a compliant if not enthusiastic, judiciary.'[79]

In the broadcasting sector, broadcasting fell under the jurisdiction of the state. The state specifically legislated the sector and imposed strict operational controls. The authoritarian model was used by the colonialists as a medium for propaganda. According to this model, the main role of the press was to uphold established authority and social order. Hence the media was not allowed to do

[75] 1963 (4) SA 720.
[76] 1963 (1) SA 304 (S.R.).
[77] Jackson R. H, The Supreme Court in the American System of Government. Howard University Press, 1955 at pg 81.
[78] Palley C, The Constitutional History and Politics in a Dispute for National Independence. Kenya Literature Bureau, 1979, at pg 353 – 354.
[79] Ibid; at pg 112.

anything which should undermine established authority or disturb order. The media was also required not only to be subordinate to established authority but to avoid offence to the majority or dominant moral and political values. Hence the colonial government used censorship to enforce these principles.[80]

At independence there were high hopes that the government would repeal all the offensive pieces of legislation. There was also hope among the civil society that the courts would be restored to some importance and be given their voice and right to judge back.

2.3.2.2 The Post-colonial Period (1980 – 2001)

During the first five years of independence, the courts could not make any significant headway in the fields of human rights. This was because of the constitutional provision stating that existing laws could not be challenged under the Declaration of Rights.[81] From 1985 – 2001, human rights flourished and the vast majority of decisions favoured the citizen. It was during this period that human rights came into issue as they had not been previously considered under the 1961 and 1979 Constitutions. During this period Chief Justices Georges and Fieldsend headed the Supreme Court.

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[80] Mazango E. M, and Chiumbu S.H, Media Policy, Law and Ethics. Zimbabwe Open University, 2000, at pg 121.

[81] Section 26 (3) of the Constitution stated that all legislation which was in existence on the 18th of April could not be subjected to constitutional challenge for the next five years.

Soon after independence there was no change in the print media as it was still in the hands of the South African controlled Argus Group. In a bid to harmonise the press with the new socio-political conditions gained at independence, the Zimbabwe Mass Media Trust (ZMMT) was formed in 1981. The trust was formed to facilitate the establishment of appropriate media that would be use in reducing cultural imperialism and achieving relevant development in communication. It was also given the mandate to transfer media ownership from the previous owners to the semi-public utility.[82] This transfer of ownership in a way improved the right to freedom of expression.[83] In the same manner, broadcasting also fell under the power of the state by virtue of the 1975 Broadcasting Act which stated that broadcasting was a state monopoly.

It is important to note that in broadcasting, the new government inherited the institutional structure, policies, laws and regulatory framework left behind by the colonialists. Like the colonial government, the new government staffed the Zimbabwe Broadcasting Corporation with party loyalists who had little professional qualification. The media was seen as a political tool serving de-colonialism and the ruling party interests. On this note Zaffiro[84] states that:

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[82] Supra Note 80, at pg 45.

[83] Originally the ZMMT was meant to act as a buffer between the private press and ZANU-PF, but this was shortlived. The Trust became increasingly dependant on the state for financial planning and political support. By 1991, it had been effectively annexed by ZANU-PF. The two organisations which fall under the ZMMT are:

- The Zimbabwe Newspapers Private Limited (Zimpapers) – the newspapers owned and controlled by the ZMMT are: *The Sunday Mail*, *The Sunday News*, *The Manica Post*, *Kwayedza*, and the recently closed *Daily Mirror* which was under the control of Central Intelligence Organisation agents.
- The Zimbabwe Inter-Africa News Agency (ZIANA)

[84] Zaffiro J, "Democratizing African Broadcasting Amidst Political Cnhange: Lessons from

> Today it is clear to nearly everyone that African media systems are regime-serving first and foremost and only secondarily people-serving. The majority of readers, listeners, and viewers see themselves at best as spectators rather than participants in matters of national importance.

It is on this basis that Mazango and Chiumbu[85] contend that to date, broadcasting in Zimbabwe is primarily a political outcome. This is due to the fact that policy is decided by political means with factors such as technology and economics playing minor roles.

The Constitution was hailed as the supreme law of the land in *Commissioner of Police v Wilson*.[86] In this case the police officer had signed a blood chit before accepting a promotion. The court held that despite this fact, he was still entitled to his full pension. The Supreme Court also dealt with the now problematic land question.[87] In this case the court distinguished between the acquisition of rights and the extinction of rights. Since parliament had merely extinguished the rights of the applicant, he could not be treated in terms of the compulsory acquisition procedures in terms of the Constitution.

In *Minister of Home Affairs v Dabengwa and Another*,[88] the government sought to use the Emergency Powers Regulation to deprive the accused of their rights to their attorneys. The government argued that in terms of section 26 (3) of the

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Zimbabwe." Paper delivered at African Studies Association 35th Annual Meeting, Washington, November 20-23 1992.

[85] Supra Note 80 at pg 122.

[86] 1981 4 SA 726 (ZA).

[87] *Hewlett v Minister of Finance* 1981 ZLR 571 (SC); 1982 1 SA 490 (ZS).

[88] 1984 2 SA 301 (S) at pg 25.

Constitution, the Regulations were still in force. The court however held that schedule two of the Constitution, which laid out the powers of the executive to deal with an emergency did not form part of the Declaration. The schedule dealt with separate rights which were not included in the ambit of section 26. This case was dealt with during operation *Gukurahundi* which was carried out by the infamous Fifth Brigade. During this time more than twenty-thousand Ndebele civilians were murdered and some are still unaccounted for until today. The accused were ZAPU leaders charged with treason. It is very ironic that so early in the democratic era the government sought to use the repressive legislation against its people.

In the case of *Minister of Home Affairs v York and Another*,[89] the accused were unlawfully detained and after an open confrontation between the two arms of state the judiciary gave into the whims of the state. This decision represented 'the capitulation of the judiciary in the face of the executive's unwillingness to be bound by the law.'[90] It was in the same year that a case on freedom of expression arose. After an attack on the Zimbabwe Air Force base in Gweru, several officers were arrested. They were tortured and denied access to their attorneys. The attorneys then called a press conference and complained about this and they were charged and convicted of contempt of court by a magistrate. They appealed to the Supreme Court which held that section 20 of the

[89] 1982 2 ZLR 48 (SC) at pg 58 – 59.
[90] Supra Note 78, at pg 115.

Constitution applied as there was no real prejudice to the trial.[91] When the Air Force officers were later tried, the Supreme Court held that denial of the accused's access to their attorneys was unconstitutional.

From 1985 to 2001, the Supreme Court made decisions in favour of the formal enjoyment of civil and political rights. However cases that had a direct impact on economic, social and cultural rights were decided against the interests of the poor because the class interests of the judiciary were compromised in this area. Chief Justices Dumbutshena and Gubbay headed the Supreme Court during this period. Dumbutshena was awarded an honorary doctorate in civil laws by the University of Oxford. This was in recognition of the role played by the Supreme Court in enhancing human rights. Most cases decided during this period, although not always in favour of the citizen, have been hailed as carefully considered and showed the honest view of the judges.

During this period, there were rare cases of non-compliance which were an indication of what was later to become a disregard of judicial rulings, the executive complied with court rulings. An example of a case was there was non-compliance is *Bull v Attorney – General and Another*[92] where the court ordered the release of customs officials who were unlawfully detained. The officials were not released and this led the Supreme Court to question the constitutionality of the Detainees Review Tribunal. Symptomatic of the disagreement between the

[91] *S v Hartmann and Another* 1988 2 ZLR 186 (SC); 1984 1 SA 305 (ZS).
[92] 1986 1 ZLR 117 (SC).

judiciary and the legislature is the juvenile whipping case. The Court found that juvenile whipping was unconstitutional and the legislature in response passed the Constitution of Zimbabwe Amendment Act (No.11) of 1990.[93] Other legislative reactions to judicial interpretation have occurred, like the denial of women to confer automatic residency upon their spouses,[94] and the ouster of judicial protection in elections.[95] Although this is what the separation of powers entails, that is, the right of the legislature to change the law to correct what the people consider to be mistakes by the courts, this is to a great extent a violation of international and regional human rights standards.

The Supreme Court has avoided dealing with the constitutional challenge of the Presidential Powers Act on several occasions. This is not appropriate as the Court is supposed to take a clear stand as far as issues which are inconsistent with the Constitution. This is due to the fact that the operation of such Act is not suspended by the neutrality of the court but the rights of people are adversely affected. It is therefore important for the judiciary to take a clear stand with regard to the contravention of any sections of the Constitution.

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[93] Act 30/90.

[94] Constitutional Amendment No. 14 Act 14 of 1996 was passed in reaction to the judicial decision in *Rattigan & Others v Chief Immigration Officer & Others* 1994 (2) ZLR 54 (SC) where the court had declared that women should have the same rights as men to confer residency and citizenship on their spouses.

[95] In reaction to the judicial decision in *Forum Party of Zimbabwe & others v Minister of Local Government, Rural and Urban Development, & others*, The Urban Councils Act Chapter 29:15 was passed which had the aim of ensuring that there was no possibility of the election held pursuant to the Regulations being voided by the courts.

The court dealt with the right to freedom of expression during this period. Indirectly, the court held that section 11 of the Constitution conferred substantive rights on individuals and freedom of expression was among the rights conferred.[96] This cemented the right to freedom of expression as well as assembly and association as they were protected in two separate provisions in the Constitution. The legislature however curbed the emphasis on these rights by re-enacting section 11 in 1996 as a true preamble.

Various issues of great significance arose during this period, which latter led to political tension. The Land Question is one of such events which was first addressed by the president in 1991. It was also during this period that the opposition party, Movement for Democratic Change, emerged.

2.3.2.3 2001 to the Present

The present situation of human rights in Zimbabwe has undergone a great overhaul. Supreme Court judges have tended to portray a very pro-government approach when applying the law. The Minister of Justice has publicly stated that the judiciary must reflect the policies and philosophies of the elected government.[97] If the judiciary passes any judgements which are contrary to government policy, this is viewed as a political attack on the government. The

[96] *In re Munhumeso and others* 1994 1 ZLR 49 (SC); 1995 1 SA 551 (ZS).
[97] The Herald 20 February 2003.

court has even gone against judicial practices by basing its decisions on a matter which was not brought before the court.[98]

There have been numerous arrests of journalists as well as the closure of *The Daily News* in 2003. An example is the arrest of a journalist for stating that in his view the country's Chief of Police was unfit for duty. The then Minister of Information, Jonathan Moyo stated in response that if the newspaper's editor could not run a professional paper, the law would have to assist him.[99] Broadcasting is state controlled and so are the major newspapers namely, *The Herald* and *The Chronicle*. *The Standard* and *The Zimbabwean Independent* are the two independent newspapers in the country which also to a great extent portray a pro-opposition point of view when reporting. The trend is usually that information published in publications is representative of the views of the owners of such publications.

The present human rights situation in Zimbabwe is very bleak. Human rights are a current victim of the ongoing political and economic crisis in Zimbabwe and while the political crisis continues the rights of the individual will continue to be violated. This is due to the fact that any assertion of one's rights is seen as the direct attack on the government. As a result of this people's rights are not held in high regard by the government.

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[98] *Minister of Lands, Agriculture and Rural Resettlement and Others v Commercial Farmers Union SC* 111/2001 (not yet reported). In *Tsvangirai and Others v Registrar – General of Elections* SC 93/2002 (not yet reported).

[99] *Mail & Guardian* (SA), 15 September 2002.

The judiciary has itself been subjected to inhumane treatment in the recent past. An example is Justice Paradza who was arrested in his chambers and subjected to inhuman treatment while in detention.[100] The environment under which the judiciary has been forced to operate also leaves a lot to be desired. Towards the end of 2007, magistrates went on strike over among others the low salary they were receiving which was estimated to be as low as US$16 per month. Lack of resources also posed a serious threat to the effective functioning of the judiciary. There were for example, instances of court appeals not being processed as a result of shortage of bond paper and some court houses operated for up to five days without water just but to name a few.[101]

There has been limitation on the right to freedom of expression and assembly during this period. People are required to seek permission from the police before they carry out any meetings or demonstrations.[102] The broadcasting sector and the print media are predominantly in the hands of the state and hence only publish news that is pro-government (there are however independent weekly newspapers which are mainly pro-opposition). There have been numerous arrests of journalists for publishing 'false news.'[103] In reaction to the repeal of

[100] www.lrc.org.za/Articles/Articles_Detail.asp?art_ID=46, (accessed February 2008).
[101] Makanaka A, State of Judiciary an international scandal, *The Zimbabwean*, 29 – 5 December 2007.
[102] Although this is seen in many democracies as a necessary safeguard, it has been highly politicised in Zimbabwe and has been gravely abused by the police to circumvent the individual's rights.
[103] Examples include Mark Chavunduka and Ray Choto. More recently, two journalists, Tsvangirai Mukwazhi and Tendai Musiyu, were arrested whilst attending a prayer meeting organised under the auspices of the save Zimbabwe Campaign. See <http://allafrica.com/stories/200703170119.html> (accessed on 19/03/07).

LOMA, the legislature enacted the Access to Information and Protection of Privacy Act (AIPPA) which was more or less the same as its predecessor if not worse. These pieces of legislation will be discussed in Chapter two of the dissertation.

The executive, on 21 February 2007, in what might be termed as a disregard of the right to freedom of expression and assembly in a democratic state, banned all demonstrations and political rallies in Harare for a month. This is arguably unconstitutional the government has not attempted to justify its actions in any way.

2.3.3 Summary

One very important observation that has been made by this study is that, the public press and broadcasting in Zimbabwe is a tool which is used by the government of the time or those with the financial resources to further their own ends. During the colonial era, *The Mashonaland Herald* and *The Zambesian Times* only published articles which were not critical to the BSAC. The broadcasting sector, which was in the hands of the state, also followed suite. The Rhodesian Broadcasting Corporation was staffed with party loyalists to ensure that it was under the control of the Rhodesian Front. In the same way, the

Minister of Information, who is a political appointee, is responsible for the broadcasting sector in Zimbabwe (see chapter 3).

The government has also to a large extent, not done away with the policies of the colonial era. These include among others, state monopoly of broadcasting (although this was declared unconstitutional by the Supreme Court, it still exists), and ownership of the public media by the government. Government also needs to move away from the authoritarian model and utilize a model which is more acceptable in a democratic society.

Although there was a change of government at independence, there have been no major changes in the right to freedom of expression. The conditions of the judiciary have even worsened, not only due to mounting government pressure, but also to the lack of resources that the judiciary faces. It may indeed be argued that legislative reaction to judicial interpretation is not in and of itself a cause for concern. It is rightly to be regarded as a sign of a healthy interaction between the various branches of the state. The line between legitimate override of judicial interpretation and abuse of the democratic process is not easily defined or identified. The above discourse on the disregard of judicial pronouncements to a large extent can be described as the progressive breakdown of the rule of law.[104]

[104] Saller K, The Judicial Institution in Zimbabwe,Siber Ink CC, 2004.

Chapter 3

The Law and Practice of Freedom of Expression in Zimbabwe

3.1 Introduction

Politically and socially volatile environments are characterized by the abuse of legislative and executive powers. In such environments, there are regulatory measures which are put in place to maintain order in society and spell out the rights and duties of the different actors within the state. In a guise to protect 'public order' and 'national security' the legislature enacts laws which tend to place unwarranted restrictions on citizens' rights. The legislature uses legislation to advance the interests of the ruling class. The laws enacted by the legislature therefore tend to be partial and have very wide provisions which are open to abuse.

In instances where the laws are impartial the governments tend to use their executive powers to further their own interests. Instead of protecting the rights of citizens the executive branch is often used to advance the interests of the elite. The judiciary, where it is impartial, is often subjected to a lot of pressure by the executive. Its task of interpreting the law in an impartial and unbiased manner is often rendered futile. In cases where the judiciary invalidates the laws/declares them unconstitutional, such decisions are ignored by the executive, who do not enforce such decisions. The legislature, where it is ordered to amend the laws, in most cases simply repeats the same provision in a new guise. The judiciary in

politically volatile environments is often ignored and the interests of the citizens are trampled upon.

The executive branch of the state in unstable environments takes pains to bend the will of the judiciary. As they are responsible for the appointment of judicial officers, they put into office judicial officers who will advance their interests at the expense of citizen's rights. The judiciary's independence and partiality is therefore compromised. It is often subjected to threats by the ruling elite when they pass judgments which are not favorable to them. The judiciary is not given the opportunity to carry out their judicial oath to apply the law without fear, favor or ill-will because the environment is not enabling.

In both stable and volatile environments, the right to freedom of expression and access to information; and the right to assembly and association are related rights. In order for citizens to decide on what action to take, that is, whether to demonstrate or not, they ought to have adequate access to information which will enable them to make informed decisions. Assemblers stand a better chance of carrying their message across than individuals. For example, it is easy for employees to get away with abusing the rights of individual workers. If that worker is a member of a trade union, this will not happen as the other workers will support that worker when he/she complains against such abuse. Demonstrating may be the only way to urge employers into action or discourage

them from implementing certain unfavorable plans. For any demonstration to be effective there has to be adequate access to information.

In the same way associations stand a better chance of being heard than individuals. Associations communicate and present the views of the people to the government. To oppressed people, more often than not, representative associations may be the only way to communicate with the rulers; hence it is often one of the central demands of oppressed peoples. The right to association is not only important for a functional democracy, but it also affords protection to religious associations, economic associations and cultural associations. In order for associations to protect adequately the rights of their members, they not only must have access to information, but they must also be given a platform to express their opinions. This is particularly important to countries with volatile environments where only the popular views are not restricted.

The press plays a very important role in providing information to the public in democratic states. In order to adequately inform the public, the press must have access to government information so as to provide correct facts or stimulate public debate. Although the press plays a vital role of supplying information and orienting public debate, it is not given any special protection over citizens or members of the public.

Access to information enables the public to assess the wisdom of government decisions. Furthermore, if people are to be able to monitor the conduct of their government and be able to participate fully in a democratic society, it is important that they have access to information. Access to information also enables the citizens to make informed choices about their lives. As there may not always be a willing speaker, the right to access to information must not be subsumed under a freedom of expression clause. Information must be readily available to the public even though it is not going to be used to express oneself. The government does not have the right to choose what the electorate can and cannot hear.

This chapter aims to examine the truthfulness of the above statements. Through the examination of legislation, the chapter seeks to examine if there is truly a culture of promotion to access to information not only to individuals but more especially the press; if such legislation promotes and protects rights that are related to freedom of expression, namely freedom of the assembly and association; more importantly, the chapter aims to examine whether the legislation regulating these rights is precise and reasonably justifiable in a democratic society.

Furthermore, this chapter aims to explore international and regional instruments dealing with the right to freedom of expression and other related rights, namely, freedom of association and assembly. Only the instruments to which Zimbabwe

is a state party, will be explored as they form part of the national law. The international instruments which will be discussed are:

1) The Universal Declaration of Human Rights (UDHR) of 1948, articles 19 and 20;

2) The International Covenant on Civil and Political Rights (ICCPR) of 1966, articles 19, 21 and 22. (Zimbabwe ratified this covenant on 13 May 1991)

3) The African Charter on Human and Peoples' Rights of 198, articles 9 and 10. (Zimbabwe ratified this covenant on the 30th of May 1986.)

It is important to note that the above international and regional instruments impose obligations on Zimbabwe, namely the obligation to respect,[1] protect,[2] promote[3] and fulfil.[4] Zimbabwe has a dualist system which requires the enactment of national legislation in the domestication of international and regional laws.[5] Rights protected in international and regional instruments can therefore not be enjoyed at the national level without the passing of the necessary legislation. At the national level individuals have to abide by the laws

[1] The obligation to **respect rights** requires states to refrain from any action that would interfere with citizens' enjoyment of their rights; including actions people take in efforts to realize their rights. The journalist must be allowed freedom of expression, which means he/she must not be hindered in her exercise of this right.

[2] The obligation to **protect rights** requires states to take action to prevent violations of human rights by others. This obligation involves encouraging individuals and organizations to respect the rights of others, as well as imposing sanctions for violations that are committed by private individuals or organizations.

[3] This is essentially about education and facilitation of the enjoyment of human rights. In SERAC, the African Commission ruled that "…. obligation of the State to promote the enjoyment of all human rights. The State should make sure that individuals are able to exercise their rights and freedoms, for example, by promoting tolerance, raising awareness, and even building infrastructures."

[4] The obligation to **fulfil rights** requires states to take action to achieve the full realization of rights. These actions can include enacting laws, implementing budgetary and economic measures, or enhancing the functioning of judicial bodies and administrative agencies. Human rights laws also need to be enforced by judges who have adequate training and are supported by sufficient court staff. Other institutions, such as human rights commissions, an ombudsman, or a parliamentary commissioner, may also be established to resolve human rights conflicts.

[5] Section 111(b) of the Constitution of Zimbabwe.

enacted by the legislature even where they are contrary to international and regional state obligations.[6]

After examining the international and regional instruments, an investigation of Zimbabwean legislation will be undertaken. The sections discussed in these pieces of legislation are mainly those which impact on the right to freedom of expression. The following is the Zimbabwean legislation which will be looked at:

1) The Constitution of the Republic of Zimbabwe, sections 20 and 21,
2) The Access to Information and Protection of Privacy Act,[7]
3) The Public Order and Security Act,[8]
4) The Official Secrets Act.[9]
5) The Broadcasting Services Act.[10]

The last part of the chapter will be dedicated to examining whether the Zimbabwean domestic law is compatible with international and regional standards.

[6] The international and regional communities have however sought to further protect the individual by enabling them to appeal to treaty bodies where their rights have not been respected at the national level, through for example the individual communication available at international and regional law levels. Although this system is optional at the international level it is compulsory at the regional level, i.e. the African system.
[7] Act 5 of 2002(Chapter 10:27).
[8] Act 1 of 2002.
[9] Act 27 of 1975 (Chapter 11:09).
[10] Act 3 0f 2001.

3.2 Freedom of expression and other related rights in international law

The UDHR was adopted for the purpose of ensuring universal human rights standards in the world. It was the first international document adopted by the newly formed United Nations in the human rights field. It was adopted by Resolution 217 (111) of the General Assembly on 10 December 1948. The Declaration is a resolution of the General Assembly, and was not intended to impose legal obligations but rather to establish ideals for states to work towards.

The reason for not giving the human rights text binding status was due to the political tension in existence during this period. Another reason is that human rights were viewed by some states as a political weapon. This declaration was proclaimed in the wake of the Second World War, in light of the atrocities which were committed during this war. There was therefore more emphasis on the need for the international protection of human rights during this period.

The UDHR is a classical instrument which has the potential to bridge different points of view. This is because of its approach to balancing civil, cultural, economic, political and social rights as well as its express reference to duties and an international order for the realization of the rights. Many states have used the UDHR as a model of their Constitutions. In the same way, the UDHR has had a tremendous impact on the development of international human rights law. It

provides the basis for all human rights treaties adopted by the United Nations bodies since 1948.[11] It must be noted that the UDHR protects people and applies to all states irregardless of whether or not the government accepts its principles.[12] The Declaration provides for the protection of the right to freedom of expression; and freedom of assembly and association.

The provisions of the UDHR have been implemented in the International Covenant on Civil and Political Rights (ICCPR). The purpose of this instrument was to further elaborate on the civil and political rights protected in the UDHR. The ICCPR was opened for signature by the United Nations in December 1966 when many African states were still fighting for independence. It only entered into force in March 1976.

3.2.1 Freedom of Expression and Access to Information

This right is protected in Article 19[13] of the UDHR. It is also protected in Article 19(2) and (3) as well as article 20 of the ICCPR.[14] Article 19 of the ICCPR

[11] Article 19, The Article 19 Freedom of Expression Manual: International and Comparative Law Standards and Procedures. 1993 pg 9.
[12] UN Sales No. E.83. XIV. 2, Chap 11 at para 68.
[13] "Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers."
[14] "2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his (sic) choice.
3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
(a) For respect of the rights or reputations of others;

contains an inherent limitation and stipulates that the right bears special duties and responsibilities. The limitation to Article 19 of the UDHR is contained in the general limitation clause of the UDHR which is article 29 (2) and (3).[15] The right to freedom of expression constitutes a cornerstone to the ideal democratic society. It includes freedom to seek, receive and impart information and ideas.

Freedom of expression encompasses every form of subjective ideas and opinions capable of transmission to others, for example, news and information, as well as commercial expression and advertising.[16] Contents of letters and telephone conversations are also encompassed in this right.[17] When expressions and dissemination of information, however, turn into actions, it is excluded from the protection of article 19. For instance, actions that go towards the toppling of government are criminal actions not protected by article 19.

Commercial advertising is protected under the freedom of expression. Banning the advertising of a legal product is not a restriction which can easily be justified in a free and democratic state. Nel[18] asserts:

(b) For the protection of national security or of public order (odre public), or of public health or morals."

[15] (2) "In the exercise of his (sic) rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.
(3) These rights and freedoms may in no case be exercised contrary to the purposes and principles of the United Nations."

[16] *Ballantyne and Others v Canada* Communication Nos. 359/1989 and 385/1989 (UN Human Rights Committee).

[17] *JRT and the WG Party v Canada*, Human Rights Committee Communication No. 104/1981, 8(c).

[18] Nel S. S, Freedom of Commercial Speech: Evaluating the Ban on Advertising of Legal Products such as Tobacco, in the *Comparative and International Law Journal of Southern*

> In a free and democratic society, the utmost faith is placed on the judgment of the members of the public…Viewing people as needing protection from dangerous pro-smoking messages because of the paternalistic that they are to make rational decisions is incompatible with the faith placed in public judgment in a democracy.

People must therefore be left to make up their own minds about what is good and bad and the government must not make such decision for them. This is inline with the theory of individual self-fulfilment. In order for people to make intelligent and well informed decisions, the free flow of commercial information is indispensable. As advertising is all about imparting information to consumers, without it, consumers would not know what is available and where to get it. Commercial speech is however not awarded protection to the same degree as other forms of speech. This is due to the fact that the motive for imparting the information is pure economic gain. In *Ballantyne v Canada* [19] it was held that the prohibition of advertising in any other language besides French constituted a violation of the freedom of expression of the English-speaking merchants. Moreover, in *Guedson v France*,[20] it was held that article 19 does not extend to one addressing the court in the language of one's choice if they can speak the official language.

Article 19 states that 'everyone shall have the right to freedom of expression.' This means that all people within a specific jurisdiction are entitled to exercise

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Africa, Volume 37 No.1, 2004.

[19] Human Rights Committee Communication No. 359/1989.

[20] Human Rights Committee Communication No. 219/1986 at para 7.2.

this right. These groups of people or entities include and are not restricted to non-citizens, corporate and other legal entities, prisoners and other convicted persons, public employees, members of professions and military personnel. Resolution 59(1) of the General Assembly highlighted the importance of the right of access to information among these groups of people. It proclaimed freedom of information as 'a fundamental human right' and 'a touchstone to all the freedoms to which the United Nations is consecrated.' The General Assembly further stated that the freedom of information implies not only the right to gather but also to transmit and publish news everywhere.

The Human Rights Committee (HRC) in its General Comment on article 19 declared that:

> Because of the development of modern mass media, effective measures are necessary to prevent such control of the media as would interfere with the right of everyone to freedom of expression in a way that is not provided for in paragraph three. [21]

This means that governments are obliged to ensure media pluralism. Article 19 (2) of the ICCPR says that individuals have the right to "receive and impart information and ideas…through any media of his (sic) choice." This means that the information and opinions are to come from a variety of sources as is declared by the market place of ideas theory. Governments are therefore refrained from any action that might impair the free exercise of the right both to impart and to

[21] Adopted by the Human Rights Committee at its 461st meeting on 27 of July 1983, UN Doc. A/38/40,109.

receive information and ideas. The state must prevent excessive media concentration by positive state actions such as financial assistance to the press.

Article 19 also states that an individual can receive and impart information 'regardless of frontiers.' This means that the scope of application with regard to the form of communication is broad. In *Autronic AG v Switzerland*[22] the European Court of Human Rights held that 'Article 10 not only applies to the content of information but also to the means of transmission or reception since any restriction imposed on the means necessarily interferes with the right to receive and impart information.' The individual is also protected from interference by state organs with regard to information that is generally accessible.

The HRC in *Gauthier v Canada*[23] emphasized the importance of the right to seek and receive information in the conduction of political (parliamentary) affairs. It further held that it was important for citizens to access information, especially through the press, about the democratic process and the activities of the elected bodies. The government in this regard, therefore has a positive right to protect individuals from private actors, especially those who assume public functions.[24] Although freedom of the press is not specifically mentioned in any of the articles, the HRC in General Comment 10 highlighted that one of the most important

[22] 12726/87 [1990] ECHR 12 (22 May 1990) at para 47.
[23] Human Rights Committee Communication No. 633/1995.
[24] *Leo Hertzberg et al. v. Finland*, Communication No. 61/1979, U.N. Doc. CCPR/C/OP/1 at 124 (1985) at para 9.1it was stated: "In considering the merits of the communication, the Human Rights Committee starts from the premise that the State party is responsible for actions of the Finnish Broadcasting Company (FBC), in which the State holds a dominant stake (90 per cent) and which is placed under specific government control."

aspects of any meaningful right to freedom of expression, is the prevention of the state control of the media or in other words freedom of the press.[25]

In the international sphere it has been affirmed that the freedom of expression is to be fully protected and not to be subjected to any unnecessary limitations. It is not only the speech which is favorable to government policies that is to be protected, but even that which is against government policy. This will ensure vibrant debate which is a major feature of democratic states.

3.2.2 Freedom of Assembly

The right to freedom of assembly and association is protected in article 20[26] of the UDHR. In the ICCPR these two rights are separated. Article 21[27] of the ICCPR protects the right to freedom of assembly and article 22[28] protects the freedom of association. These rights along with freedom of expression form the core of the category of political rights.

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[25] Joseph S, Schultz J, and Castan M, The International Covenant on Civil and Political Rights Cases and, Materials and Commentary. Oxford University Press, 2004 at pg 522.

[26] 1. Everyone has the right to freedom of peaceful assembly and association.
2. No one may be compelled to belong to an association.

[27] The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others.

[28] 1. Everyone shall have the right to freedom of association with others…
2. No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (*ordre public*), the protection of health or morals or the protection of the rights and freedoms of others. This article shall not prevent the lawful restrictions on members of the armed forces and of the police in their exercise of this right.

The rights to freedom of assembly and association, although related and sometimes listed as one right, (in the UDHR for instance) are two distinct rights. For example one can be a member of an organization without ever attending a meeting and one can attend an assembly without being a member of an association.[29] Partsch is of the view that the decision to separate these two rights was a political one, which was taken in reaction to a Soviet proposal which aimed to place heavy restrictions on the rights in question. In a bid to reinforce both of the rights, separate guarantees were designed for each right.[30] These two rights, in this section, shall be discussed as separate rights.

Freedom of assembly is described as the right of persons to gather intentionally and temporarily for a specific purpose. An assembly is therefore an intentional and temporary gathering of several persons for a specific purpose.[31] The democratic function of forming expressing and implementing political opinions is the main focus of the freedom of assembly. Assemblies contribute to reinforcing and upholding democracy mainly when they are staged against the interests of State power holders. The paradox is that the effective exercise of the right is dependent on the State's protection.[32]

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[29] Motala Z. and Ramaphosa C, Constitutional Law: Analysis and Cases, Oxford University Press, 2002 at pg 377.
[30] Alfredsson G. and Eide A, (eds), The Universal Declaration of Human Rights. Kluwer law International, 1999 at pg 420.
[31] *Ibid*; at pg 484.
[32] *Ibid*; at pg 482.

Nowak submits that the location of the right to freedom of assembly implies that it is specifically directed at protecting assemblies concerned with the discussion or proclamation of ideas and information.[33] He goes on to say:

> Such information and ideas need not necessarily be of a political nature in the narrow sense of the word (party politics or current events), but they must go beyond the purely private sphere and be directed at the *public* although the latter may be a restricted one. Thus, freedom of assembly may be understood as a special, *institutional form of expression* conditioned by its specific, democratic meaning.

The right to freedom of assembly also includes the right not to participate in a demonstration (negative freedom of assembly). The UDHR states that 'everyone' has a right to assembly. The ICCPR on the other hand states that the right of peaceful assembly shall be recognized. This implies that the state is given discretion in the application of the right. The wording in the ICCPR somewhat weakens the obligation of the state with regard to this right. This creates the impression that it is optional for the state to promote and protect the right. The right to freedom of assembly also includes the right not to participate in a demonstration

The right of assembly is restricted only to peaceful assemblies. 'Peaceful' means the absence of violence, the assembly must therefore take place without uproar, disturbance, or the use of arms.[34] This definition is only confined to the manner in

[33] *Ibid*; at pg 485.

[34] An assembly ceases to be peaceful when the participants are armed even thought they have not used the arms in any violent way. Defensive means taken by the participants of an

which the assembly is held. Peaceful should be broadly interpreted to also consider the contents of the opinion expressed at an assembly. For example, a quiet and orderly march of Nazis through the streets of a predominantly Jewish neighborhood should not be protected by the article. Since the freedom of assembly involves specific forms of expression, contents of messages and ideas conveyed at assemblies are to be subjected to restrictions in article 19(3) and article 20 of the ICCPR. The state, in controlling violent assemblies, must adhere to the international human standards. Despite the fact that the crowds are participating in violent assemblies they are still protected against inhuman and degrading treatment.[35]

The state has a positive duty to ensure that the right to freedom of assembly is fully protected and that there is no interference by third parties. As a result the state is obliged to provide adequate means to ensure that the assembly is not in any way interrupted. This can be done by among other things providing police protection to ensure that clashes or riots do not occur.[36] The right also embodies the preparation for the assembly.

The HRC discussed the freedom of assembly in *Kivenmaa v Finland*.[37] The area of contention was whether a certain behavior by the applicant could be considered an assembly or a demonstration. The state accused the applicant of

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assembly do not deprive an assembly of its peacefulness character.
[35] Article 7 of the International Covenant on Civil and Political Rights.
[36] *Arzte fur das Leben v Austria* of June 21 1988 Series A No. 139 para 32.
[37] Communication No. 412/1990.

holding a public meeting without prior notification as was required by the Finnish Act on Public Meetings. The alleged demonstration, apparently took place when a large crowd gathered outside the Presidential Palace where a foreign head of state was meeting the leaders. The applicant and members of her organization distributed leaflets and raised a banner critical of the human rights record of the visiting head of state. The HRC held that:

> A requirement to notify the police of an intended demonstration in a public place six hours before its commencement may be compatible with the permitted limitations laid down in article 21 of the Covenant. In the circumstances of this specific case, it is evident from the information provided by the parties that the gathering of several individuals at the site of the welcoming ceremonies for a foreign head of State on an official visit, publicly announced in advance by the State party authorities, cannot be regarded as a demonstration… Consequently, the application of Finnish legislation on demonstrations to such a gathering cannot be considered as an application of a restriction permitted by article 21 of the Covenant.

Commenting on this case Nowak is of the opinion that the HRC's statement is contradictory. He says that if the demonstrations of the applicant did not reach the threshold of a public meeting they should also not have been considered an assembly in the context of article 21. Hence Finland could not have violated any freedom of assembly as was argued by the applicant.[38]

[38] Supra Note 25, at pg 486.

Freedom of assembly is only to be restricted within the permissible limits and must not be too broadly restricted. The states not only have a right to provide protection for peaceful assemblies but they must also ensure that they adhere to international human rights standards in controlling violent crowds.

3.2.3 Freedom of Association

The freedom of association is conceived as the right of the individual to found an association with like-minded persons or to join an already existing one. State parties have a positive obligation to provide the legal framework for the incorporation of juridical persons. This is due to the fact that the founders of associations usually seek to pursue their long-term interests in a legally recognized manner.

The freedom of association lies in the overlapping zone between civil and political rights. Although this right is a predominantly individual right, not all aspects of it are individual in character. The right to found and join an association for instance is individual in character. On the other hand, the rights to choose the constitutional structure and to formulate rules for the admission and expulsion of members belong to the association and are not individual in character.[39]

[39] Barendt E, Freedom of Speech. Oxford University Press, 1985 at pg 284.

The negative freedom of association is also protected by this right. A person can therefore not be compelled to become a member of an association. In *Gauthier v Canada*[40] it was also held that requirement that one should be a member of parliament in order to access parliamentary press facilities violated the right to freedom of association.

The right to freedom of association is mostly protected in open democracies and capitalist societies. This is due to the fact that people are more at liberty to carry out their wishes. In authoritarian states, however, people are compelled to join associations which support government policies. Where individuals try to form associations in authoritarian states they are usually suppressed by the ruling elite.[41]

3.2.4 Limitations

Any application of a restriction to the right to freedom of expression, freedom of assembly and freedom of association must be subject to adequate safeguards against abuse. These safeguards include the right of access to an independent court or tribunal, as an aspect of the rule of law. The interference must be necessary to achieve the purposes that are listed hereunder. Furthermore, the limitation must be proportional to the purpose sought to be achieved. In applying

[40] Supra Note 23, at para 20.
[41] *Womah Mukong v Cameroon*, Human Rights Committee Communication No. 458/1991 – In this case the author who was a journalist, was an opponent of the one party system in Cameroon and he was arrested for advocating for a multiparty democracy. He frequently and publicly worked towards the establishment of a new political party in his country.

the proportionality test one must ask; - is the restriction; (a) rationally connected with the purpose and; (b) no more than is necessary to accomplish that purpose. Both these questions must be answered in the affirmative. The restrictions listed below apply to all three rights; namely freedom of assembly, freedom of expression and freedom of association. The state imposing the limitations enunciated below must demonstrate that they do not impair the democratic functioning of the society.

3.2.4.1 Restrictions provided by law

The limitation to any of the above rights must be sufficiently delineated in a state's law. The limitation must be regulated by formal legislation or common law. Any limitation which is based on a vague statutory authorization or on an administrative provision, with specific reference to the freedom of expression and the freedom of association, violates these rights. The law must be accessible, unambiguous, and narrowly and precisely formulated. This is for the purpose of enabling individuals to predict with reasonable certainty in advance the legality or otherwise of a particular action.[42]

Inasmuch as people have a right to freedom of expression, freedom of assembly and freedom of association, they also have duties and responsibilities which they have to perform. In essence the right of the individual imposes duties and

[42] Principles of Freedom of Expression and Protection of Reputation, Principle 1.1

responsibilities on other individuals as well as the state. With regard to freedom of expression, as the public has the right to receive information, the press and the government have a corresponding duty to disseminate information. Such information is to be disseminated in a truthful, accurate, impartial and in a balanced manner. On the same note the government has a duty to ensure media pluralism so that people can engage in the market place of ideas by having access to various sources of information.

The HRC has rejected a number of grounds for limiting access to information. These include: ensuring a fair, impartial trial in court and the prevention of disclosure of secrets. The HRC held that these limitations were too specific and accepted proposals that aimed less at the content than at a listing of permissible purposes for inference. It was also stated that prior restraint was not covered by the restrictions in article 19. It is also important to note that when restrictions/limitations are placed on the right to freedom of expression, the right must not be put in jeopardy.

Article 21 of the ICCPR on the other hand requires that limitations on this right must be 'imposed in conformity with the law.' Unlike the requirement that the restriction must be imposed by law, this phrase means that a limitation on freedom of assembly does not necessarily have to be set forth in a law. Rather authorization can be granted to administrative bodies to undertake independent actions. For example the police can break up an assembly which threatens

national security on the basis of a general authorization. The administrative act must however have a lawful basis and must not violate a formal law.

On the whole, no limitation on the exercise of the rights (that is, freedom of assembly, association and expression) shall be made unless provided for by national law of general application which is consistent with the Covenant and is in force at the time the limitation is applied.[43] Furthermore, any laws imposing limitations on the exercise of these rights shall not be arbitrary or unreasonable.[44] A law restricting a fundamental right/freedom must be precise and unambiguous: it must not permit unrestrained public official discretion. In other words, the legal provision restricting a freedom must facilitate and permit "due process of law."[45]

3.2.4.2 Respect of Rights and Reputations of Others

Defamation is expressly prohibited by article 19. Although this article does not concentrate on the respect for honor, defamation often comprises an attack on the honor and reputation of others. The state is therefore obliged to provide statutory protection against intentional infringement on honor and reputation by untrue assertions. The term 'rights' in article 19(3) of the ICCPR can be

[43] Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, Principle 15.
[44] *Ibid*; Principle 16.
[45] Due process is achieved if law is accessible and formulated with sufficient precision to enable a person to regulate his conduct. He or she must know with reasonable certainty, what the law is and what actions are in danger of breaching the law.

interpreted to mean other human rights, for example, copyright is a limitation of free expression which protects the property rights of others.

The article allows for statutes pursuant to it, to restrict the right to freedom of expression as long as this is necessary in order to respect the reputations of others. Such statutes can also restrict defamations and insults based on true assertions or even those which are not committed intentionally. In imposing these restrictions, care must be taken that freedom of expression is not undermined. Other limitations that harm the reputation of others include the prohibition of blasphemous statements, discrimination as well as advocacy of racial and religious hatred.

Articles 19 provide for a right to seek information actively. This does not interfere with the duty of the state provided for in article 17 of the ICCPR to protect the privacy of individuals from sensational journalism. Article 14(1) of the ICCPR expressly provides for the limitation of access of the press and public to court proceedings in the interest of the private lives of the parties to the court proceedings. Restrictions are also placed on the access to personal data to prevent any abuse by parties accessing such data. A limitation to a human right based upon the reputation of others shall not be used to protect the state and its officials from public opinion or criticism.[46] The European Court of Human Rights held that value-judgments are a violation of article 10 (freedom of expression) of

[46] Supra Note 43, Principle 37.

the European Covenant on Human Rights as these are not susceptible to proof.[47] As a result, the court stated that there must be a distinction between facts and value-judgments. This is because the existence of facts can be demonstrated.

In the case of *Ballantyne v Canada*[48] it was held that the prohibition of English speakers from advertising in English was a violation of articles 19. The court stated that the rights of the Francophone minority in Canada were not jeopardized by the freedom of others to advertise in a language other than French. It was stated that although the preservation of the French language was a legitimate legislative objective, there was another alternative (dual language signage) other than the restriction of the freedom of expression to advertise. Another case which involved the use of language was *Die rgaat v Namibia*.[49] In this case it was held that article 19(2) was not violated by the officials' failure to respond to queries in Afrikaans, taking into cognizance that English was the official language.

3.2.4.3 Protection of National Security

National Security is invoked as a limitation when the political independence or the territorial integrity of the state is at risk. Restrictions based on national security are only permissible in serious cases of political or military threat to the

[47] *Lingens v Austria* – 981 5/82 [1986] ECHR (European Court of Human Rights) 7 (8 July 1986), at para 46.
[48] Supra Note 16, at para 11.4.
[49] Human Rights Committee Communication No. 760/1997; Lord Colville, and Maxwell Yalden (dissenting), at para 2.

entire nation.[50] An example of a serious threat is a publication for a call to a violent overthrow of government where there is political unrest. The threat to national security is therefore more acute where there is political unrest. The prohibition of transmission of official secrets is another permissible limitation in the interests of national security.[51]

According to the Siracusa Principles,[52] national security cannot be invoked as a reason for imposing limitations to prevent merely local or relatively isolated threats to law and order. In addition, national security cannot be used as a pretext for imposing vague or arbitrary limitations. It may only be invoked where adequate safeguards and effective remedies against abuse exist.

In exercising one's right to freedom of expression, freedom of assembly and freedom of association, they must take into account the political situation prevailing in the country. The press must take this into account when publishing

[50] *Womah Mukong v. Cameroon*, Communication No. 458/1991 at para 9.7: 'The State party has indirectly justified its actions on grounds of national security and/or public order, by arguing that the author's right to freedom of expression was exercised without regard to the country's political context and continued struggle for unity…The Committee considers that it was not necessary to safeguard an alleged vulnerable state of national unity by subjecting the author to arrest, continued detention and treatment in violation of article 7. It further considers that the legitimate objective of safeguarding and indeed strengthening national unity under difficult political circumstances cannot be achieved by attempting to muzzle advocacy of multi-party democracy, democratic tenets and human rights; in this regard, the question of deciding which measures might meet the "necessity" test in such situations does not arise. In the circumstances of the author's case, the Committee concludes that there has been a violation of article 19 of the Covenant.'

[51] In *Jong-Kyu Sohn v. Republic of Korea*, Communication No. 518/1992 at para 10.4, the HRComm held that in order for an act to qualify as a threat to national security, the state party must specify the precise nature of the threat which it contends an individual's exercise of free speech posed.

[52] United Nations, Economic and Social Council, Saracusa Principles on the limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, Principle 29.

news and must not unnecessarily incite violence. The state, in strengthening national unity under difficult political circumstances, must not muzzle advocacy for multi-party democracy, democratic tenets and human rights. Inasmuch as it is important to protect national security, the rights of individuals must not be sidelined. Democratic principles must be at the helm of every state government in accordance with international law.

Statutory provisions declaring conduct a breach to national security must not be too broad. This helps prevent abusive application and interpretation. The HRC is often reluctant to allow restrictions to the freedom of expression on grounds of national security. This is because there is a lot of abuse by governments, which often invoke this limitation to their elite positions. The state must therefore provide detailed justifications when relying on this limitation. The conduct which threatens national security must not only be explicit, but the nature and the extent of the risk must be evident – “clear and present danger test”.

3.2.4.4 Public Order

Public order may be described as the sum total of rules which ensure the peaceful and effective functioning of society. It is the set of fundamental principles on which society is founded. Examples of actions which are limited under public order are, broadcasting without a license as well as speech which may incite crime and violence. It is also plausible ‘under the term public order to

include all the universally accepted fundamental principles, consistent with respect for human rights, on which a democratic society is based.'[53]

This is a very vague term which is more often than not subject to grave abuse. The international standards and limitations must therefore not be set too low and there must be strict requirements placed on any statutory limitation. In the case of *Gauthier v Canada*[54] it was held that the protection of parliamentary procedure could be seen as a legitimate goal of public order. An accreditation system could therefore be a justified means of achieving this goal. The HRC noted that the accreditation system operated as a restriction of the freedom of expression provision (Article 19). Its application must therefore be shown as necessary and proportionate to the good in question and it must not be arbitrary. It must also be specific, fair and reasonable and its application should be transparent. The accreditation system in the case of *Gauthier* was however found to be an unnecessary and unproportional restriction of the right within the meaning of the freedom of expression provision. This was due to the fact that the state had allowed a private organization to control access to parliamentary facilities without intervention and this was unlawful.

In *Baban v Australia*[55] a prisoner who was on hunger strike was removed from one facility to another. The HRC found that the removal of the prisoner was in

[53] Nowak M, United Nations Covenant on Civil and Political Rights Commentary, 2nd Edition. Norbert Paul Engel Verlag Publishers, at pg 465.
[54] Supra Note 23, at para 13.6.
[55] Human Rights Committee Communication No. 1014/2001 at para 6.7.

line with article 19(3) of the ICCPR as the hunger strike posed a danger to the health and safety of detainees, who included young children. In maintaining and restoring public order the state must adhere to the international human rights standards.

3.2.4.5 Public health and Morals

Although this interest can be found in all limitation clauses in the two covenants, it is of minor practical relevance to freedom of expression. Examples where public health can be raised is in relation to the restriction of publications with misleading information on health threatening substance like drugs as well as other harmful but not life threatening substances like tobacco and alcohol. According to the Siracusa principles, public health can only be relied on as a limitation to rights where there is a serious threat to the health of the population, or individual members of the community.[56] Moreover, due regard must be taken to the international health regulations of the World Health Organization.[57] With regard to freedom of assembly they are also raised as limitations in exceptional circumstances.

Public morals can be brought up in relation to prohibitions on blasphemous or pornographic materials. Their justification, given the secular nature of many modern societies is contentious in many states. Public morals however differ

[56] Supra Note 52, Principle 25.
[57] *Ibid*; Principle 26.

according to different societies. Christian societies, for instance, do not adhere to the same principles as Atheist or Muslim societies. For example marriage to more than one woman is not morally acceptable in Christian societies. The same is not true in Atheist and Muslim societies. Principle 27 of the Siracusa Principles supports this view and states;[58]

> Since public morals vary over time and from one culture to another, a state which invokes public morality as a ground for restricting human rights, while enjoying a certain margin of discretion, shall demonstrate that the limitation in question is essential to the maintenance of respect for fundamental values of the economy.

A certain margin of discretion is given to the responsible national authorities to determine what constitutes morally acceptable behavior.[59] It must be noted, however, that the margin of discretion left to states does not apply to the rule of non-discrimination in the Covenant.[60] In *Hertzberg et al v Finland,*[61] Mr. Torkel Opsahl conceded that public morals are relative and changing hence the state imposed restrictions must give room for such change. They must not be applied so as to perpetuate prejudice or promote intolerance. This margin of discretion gives a benefit of doubt to states.

[58] *Ibid*; Principle 27.
[59] *Hertzberg et al v Finland* (61/1979) at para 10.3.
[60] Supra Note 52, Principle 28.
[61] Supra Note 59, Individual opinion of Mr. Torkel Opsahl.

3.2.4.6 Prohibition of Propaganda for War and Advocacy for Hatred

This limitation is directed at both individual and semi-state media. This limitation is contained in article 20[62] of the ICCPR. Unlike other limitations, this article does not limit any particular right, it is a general limitation. Among the limited rights are the rights to freedom of expression, freedom of assembly and freedom of association.

Propaganda has to do with intention. So when intention reinforces a willingness to act even when there is no objective, the action will still constitute propaganda. Nowak[63] states that propaganda is the 'well-aimed influencing of individuals by employing various channels of communication to disseminate, incorrect or exaggerated allegations of fact.' He states that negative or simplistic value-judgments, whose intensity is at least comparable to that of provocation, instigation or incitement, are propaganda. The latter, must therefore be specific enough for evaluating whether it relates to war or aggression.

It is important to note that all the limitations of the rights in the ICCPR must be in-line with democratic principles. Article 20 prohibits propaganda for wars of aggression and not merely wars which are fought for self-defense, independence

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

[63] Supra Note 53, at page 472.

and for self-determination. The definition of war in this context is international war, or war against another state. The General Comment on Article 20 indicates that wars sanctioned under the United Nations Charter for the purpose of Article 20(1) are not wars. Where the war is illegal, it is caught within the ambit of Article 20(1) hence propaganda would be prohibited by law. The General Comment however does not define what 'propaganda for war' is. As intention is the most important element, the actual aggression or taking up of arms need not occur. The law[64] restricting the right must prohibit propaganda for war. The General Comment on Article 20 states that the prohibition refers to those 'forms of propaganda threatening or resulting in an act of aggression or breach of the peace contrary to the Charter of the United Nations.[65]

Article 20 (2) prohibits the advocacy of hatred. It expressly instructs state parties to prohibit by law 'any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence. This article implies that incitement to discrimination is prohibited. The discrimination must be linked with or take place in the same instance as any advocacy of national, racial or religious hatred. All other forms or types of incitement which are not mentioned in this article do not fall under the ambit of this section. The separation of incitement and discrimination also implies that these two terms are to be taken separately.

[64] This law can be a statute, or an equivalent unwritten norm of common law is to be accessible to the subjects of that law.
[65] General Comment of the General Assembly 11/1992.

The article does not prohibit advocacy of hatred in private that instigates non-violent acts of racial or religious discrimination.[66]

In *JRT and the W.G. Party v Canada*[67] it was held that freedom of expression prime facie falling within the scope of Article 20 did not have to be examined within the limitation clause of Article 19(3). Nowak[68] on the other hand states that 'even though Article 20 is to be understood as *lex specialis* to Article 19, this does not relieve tribunals of having to review the alleged violation of Article 19.' He further says that the obligations in Article 20 'may not be interpreted in such a way as to establish for a state party the right to restrict other covenant rights to an extent going beyond permissible interference' by the covenant. It can also be stated that Article 20 is an extension of Article 19. This is due to the fact that the prohibition of propaganda for war is necessary for the protection of national security. The prohibition of advocacy for hatred is also necessary for the respect of the rights of others and for the protection of public order. In interpreting Article 20 one must also invariably take into account the provisions of Article 19.

In *Ross v Canada*[69] the HRC used Article 20(2) as an additional argument in the interpretation of the limitation clause in Article 19(3). In the case of *L.K. v The*

[66] International Convention on the Elimination of All Forms of Racial Discrimination, article 1(1): 'In this Convention, the term "racial discrimination" shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.'
[67] Supra Note 17.
[68] Supra Note 53.
[69] Human Rights Committee Communication No. 736/1997 at para 11.5.

Netherlands[70] it was held that where a group of people had drawn up a petition against the settling of a 'foreigner' in their neighborhood this amounted to incitement to racial discrimination and to acts of violence against persons of another color or ethnic origin. This was contrary to article 4 of Convention on the Elimination of Racial Discrimination. The author and his friends were called monkeys by the teacher and headmaster because they were foreigners.

3.3 Freedom of Expression in the African Charter

Although human rights are generally accepted as universal, each region has issues which are specific to it. There is therefore a need to address such issues at the regional level. In a bid to cater for the needs of Africa, the African states came up with the African Charter on Human and Peoples' Rights. In line with African traditional values the African Charter places a lot of emphasis on peoples' rights rather than individual rights. The member states have an obligation to recognize the rights, duties and freedoms in the Charter.[71] They also have an obligation to adopt legislative and other measures which will give effect to the rights. In addition every individual in the jurisdiction of all the member states is entitled to the rights and freedoms guaranteed in the Charter.

The Charter has four important components, namely; to respect, to protect, to promote and to fulfil the rights recognized. The Charter contains two categories

[70] Committee on the Elimination of Racial Discrimination, Communication No. 4/1991, para 6.3 and 6.6.
[71] African Charter on Human and Peoples' Rights, Article 1.

of civil and political rights. There are those which must not be restricted and those that may be restricted. Some of the latter rights that may be limited by claw-back clauses. The term 'law' in the claw-back clause is not to be construed as referring only to domestic law but also to international law.[72] The rights to freedom of expression, freedom of assembly and freedom of association fall under the category of rights that can be limited.

Article 9[73] of the Charter provides for the protection of the right of freedom of expression. The wording of this article is very similar to the ICCPR and the UDHR. The right is however not subjected to any internal limitations. In the Johannesburg Principles[74] the right is further elaborated. Principle 1(b) states that when a government places a restriction on this right based on national security, it must be able to demonstrate that the restriction is prescribed by law and is necessary in a democratic society to protect a legitimate national security interest. The principles also state that adequate safeguards must be put against abuse. The judiciary, which in an ideal situation is to be independent, must scrutinize the validity of the restriction. Furthermore, the principles go on to mention the kind of expressions which threaten national security. These are 'expressions intended to incite imminent violence'; 'expressions likely to incite violence'; and where 'there is a direct connection between the expression and

[72] *Civil Liberties Organization vs. Nigeria*, African Commission on Human and Peoples' Rights, Comm. No. 101/93 (1995) para 16.

[73] 1. Every individual shall have the right to receive information.
2. Every individual shall have the right to express and disseminate his opinions within the law.

[74] The Johannesburg Principles on National Security, Freedom of Expression and Access to Information, U.N. Doc. E/CN.4/1996/39 (1996).

the likelihood or occurrence of such violence.' [75] Principle seven lists the types of expression that are protected.[76] The public interest in gaining access to information should be the primary consideration of all governments. Access to information can therefore not be denied on the grounds of national security unless it is prescribed by law. Whistleblowers are also to be protected when they reveal wrongful deeds done in their workplace.

Another important instrument is the Declaration of Principles of Freedom of Expression in Africa.[77] This Declaration among other things affirms that the freedom of expression is indispensable to democracy and that, laws and customs that repress freedom of expression are a disservice to society. It further asserts that the fundamental importance of freedom of expression as an individual human right is a cornerstone of democracy and a means of ensuring respect for all human rights and freedoms. The Declaration also provides that "the right to express oneself through the media by practicing journalists shall not be subject to undue legal restrictions".

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[75] *Ibid*; Principle 6.

[76] Subject to Principles 15 and 16, the peaceful exercise of the right to freedom of expression shall not be considered a threat to national security or subjected to any restrictions or penalties. Expression which shall not constitute a threat to national security, includes but is not limited to, expression that: (i) advocates non-violent change of government policy or the government itself; (ii) constitutes criticism of, or insult to, the nation, the state or its symbols, the government, its agencies, or public officials, or a foreign nation, state or its symbols, government, agencies or public officials; and (iii) constitutes objection, or advocacy of objection, on grounds of religion, conscience or belief, to military conscription or service, a particular conflict, or the threat or use of force to settle international disputes among others. Further, no one may be punished for criticizing or insulting the nation, the state or its symbols, the government, its agencies, or public officials, or a foreign nation, state or its symbols and government, whether written or oral, can never be prohibited on the ground that it is in a particular language, especially the language of a national minority.

[77] Adopted by the African Unions Commission on Human and People's Rights October 23, 2002 Banjul.

The adoption of the SADC protocol on Culture, Information and Sport, 2001 was a very significant recognition of information rights by governments in the SADC region. The protocol also encourages the protection of freedom of the media and the right to information by citizens. The aims of the protocol as set out in Article 17 are to ensure the free flow of information, a pluralistic media and a free media. These can however be best realized with the existence of the right of access to information including government information.

Article 21 of the Protocol poses substantial danger to the right to freedom of expression. This article allows state parties to create codes of ethics for journalists through legislation. The practice of some states in the SADC region, for example, Zambia which created a Media Council which the state uses to harass journalists and curtail media freedom; and Zimbabwe whose Media Commission is used to take disciplinary action against any journalists who are found to have breached the law or any applicable code of conduct; is enough proof that this article will be used to curtail media freedom.[78]

Article 22 calls for the establishment of an accreditation system for all media practitioners in the SADC region. The justification offered for this is the facilitation of journalists' work in the rest of the world. But what this essentially means is that it is the heads of states who will decide which media practitioners or media

[78] Kandjiii K, A Brief Commentary by MISA on Deficiences in the SADC Protocol on Culture, Information and Sport, in Licencing and Accreditation – the threat to media freedom in the SADC region, MISA at pg 28.

institutions get accredited. This section is enacted in contradiction to the rich jurisprudence which is now available on the international plane.

There are no fundamental differences between the international and national instruments on the protection of the right to freedom of assembly and association. Hence only the right to freedom of expression shall be discussed at the national level.

3.4 National Legislation

3.4.1 The Constitution of Zimbabwe

The Constitution of Zimbabwe is the Supreme law (*lex fundamentalis*) of the land and any legislation which is inconsistent with it shall be void to the extent of its inconsistency.[79] Constitutional interpretation is for this reason different from the interpretation of ordinary legislation. The principles of interpreting statutes are to be derived from the Constitution. The interpretation of the Constitution is directed at ascertaining the fundamental values inherent in it. The interpretation of legislation is directed at ascertaining whether it is capable of an interpretation which conforms to the fundamental principles of the Constitution.[80] The Declaration of Rights is to be interpreted in a benevolent and purposive way.

[79] The Constitution of the Republic of Zimbabwe, Section 3.
[80] *Matiso v Commanding Officer Port Elizabeth Prison* 1994 (4) SA 592 (SE) at 597G-H.

Section 20 of the Constitution protects the right to freedom of expression while section 21 protects the rights to freedom of assembly and association. These rights are also protected in section 11(b).[81] Like the UDHR, the Zimbabwean Constitution does not provide for a free standing right to access to information. Section 20(1) which protects freedom of expression also includes "…freedom to …receive and impart ideas and information without interference." The right to access information therefore also includes the right not only to impart information but also to receive it. The right to access information is an ancillary right to freedom of expression. The courts often refer to the public interest in receiving information as aspects of freedom of expression.[82] This is due to the fact that one cannot adequately express themselves without adequate access to information. It is therefore impractical to separate these two rights.[83]

It is important to note that the Constitution can only be amended by a two thirds majority as is stipulated by section 52. Also included in the right to freedom of expression is the right of religious denominations to establish schools. Parents or

[81] Whereas every person in Zimbabwe is entitled to the fundamental rights and freedoms of the individual, that is to say, the right whatever his (sic) race, tribe, place of origin, political opinions, colour, creed or sex, but subject to the respect of the rights and freedoms of others and for the public interest, to each and all of the following, namely
(b) freedom of conscience, of expression and of assembly and association.

[82] *AG v Times Newspapers* Ltd (1974) AC 273.

[83] In *Case and Another v Minister of Safety and Security* 1995 (5) BCLR 609 (CC); 1996 (3) SA 617 (CC) para 25 the Constitutional Court of South Africa held: "But my freedom of expression is impoverished indeed if it does not embrace my right to receive, hold and consume expressions transmitted by others. Firstly my right to express myself is severely impaired if others' rights to hear my speech are not protected. And secondly, my own right to freedom of expression includes as a necessary corollary the right to be exposed to input from others that will inform, condition and ultimately shape my own expression. Thus a law which deprives willing persons of the right to be exposed to the expression of others gravely offends constitutionally redetected freedoms both of the speaker and of the would be recipients."

guardians may not be prevented from sending their child to a particular school on the ground that government does not fund it.

The Zimbabwean Constitution guarantees freedom of expression, which is much wider than the protection of speech. Expression also includes conduct. In the United States of America, freedom of speech is protected under the First Amendment, which provides that, 'Congress shall make no law…abridging the freedom of speech or the press.' The USA protection is therefore narrower (the courts have however interpreted speech to include conduct) than the protection granted by section 20 of the Zimbabwean Constitution. The USA Supreme Court has however attempted to remedy this by interpreting speech to include symbolic speech.[84]

In interpreting and enacting national legislation, including the Constitution, the judiciary and the legislature must conform to the international and regional obligations, which Zimbabwe has undertaken. Section 111B(1)(b) states that any conventions or treaties acceded to shall not form part of Zimbabwean law until an Act of Parliament is passed incorporating them to national law. Zimbabwe has not yet passed any legislation, which incorporates the ICCPR or the African Charter into national law. The judiciary however can still refer to international law despite this.

[84] In *Stromberg v California* 283 US 359, 51 SCt 532 (1931), the Supreme Court held that certain forms of expression consisting solely non-verbal actions were included in the First Amendment right to free speech. The Court held that a state statute prohibiting the display of a red flag as a symbol of opposition organised government was unconstitutional.

The Vienna Convention on the Law of Treaties (1969) in article 26 states that 'every treaty in force is binding upon the parties to it and must be performed by them in good faith.' Furthermore, Article 49 (2) states that after ratification, the covenant shall enter into force three months after the deposit of the instrument of ratification or accession. In light of these two articles, which are part of international customary law, the judiciary can directly apply both international and regional agreements. In addition, state parties are obliged to repeal all domestic legislation which is inconsistent with international treaties and international customary law. The state must also adopt measures, which ensure the implementation of the obligations contained in the treaties, which they have ratified.

The rights to freedom of expression and freedom of association and assembly are not absolute in the Zimbabwean Constitution. The courts have held that '…limitations of freedom of expression that do not serve one of the legitimate exceptions listed in s 20(2) of the Constitution are not valid."[85] These rights are placed under additional limitations, which are not contained, in the international or regional instruments discussed above. Whereas the regional and international instruments state that these rights protect everyone, there are people who are expressly excluded from the protection of these rights in the Zimbabwean Constitution. These people include: a person who is a member of a disciplined force of Zimbabwe or of another state who is in Zimbabwe under an arrangement

[85] *Chavunduka and anor v Minister of Home Affairs and anor* 2000 (1) ZLR 552 (S), at pg 561B-C.

with another state or organization; and a person who is a member of a state with which Zimbabwe is at war, or with which a state of hostilities exists.[86]

A further limitation is placed on these rights by section 20(6) and 21(4). These sections state that the provisions of subsection (1) of the two sections, shall not be held to confer on any person a right to exercise his freedom of assembly or association / freedom of expression in or on any road, street, lane, path, pavement, sidewalk, thoroughfare or similar place which exists for the free passage of persons or vehicles.

All legislation regulating the rights to freedom of expression and freedom of assembly and association are derived from sections 20 and 21 of the Constitution. Such legislation is therefore to be consistent with these sections. The following pieces of legislation will be the subjects of the ensuing discussion:

1. Access to Information and Protection of Privacy Act (AIPPA) 5 of 2002 [Chapter 10:27},
2. Public Order and Security Act (POSA) 1 of 2002 [Chapter 11:17],
3. Official Secrets Act (OSA) [Chapter 11:09].
4. The Broadcasting Services Act 3 of 2001 [Chapter 2:06].

[86] The Constitution of Zimbabwe, section 26(7).

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

This Act was passed in the wake of a story published by an independent newspaper of a failed coup by members of the army. The editor of the newspaper and the chief reporter were arrested on the grounds of section 50 of the Law and Order Maintenance Act (LOMA) of 1960 [Chapter11:07], which has since been repealed by POSA.[87] After the story the government embarked on a verbal attack of the private media accusing them of wanting to destabilize the government. Two years before the enactment of this Act there was a failed government referendum which advocated for the change of the constitution.

Jonathan Moyo was appointed the Minister of Information in the year 2000. In the same year, Zimbabwe saw a wide redistribution of land to the majority of the people by the government in what was called the *Third Chimurenga*.[88] One of the privately owned newspapers, *The Daily News* increasingly came under attack by mysterious forces in 2000. In April the newspaper's head office was bombed and in January 2001 its printing press was also bombed. Hours before this attack the Minister of Information had told the Zimbabwe Broadcasting Corporation that the state would silence *The Daily News* because it posed a security risk to the nation.[89]

[87] Media Monitoring Project Zimbabwe, "The Campaign to Silence Private Media in Zimbabwe," www.mmpz.org.zw/freedom&law/aippa.htm.
[88] *Ibid*.
[89] *Ibid*.

The private press from the 1990s onwards grew in strength and, as it did, the climate for private journalists grew increasingly hostile. The private press became increasingly outspoken in its criticism of unacceptable government actions.[90] The Act was passed as candidates were preparing for the 2002 Presidential elections. This environment gave a need for greater protection of freedom of expression so that the electorate could make informed decisions on the Presidential candidate. It was against this background that the Act commenced in March 2002. The Minister of Information, Jonathan Moyo, declared that this Act was necessary to hold journalists accountable for their actions.[91]

3.4.2.1 Sections Impacting on Freedom of Expression and Access to Information

The preamble of AIPPA states that it was passed with the intention of regulating access to information held by public bodies. Furthermore, the Act aims to make public bodies accountable by giving the public a right to request correction of misrepresented information. AIPPA also aims to prevent the unauthorized collection, use or disclosure of information by the public bodies.

Section 3 states that the Act applies to matters relating to access to information, protection of privacy and the mass media, and does not substitute any other law. Where there is a conflict between the Act and another law, the former will prevail.

[90] *Ibid,* Media Monitoring Projects.
[91] *Ibid,* Media Monitoring Projects.

The implication of this section is that the rights in the Act are not protected by the Constitution. If the rights were protected by the Constitution, then any conduct inconsistent with the Act would automatically be declared unconstitutional. What the legislators sought to do was to simply supersede and not invalidate other Acts.

The records listed in schedule 1 are all excluded from the application of the Act. These include a personal note or communication of a person who is acting in a judicial capacity; a record of a question that is to be used in an examination and any record which is protected in terms of the Privileges, Immunities and Powers of Parliament Act. Members of the public who wish to access the records in schedule 1 can make an application to the court in instances where the relevant Acts are too restrictive. The restrictive Acts can be directly challenged under section 20 of the Constitution. The media may not be prosecuted under this Act if they produce publications in schedule one.

The client-attorney privilege which is protected by section 16 is limited by section 30 which gives the Minister power to access personal information. Failure to disclose the personal information may result in a two-year imprisonment sentence or a fine of Z$20000 or both. Reading these two sections together removes the client-attorney privilege, as individuals may be compelled by the Minister to divulge personal information.

Sections 5 to 13 of the Act regulate the public's right to access information. According to this part of the Act, every person shall have access to any record held by a public body.[92] Public officials have the duty to assist a person in obtaining the record.[93] Read together with sections 11 and 12, the public official is given 70 days to respond (no guarantee is given after this time that access to information will be granted) to the request. The Act does not provide for urgent requests for information, and this may prove futile to persons who are in urgent need of the information. It is important to note that the public may only have access to government information with the express authority of the head of the public body. The applicant only has access to the information which they have requested.

The public is given a right to receive accurate information. The individual about whom the information is disclosed is also protected from the disclosure of inaccurate information about him/her.[94] Where the head of the public body fails to disclose accurate information, then the party who is prejudiced by the inaccurate information may sue the head of the body. This ensures that freedom of expression is based on true and accurate information. Furthermore a person may request the correction of 'personal information relating to him (sic)'[95] that is in the control of a public body if such information is inaccurate. An individual is also

[92] AIPPA, section 5(1).
[93] AIPPA, section 8.
[94] AIPPA, sections 31 and 32.
[95] AIPPA, section 32(1).

given permission to access personal information which a public body uses to make a decision.

The Act imposes additional restrictions which are not contained in the Constitution. For instance, section 5(3) limits the nature of the person that may claim records in the Act. People who are not citizens of Zimbabwe and are in the country illegally have no right to access to information.[96] The section also states that citizens who are not permanently resident in Zimbabwe have no right to access information. In addition, section 3(c) points out that 'any foreign state or agency thereof' has no rights to access to information. This is justified taking into cognizance that persons protected by rights are subjects of the state or persons who are physically present in the state. The purpose of this provision is however defeated by the fact that members or representatives of the foreign state agency will have access to information. The justification of this section comes in that the right to access to information may be restricted, among others, for national defence and security.

It is evident that section 5(3) violates section 18 of the Constitution which states that 'every person is entitled to the protection of the law.' Every person who is physically present in Zimbabwe is entitled to the right access of information. The African Charter, ICCPR and the UDHR also state that the right is extended to everyone. This section is not only unconstitutional; it also violates both international and regional standards.

[96] AIPPA, section 5(3) (a).

Section 5 (3) (b) regulates the mass media. In terms of the section, in order for the mass media to acquire any rights it must be registered. Hence any mass media house which is not registered will not have the right to freedom of expression. The mass media house in the same way cannot defend its right to access to information.

The Act provides for the restriction of access to certain types of information.[97] All information relating to deliberations of cabinet and local bodies shall not be disclosed, except where such deliberations are made in the presence of members of the public. This limitation will apply until after 25years after such deliberation. If a journalists or a media house publishes such information they are likely to lose their accreditation or certificate of registration.[98] It must also be noted that the publication of the information constitutes a criminal offence. This section makes government deliberations secret documents which are not available to the public.

Section 14 applies a blanket restriction to access to information which is prohibited by section 20(2) of the Constitution. This section requires that each restriction must be specific and is to be considered separately. It renders proposed legislation an official secret which even parliament (which is regarded as a member of the public) does not have access to until it is presented to it by

[97] AIPPA, section 14.
[98] AIPPA, section 80(1)(d).

the relevant Minister. During the deliberations of POSA this section was applied and as the ruling party has majority seats in parliament the Act was passed into law despite public protest. This was because there was no consultation during the enactment of the Act with the relevant stake holders. Debate when the Act is enacted was futile as the majority had the final say. The principle of maximum disclosure which is a feature of access to information legislation was not applied.

The Act gives the Minister discretion to limit the right to access information if in *his opinion* (emphasis supplied) such disclosure would affect the relations between government and municipal or rural district council, a foreign state or an international organization of states.[99] The information will not be granted if it 'may affect' relations between the named bodies. The Minister has discretion to either grant or decline access to information and once he/she has made the decision, it is not subject to appeal. It is important to note that section 20(2) provides that limitation to freedom of expression must be made in terms of the law. Limitation of this right must therefore not be left to the discretion of the Minister but must be expressly laid down by a law. Further, these relations are negotiated for and on behalf of the public and presumably for their benefit and therefore they should know about them. The phrase 'may affect' is also too broad and far exceeds the purpose that it aims to achieve.

[99] AIPPA, section 18.

Section 28[100] allows for the disclosure of information if it is in the public interest. Read in line with sections 14 and 30, it implies that the public is a danger to itself and the government cannot pose any danger for the public. This is particularly true when it is taken into account that cabinet deliberations may not be disclosed even where it is in the public interest to do so. Public interest must be a standard that permeates all sections in the Act. The harm that may be caused by disclosing information should be greater than the public interest in having the information. This section must not be set apart as a separate section but must apply to all the sections in the Act.

The Act also deals with the regulation of mass media services. The regulation applies to Zimbabwean and foreign media owners who disseminate mass media products in Zimbabwe.[101] Where a journalist or media house publishes information deemed by the Act to be an abuse of the right to freedom of expression, it shall be charged with criminal defamation[102] which is punishable by deregistration.[103] The court in *S v Modus Publications (Pvt) Ltd and Another*[104]

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[100] The section provides that the head of a public body must disclose to an applicant or members of the public affected, whether or not they have requested the information, information concerning:
- The risk of significant harm to the health or safety of members of the public;
- The risk f significant harm to the environment;
- Any matter that threatens national security; any matter that is in the interest of public security or public order, including any threat to public security or public order, but this must only be disclosed to the relevant law enforcement authorities;
- Any matter that assists in the prevention, detection or suppression of crime.

[101] AIPPA, section 63.

[102] Criminal defamation is defined as the unlawful and intentional dissemination of false, verbal or written, statements concerning another, which tends to injure his/her reputation. The crime of criminal defamation is open to constitutional challenge on the basis that it is so nebulous and ill defined that it is incapable of fair application [Feltoe G. and Biti T, Media Law and Practice in Southern Rhodesia: Zimbabwe No. 6 1997. Article 19 at pg 13.]

[103] AIPPA, section 64.

held that the defamation has to be serious before it can be said to amount to a crime. The Zimbabwean court in *Chavunduka*[105] quoted with approval the dictum in *R v Zundel* where it was stated that 'most important, the consequences of failure to prove truth are civil damages, not the rigorous sanction of criminal conviction and imprisonment.'

Section 65 states that individuals who are not citizens of Zimbabwe and have no permanent residency may not be owners of the mass media. They may also not acquire or hold any shares in the mass media service. The Act does not however provide for any compensation to the foreign mass media owners or shareholders at the commencement of the Act. The section may be seen as a violation of section 16 of the Constitution. Section 16 states that, a person has a right to property and such property may not be compulsorily acquired. The exception is only when such person is adequately compensated.

Section 25 protects the individual from invasion of privacy by a third party. In considering whether or not to grant the information to the applicant, the official must consider, among other things, if the disclosure will unfairly expose the third party to financial harm[106] or if the information is likely to be inaccurate or unreliable. On the other hand, section 25(4) (c) states that disclosing personal information shall not be an invasion of an individual's privacy if it is authorized by law. The implication is that privacy is protected until a law which infringes such

[104] 1996 (2) ZLR 553 (S).
[105] Supra Note 89.
[106] AIPPA, section 25(2) (e).

privacy is passed. The onus of proof is reversed in this section in defamation litigation. The publisher has to prove that the publication was not defamatory or injurious to the complainant. The complainant must simply aver that he has been defamed or injured. This reverse of the onus of proof unnecessarily restricts the right of freedom of expression.

The Act also provides for the collection, protection and retention of personal information by public bodies.[107] A person is therefore obliged to provide information to the public body notwithstanding that such disclosure would amount to invasion of the right to privacy. This is very ironic considering the title of the Act is 'Protection of Privacy.' The Act is supposed to explicitly provide for the protection of privacy which is not done in this section. Section 29(a) provides that any act which provides for the collection of information is lawful. This is open to abuse as the collection of such information may offend the right to privacy. Moreover, the Act does not specifically state that such act must be subject to either international law or the constitution.

Section 80(1) (a) states that it is an offence to falsify or fabricate information. It is not clear what constitutes a false statement and the section does not mention what amounts to a fabrication. The Supreme Court has held, in this regard, that '…a law which forbids expression of a minority or 'false' view on pain of criminal prosecution and imprisonment, on its face, offends the purpose of the guarantee of freedom of expression.' The court further held that:

[107] AIPPA, part V.

> What is overlooked in the criminalization of false is that language is used in a variety of complex and subtle ways. It is simply not possible to divide statements into categories of fact and opinion. Rhetorical devices, figures of speech, comedy, metaphor and sarcasm are all examples of superficially false statements which either may be substantially correct or be expressions of opinion."[108]

This section was however repudiated by the Supreme Court in *Association of Independent Journalists and Others v The Minister of State for Information and Publicity in the President's Office and Others*.[109]

3.4.2.2 The Media and Information Commission

Part VII of the Act provides for the establishment of the Media and Information Commission (MIC). Section 39 spells out the functions of the MIC which include; ensuring that Zimbabweans have access to information; the control of mass media services and to receive and evaluate applications for the accreditation of journalists. Strangely section 39(1) (c) states that the MIC has the right to comment on proposed legislation. The implication of this section is that the commission is given preferential treatment unlike other bodies that do not have the right to comment on any legislation before it is presented to parliament.

[108] Supra Note 89, at pg 562H.
[109] Judgment No S.C136\02.

The commissioners of the MIC are appointed, remunerated and dismissed at the discretion of the Minister of Information. This compromises the independence of this Commission taking into cognizance that the Minister is a political functionary and the commissioners serve at his/her benevolence. The Minister has the right to remove commissioners on such vague grounds as the commissioner has engaged in conduct that renders him/her unsuitable. What constitutes such conduct is left undefined and therefore discretionary, vague and open to abuse. Furthermore the Minister is an interested party as he/she heads the public media, and will tend to protect their interests. There is a danger that the Minister will appoint commissioners who might not be independent in light of the above facts.

Clause 8 of the third schedule allows the MIC, with the approval of the Minister, to enter into arrangements with government or any local or other authority in order to obtain rights, privileges and concessions from them. This greatly compromises the independence of the Commission as its primary responsibility is to ensure the protection of journalists and the public's right to freely receive information. The protection of freedom of expression and the freedom of the press in particular, is a means by which the State and its officials can be challenged and held accountable to the people for their actions, thus promoting democracy. For a body whose purpose is the protection of the right to freedom of expression to be seen entering into arrangements with the government is very questionable.[110]

[110] Petras I, "The legal implications of accreditation or non-accreditation of journalists under the Access to Information and Protection of Privacy Act," A paper prepared on behalf of MISA-

Section 39(k) gives the MIC power to review the decisions of the public bodies. The section does not state the extent of the powers of review. This means that the Minister is essentially given the discretion to access personal information even where the public body has a genuine reason for not disclosing such information. Considering the manner of appointment of the MIC and the potential bias the body has, this might not be of much use to individuals if the disclosure of the information is against the interests of the government. The Minister is given the power to gather information on any matter and on any person where the information is in the possession of a public body. The information which is requested by the MIC must be produced.[111] This gives the impression that it is only the MIC which has a genuine right to access of information. When the MIC obtains the information it may not in turn disclose such information to any unauthorized person.[112]

The Act requires that any change to ownership of the newspaper or media house has to be reported to the MIC.[113] The MIC on the 3rd of May 2004 issued a threat to suspend *The Tribune*'s registration for among other things; 'failure to disclose material changes' in the ownership of the newspapers.[114] The paper was actually closed down a few weeks later. Joseph Maphenduka, a former journalist,

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Zimbabwe Chapter for presentation at the National Journalists and Media Associations' Conference held in Harare on 19 October 2002.

[111] AIPPA, section 62.
[112] AIPPA, section 51.
[113] AIPPA, section 67.
[114] The Public Information Rights Report: January 1, 2004 – March 31, 2005.

resigned from the MIC in August 2003 over what he termed the MIC's ill-advised decisions to close down four newspapers.[115] This gives the government power to monitor all disseminators of information. The mass media is also to notify the MIC of changes made to the area where the mass media products are circulated as well as any change of name or language of the publication. If the mass media fails to comply with the provisions of the Act, then the MIC may refuse to register it. This is an unjustified limitation of the freedom expression. It means that one has to register in order to exercise their right to impart information to the public. Such application for registration must be made every two years and no guarantee is granted that the mass media house will be re-registered.

Section 66 of the Act gives the MIC powers to register mass media services. International law does not at present rule out purely technical registration schemes. Where government does decide to require media organizations to register, this must be a purely administrative matter, similar to company registration. The information required should be lodged with an administrative body and registration should be automatic upon the submission of the relevant documents.

In a case from Nigeria[116] the African Commission on Human and Peoples' Rights had to decide upon the legality of a legal requirement for newspapers to register,

[115] MISA, So This Is Democracy. 2006.
[116] *Media Rights Agenda and Others v Nigeria*, 21 October 1998, Communication Nos. 105/93, 128/94, 130/94 and 152/96, para.52.

with discretion on the part of the authorities to refuse registration. The Commission stated:

> A payment of a registration fee and a pre-registration deposit for payment of penalty or damages is not in itself contrary to the right to the freedom of expression. The government has argued that these fees are 'justifiable in any democratic society and the Commission does not categorically disagree….

Of more concern is the total discretion and finality of the decision of the registration board, which effectively gives the government the power to prohibit publication of any newspapers or magazines they choose. This invites censorship and seriously endangers the rights of the public to receive information, protected by Article 9.1. There has thus been a violation of Article 9.1 of the African Charter on Human and People's Rights.

Furthermore, principle VIII of the Declaration of Principles on Freedom of Expression in Africa on the print media states that: "any registration system for the print media shall not impose substantive restrictions on the right to freedom of expression." For the registration requirement to be lawful or internationally acceptable, it must comply with the following requirements:

- the authorities should have no discretion to refuse registration once the requisite information has been provided;
- registration should not impose substantive burdens and conditions upon the media; and

- the registration system should be administered by bodies which are independent of government.[117]

The last requirement is very important for the freedom of expression of mass media services as well as journalists. The body which accredits journalists and registers mass media services must be independent. It is however disputable whether the MIC is independent especially considering that the members of the Commission are appointed by a Minister who is a member of a political party and is likely to want to advance the interests of such political party.

In democratic countries the best way of regulation of the journalist profession is self-regulation. This is due to the fact that unlike other professions where registration is required, the practice of journalism requires a person to engage in activities that define or embrace the freedom of expression. It is therefore recommended that the journalist profession be self-regulated. Zimbabwe would do well to imitate the example of Tanzania which has a self regulatory media council.

The legislature has told journalists, through Leo Mugabe, the chairperson of the Parliamentary Committee on Transport and Communication, that they 'support the idea of a voluntary media council…but it should be within the confines of the law, so that you do not have a structure that runs parallel to the media and

[117] *Constitutional Rights Project and Media Rights Agenda v Nigeria*, 31 October 1998, Communication nos. 105/93, 130/94, 128/94 and 152/96 (African Commission on Human and Peoples' Rights).

information commission.'[118] As self-regulation is best for the journalist profession, it is recommended that the journalists accept the terms of the government and work together with the Media and Information Commission to come up with a structure which will be 'within the confines of the law.' Adopting an aggressive stance, will only mean that the government will react in the same manner. Care must therefore be taken in establishing a self-regulatory body.

3.4.2.3 Journalists

A journalist is defined as any 'person who gathers, collects, edits or prepares news, stories, materials and information for a mass media service, whether as an employee of the service or as a freelancer.'[119] The individual must be an employee of a mass media service before he qualifies to be a journalist. Any mass media service which employs a journalist who is not accredited risks suspension or the termination of their license. The definition of a journalist includes a freelancer as well.

The accreditation of journalists is granted for one year and may be renewed.[120] A person who is not a Zimbabwean citizen can only be accredited for a period not exceeding 30 days.[121] This relatively short period of accreditation of journalists,

[118] Dongozi F, and Chinaka C, "Mugabe ally threatens media council," *The Standard*, www.thezimbabwestandard.com/viewinfo.cfm?linkid=11&id=5758&siteid=1 (accessed on 4/2/2007)
[119] AIPPA, section 2.
[120] Section 84 of AIPPA.
[121] Section 79 (4) of AIPPA.

more so non-citizens, is arguably a grave limitation of the right to freedom of expression.[122] An unaccredited journalist cannot practice his/her profession in Zimbabwe.[123] The journalist, in terms of section 85(1) is required to observe a code of conduct which had not yet been prepared at the time of commencement of the act. This was against the law as requiring a person to enter into a contract where the terms are unknown is contrary to the law.

A mass media house is also required to be registered. In deciding whether or not to register a mass media house, the MIC must be independent and impartial. In *Associated Newspapers of Zimbabwe (Pvt) Ltd v The Media Commission of Zimbabwe,* the Administrative Court found that the decision to refuse to register *The Daily News* should be set aside because the chairperson had displayed clear bias against the newspaper.[124]

Hondora states that 'the Access to Information Act represents a political desire to control the minds and opinions of the people, not by giving them any values or

[122] As a result of the passage of section 79, numerous foreign journalists have been denied entry into Zimbabwe after their requests for temporary accreditation were denied. Among those denied visas were Sally Sara of the Australian Broadcasting Corporation and David Blair of the British Daily Telegraph who was immediately deported upon arrival. Further, the government alleges that it accredited 580 journalists before the March 2002 presidential election, but a private media watchdog group, the Media Institute of Southern Africa, suggests that number is closer to 72.

[123] Local reporters have been most affected by the registration policy. For example, Fanuel Jongwe, a senior reporter for the Daily News, was arrested on January 27, 2003 in the town of Zvishavane along with five foreigners and charged under section 79 of AIPPA, which prohibits practicing journalism without a license from the Commission. The five foreigners, reported to be members of the World Lutheran Foundation (WLF), were charged under section 72, which prohibits running a media outlet without authorization. Jongwe stated that he had been invited to cover the WLF's activities as a development organization in the area. The group was later released after police confiscated a laptop, notebooks, cameras, and literature.

[124] Campaign to Silence the Private Media in Zimbabwe; www.mmpz.org.zw/freedom&law/aippa.htm.

information but by denying them access to information that relates to the governance of the country.'[125] This is evidenced by the refusal to grant access to government records on request by members of the public. The MIC also controls the information which is to be disseminated to the public as they are given powers to choose who may practice as a journalist. If the mass media service or journalist 'abuses the freedom of expression' (which is totally left to the discretion of the MIC) then their registration/accreditation will be removed. The MIC in this way controls public opinion, through the control of the flow of information.

In a case brought before the Supreme Court,[126] *The Daily News* refused to register with the MIC on the grounds that this violated its right to freedom of expression. Although admitting that the constitutionality of section 66 was debatable, the Court held that it was not blatantly unconstitutional. The court stated that citizens were obliged to obey the law of the land and argue afterwards. It was said that the complaint of *The Daily News* would be entertained once the paper had registered with the Commission. It is very disheartening that the highest court in the land allowed those whom it is supposed to protect to be subjected to legislation that violates their rights. In the first place, the court failed to adhere to the principle of the supremacy of the Constitution, and use it as the standard for human rights protection.

[125] Hondora T, "AIPPA Research," MISA 2002.
[126] *Associated Newspapers of Zimbabwe (Pvt) Ltd v Minister for State Information and Publicity in the President's Office and Others* (ZSC, SC20/03, 11 September 2003).

From the discussion above it is clear that the main thrust of the Act is to give government extensive powers to control the media. This is achieved by requiring the registration of journalists as well as the prohibition of the "abuse of freedom of expression."[127]

3.4.3 The Public Order and Security Act 1 of 2002 (POSA)

The Act commenced in January 2002. The purpose of the Act is to regulate internal security and public order in Zimbabwe. Furthermore the Act 'seeks to curb activities that impact upon state security, such as terrorism and the subversion of the state.'[128] The Act also aims at regulating public gatherings. This Act repealed the notorious Law and Order Maintenance Act.

3.4.3.1 Sections impacting on the freedom of expression and freedom of assembly

Section 5 of the Act makes it an offence for a journalist to 'organize(s) or set up or advocate(s), urge or suggest the organization or setting up of any group or body with a view to:

i) coercing or attempting to coerce the government;

ii) overthrowing and taking over the government through unconstitutional means; and

[127] Banisar D, Freedom of Information, www.freedomofinfo.org/countries/zimbabwe.htm.
[128] The SADC Media Law: A Handbook for Media Law Practitioners. Volume 1, Konrad Adenauer Stiftung at pg 119.

iii) supporting or assisting any group or body that attempts to engage in any of the above.

Both journalists and ordinary members of the public are prohibited from performing acts that 'subvert constitutional government.' Under this section, it is an offence for any person in or outside Zimbabwe to suggest or do anything to advocate the overthrow of government through unconstitutional means.[129] It is not expected in any country that journalists would organize or advocate the taking over of government through unconstitutional means. To the contrary, it is part of the democratic process that journalists make statements that advocate for the setting up of an organization which has as one of its objective coercing of government. It is also normal for journalists to advance that one way for a regime change is by following the paths of Yugoslavia. This provision therefore negatively affects vibrant journalism which must be present in ideal democracies.

Section 5 of POSA states that, no person may organize or set up an organization which coerces the government. Coercing is broadly defined in section 5 of POSA as 'constraining, compelling or restraining by among other things physical force or violence and civil disobedience. Coercion is very loosely defined and includes within its ambit of limitation normal democratic discourse which would not be restricted.[130] In the case of *Chavunduka*,[131] Gubbay CJ stated that:

> Plainly, embraced and underscoring the essential nature of freedom of

[129] *Ibid*.
[130] Hondora T, "Essential Media Laws," Research done for MISA-Zimbabwe and Funded by the Netherlands Institute of Southern Africa (NIZA) – November 2002, at page 68.
[131] Supra Note 89, at pg 558E-F.

> expression, are statements, opinions and beliefs regarded by the majority as being wrong or false…[t]he fact that the particular content of a person's speech might 'excite popular prejudice' is no reason to deny it protection for 'if there is any principle of the Constitution that more imperatively calls for attachment than any other, is the principle of free thought-not free thought for those that agree with us but freedom for thought of that we hate.'

Section 12[132] makes it an offence to attempt to cause any disaffection amongst members of the police or defense force which will lead to such members withholding their services, loyalty or allegiance. The Act makes it an offence to;[133]

i) expose, for instance, the poor salary and working condition of members of the defense and police service, and comparing such with the extravagant living or corruption of the ruling elite,

ii) Appeal to the conscious of the police, and urge them not to follow superior orders in instances where the government intends to violate basic human rights, and the Constitution.

The intention of the person is immaterial to this offence. What gives rise to culpability is the result of the author's actions. If the government however

[132] MDC official Kenneth Mathe was arrested and brought before a magistrate in the resort town of Victoria Falls on January 24, 2003 for violating section 12(a) of POSA. In an interview with the opposition newspaper *Daily News*, Mr. Mathe commented on reports that police and members of the armed forces were beating civilians in the area after the murder of an Australian tourist. He likened the events to the Matabeleland massacres in the 1980s. The police interpreted his statement as "causing disaffection amongst members of the Police Force or Defense Forces," arrested him, and released him on bail pending trial. See, Jafari J, "Attacks from Within: Zimbabwe's Assault on Basic Freedoms through Legislation," 10 No. 3 *Human Rights Brief* 6 (2003).

[133] Supra Note 129, at pg 69.

charges a journalist with this offence, it will be sending a message that its army is highly ill-disciplined. This is inherent in the fact that if the army merely reads a newspaper article then their loyalties are changed. It is important to note that the section falls in the permissible limitations of the public order limitation in section 20(2) of the Constitution. The section is however not reasonably justified in a democratic state. In any democratic state people must be free to discuss issues that concern them, that is, issues of governance without any hindrance.

Section 15 prohibits the publication and communication of false statements which are prejudicial to the state. It is an offence to publish or communicate information which is materially false where the person intends or realizes that there is a risk or possibility of among other things, inciting or promoting public disorder or public violence or endangering public safety. The use of the word 'false' raises problems in section 15. The use of the word "false" is wide enough to embrace a statement, rumour, or report which is merely incorrect or inaccurate, as well a blatant lie, negligence is therefore criminalized. Failure by the person accused to show, on a balance of probabilities, that any or reasonable measures to verify the accuracy of the publication were taken, suffices to incur liability even if the statement, rumour or report that was published was simply inaccurate."[134]

In *Chavunduka*[135] the court ruled against the criminalization of false statements, as this is important in functional democratic systems. It has been advanced that

[134] Supra Note 89 at pg 562F.
[135] Supra Note 89.

the main aim of criminalizing false news is for the protection of public officials around the world who suppress expressions that are critical of them or their governments.[136] The courts have however held that the constitutional guarantee of freedom of expression extends to the statements, opinions and beliefs regarded by the majority as being wrong or false.

Section 15 is very similar to section 50(2) of LOMA which it repealed. The Supreme Court found this section unconstitutional on the grounds that it was vague. It boggles the mind why legislature would create the very same law which has been declared unconstitutional.[137] Section 16 deals with undermining the authority of or insulting the President. The section states that it is an offence to publish a statement about the President or Acting President where the person:

i) knows or realizes that there is a risk or possibility of engendering feeling of hostility towards the President or the Acting President, or of causing hatred, contempt or ridicule of the President or an acting President (either against him personally or against his office); or

ii) makes any abusive, indecent, obscene or false statement about or concerning the President or an Acting President (either against him personally or his office.

[136] Louw R, "Restriction: Laws Impacting on Media Freedom in SADC," MISA, 2004 at pg 122.

[137] In *Chavunduka* at pg 562D, it was stated: "Because s 50(2)(a) is concerned with likelihood rather than reality and since the passage of time between the dates of publication and trial is irrelevant, it is, to my mind, vague, being susceptible of too wide an interpretation. It places persons in doubt as to what can lawfully be done and what cannot. As a result it exerts an unacceptable "chilling effect" on freedom of expression, since people will tend to steer clear away from the potential zone of application to avoid censure, and liability to serve a maximum period of seven years' imprisonment."

These offences carry a penalty of one year imprisonment or a fine. As has already been discussed the words abusive, indecent and false are very vague and subjective. This offence is therefore '…insufficiently imprecise to demonstrate the area of risk and provide guidance of conduct to persons of average intelligence.'[138]

The police are also protected from being undermined. Any statements uttered by any person in a public place which engenders feelings of hostility or expose the police officer or the police generally, to contempt, ridicule or disesteem, amount to a criminal offence. In order for the offence to be committed the statement,[139] must be made in a public place[140] or in the presence of a police officer. Stating that the statement was made in a private place is a defense. This is also vague as 'it is not possible to predict with absolute certainty when a statement is made whether it would give rise to a feeling of hostility, contempt, ridicule or disesteem.[141] Individuals will fear to express themselves due to fear that they will be found on the wrong side of the law. In the Canadian case of *Zundel* the court held: 'should an activist be prevented from saying "the rainforest of British Columbia is being destroyed" because she fears criminal prosecution for spreading "false news" in the event that scientists conclude and a jury accepts

[138] Supra Note 83, at pg 563G.
[139] It is not clear whether the statement is written of verbal or both.
[140] A place where the public's right of admittance is not restricted either by operation of law or by another person exercising superior rights.
[141] Supra note 129, at pg 73.

that the statement is false and that it is likely to cause mischief to the British Columbia forest industry?'[142]

POSA makes it mandatory to notify the police four days in advance of any public meeting or demonstration. The police have interpreted the requirement to notify as meaning that police permission is needed before a public event can take place. The Act allows the police to prohibit public events if they believe such events will result in public disorder. In practice the police have used arbitrary criteria to distinguish between private and public gatherings. The police have also used POSA to arrest people for meeting in their own homes or places of business.[143] An example was the arrest of Women of Zimbabwe Arise (WOZA) activists on 16 June 2004 when they had attended a private meeting in one of the activists' home. The police also arrested WOZA activists in 2003, while they were taking part in a peaceful demonstration for failure to comply with the notification requirement.[144]

3.4.4 Official Secrets Act

The Official Secrets Act commenced in February 1970. This Act was enacted by the Smith regime to prevent people from exercising their right to freedom of expression. As this was one of the pieces of legislation used to suppress the

[142] *R v Zundel* (1992) 10 CRR (2d) 193 (Can SC) at pg 219.
[143] "Zimbabwe: Human Rights Defenders Under Siege," http://web.amnesty.org/library/index/engafr460122003 (accessed on 26/03/07).
[144] *Ibid*;

majority, one wonders why it is still operational and has not been repealed. The Preamble to the Act states that its purpose is among other things the prohibition of disclosure of any information which is prejudicial to the interests of Zimbabwe and might be useful to the enemy.[145] It also prohibits unauthorized persons from making sketches, plans or models of and to prevent trespass upon defense works and other prohibited places. This Act is modeled on the now repealed United Kingdom Official Secrets Act of 1911. The main aim of the Act is to criminalize the unauthorized disclosure by a state employee or government contractor of any information that he/she acquired in the course of employment or while carrying out a contract.[146]

Section 3 of the Act reasonably prohibits individuals from entering prohibited areas.[147] The section makes it an offence to approach or pass in the vicinity of such prohibited places. Section 3(c) prohibits the publication or communication to a third party any information which 'might' be useful to an enemy. Again it is irrelevant whether the disseminator of the information had any intention to harm or prejudice the state. A possibility that the information may be useful to the enemy is sufficient for the commission of the offence. The restriction of the

[145] The term enemy in section 2 includes a hostile organization. A hostile organization is in turn defined as any organization which is an unlawful organization in terms of the Unlawful Organizations Act or any organization operating in Zimbabwe which is declared by the President, by notice in a statutory instrument, to be a hostile organization on the ground that it is furthering or encouraging persons to commit acts prejudicial to the safety or interests of Zimbabwe.

[146] Supra Note 129, at pg 124.

[147] This is a place where any defense work belonging to, or occupied by or on behalf of the state; any place where ammunitions of war or any other document relating thereto is being built, repaired, made, kept or obtained under contract with or on behalf of the state or of the government of any other country other than Zimbabwe; any place declared by the President in terms of section 13 to be a prohibited place for the purposes of this Act.

public's right to know on the basis that the information published may be useful to the enemy is too vague an abridgement on the freedom of expression.[148] On this note it can be argued that no information from another country is useless. Information can be found useful for many reasons, namely; political, economic etc. This restriction is therefore somewhat absurd and it is also too broadly construed. The law again in this regard, fails to advise the individual '…with reasonable certainty what the law is and what actions are in danger of breaching the law.'[149] The restriction, '…fails for want of proportionality between its potential reach on the one hand and the evil to which it is directed on the other.'[150]

Section 4(1) (c) prohibits the disclosure of government information by government employees even when it does not harm the public interest. State employees are therefore reluctant to offer any information to journalists for fear of criminal sanction. A journalist cannot publish any information received in confidence from a state employee. This means that some tactics of investigative journalism (obtaining the confidence of another) are criminalized. The Act also states that information which is obtained in a prohibited place may not be published.[151] This is a legitimate restriction by the state to prevent any compromise of national security. However, the imposition of 'criminal censure on expression on the basis of perceived breach of trust and confidence, fails to

[148] Supra Note 106, at page 83.
[149] Supra Note 89, at pg 561B.
[150] Supra Note 89, at pg 568.
[151] POSA, section 4(1)(a).

adequately demarcate the area of risk and reign in the use of official discretion as demanded by section 20(1) of the Constitution.'[152]

A person may not use any information which they obtained while employed by the state in a manner which is prejudicial to the interests of the state.[153] It is also a criminal offence to obstruct persons who are on guard in protected areas. The limitations of this Act are restricted by law as per the requirement in the Constitution. The limitations are, however, too broad and oppressive as the reach far exceeds the demands of the objective, which is the prevention of leaking sensitive government information. Basildon Peta, a journalist, was charged under this section for publishing a story which had leaked from a public official stating that the government controlled newspapers, Zimpapers Ltd, were not paying taxes.

3.5 Summary

The right to freedom of expression is protected at both international and regional law. At both levels there are limitations to this right, namely, public order, national security, restrictions provided for by law, respect for the rights and reputations of others, prohibition of propaganda for war and advocacy for hatred and public health and morals. In the imposition of these limitations, the state party must demonstrate that they do not impair the democratic functioning of the society.

[152] Supra Note 106, at pg 85.
[153] POSA, section 4(1)(d)(ii).

The Zimbabwean Constitution also protects the right to freedom of expression. It further provides for limitations to the right. AIPPA, POSA and OSA are among legislation in Zimbabwe impacting on the right to freedom of expression. Provisions in these pieces of legislation however greatly infringe on the right to freedom of expression. OSA for instance was enacted in 1970 by the colonial government and there is a need of the reform of the law. The accreditation of journalists, lengthy period before accessing information of a public body, and the protection of public officials against criticism are some of the areas which need to be revisited by the legislature.

Other legislation regulating the freedom of expression includes the Radiocommunication Services Act, the Preservation of Constitutional Government Act, the Interception of Communications Act and the Protected Places and Areas Act. The Interception of Communications Act allows for government interception of citizens' private telecommunications and mail. This is to be achieved by the establishment of a communication centre to monitor and intercept certain communications in the course of their transmission through a telecommunication, postal or any other related service system. The Supreme Court[154] has in the past stated that freedom of expression includes the right from interference with correspondence. The Minister of Transport and Communication has said;

> It's a regulation with guidelines and the Minister must have reasonable suspicion to warrant the interception of communication. If for example the

[154] S.C 59/2003.

> request comes from the Director General of the Central Intelligence Organisation (CIO), he is not above the law, it could be granted or denied depending on the circumstances.[155]

The Act is vague in that it does not give any guidance as to what a citizen should not do to avoid interception of their mail. This Act is a great inroad in the right to freedom of expression. With regard to mail, the Supreme Court has said that '…the use of the mails is almost as much a part of free speech as the right to use our tongues.'[156]

Rather than granting access to information AIPPA, has been described as turning the business of gathering and disseminating news (journalism) into a privilege. This in turn is itself controlled under the Act by excessively restrictive clauses that carry heavy criminal penalties.[157] The Act not only violates the Constitutional provisions but it also violates the regional and international instruments. The Declaration of Principles of Freedom of Expression in Africa provides that the right to express oneself through the media by practicing journalists shall not be subject to undue legal restrictions. Furthermore, the government is obliged to promote diversity by promoting a range of information and ideas. This is the opposite of what is happening in Zimbabwe as four newspapers have been closed down by the MIC. The same applies to

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[155] Harare Bureau: "Proposed Interception of Communications Bill," in *The Chronicle*, September 05, 2006.

[156] *Milwaukee Social Democratic Publishing Co v Burleson* 255 US 407 (1921) at pg 437, quoted with approval by the Zimbabwean Supreme Court in the case of *Woods and Others v Minister of Justice, Legal and Parliamentary Affairs and others* 1994 (2) ZLR 195 (S) at pg 198B.

[157] *Weekly Mail and Guardian*, "Freedom of Expression and the 2005 Parliamentary Elections," 16 December 2004.

broadcasting; the state owned broadcasting service is still the only broadcaster in the country.

Any regulatory body established to hear complaints about media content, including media councils, shall be protected against political, economic or any other undue interference. Its powers shall be administrative in nature and it shall not seek to usurp the role of the courts.[158] Both the MIC and the Broadcasting Authority of Zimbabwe are appointed by government Ministers who are themselves political appointees. The independence of both these bodies is therefore very questionable. It is recommended that the Zimbabwean authorities put more emphasis on self regulation as this is the best system for promoting high standards in the media.

The defamation laws in the Zimbabwean legal system tilt towards the protection of public figures with criminal sanction imposed on defaming the President and the Acting President. States are however to ensure that laws relating to defamation conform to regional and international standards. Firstly, no one shall be found liable for true statements, opinions or statements regarding public figures which it was reasonable to make in the circumstances. And secondly, public figures shall be required to tolerate a greater degree of criticism. This is however not applied in the Zimbabwean context as journalists face criminal sanctions where they criticise public figures.

[158] Declaration of Principles of Freedom of Expression in Africa, XI (2).

Section 16 of POSA unnecessarily cordons the office of the Presidency, which is a public office occupied by an elected official who is answerable to the public. Every one in a democratic society ought to be equal before the law. Therefore the President, like anyone else should find adequate protection from general laws on defamation in Zimbabwe that address issues of criminal defamation and libel. The late Dr Zvobgo, the then chairperson of the Parliamentary Legal Committee stated that:

> The original bill was manifestly unconstitutional. As a chairman of your committee, I can say without equivocation that, this Bill, in its original form was the most calculated and determined assault on our liberties guaranteed by the Constitution…What is worse, the Bill was badly drafted in that several provisions were obscure, vague, overbroad in scope, ill-conceived and dangerous.

The late Minister's words have been held to sum up the overall picture of the POSA. Before the POSA was passed into law, the Special Representative of the United Nations Secretary General on Human Rights defenders sent an urgent communication to the Zimbabwean authorities. The communication raised concerns that if the Act was passed into law it would not only result in the restriction of freedom of expression but also freedom of assembly and association.

Journalists in Zimbabwe have a responsibility towards ensuring national stability. Some journalists have taken to sensationalizing events in Zimbabwe and giving both the national and international community false information. It is therefore not only the government which has a duty but the media must also apply adequate

self-regulation measures. The overall picture in Zimbabwe is however that the media laws are very repressive. In regulating the use of the rights to freedom of expression and the freedom of assembly and association, the competent authorities should not enact provisions which would limit the exercise of these freedoms. The competent authorities should not override constitutional provisions or undermine fundamental rights guaranteed by the constitution and international human rights instruments.[159]

[159] Civil Liberties Organization vs. Nigeria, African Commission on Human and Peoples' Rights, Comm. No. 101/93 (1995).

Chapter 4

The Zimbabwean Judiciary: scalpel or sledgehammer?[1]

"We will respect judges where judgments are true judgments... but when a judge sits alone in his house or with his wife and says 'this one is guilty of contempt' that judgment should never be obeyed. I am not saying that because we want to defy judges. In fact we have increased their salaries recently. But if they are not objective, don't blame us when we defy them."[2]

President Mugabe

4.1 Introduction

It is no doubt that the judiciary plays a very pertinent role in a democratic state. If the judiciary is not independent its whole purpose is defeated. The judiciary cannot operate effectively in an environment where there is no rule of law. This affects the relationship between the judiciary and the other organs of state. Cooperation between the three arms of the state has to exist for the rule of law to prevail. Each organ has to perform its own functions and not to interfere with those of the other. This entails the legislature and the executive carrying out the decisions passed by the judiciary. The above statement by the head of state however shows that the Zimbabwean judiciary is faced with non-compliance with its decisions by the executive. It implies that the executive is given the power to

[1] In *Smith v Attorney-General, Bophuthatswana* 1984 (1) SA 196 (B) Hiemstra JA, said that in interpreting the Bill of Rights 'the Courts has particular duty as a guardian of liberty, but it has to exercise its powers of controlling legislation with a scalpel and not a sledgehammer.'

[2] Taken from a report of the in Herald 27 July 2002, of the speech made by President Mugabe at a reception to mark the opening of Parliament.

assess judicial judgments and only enforce those it deems ‘true.’ It is also questionable who will then determine whether judges have been ‘objective.’

In order to determine whether the Zimbabwean judiciary is either an instrument of oppressive policies or a neutral and independent arbiter of justice and upholder of fundamental human rights, it is necessary to examine the way in which the legal system operates particularly with regard to the protection of fundamental human rights and freedoms. This entails a detailed analysis of the division of power between the judiciary, the executive and the legislature.

In democratic states where the constitution is the supreme law, an independent and impartial judiciary is one of the fundamental pillars. The concept of judicial independence has its origin in the doctrine of separation of powers. This doctrine essentially requires that different organs exercise the three functions of government. The rationale behind this doctrine is that each organ must act as a check and balance against the possible excesses that may ensue from the autonomy of each organ.

A number of cases will be discussed to illustrate the role that the judiciary has played in protecting the right to freedom of expression. Among the issues raised in these cases will be the remedies granted by the judiciary and the reaction of the executive to them. Moreover, the effectiveness of these remedies will be assessed. It is to be noted that there is a need to protect this right even in volatile

political conditions such as those prevailing in Zimbabwe.[3] An important question to be answered in this chapter is; can the judiciary remain impartial in its adjudication having regard to pressure being exerted on it by the executive and other forces in society?

4.2 The Concept of the State

A state can be described as the 'organized aggregate of relatively permanent institutions of governance.'[4] Currie and De Waal[5] define a state from three different perspectives. Firstly, according to international law, a state is 'an independent, politically organized community living in a defined territorial area.' Secondly, in political science, a state refers 'to the institutions of the government and organized political power.' Finally, constitutional law envisages a state as the organized authority of a particular political community which manages the public affairs of that community, both internally and externally. For purposes of this research the former definition shall be preferred, namely an organized aggregate of relatively permanent institutions of governance.

[3] In this regard Louis Henkin notes that human rights are universal and they are the due of every human being in every society. He further states that human rights know no geography or history, culture or ideology, political or economic system or state of development. Hence the ideal is that human rights be enjoyed in every society despite the political or economic situation, among other things, in that particular country. See Rights Here and There, Vol. 81, 1991 Columbia Law Review 1582.

[4] See The State and Dependant Capitalism, in the International Studies Quarterly 25, No.1 (1981) at pg 106.

[5] Currie and De Waal, Constitutional and Administrative Law Volume 1, Juta, 2002.

For the purposes of maintaining order in the territory, there has to be authority which is distributed among the different permanent institutions of governance. The idea of authority postulates a relationship between the different legs of the state. In this relationship, there is an assumption of different roles played by the different spheres of the state. It is desirable that in the assumption of their roles, the different spheres do not encroach or interfere with one another.

The three organs of state are: the executive, which enforces decisions; the legislature, which is the structure that enacts laws; and the judiciary, which is the mediating body that adjudicates decisions between the organs of state as well as between those organs and individuals. In constitutional states the three organs are all bound by the constitution, which is the *grund* norm binding all facets of the state. It is a chart for the governing bodies, which lays out how authority ought to be divided among them. The exercise of their authority as well as the extent of their power is therefore limited and defined by the constitution.

A constitution is enacted to ensure that law making takes place within approved parameters. This is to ensure that the rights of individuals are put off limits to the whims of majority rule. The constitution must therefore be entrenched to ensure that it is neither easy nor impossible to change. The United States of America constitution, for instance, has been amended only 27 times from 1787. This might be an implication that although the Constitution can be changed it is not

done so with too much ease which might give the majority an avenue to amend it willy-nilly.

The constitution not only states the functions of the different organs of state but it also prescribes the procedures which must be followed when performing these functions. Where these procedures are not followed, then the functions or such conduct will be unconstitutional. However, this is not the case with Zimbabwe. The supremacy clause[6] states that it is only law that is inconsistent with the constitution, which is to be subjected to constitutional scrutiny. Conduct is not included in the ambit of constitutional scrutiny. Delegated legislation, that is proclamations and regulations are put in the ambit of law by section 113 of the Constitution. This, however, implies that discretionary conduct that is not included in legislation cannot be subjected to constitutional scrutiny. Discretionary executive conduct, such as police raids and decisions of administrative bodies, are open to abuse since they cannot be constitutionally challenged. This it may be argued gives too much power to the executive whose conduct is not subject to judicial scrutiny.

The modern constitutional state is characterized by the rule of law and the doctrine of separation of powers. Zimbabwe can also be characterized as a constitutional sate as it is also subject to a supreme constitution. Hence it is important that these two concepts be discussed briefly below.

[6] Section 3 of the Constitution of Zimbabwe.

4.3 The Rule of Law

In defining the rule of law, Dicey[7] advances three essential components of the concept, which he sees as distinct and kindred. The first one is the absence of arbitrary power on the part of government. Thus, when a person is punished, it must be for a distinct breach established in the ordinary legal manner before the ordinary courts of that state. The opposite of the rule of law is the exercise, by persons in authority, of wide, arbitrary, or discretionary powers. Persons in authority must be exemplary by following what the law states and not bending it to suit their own whims. If rulers do not respect the law, it follows that the populace will also have a general disrespect for it.

The rule of law is compromised where the constitution can be easily amended at will and where certain individuals will not be punished when they do not follow or infringe the law. Furthermore, regulations and proclamations, which are issued, must also promote and conform to the rule of law. They ought therefore to be applicable to all persons irrespective of tribe and political affiliation. The clemency orders, which are prevalent in Zimbabwe, are contrary to the requirement of the rule of law. These orders have, in the past, been used to grant amnesty to perpetrators of human rights abuses during the 1988 settlement between ZANU and ZAPU.[8] More recently, they have been granted to issue blanket pardons to ZANU-PF supporters for politically motivated crimes. The

[7] Dicey A. V, An Introduction to the Study of the Law of the Constitution, Macmillan and Co Limited, 1931 at pg 183 – 185.
[8] Clemency Order (1) of 1988.

pardons, which were issued by the President in the aftermath of elections held in the 1990s, only protected supporters of the ruling party, ZANU-PF.[9]

The second conception of the rule of law is that every man is subject to ordinary law administered by ordinary courts. This means that 'no man is above the law, but…every man, whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals.'[10] Supporters of the ruling ZANU-PF party have in the past proven to be somewhat above the law. This is by way of the pardons granted to them by the President and or lack of action by the police against their actions. An example is the death of two MDC supporters, Chiminya and Mabika. Their vehicle was set on fire while they were in it allegedly in the presence of police officers. The perpetrators of this heinous crime were Mwale and Ziminya (CIO operatives and members of ZANU-PF) who were not arrested for the murders they committed.[11] Furthermore, the President of Zimbabwe can in a way be said to be above the law. This is because the Constitution states that the President, in his personal capacity, may not be prosecuted for any breach of the law while he is still in office.[12]

The third conception is that the general rules of constitutional law are a result of the ordinary law of the land. This simply means that the constitution is made up

[9] Saller K, The Judicial Institution in Zimbabwe, Siber Ink CC, 2004 at pg 59.
[10] Supra Note 7 at pg 189.
[11] "Justice in Zimbabwe," 30th September 2002, A report Compiled by the Legal Resources Foundation, Zimbabwe.
[12] Section 30(1) of the Constitution of Zimbabwe.

of judge-made law. This is not necessarily true in the Zimbabwean context although judges, to a limited extent, make the law.

The rule of law requires that all people and institutions alike irrespective of their status in society to respect the law. The principle calls for a predominance of the law as opposed to arbitrary or wide discretionary authority on the part of the executive. It also emphasizes equality before the law. No one should therefore be above the law or pass laws in a manner which is not prescribed by the constitution. The rule of law has been flouted by refusal by the executive to execute court orders.[13] A total state of anarchy was brought into existence by attacks on judges and magistrates by war veterans.[14]

Professor Tony Matthews[15] has updated the traditional rule of law theory as expounded by Dicey in what he describes as the 'protection of basic human rights approach.' This simply means that the operation of the rule of law is restricted to fundamental rights. Cowling[16] argues that this 'approach overcomes the defects inherent in the material justice approach which charges the rule of law with the task of bringing about not only legal, but also social and economic, justice.' He states that although this is admirable, judges are not equipped or

[13] On 21 June 2002 the Supreme Court granted an order for the bail of two MDC supporters. When two MDC officials produced the court order the senior prison officers refused to secure their release. See Supra Note 9, at pg 30.
[14] Supra Note 11. A similar situation also occurred in South Africa where members of COSATU threatened the judiciary with a bloodbath if Jacob Zuma was brought to court. (See *The Zimbabwe Independent*, January 11 to 17 2008, pg 8).
[15] As quoted in Cowling M. G, "Judges and the Protection of Human Rights in South Africa: Articulating the Inarticulate Premiss," South African Journal of Human Rights, 1987 at pg 179.
[16] *Ibid*.

qualified to make decisions concerning the redistribution of wealth, the running of the economy, or the implementation of any other broad political, social or economic programme.

To the executive the rule of law practically means that executive officers and the legislature may only exercise those powers which are conferred on them by the law. This is implemented when the judiciary subjects executive and legislative actions to scrutiny and sets aside all acts that have not been legally authorized. The rule of law therefore requires the executive and the legislature to be just and reasonable, not only from the view-point of majority sentiment but also in conformity with a higher law.

4.4 The Doctrine of Separation of Powers (*trias politica*)

John Locke, who was a proponent of decentralization of power in his Second Treatise of Civil Government, wrote that 'it may be too great temptation to human frailty, apt to grasp at power, for the same person who has the power to make laws, to have also on their hands the power to execute them.'[17] In this statement, he was merely expressing that too much concentration of power in one person or one organ of the state is detrimental to the freedoms of citizens.

[17] Wade E. C. S, and Bradley A. W, Constitutional and Administrative law. Hong Kong: Longman House, 1991 at pg 51.

Montesquieu further developed this theory and four principles have emerged from this doctrine.[18] Firstly is the principle of *trias politica*, which formally distinguishes between the various branches of the state namely, the legislature, the executive and the judiciary. Secondly, the principle of separation of personnel and functions requires that each branch of the state be staffed with different officials. The third principle is the separation of functions which states that each branch of the state is entrusted with its core function, namely, legislation, administration of state affairs and adjudication. The principle of separation of powers is otherwise known as the principle of checks and balances. According to this principle, each organ is entrusted with special powers, to keep a check on the others so that equilibrium in the separation and distribution of powers is upheld.

The constitutional law principle of separation of powers is very relevant to the discussion of the role of the judiciary in democratic states. The principle postulates that although the organs are to be confined to their operation, they are at the same time coordinate components of the state. The decentralization of power aims to prevent potential abuse, which may result from centralization. This is achieved through the structural and functional separation of state authority between the legislature, executive and the judiciary.

The line of separation of powers discussed here is partial and therefore permits some overlapping of powers and functions. This is to ensure that the entire state

[18] Van der Vyver J. D, "The separation of powers," *SA Publiekreg/Public Law*, 1993 at pg 178.

can operate effectively. Examples of such overlapping functions are, firstly, the power of the President, who is a member of the executive, to appoint judicial officers.[19] Secondly, the judicial law making function, although it is limited.

The elementary value of this doctrine lies in the checks and balances, which ensure that the organs of state perform the functions that are required of them. These also guarantee that state authority is not arbitrary but is constitutionally examined. There ought not to be dominance of one branch over another. Judicial control is a tool used for balancing and checking widely dispersed government powers. This does not, however, permit the judiciary to unnecessarily encroach on the proper spheres of the other government organs.[20] In the United States of America, the President serves as the commander-in-chief, but only congress has the authority to raise and support an army, and formally to declare war. However, a lot of debate has been generated on such control by the judiciary, especially in view of the fact that the judiciary is an unelected body and is given powers over an elected body. This is termed the counter-majoritarian dilemma.

The most important requirement of the doctrine of separation of powers is that the judicial authority of the state be truly independent and impartial. This independence and impartiality of the judiciary enables the courts to act as

[19] Section 84 of the Constitution of Zimbabwe.

[20] Mr. Justice Berger (1993, 262) of the Supreme Court of British Columbia once declared: The history of the long struggle for separation of powers and the independence of the judiciary not only establishes that the judges must be free from political interference, but that the politicians must be free from judicial intermeddling in political activities. This carries the important and necessary concomitant result - public confidence in the impartiality of judges - both in fact and appearance. See Labuschagne P, "The doctrine of separation of powers and its application, in South Africa" in *Politeia* Vol 23 No 3 2004 at pg 86.

arbitrator between the different branches of the state, the state authority and the subjects of the state.[21]

4.5 Judicial Independence

Judicial independence is founded on Montesquieu's doctrine of separation of powers. His view that there could be no freedom if the judiciary was not separate from the legislature and the executive paved the way for the modern theory of judicial independence. It has two facets, one characterizing the judge individually and the other characterizing the institution in which he/she functions. This is because judges perform their functions both collectively and individually. In this regard, the Canadian Supreme[22] court held:

> It is generally agreed that judicial independence involves both individual and institutional relationships: the individual independence of a judge…and the institutional independence of the court or tribunal over which he/she presides, as reflected in its institutional or administrative relationship to the executive and legislative branch of government…The relationship between these two aspects of judicial independence is that an individual judge may enjoy the essential conditions of judicial independence but if the court or tribunal over which he/she presides is not independent of other branches of government, in what is essential to its functions, he/she cannot be said to be an independent tribunal.

[21] Labuschagne P, The doctrine of separation of powers and its application in South Africa in Politeia Vol 23 No 3 2004 at pg 90.
[22] *R v Valente* (1985) 24 DLR (4th) 161 (SCC), as quoted in Advocate, Vol. 19 No. 2 August 2006.

These two facets are therefore inextricable as can be seen from the judgment of the court quoted above.

Judicial independence is indispensable for a functioning democratic state that lays claim to respecting the rule of law. It is however practically impossible to achieve this in a state that does not practice democratic values or is autocratic. In such states where the judiciary passes decisions, which are not in favor of the executive, the former is usually subjected to threats and even physical harm by the ruling class and other actors in society. Under these conditions, members of the judiciary will not be free to decide freely and fairly for fear of censure. The appointment of members of the judiciary is also very questionable in such states. In most instances, they are appointed on political lines rather than on merit.

Judicial independence also requires that a member of the judiciary shall, in the exercise of his/her judicial authority, not be subjected to the direction or control of any person or authority.[23] The only exception is where he/she is placed under a law, which directs him/her to the control of another member of the judiciary. Judicial independence essentially entails both the independence and impartiality of the courts. In this regard, Chief Justice Chidyausiku rightly said that:

> We should have an independent judiciary rather than one that panders to the wishes of government. We should have a judiciary that is prepared to make a decision that will be unpopular with the government.[24]

[23] Section 79B of the Constitution of Zimbabwe.
[24] Quoted in the *Zimbabwe Independent* of 12 January 2001.

In whatever environment the judiciary finds itself in, it must always be prepared to interpret the law as it is regardless of any threat to it.

The judicial oath requires judicial officers to apply the 'law without fear favour, affection or ill-will.'[25] Impartiality therefore refers to the state of mind with which the law is applied, that is, with regard to the issues and parties in a particular case, and connotes the absence of bias.[26] An impartial judge is a fundamental prerequisite for a fair trial. If there are reasonable grounds on the part of the litigant to show that the member of the judiciary was not or will not be impartial, he/she must recuse him/herself from the trial. A reasonable suspicion of bias is adequate; the bias therefore need not be real.

Judges must interpret legislation in an impartial manner despite their personal feelings.[27] Where judicial members are influenced by, for example, politics or political affiliation, there will be no impartiality.[28] Hence appointing persons with well known political affiliations and backgrounds to the bench becomes quite questionable. Questions have been raised in Zimbabwe about the appointment of Chief Justice, Chidyausiku to the Supreme Court. Such questions were raised by the political affiliations of the new Chief Justice who is widely seen as a supporter of the ruling ZANU-PF and is a former Minister of Justice.[29] Due to the Chief

[25] Schedule 1 of the Constitution of Zimbabwe; Judicial Oath.
[26] Advocate, Vol. 19 No. 2 August 2006, at pg 35.
[27] *PTC v Retrofit* 1994 (2) ZLR 71 (S) at 73F – 74A.
[28] Gubbay A. R, The Challenge of Independence, Paper delivered at the Inaugural World Bar Conference – Edinburgh on 28 June 2002.
[29] Supra Note 11 at pg 11.

Justice's past position as a political appointee in the executive, it can be reasonably argued that the accusations labeled against the Chief Justice are based on reasonable suspicion. This has led to the credibility of the independence of the newly composed Supreme Court being questioned.

Institutional independence requires that the judiciary must be able to function without interference from the other organs of state. Ideally the judicial institution ought '…not to be tied to the apron strings of the executive; …adequately funded in a way that does not subject the judiciary to be a beggar institution of the executive.'[30] This implies that the judiciary must ideally have its own treasury and not be financially dependent on the executive. If the judicial institution is therefore to be completely independent, it is pertinent that it handles its own financial affairs. It is also recommended that the judiciary have financial autonomy. The central administration of the courts should therefore not be entirely placed in the hands of the executive branch.

In Zimbabwe, like many other democratic countries, the judiciary is dependent on the executive. This is in terms of, among other things, the provision of equipment, stationery as well as the erection and maintenance of court buildings. In instances where the executive is hostile to the judiciary as a result of the decisions it passes, the executive can sabotage the proper functioning of the judiciary. This it can do by, for example, deliberately replacing competent

[30] Eso K, "Judicial Independence in the Post Colonial Era," in Ajibola B, and Van Zyl D, (eds), The Judiciary in Africa, Juta and Co Ltd, 1998 at pg 121.

administrative personnel with inefficient and corrupt ones. It may also neglect the supply of stationery or other facilities to the judiciary.

The Zimbabwean judiciary is particularly affected by the lack of funds. In her speech to mark the start of the legal calendar year, Justice Makarau highlighted the lack of resources that the Zimbabwean judiciary faces. She stated that the courts operate without adequate stationery, computers and libraries "varying in their degree of uselessness."[31] The fact that the Judge President went to the extent of publicly talking about these issues highlights just how serious the situation is, which can be detrimental to the independence of the judiciary. Some judges have greatly compromised their independence by occupying commercial farms that were unlawfully seized from white commercial farmers. In the last part of 2007, magistrates went on strike due to their low salaries.

The individual independence of judges can best be achieved in an environment where there is institutional independence. If the institution is not independent it will prove practically impossible for individual judges to be independent. Institutional independence therefore serves to strengthen the personal independence of individual judges. It can be best maintained and upheld where the members of the judiciary know that the decisions they make will not be frustrated by executive powers. This is particularly significant having regard to the fact that the judiciary is the weakest branch of the state. The judiciary has no

[31] Moyo G, "Your Honour; it's not just About Money," in *The Zimbabwe Independent*, January 19 to 25 2007 at pg 6.

armies to enforce its decisions and is totally dependent on the executive branch for the enforcement of its decisions. The judiciary is rendered useless if it fails to regulate the legality of government behavior or determine significant constitutional and legal issues.

Tenure of office, remuneration and other conditions of service affect the independence of the judiciary. The drafters of the Zimbabwean constitution envisioned these conditions and agreed that they must be statutorily regulated. The retirement age of judges is 65-years[32] and before this age they can only be removed from office for failure to discharge duties of the office.[33] The intention of protecting the above is to render the executive powerless to remove judges they do not want from office.

The Constitution[34] gives certain members of the executive, namely the President and Ministers, powers to legislate. The executive has used these government regulations and proclamations, among other things, to change voting procedures and voting district boundaries.[35] This has often resulted in the reverse of judicial

[32] Section 86 of the Constitution of Zimbabwe.
[33] Section 87 of the Constitution of Zimbabwe.
[34] Section 113(1) of the Constitution of Zimbabwe: "Law means – (b) any provision of a statutory instrument"; statutory instrument is in turn defined as "any proclamation, rule, regulation, by-law, order, notice or other instrument having the force of law made by the President, a Minister or any other person or authority under this Constitution or an Act of Parliament."
[35] Section 158 of the Electoral Act which states that the President "may make such statutory instruments as he considers necessary or desirable to ensure that any election is properly and efficiently conducted…" This is provision is open to grave abuse taking into cognisance the fact that the President is himself politically involved and may therefore issue enactments which are detrimental to the opposition party. The MDC has challenged among others a notice extending the voter registration period from 10 January to 3 March and further authorising the compilation of an unpublished supplementary voters' roll in what was an apparent breach of the Electoral Act.

decisions by the executive. This has the effect of rendering the judiciary redundant more often than naught. The legislative branch of Zimbabwe is also guilty of the same offence.

It aught to be noted that although a judge may be individually impartial, it does not follow that they are independent. An example is when a judicial officer is not insulated.[36] Instances arise when judicial officers are punished for not dealing with political issues in the way sought by the politicians and other actors in society. This will undoubtedly lead to judicial independence being compromised. Furthermore, the judiciary does not have the authority to challenge the legality of other government organs unless such a case is brought before it by a party or parties with *locus standi* before the court.

Members of the judiciary do not however operate in a vacuum and therefore are subjected to a number of external influences such as political and religious pressure. Judicial independence can therefore never be said to be uncompromised in any society. Judicial independence in the strict sense would mean that if the judiciary was the hand then it would detach itself from the body and operate on its own. This is highly impractical; hence the state organs must function in a way that they complement one another without necessarily

[36] Judicial insularity is the notion that judges should not be used as tools to further political aims nor punished for preventing their realisation. Thus judges should not be punished for reaching decisions which are unpopular and the make-up of the courts must also not be altered for political gain.

encroaching on each other's functions, that is coordinate and equal branches of government.

4.5.1 Challenges to the Independence and Impartiality of the Judiciary

In many countries Judges are often subjected to pressures of various kinds aimed at compromising their independence and impartiality. There are various ways in which the impartiality and independence of the judiciary can be tampered with. The most common practices observed in Zimbabwe are as follows:[37]

- Appointment procedures: judicial independence is compromised or undermined where judges are handpicked exclusively by the Executive or Legislature and at times even elected through a process susceptible to political whims of the incumbent government or ruling political party. In Zimbabwe the judges in the higher courts are the most affected by this. Judges are appointed by the President in consultation with the Judicial Services commission. The composition of the panel which appoints the judicial officers at this level does not secure the independence of the bench;[38]

[37] Chimhini S. B, and Sacco S. F, Reference Book on Human Rights and the Administration of Justice, Human Rights Trust of Southern Africa, 2006, at pg 46 – 47.

[38] The President is a political functionary; the Judicial Services Commission is composed of the Chief Justice, who is appointed by the President, the Chairman of the Public Service Commission who is also appointed by the President, the Attorney-General, also appointed by the President and two or three additional members also appointed by the President. The competence of the Judicial Services Commission to appoint an independent judiciary is therefore very questionable.

- Lack of security of tenure, this arises as a result of the ability of the executive and other powerful actors in Zimbabwe to force members of the judiciary to resign;
- Inadequate remuneration may also constitute a threat to the independence of judges in that it may for instance make them more amenable to corruption and in the Zimbabwean case, spend more time on their farms;
- Public criticism by either the Executive or Legislature aimed at intimidating the judges and dissuading them from acting professionally;
- Arbitrary detentions and direct threats to lives of judges, including killings and disappearances. These are not only perpetrated by State authorities but are frequently also carried out by private individuals, either independently or in connivance with bodies such as criminal organizations and drugs cartels;
- Lack of resources which result in the judiciary being dependant on the executive.

Below are some of the decisions passed by the judiciary and the reasoning behind such decisions. These cases and the above considerations will prove or refute the assertion that the Zimbabwean courts are instruments of oppressive social policies' rather than neutral and independent arbiters of justice and upholders of fundamental rights and freedoms.

4.6 *Retrofit (Pvt) Ltd v PTC & Anor* [39]

4.6.1 Introduction

The applicant applied to the Post and Telecommunications Corporation (PTC) for a licence to operate a mobile cellular service. The application was refused on the ground that the PTC enjoyed statutory monopoly, which precluded it from issuing licences to other persons. There were a few exceptions to this rule in accordance with section 26 of the Postal & Telecommunication Services Act. The Supreme Court in an earlier decision[40] agreed that as per statutory interpretation, the PTC was not empowered to licence an applicant to operate a mobile cellular service. The PTC had acknowledged that there was a definite need for a mobile cellular service in the country and that it did not have the capacity to establish one. The applicant then appealed to the Supreme Court challenging the constitutionality of section 26 of the Postal and Telecommunication Services Act and this is the case discussed herein under.

The question raised in *Retrofit (Pvt) Ltd v PTC & Anor* (herein after referred to as *Retrofit*) was whether the monopoly created by the Postal and Telecommunication Services Act interfered with the applicant's right to freedom of expression further than was justified in a democratic society. In an attempt to answer the issue raised, the first question asked was who had *locus standi* to

[39] 1995 (2) 2LR 199 (SC).
[40] *PTC v Retrofit (Pvt) Ltd* 1994 (2) ZLR 71 (S).

bring an application for redress for a breach of the declaration of rights. In answering this question, the court referred to section 24 (1) of the Constitution[41] which gives a person[42] the right to apply to the Supreme Court for redress where the declaration of rights has been or is likely to be infringed. It is only a person who is affected by such law who is entitled to bring such application. The court held that the applicant was affected by the law hence, had *locus standi*.

One of the most important functions of the judiciary is the interpretation of the law and weighing the law against the *grund norm*, i.e. the constitution. In the interpretation of the law, a proactive judiciary will take into cognisance international law and the jurisprudence of international courts and treaty bodies. This is mainly due to the fact that international and regional instruments which a state is party to impose obligations on the state and bestow rights upon the individual which the judiciary has an obligation to protect. This, the judiciary must do despite the conditions that are prevailing in a country. The judiciary therefore has an obligation to protect the rights of the individual at all times directly according to national law and indirectly according to international law.

[41] "If any person alleges that the Declaration of Right has been, is being or is likely to be contravened in relation to him (sic) (or, in the case the case of a person who is detained, if any other person alleges such a contravention in relation to the detained person), then, without prejudice to any other action with respect to the same matter which is lawfully available, that person (or that other person) may, …apply to the Supreme Court for redress."

[42] Person is defined in Section 113 of the constitution as any individual or any body of persons, whether corporate or unincorporated.

4.6.2 The Right to Freedom of Expression

With regard to who is entitled to freedom of expression, the court in this case held that all persons, whether juristic or natural persons are entitled to this right. Hence a corporate entity is protected under section 20(1) of the Constitution and can thus bring applications under section 24 (1) of the Constitution. It was held that the motive behind such application was immaterial. The court relied on the decision of the European Court of Human Rights in *Autronic AG v Switzerland* [43] where it was held:

> In the court's view, neither Autronic AG's legal status as limited company nor the fact that its activities were commercial nor the intrinsic nature of freedom of expression can deprive Autronic AG of the protection of Article 10. The Article applies to 'everyone', whether natural or legal persons. The court has moreover, already held on three occasions that it is applicable to profit making corporate bodies.

Entities and individuals therefore are entitled to their right to freedom of expression irregardless of the motive behind wanting to enjoy that right. This, ought only to be restricted in accordance with the permissible limitations both according to national and international law standards.

As this right is of fundamental importance in any democracy, it must therefore be jealously guarded. This is because it "is the matrix, the indispensable condition of

[43] (1990)12 EHRR 485 at par 47.

nearly every other form of freedom"[44] in democratic societies. The four justifications which give this right such importance and such a high status are:

i) it helps an individual obtain self fulfilment;

ii) it assists in the discovery of truth;

iii) it strengthens the capacity of any individual to participate in decision-making; and

iv) it provides a mechanism by which it would be possible to establish a reasonable balance between stability and social change. [45]

The right to freedom of expression is therefore essential to the enjoyment of other rights associated with democracy, for example, the right to freedom of association and assembly.[46]

The protection of the right to freedom of expression also entails the protection of the means of expression.[47] This is manifested in the freedom to receive and impart ideas and information without interference. This view is supported by *Autronic AG v Switzerland* where it was stated that freedom of expression:

> Applies not only to the content of information but also to the means of transmission or reception since any restriction imposed on the means necessarily interferes with the right to receive and impart information.

[44] Supra Note 30, at pg 211.
[45] See Chapter 2, 2.2.
[46] The African Commission in *Amnesty International v. Zambia*, Twelfth Annual Report of the Commission, Communication 212/98, held that "freedom of expression is a fundamental human right, essential to an individual's personal development, political consciousness and participation in the public affairs of his country."
[47] Supra Note 30 at pg 214.

An important conclusion made by the Supreme Court in Retrofit is that any monopoly, which has the effect of hindering the right to receive and impart information violets the right to freedom of expression.[48] More emphasis should be placed on the effect of the monopoly and not its purpose when deciding whether the applicant's right to freedom of expression has been infringed. The court in Retrofit therefore considered the:

> …injurious consequences of the prevailing inadequacies upon commercial farmers, building contactors, transport operators, journalist, publishers, the manufacturing industry .....and members of both the Zimbabwe Import and Export Association and the Indigenous Business Development Centre.[49]

Based on the effect of the monopoly the court came to the conclusion that the applicant's right had been infringed.

4.6.2.1 Limitation of Rights

In assessing whether a law is a reasonable limitation of a right in a democratic society and that such law is permissible and not arbitrary, the Supreme Court determined whether:

i) The legislative objective was sufficiently important to justify limiting the right;

ii) There was a rational connection between the objective and measures designed to give effect to the right; and,

[48] Supra Note 30, at pg 217.
[49] Supra Note 30, at pg 220.

iii) The means used to impair the right was no more than necessary to accomplish the objective.

It is important to take note of the fact that 'free market competition, not public or private monopoly, almost invariably makes for greater economy.' Hence the submission that a monopoly could lead to less expensive telecommunication services as a result of the avoidance of duplication of services was not an adequate justification according to the Supreme Court. Rather, the Supreme Court stated that the spur of competition should inspire greater efficiency and economy on its part. Where no evidence is adduced to show that a monopoly will lead to the attraction of the investment or that it will attract expertise and subsidiary participation, it should not be maintained. The Court therefore found that the objectives were not adequate to warrant a limitation to the freedom of expression.

To the second question, the Supreme Court noted that a monopoly 'like all power ...is laden with the possibility of abuse, because it encourages sloth rather than the active quest for excellence; ....and it turns to damage the fabric of our economy and our society.'[50] The Supreme Court was not convinced that there was any rational connection between the statutory monopoly, the objectives of viability and economy as advanced by the PTC.[51] There should rather be support for a free market ideology (support for the free exchange of ideas).

[50] In *Berkey Photo Inc v Eastman Kodak Co* 603F 2d 263(1979) at 273, quoted with approval by Gubbay CJ at pg 223 of *Retrofit*.
[51] Supra Note 30, at pg 224.

Competition would bring mobile cellular services to more people and it would in no way restrict the PTC from exercising power over the regulation of the telecommunication market.

The Supreme Court held that the corporation's ability to attract finance would not be negatively affected by a loss in monopoly. The incentive to invest or participate would be grounded upon the corporation's proven ability in the field of telecommunications rather than on the exclusive privilege accorded to it under the law. The various cases quoted by Gubbay C.J revealed that healthy competition unlike monopoly is likely to make service cheaper, of better quality and greater efficiency.

The third question, whether the means used to impair the right were no more than was necessary to accomplish the right was also answered in the negative. It reasoned that such objectives could as easily be achieved without dependence on the monopoly. When balanced against the gravity of the infringement of the fundamental right, the monopoly was found wanting.

4.6.3 Conclusions from Retrofit

The Court in this case raised some very important issues. Firstly, it established that the freedom of expression is to be protected no matter what the motive behind the application for its protection is. Secondly, the right applies to everyone including corporate bodies even if the pursuit for such protection is purely economic gain. Thirdly, it was held that in protecting the right to freedom of expression it is also important to protect the means of such communication.

The Supreme Court, by striking down the telephone monopoly, transcended the content-conduit distinction known to scholars of free expression. In modern technology it is virtually impossible to do away with conduit (the carrying of expression to others) and remain with content. For instance, where one sends a message or speaks over the telephone, any attempt to interfere with such communication is a clear infringement of freedom of expression. But it is highly impractical to say that the entity which provides the communication system, (since it does not itself speak) has no right to institute infringement proceedings. Neither can it be rightly said that any restrictions on such an entity results in the interference with the free expression of the entity. A compromise must therefore be reached. This can best be achieved by doing away with the content-conduit distinction. The distinction, in the light of the high use of the services of such entities for the purposes of expression is illegitimate, and causes many complexities.

What is more important is the high level of scrutiny to which the monopoly was subjected. Governments have utilised communication monopolies as a means to counter dissent. The Zimbabwean government has gone an extra mile by promulgating the Interception of Communications Act (see chapter 2.5 above). This Bill seeks to censure the flow of communication through the interpretation of all communication, which is a 'threat to national security.' The Bill gives the Minister of Information the right to access private phone and email conversations where he/she thinks there is a threat to national security. However, following the *Retrofit* decision one can safely conclude that this Bill will not pass constitutional scrutiny. This is due to the importance, which the Supreme Court placed on the right to freedom of expression.

However, the Supreme Court has been criticised however for failure to provide extensive reasoning from the principles involved, preferring instead to base its conclusions on decisions of other jurisdictions.[52] The decision is however not out of line with comparable overseas jurisprudence hence its legitimacy is guarded. Whether the Supreme Court appreciated or did not appreciate that it was breaking new ground with the content-conduct distinction is of little relevance. This is based on the assertion that a distinction would really diminish the right to free speech. The failure of the Court to take on board the full significance of the

[52] "Freedom of Expression in Zimbabwe and the Telecommunications Monopoly," *International and Comparative Law Quarterly* Vol.46, Part 1, January 1997 at pg 130.

content-conduit distinction may, unfortunately, minimise the value of its decision to other courts.

This case is of great importance in that it emphasised the importance of freedom of expression in a democratic society thereby making a definite move towards the protection of the rights of citizens. The right to freedom of expression was hailed above the interests of the government to create a monopoly thereby protecting its own interests at the expense of access to information to citizens. It is also important to note that the Supreme Court in arriving at its decision relied on cases from both international bodies in its interpretation of substantive issues.

4.7 *Chavunduka and Anor v Minister of Home Affairs and Anor*[53]

4.7.1 Introduction

The appellants in this case were the editor and a journalist (an author of the article leading to these proceedings) of a weekly newspaper, *The Standard*. On 10 of January 1999, the newspaper published an article stating that there had been a failed coup by senior members of the army. The story alleged that 23 members of the Zimbabwe National Army had been arrested in connection with the alleged coup attempt. It went on to say that the general discontentment

[53] 2000 (1) ZLR 55 2 (SC).

obtaining in the army as a result of the war in DRC (with some soldiers allegedly defying orders to go to the DRC) and the mismanagement of the economy were some of the causes of the failed coup. The editor of *The Standard* was arrested on 12 of January and the second respondent turned himself in at the police station on 19 of the same month. The appellants were charged with contravening section 50 (2) (a) of the Law and Order Maintenance Act[54], which states that:

> Any person who makes, publishes or reproduces any false statement, rumour or report which-
>
> (a) Is likely to cause fear, alarm or despondency among the public or any section of the public, or
>
> (b) Is likely to disturb the public peace;
>
> Shall be guilt of an offence and liable to imprisonment for a period not exceeding seven years, unless he (sic) satisfies the court that before making, publishing or reproducing, as the case may be, the statement, rumour or report he (sic) took reasonable measures to verify the accuracy thereof.

A statement is defined in subsection 1 as "any writing, printing, picture, painting, drawing or other similar representation." The main issue in this case was: did section 50 (2) (a) infringe the right to freedom of expression?

The Court found that this section-originated from the Statute of Westminster whose primary aim was to prevent false statements, which threatened national security in a society, dominated by powerful landowners. This was followed by section 10 of the Public Order Act 31 of 1955, which infringed the right to

[54] Chapter 11: 07

freedom of expression. This section was justified by the government of the time as guarding against sensationalist journalism, which would only lead to chaos and disorder. Both these statutes were of little use as such instances never occurred and hence they were eventually repealed. Section 43 of the 1961 Act which is identical to the above sections substituted the word 'likely' with 'calculated' giving the accused person the burden of proving that reasonable steps had been taken to ensure the accuracy of the statement. This was reasonable as it prevented journalists from publishing unfounded articles, which had the potential to harm public order.

In order to secure a conviction of false news crimes, the state has to prove that, not only is the statement false, it must have been published to one or more persons. There has to be a likelihood of the statement actually causing fear, alarm or despondency. It will not suffice if the state merely proved this theoretically. The state has to practically prove that the statement was not only false but it had a likelihood of causing fear, alarm and despondency. In the United States of America there is a totally different version on false news. Justice Powell wrote that 'under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas.'[55] This would therefore mean that false news is totally acceptable in the United States jurisdiction. Hence the judiciary has an obligation to balance between the

[55] Jackson V. C, Tushnet M., Comparative Constitutional Law, Second Edition, Foundation Press, 2006 at pg 1482.

right to freedom of expression and false news that might cause fear, alarm and despondency.

4.7.2 Interpretation of freedom of expression

The Court established that a benevolent and purposive approach had to be taken in the interpretation of section 20 (1) of the Constitution. How is information that the majority terms 'false' to be treated or should the minority view always conform to that of the majority? This question was answered in the negative. The learned judge held that 'mere content, no matter how offensive, cannot be determinative of whether a statement qualifies for the constitutional protection afforded to freedom of expression.'[56] The Supreme Court in this instance again highlighted the importance of the right to freedom of expression.

The Court quoted with approval the case of the infamous David Irving who alleged that the holocaust never happened and that it was a myth "perpetrated by a worldwide Jewish conspiracy." In this case the Canadian Court held:

> The guarantee of freedom of expression serves to protect the minority to express its view however unpopular it may be...viewed thus a law which forbids expression of a minority or 'false' view on pain of criminal prosecution and imprisonment on its face, offends the purpose of the guarantee of free expression.[57]

[56] Supra Note 53 at pg 558.
[57] *R v Zundel* (1992) 10 CRR (2d) 193 (Can SC) at pg 206.

It is important to note that what the majority deems to be truth does not need any constitutional protection. This is because it is generally accepted and it will not be subjected to any censure. It is what is deemed to be false (or the minority view) by the public that needs constitutional protection. Freedom of speech therefore ought to include saying those things, which other people do not want to hear. David Irving rightly stated that 'freedom of speech is the right to be wrong... there is not much point in protecting speech that does not need protection.'[58]

The discussion of the publication of false information not favourable to the majority leads to the Cartoons on the Prophet Mohammed. These were a series of twelve cartoons published in September 2005. One of the cartoons showed the Prophet Mohammed wearing a turban shaped as a ticking bomb. This led to mass demonstration (where violence was at certain instances employed) in the Muslim world. Some have argued that this was very primitive considering that there are courts, which deal with such issues.[59] This case however highlights the need to balance between freedom of expression and speech that can potentially cause harm in society.

The European Court of Human Rights in *Handyside v The United Kingdom* [60] noted that freedom of expression must not be restricted to information or ideas that are favourably received or regarded as inoffensive. Protection must also be

[58] Sunday Times Foreign Desk, I won't be silenced says Holocaust Denier Irving, in The Sunday Times, 26 February 2006.
[59] Gemie S, Cartoon Conflict, New Internationalist, May 2006, at pg 30 – 31.
[60] (1979-80) 1 EHHR 737 at 754 par 49.

given to those statements that offend, shock or disturb the state or any sector of the population. Such are the demands for pluralism, tolerance and broadmindedness to flourish, without which there is no democratic society.[61] With this in mind, being offensive is therefore not a crime but is couched within the confines of the right to freedom of expression.

The Supreme Court in what was a very important advance of the citizens' right to freedom of expression ruled that section 50 (2) (a) of the Law and Order Maintenance Act did offend section 20 (1) of the Constitution (C*havunduka*). This provision was said to be a curtailment of free expression with particular reference to the seven-year jail term imposed on a person who published a false statement.

As important as the right to freedom of expression is, it is also subject to limitations. Even the Mohammed cartoonist had to bear that in mind. The adage that 'you can't shout fire in a crowded theatre' is an example of a restriction on the right to freedom expression. Journalist and the public therefore have a responsibility in as much as they have a right with regard to freedom of expression. Naeem Jeenah states:

[61] In *Publications Control Board v William Heinemann Ltd and Others* 1965 (4) SA 137 (A) at 160E-G Rumpff JA held: 'The freedom of speech – which includes the freedom to print – is a facet of civilization which always presents two well-known inherent traits. The one consists of the constant desire by some to abuse it. The other is the inclination of those who want to protect it to repress more than is necessary. The latter is also fraught with danger. It is based on tolerance and is a symptom of the primitive urge in mankind to prohibit that which one does not agree. When a Court of law is called upon to decide whether liberty should be repressed – in this case the freedom to publish a story – it should be anxious to steer in the course as close to the preservation of liberty as possible. It should do so because freedom of speech is a hard-won and precious asset, yet easily lost.'

> But can freedom of expression be a carte blanche right to be used by the racists and xenophobes to perpetrate violence? I can't openly drink beer in the streets of New York or walk the malls of Johannesburg naked. If I can be punished for impinging on public space, should I not also be subject to limitations for the hate speech against religious cultural groups… The double standards go further: Islamophobia must be allowed because of freedom of expression, but Holocaust denial is a criminal offence in some European countries.[62]

The limitation of freedom of expression is therefore clearly justified as long as the ground for such justification are found in section 20 (2) (a) of the Constitution.

The Court had to determine whether constitutional provisions justified the limitation. The first question to be asked was whether any law justified the restrictions of freedom of expression. Two requirements ought to be fulfilled before conduct can be said to be prescribed by the law.[63] Firstly the law must be accessible to the citizen. The second requirement is that the law must be formulated with sufficient precision, which will enable the citizen to regulate his/her conduct. It is not enough for the citizen to know what the law is, they must also know with reasonable certainty what actions amount to breaking the law. Due process demands that the terms of law must not be vague. In the same vein, the rule of law requires that all persons are entitled to be informed of what the state commands or forbids. Indeed if a 'statute forbids or requires certain action in terms so vague that man (sic) of common intelligence must necessarily guess

[62] Jeenah N, "Cartoons Expose the Immaturity of Civilisation," *Pretoria News*, 10 February 2006.
[63] The court quoted the case *Sunday Times v the United Kingdom* (1979-80) 2 EHRR 245 at 271 par 49.

at its meaning and differ as to its applications', this will be in violation of the due process of the law.[64]

Section 50 (2) (a) was described by the Court as a speculative offence due to its vagueness. The Court observed that the section created an offence out of conjectural likelihood of fear, alarm or despondence. This could arise out of the publication of any statement, rumour or report even to a single person whether or not it led to actual fear, alarm or despondence. The likelihood requirement of section 50 (2) (a) was held to be vague as it left a person guessing what action would lead to sanction. Furthermore, this restricted freedom of expression because people would rather reserve their right to express themselves than face the possibility of serving a seven-year jail term.

Section 50 (2) (a) placed a great burden on journalist and newspapers on how to write and publish their articles. The style of writing would then exclude sarcasm, rhetorical devices, figures of speech as well as comedy, all which are forms of superficially false statements. It also meant that the publication or expression of one's opinions,[65] if it was considered by relevant authorities to be false, was criminalised. Negligence also sufficed or was criminalised as actual knowledge was not a condition. This therefore meant that all the news worthy articles (i.e. articles that attract readers) in newspapers were effectively criminalised as journalists could not use certain language devices in the articles they wrote.

[64] Supra Note 55 at page 562 - 563.
[65] See Irving, supra note 58.

Granting the authorities such wide discretionary powers might actually lead to the abuse or manipulation of power. This will essentially mean that the authorities choose what the public can or cannot read. The market place of ideas theory, however, demands that the truth ought to fight its own battles and authorities do not have to put a protective fence around it. If it is truth then such information ought to emerge as such among the different and varying ideas in the market place of ideas. Both false and true information must therefore be left to compete in the market place of ideas. This ought to be so in all-mature and stable democracies. In politically volatile environments, such as the one prevailing in Zimbabwe, citizens and journalists in the expression of their ideas must take greater care. This is so because in such sensitive areas any sensationalisation of news by journalist might actually lead to public violence and disorder. However, the fact remains that legislation must be sufficiently precise even in such environments.

The Court held that section 50 (2) (a) failed to sufficiently and precisely demonstrate to the average intelligent person what conduct was permissible. This was so because the breadth of the section was too wide. Compared with section 181 of the Canadian Criminal Code, the section was said to be more far-reaching than that of the injury or mischief to a public interest in the latter.

The limitation of freedom of expression must not incidentally affect one of the six legitimate limitations as stipulated in the constitution. Rather it must be primarily

directed at the aim, or the overriding objective which it seeks to achieve. The aim of section 50 (2) (a) was to ensure that public order and safety were not jeopardised by irresponsible journalists and rumourmongers. As section 50 (2) (a) has the legitimate aim of protecting public safety, a charge could be laid under it. The court therefore found that section 50 (2) (a) legitimately made provisions in the interest of public safety or public order.

The state failed to discharge the burden of establishing that the section was pressing and substantial in a democratic state. The answer to the first question was that the objective of section 50 (2) (a) was not sufficiently important to warrant overriding the freedom of expression. With regard to the second question it was held that there was no rational connection between the objective and the measures used to give effect to it. The court held that there were other less arbitrary, unfair and invective ways of achieving a legitimate curtailment of freedom of expression. An important observation by the court was that false news provisions did not exist in most democratic states. Where such provisions existed, they were more finely tuned to a legitimate aim and their ambit was narrow.

The reach of section 50 (2) (a) also failed for want of proportionality between its potential reach on the one hand, and the evil to which it is claimed to be directed, on the other. The ambit of the section was said to be overbroad and went further than was necessary in achieving its aim. Lies ought to be left to civil wrongs

except where they are serious forms of improper speech, which should be subjected to criminal sanction. Who determines what amounts to serious misconduct is yet another debate which the Supreme Court did not delve into. But in determining the above, the minority must be considered as it needs more constitutional protection than the majority.

4.7.3 Conclusions from Chavunduka

The ruling of the Supreme Court was that section 50 (2) (a) of the Law and Order Maintenance Act did infringe the right to freedom of expression and was not justified by section 20 (2) of the Constitution. The Court set good precedence to be followed in other decision by pointing out to the legislature that when enacting statutes it must finely tune the provisions to the latter. This case also made great inroads on the protection of journalism as it is known in democratic states. Journalism is not about reporting news that is agreeable to the majority. It involves reporting on news that maybe offensive to some parts of the public within the limitation set out in section 20 (2) of the Constitution. Journalism, and indeed speech by ordinary citizens, must be protected even where it is one's opinion and includes sarcasm. In the words of David Irving,[66] freedom of expression does include the right for one to be wrong.

[66] Supra Note 58.

The most important principle expressed in this case is that all democratic states ought to have a vibrant market place of ideas where even false statements, which do not amount to hate speech, are allowed into the market. The government is not given the right to choose for people what they ought to hear, this would be an encroachment of one's individual liberties.

4.8 Associated Newspapers of Zimbabwe (Private) Limited v (1) The Minister of State for Information and Publicity in the President's Office (2) Media and Information Commission (3) The Attorney-General of Zimbabwe[67]

"It is not the function of the courts to support the government of the day, or the would be government of tomorrow. It is not their function to support the State against the individual. The courts' duty is to the law alone. Judges, as individuals, have their own political, legal and social views and opinions. But it is the sworn duty of every judge to apply the law, whatever he or she may think of the law."[68]

4.8.1 Introduction

The atmosphere with regard to the freedom of expression in Zimbabwe was very tense right from the time when the ruling party had what one can call a strong

[67] Judgment No. S.C.20\03 (Hereinafter ANZ Case).
[68] Ebrahim JA in *Minister of Lands & Others v Commercial Farmers Union* 2001 (2) ZLR 457 (S) at pg 490G-H.

opposition. Independent newspapers also emerged at the same time and in 2002, the infamous Access to Information and Protection of Privacy Act (AIPPA) came into force. It has been argued that this was a ploy by the executive arm to put an end to any dissenting views from independent media houses and journalists. This is due to the stringent restrictions that were placed on both journalists and media houses by this Act. Despite the national and international criticism this Act was still passed into law. The Act was amended 36 times before a new version was brought before the Parliamentary Legal Committee, and even after that the Committee did not approve of the Act.

When AIPPA was passed, it introduced a requirement that a mass media owner had to register in terms of the Act in order to carry out the activities of a mass media service.[69] The Associated Newspapers of Zimbabwe (Private) Limited, which was a corporate company that owned and published *The Daily News*, refused to register on the ground that the new piece of legislation was unconstitutional and infringed the right to freedom of expression. The registration of mass media services is not peculiar to Zimbabwe, it is also required in countries like Swaziland,[70] South Africa,[71] Namibia,[72] Tanzania[73] and Zambia.[74]

[69] Section 66 of AIPPA.
[70] Print publications are controlled by the Proscribed Publications Act 1968 which gives the Minister of Public Service and Information (section 3) power to suspend any publication deemed prejudicial to the interests of defence, public safety, public order, morality or public health.
[71] Newspapers are required to register in accordance with the Imprint Amendment Act, 1994. This is however for purely administrative purposes.
[72] The registration of Newspapers in Namibia is regulated by the South African Newspaper and Imprint Act. The newspaper registration system is not onerous for the media as it is of a simple and purely technical nature.
[73] Pursuant to the Newspapers Act, 1976, newspapers must register with the Registrar of

The Associated Newspapers of Zimbabwe was however against registration in this particular case for a number of reasons. One of these reasons was that the Minister of Information and the Media and Information Council (MIC) had shown or exhibited bias as well as partisanship hence the real purpose of such registration was to stifle any opposition against the government.

The Associated Newspapers of Zimbabwe therefore stated that their refusal to register was not a rejection of any form of registration but rather it was a protest against the manipulation of the law for political ends. The reasons for the justification of this conclusion were, firstly, that the Minister is the chief propagandist of the government and his portfolio entails selling as well as defending the government hence his work would be made easier by the enactment of such a law. Secondly, the rate at which the Bill was fast tracked through parliament in disregard of the recommendations of the Parliamentary Legal Committee which had stipulated that more that half of the provisions in the Act were unconstitutional.

Thirdly, the statements of the Minister of Information in the government press left no doubt that he could not be trusted with applying controls that affected the private media impartially. The Minister of Information went on to appoint questionable characters to the MIC which further made the application of the law

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Newspapers who is appointed by the Minister responsible for matters relating to newspapers. Registration is permanent.

[74] The Printed Publications Act, Cap.161 requires that all Newspapers must be registered with the Director of the National Archives. Such registration is permanent and newspaper registration system is not onerous for the media.

quite biased. Due to the above reasons, the Associated Newspapers of Zimbabwe therefore sought a remedy through the Supreme Court as registration would be tantamount to the taking away of its freedom of expression.[75] The Supreme Court is given the mandate to grant effective remedies to people whose rights have been or are being violated or where it is likely that they will be violated.[76] The right to freedom of expression is one of the rights given constitutional protection.

In 2002, *The Daily News* was arguably the most popular independent newspaper among the Zimbabwean population. It provided information, which was not printed in the government newspapers, namely *The Herald* and *The Chronicle*. The case in question did not deal with the right to freedom of expression in detail although it is raised. It mainly dealt with the 'clean hands' doctrine. This case is discussed in this dissertation as it has a very significant impact on the protection of human rights in Zimbabwe, more so the right to freedom of expression.

[75] Uriri L, "The Sacred Cow Untethered! A No Hands Barred Critique of the Supreme Court Decision in *ANZ v Minister of Information and Publicity in the President's Office and Others* in Access to Justice Series Under Siege? Freedom of Expression in Zimbabwe The ANZ Saga," Zimbabwe Lawyers for Human Rights, at pg 34.

[76] Section 24 of the Constitution of Zimbabwe. In the case of *United Parties v Minister of Justice, Legal and Parliamentary Affairs & Ors* 1998 (2) BCLR 224 (ZS), this was interpreted to mean that there must be a reasonable, realistic or appreciable probability and not merely a reasonable possibility of the rights of the person.

4.8.2 Main Grounds for Challenge in the ANZ Case

After the coming into force of AIPPA in 2002, the ANZ, a newspaper company which operated the popular daily, *The Daily News* and *The Daily News on Sunday* which was a weekly publication, did not register with the MIC as required by AIPPA as it felt that its rights would be severely infringed. This was not only due to the restrictive provisions of the Act but also due to the partisan bias which the Minister and the members of the Commission, more so the Chairperson, had exhibited.

In the case, the Associated Newspapers of Zimbabwe applied to the Supreme Court for an order declaring certain provisions of AIPPA which required all print mass media to register with the MIC as a precondition to operating in the country. The main reason for the Associated Newspapers of Zimbabwe application was that the piece of legislation was open to abuse by the ruling party, which intended to silence the independent press and restrict access to information by the public. They also argued that the MIC, which was to be appointed by a Minister who had publicly expressed antipathy towards the private media, was also likely to be biased.

In essence the Associated Newspapers of Zimbabwe argued that AIPPA in general terms unduly restricted the enjoyment of the right to freedom of expression by the citizens of Zimbabwe. As a result of this allegation, the

Associated Newspapers of Zimbabwe refused to comply with the requirements of the law and brought the matter before the Supreme Court. The sections that were challenged in this case included sections 39, 40, 41, 65, 66, 70, 71, 80 and 89.

4.8.3 The Clean Hands Doctrine

The clean hands doctrine traditionally emanates from equity. Equity refers to a select set of remedies and associated procedures and normally these are distinguished from the legal ones. Generally an equitable relief is available where a legal relief is inadequate or insufficient in some way. The distinction between law and equity arose in England where there were separate courts for law and equity. This distinction was necessary to ensure fairness, which would be hampered by the confines of the old common law or the technical requirements of the law. Today there is however no such distinction and the courts of law can also prescribe an equitable remedy.

According to the clean hands doctrine, a party cannot seek equitable relief or assert an equitable defense if that party has violated an equitable principle such as good faith.[77] This doctrine is very controversial particularly in public law where the responsibility of the state is not engaged where the complaint has acted in

[77] Black's Law Dictionary, 2000.

breach of the law of the state.[78] This doctrine should however be applied cautiously especially where fundamental human rights are in question. It is also important to note that this principle is not a rule of law.

The clean hands doctrine has also arisen in other jurisdictions. In the United States of America, the Supreme Court[79] has held that in constitutional cases, the most important consideration must be to uphold the rights of the litigant, which cannot be forfeited because his hands are dirty. In this case, the defendants (who were accused of murder) attempted to bribe the judge who subsequently sentenced them to death. The defendants then applied for the decision to be set aside as their right to a fair trial had been compromised. The decision was set aside based on the fact that although the corruption of their trial was their fault that did not mean that they should be deprived of their constitutional protection. Execution of the defendants in this case would have essentially meant that they had been executed for bribery.

The European Court of Human Rights in the case of *Van der Tang v Spain*,[80] also rejected the dirty hands doctrine. In this case a Spanish national complained of the length of pre-trial detention, which was unreasonable. The applicant however once granted bail absconded and avoided trial. The Spanish government relied on the international law clean hands principle according to

[78] Magaisa A. T, Clean Hands? Thou Hath Blood on your Hands: A Critique of the Supreme Court Judgement in the ANZ Case, in Access to Justice Series; Under Siege? Freedom of Expression in Zimbabwe The ANZ Saga, Zimbabwe Lawyers for Human Rights at pg 8.
[79] *People v Hawkins* 181 Ill 2d 41 NE2d 999 (1998).
[80] (1996) 22 E.H.R.R. 363.

which the state could not be held accountable where the complainant has acted in breach of the law. The European Court however held that, the violation of the right of the applicant came before the breach of the law. It was held that the applicant was entitled to the rights and freedoms, which were accorded to them according to the European Convention. The overriding consideration in this case was that the fundamental rights of the applicant must not be violated.

The South African courts have rejected the clean hands doctrine. In the case of *Treatment Action Campaign v Rath and Others*[81] the court held that:

> …that as a result of the abuse of the Minister, any other person can now with impunity make defamatory allegations concerning the TAC and do so repeatedly. This proposition is not supported by any authority and has no foundation in law.

It can be concluded that the court meant that the fundamental rights of a person cannot be ignored simply because that person was also in breach of the law. Even if such person did not abide by the law, their fundamental rights were still to be respected.

4.8.4 Impact of the decision on the protection of human rights

Chidyausiku, C.J, stated that he was not persuaded by the argument that the principle of dirty hands only applied to those litigants whose conduct is tainted

[81] C2807/05 at pg 9.

with moral obliquity. He held that *Deputy Sheriff, Harare v Mahleza & Anor*[82] was not an authority for the principle that relief was only guaranteed for those litigants whose conduct lacked probity or honesty. He also stated, quoting the case of *S v Neill*[83] and *S v Nkosi*,[84] defiance of court orders, which according to him was the same as defiance of the law, would result in the court not granting relief to a litigant until such defiance was purged.

The Court however held that a citizen who disputes the validity of the law must obey it first and contest it afterwards. It reasoned that where citizens were only bound by those laws which they considered constitutional, it would result in chaos and a total breakdown of the rule of law. In reaching this decision the Chief Justice relied on the case of *F. Hoffmann-La Roche & Co A.G. and Others v Secretary of State for Trade and Industry*.[85] In this case Lord Denning M.R. held:

> So long as that order stands, it is the law of the land. When the Courts are asked to enforce it they must do so…they [applicant] argue that the law is invalid; but unless and until these courts declare it to be so, they must obey it…they must obey first and argue afterwards.

The Associated Newspapers of Zimbabwe was therefore obliged to obey the law before bringing a constitutional challenge against such law.

[82] 1997 (2) ZLR 425 (HC).
[83] 1982 (1) ZLR 142.
[84] 1963 (4) SA 87.
[85] (1975) AC 295.

Professor Geoff Feltoe[86] however is of the view that the court should not have relied on the *Hoffmann* case as this case is not constitutional in nature and the dirty hands principle was not at issue. He states that:

> The main issue was whether the Crown was obliged to give an undertaking to pay damages in the event of the statutory instrument in question being later ruled to be invalid. It was in this context that the court made its statements about the presumptive validity of laws, and the obligation of the company to obey the law without stipulating conditions for compliance.

He further goes on to say that the court in the *Hoffmann* case did not mean that citizens should comply with a law which violates their rights before raising the issue with the courts.[87]

It is also important to note that the *Hoffmann case* was neither raised by the applicants nor the respondents. Concerning this matter, Justice Dumbutshena in this regard stated:

> It would be wrong for judicial officers to rely for their decisions on matters not put before them by litigants either in evidence or in oral or written submissions. Now and again a Judge comes across a point not argued before him by counsel but which he thinks material to the resolution of the case. It is his duty in such circumstances to inform counsel on both sides and invite them to submit arguments either for or against the Judge's point. It is undesirable for a Court to

[86] Feltoe G, "Whose Hands are Dirty? An Analysis of the Supreme Court Judgement in the ANZ Case," Case note Commissioned by the Media Monitoring Project Zimbabwe (MMPZ) at pg 7.
[87] Ibid.

deliver a judgment with a substantial portion containing issues never canvassed or relied on by counsel.[88]

In the ANZ case, the court did not allow the parties to advance arguments on this case which it raised during the judgment. This, it can be argued was a procedural error which possibly led to a wrong decision being made.

In normal criminal proceedings, when a constitutional issue is raised, such issue is taken to the Supreme Court for determination. Normally the criminal case is halted pending the outcome of the constitutional matter. Just as the lodging of a challenge to a criminal provision will halt the criminal process until the constitutionality of the provision is determined, so too a constitutional challenge prior to a prosecution under a law that contains penal sanctions for failure to comply with it should freeze the application of the law until the constitutionality of the law has been determined.[89] The Supreme Court, despite the lack of compliance with the law by the Associated Newspapers of Zimbabwe, was in the same vein supposed to determine the constitutionality of the Act.

A law which is unconstitutional is null and void as per section 3 of the Constitution of Zimbabwe. Such law or act is *void ab initio*, which means that the nullity of the act has retrospective effect. Adopting the attitude of the Supreme Court that the law is valid until it is declared unconstitutional would alter the

[88] *Kauesa v Minister of Home Affairs & Ors* 1996 (4) SA 965 (NmSC) at 973-974.
[89] Supra Note 85 at pg 13.

declaration to voidable and not void. This is not in line with the requirements of section 3 of the Constitution.[90]

The requirement that a litigant complies with an unconstitutional piece of legislation means that such litigant is denied access to a right s\he is entitled to. In the *ANZ case*, if the applicant had complied with the law and closed down the newspaper pending the ruling of the Supreme Court, this would have resulted in serious financial loss. On the other hand, if the Associated Newspapers of Zimbabwe had decided to register it would have wasted time and effort spent during registering. Also in the event that the Associated Newspapers of Zimbabwe followed the advice of the court and 'purged its actions,' the registration would have been difficult as the MIC might have had prejudice against the media owner.

It is the duty of the Supreme Court to deal with all serious constitutional issues which are brought before the court. Section 24 (4) (b) gives the Supreme Court powers to throw out any litigation that is vexatious. Where a litigant brings spurious constitutional challenges to avoid complying with the law, the Court can use this section to throw the case out of court. In cases involving fundamental

[90] In *Macfoy v United Africa Co Ltd* [1961] 3 ALL ER 1169 (PC) at 11211, Lord Denning stated 'If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado, although it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse.'

rights such as the *ANZ case* the Court is obliged to hear and make rulings on such matters.

Similarly, it does not make sense that when citizens are faced with laws that violate their freedom they should just sit back, accept the violation and argue afterwards. This would serve the interests of the state rather than the interests of the citizens of such a state. In a situation where a person is arrested for not complying with a certain law, and then the accused person claims that the law is unconstitutional, will the court then seek to determine if such a person has clean hands? As per section 24 (1) of the Constitution, a person is allowed to challenge an act at any stage and the court should give such person an audience. Future contraventions do not have to be real; there should simply be a likelihood which is realistic. The principle of 'lose your rights first and complain later' is very detrimental to the protection of the rights of the citizens. If the Constitutional rights of citizens are made subject to acts of parliament, the constitution would then become a worthless piece of paper.

In response to the two reasons advanced by the applicant as to why the court should exempt it from the dirty hands doctrine, the learned Chief Justice held that the disclosure by the applicant of the defiance of the law was inadequate 'to purge the applicant's contempt of the law.' It was held that the applicant had no alternative but to disclose to the court and it was during such disclosure that the

court would then raise the dirty hands doctrine. Relying on the case of *Mahleza*[91], the court held that the applicant could not claim any credit for the disclosure of something which was obvious.

To the second reason, the court held that section 66 of AIPPA and the other impugned sections were not blatantly unconstitutional. It was stated that had the sections been patently unconstitutional the court might have been persuaded. The sections were said to be debatable and they required careful consideration to determine their unconstitutionality. The fact that the applicant was the only conscientious objector of the law (other mass media service owners had complied with the law) also led the court to believe that the sections in the Act were not so morally repugnant. If that had been the case, other mass media service owners would have refused to comply with its requirements.

The reasoning of the court with regard to 'blatant unconstitutionality' is at most boggling. The Court held that if 'the impugned section was patently unconstitutional the court might be persuaded' to consider the matter. The question however would be raised how such unconstitutionality is determined. It is only upon careful consideration of the arguments raised by the parties that constitutionality can be determined. To say the least, the phrases used by the court are very strange. A constitutional provision is either constitutional or unconstitutional; the degree of such unconstitutionality is irrelevant.[92]

[91] Supra Note 85.
[92] Supra Note 85, at pg 18.

The decision of the court was therefore that citizens were obliged to comply with the law and argue afterwards. The Chief Justice emphasized that the applicant was not barred from approaching the court, but it was required to comply with the law and approach the court with clean hands. The ANZ could therefore simply desist from carrying out the services of a mass media service and not necessarily register.

It must be noted that a person can suffer grave harm where they ought to comply with a law that is unconstitutional. The courts therefore ought to allow a person to bring a case before it where there is an allegation of unconstitutionality. On this basis, it is debatable if the decision is based on 'sound authority and common sense' as the court did not cite authority to show that a litigant may be denied their constitutional right because they have dirty hands. Authority from different jurisdictions however shows that litigant's fundamental rights are to be considered by the courts despite the dirty hands principle.

4.8.5 Conclusions from ANZ

It is important to note that the focus of constitutional rights protection is not on the guilt of the applicant but the constitutionality of laws or policies of the state. When proceedings are brought before the court it therefore ought to determine the constitutionality of the issues rather than focus on the guilt of the litigant. This is

so because in most cases litigants are guilty of contravening the acts they claim to be unconstitutional.

This case was about the role of the judiciary in protecting the fundamental rights of citizens (freedom of expression being one of them). It can be argued that the guilty party also indeed qualifies for constitutional protection. This case shows that the court was willing to pay allegiance to parliamentary legislation at the expense of the rights which have been guaranteed by the constitution (the courts being the custodians of the constitution). This was arguably a great setback for the protection of human rights by the Zimbabwean courts, more specifically the right to freedom of expression.

This case therefore means that citizens are to give primary allegiance to parliamentary legislation rather than to the constitution. This case also had adverse effects on the citizens who were denied the right of access to information by the closure of *The Daily News*. This judgment has various implications,[93] among others, the violation of separation of powers. This is because in concurring with the Minister that the ANZ should submit itself to AIPPA, the Supreme Court conspired, with rather than checked, the legislature in infringing the rights of the Associated Newspapers of Zimbabwe.

[93] Maanda T, "An analysis of the Supreme Court in the ANZ Matter as Read with the Constitution of Zimbabwe and AIPPA," infra note 84.

The case also undermined the paramountcy of the constitution by giving primary allegiance to parliamentary legislation. Furthermore, there were flaws in the reasoning of the court. The court did agree that the constitutionality of the sections brought before it were debatable but still refused to make a ruling on these sections. The court also acted *ultra vires* its powers under section 24 (4) 'to make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of the Declaration of Rights.' The Supreme Court has therefore no option but to enforce the right of the aggrieved party as stipulated in the Declaration of Rights. This, sadly, did not happen in the *ANZ* case

4.9 (1) Association of Independent Journalists (2) Abel Ticharwa Mutsakani (3) Vincent Kahiya v (1) The Minister of State for Information and Publicity in the President's office (2) Media and Information Commission (3) The Attorney General of Zimbabwe.[94]

4.9.1 Introduction

This case again brought into question the constitutionality of AIPPA. This was another case which put yet another nail to the coffin of the right to freedom of expression, especially with regard to the right 'to say, to hold opinions and to

[94] Judgment No S.C.136\02.

receive and impart information without interference.'[95] In short this is the practice of journalism. The court stated that for persons to practice the rights laid out in section 20 (1) of the Constitution, they had to be accredited.

Accreditation of journalists is recognized the world over as a system by which journalists are given the right to access meetings and places to which access is ordinarily restricted. This is so that they may report on such meetings in the public interest, e.g. access may be granted to journalists to Parliament so that they may report publicly on this important body.

AIPPA grants accreditation to journalists for a period of one year. It is important to note that the system of accreditation is compulsory; hence journalists cannot practice journalism without accreditation. The MIC is tasked with the accreditation of journalists which is made subject to the approval of the Permanent Secretary of Information and the Minister of Information. This opens a route for abuse by the executive arm of government as well as the ruling party (these two are members of the ruling party).

The Association of Independent Journalists of Zimbabwe (IJAZ) and two other independent journalists brought a case against the Minister of Information, the MIC and the Attorney General, alleging that certain provisions of AIPPA were unconstitutional. The applicants contended that these sections constituted a violation of the applicant's right to say, receive and impart information and ideas

[95] Section 20 (1) of the Constitution of Zimbabwe.

without hindrance or interference. Section 79 of AIPPA allegedly contravened the rights of the applicants to be heard before a decision affecting their rights was heard. It was also alleged that section 79 read with section 91 was unconstitutional. Furthermore, section 79 was said to confer to the Minister too much power in the licensing system for journalists.

The assertion by the applicants was that the sections alleged to be unconstitutional fell outside the permissible limitations as spelt out in section 20 of the Constitution and thus they were null and void. Furthermore, the sections were said to be excessively broad and unnecessary in a democratic society.

The applicants were of the opinion that journalism was different from other professional practices like medicine and law hence should not be subjected to such stringent statutory requirements. They also contended that journalists like other professions, e.g. the Architects Council of Zimbabwe, Council of the Institute of Chartered Secretaries and Administrators and the Council of the Law Society of Zimbabwe, had a right to be governed by democratically elected bodies and not those imposed on them. They stated that self-regulation was one of the major features of a profession. The applicants alleged that the MIC was not independent hence self-regulation was the preferred option among journalists.

The applicants further argued that there was no need for the statutory protection of the dignity and reputation of others as this was already provided for in common law. According to the applicants, there was no difference between freedom of expression and freedom of the press. Attacking freedom of the press and denying having attacked freedom of expression was said to be tantamount to attacking Harare and denying having attacked Zimbabwe. This is because freedom of the press is an element of freedom of expression.

The main challenge was the compulsory accreditation of journalists as required by AIPPA. Sections 79, 80, 83 and 85 were said to infringe the applicants' rights to say, receive and impart information.

4.9.2 Press Freedom and Regulation of the Media

Relying on the *Capital Radio v The Broadcasting Authority of Zimbabwe and Ors*,[96] Chidyausiku CJ held that the right to freedom of expression enshrined in section 20 of the Constitution included freedom of the press. This however did not outlaw the enactment of laws that regulate the licensing and the functioning of the press. Such laws however had to be within constitutionally permissible limits. The argument that journalism was special thus the only constitutional regulation was self-regulation was dismissed by the CJ. The press in all democratic societies requires special protection as it is tied to the exercise of the

[96] Judgement No S.C.128\02.

right to freedom of expression. Although it is indeed not above statutory control, there is a requirement for protection of the press. Hence the statutory control should seek to enhance the independence of the press from both governmental and commercial control. In South Africa for instance the press has been accused of being elitist as it only covers the interests of the rich in society.

The learned Chief Justice held that there was no basis for holding that it was constitutionally permissible to regulate the electronic media and not the print media. In principle however there was a fundamental difference between the print and electronic media. This was essentially concerning the reasons for regulation. The limited broadcasting frequencies justify the regulation of the electronic media. The state had to ensure that there was fair allocation of these frequencies thereby ensuring orderly and effective broadcasting. This reason does not however apply to the print media.

It was argued that section 79 was not constitutional as it was not under any of the permissible limitations which were imposed by section 20 (2) of the Constitution, the Chief Justice however held that this limitation fell under the public order limitation.[97] Public order as discussed in chapter 2 above refers to the maintenance of public peace as well as preventing things like public disturbances. In accordance with the *Athukorale*[98] case which the Chief Justice used as authority, the public order limitation refers to the electronic media. As

[97] He based his findings on the case of *Athukorale and Ors v Attorney-General of Sri Lanka* (1997) 2 BHRC 610.
[98] Ibid.

already discussed above the argument advanced for regulating the electronic media cannot be advanced for the print media. It is therefore very difficult to understand how the section 79 limitation can possibly fall under the public order limitation.

In democratic countries there are rarely any systems that require compulsory accreditation of journalists. Where such systems exist, it is done purely for administrative purposes and not to impose any onerous obligations which will possibly prohibit journalists from practicing. Countries like South Africa, Zambia, Malawi and Botswana do not require the licensing or registration of journalists.

Chidyausiku CJ held that the word 'may' in section 79 (5) did not give the MIC discretion when accrediting journalists. Rather, once all the requirements were satisfied, an applicant was entitled to be registered. Hence there was no room for the abuse of powers of accreditation by the Commission. He however agreed that the requirement that accreditation was to be approved by the Permanent Secretary and the Minister of Information did bear the hallmarks of unconstitutionality.

Limitations to the right to freedom of expression are only those which are provided for by the law. Laws that give excessively broad discretionary powers to limit the freedom of expression are prohibited. The case of *Re Ontario Film and*

Video Appreciation Society v. Ontario Board of Censors,[99] illustrates this point. The court struck down a law granting the Board of Censors power to censor a film that it did not approve of. The court held:

> It is accepted that law cannot be vague, undefined, and totally discretionary; it must be ascertainable and understandable. Any limits placed on the freedom of expression cannot be left to the whim of an official; such limits must be articulated with some precision or they cannot be considered to be law.

Hence leaving the licensing of journalists to the discretion of the MIC will constitute a breach of the freedom of expression.

4.9.3 The Costa Rican Case

Chidyausiku CJ, accepted the correctness of the decision in the Costa Rican case but held that the decision was not applicable in the Zimbabwean context as the wording of Article 13 of the Inter-American Convention on human Rights (the Convention) differed from section 20 of the Zimbabwean Constitution. He stated that the wording led to two significant differences between the two provisions:

i) The right guaranteed in Article 13 of the Convention was broader than the right guaranteed by section 20 of the Constitution. He stated that the former included the means of communication while the latter did not.[100]

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[99] (1983) 31 O.R. (2d) 583 (Ont.H.C.), at pg 592.

[100] This conclusion seems to be inconsistent with the *Capital Radio* case where at page 13 of the judgement it was held that freedom of expression includes freedom of the press and that any restriction to the **means of communication** including the press abridges the constitutionally guaranteed right to freedom of expression. The case of Retrofit (discussed above) clearly

ii) The derogation permissible in terms of Article 13 is narrower than that permissible in terms of section 20 of the Constitution. This is mainly because Article 13 outlaws preventive restriction of any description.

It is important to note that the respondents did not come up with these two points in their heads of argument. The Chief justice raised them in his judgment and the applicants were therefore not given an opportunity to respond to these two points.

As discussed in chapter 2 above, although section 20 of the Constitution does not explicitly indicate that one can use the media of his choice, the drafters of the Constitution surely intended that individuals could express themselves through the media of their choice. This is implicit in the phrase that individuals are entitled to 'receive and impart information without interference.' The logical conclusion of this phrase is that the right must surely include the right to transmit and receive information through the print and electronic media.[101]

With regard to the second provision, this was just one of the grounds which were advanced by the Costa Rican court. The Chief justice neglected to include two other grounds for striking down the law, namely:

i) that the compulsory licensing of journalists was incompatible with Article 13 if it denies any person access to full use of the

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supports this contention.

[101] Supra Note 86 at pg 6.

news media as a means of expressing opinions or imparting information.

ii) That the law was incompatible with Article 13 in that it prevented certain persons from joining the Association of Journalists and, consequently, denies them the full use of the mass media as a means of expressing themselves or imparting information.

Hence even if the provision advanced by Chidyausiku CJ was no bar to preventative restrictions in section 20 of the Constitution, the other two provisions were relevant and could have been used to strike down the repugnant provision.[102] Furthermore section 20 of the Constitution also prohibits prior censorship (no person shall be hindered in the enjoyment of his freedom of expression). It can be argued that accreditation of journalists by a statutory body is a form of prior restraint.

4.9.3 False news provisions

Section 80 of AIPPA criminalizes the abuse of journalistic privilege. Chidyausiku CJ conceded that the wording of the section was a cause for concern. He held that perceiving a constitutionally guaranteed right as a privilege was not correct. He emphasized that freedom of the press was a guaranteed right and not a privilege. According to section 80 (1) (a) and (b), a journalist who falsified or

[102] Ibid, at pg 7.

fabricated information and published falsehoods was guilty of a criminal offence.[103] The CJ concurred with the applicant that these provisions were unconstitutional and *ultra vires* section 18 of the Constitution. These sections created strict criminal liability and were too broad. He further held that these sections were not *ultra vires* section 20 because they dealt with falsehoods.

According to the theory of the market place of ideas discussed in Chapter 2, the above assertion is not acceptable in a democratic society. This theory states that there must be unfettered exchange of particularly ideas and more generally information, which will in turn promote robust debate, which is essential in a democratic society.[104] If this theory is therefore applied in a society, freedom of expression would therefore include the publication of falsehoods. This in the Zimbabwean context is supported by the case of *Chavunduka & Anor v Minister of Home Affairs & Anor*[105] where it was held that freedom of expression encompassed statements and beliefs regarded by the majority as being wrong. It would therefore seem that the learned Chief Justice moved away from the traditionally accepted fact that falsehoods are protected by the freedom of expression. Although there is no value in the publication of such statements, members of society are able to make informed judgments on matters of national

[103] In *New York Times Co v Sullivan* 376 US 254 (1964), the Court held that for a public official to recover damages for defamatory falsehood relating to his/her official conduct he/she must prove that the statement was made with knowledge that it was false or with reckless disregard as to whether it was false or true.

[104] Dworkin, Freedom's Law 238, quoted in Burchell J, Personality Rights and Freedom of Expression The Modern *Actio Injuriarum*, Juta and Co Ltd, 1998 at pg 30 states that: 'No one may be prevented from influencing the shared moral environment, through his own private choices, tastes, opinions, and example, just because these tastes or opinions disgust those who have the power to shut him up lock him up.'

[105] Supra Note 53.

and private interest where there is free propagation of ideas, opinions and information. This is regardless of whether such ideas are false or true. In cases of defamation, this is best handled by the common law and there is no need to criminalize defamation.

Section 80 (1) (c) was said to be obscure and it did not pass the three tests set out in the *Nyambirai* case.[106] It was further held that this section was best left to the domain of the contractual relationship between the employer and employee. Sections 80 (1) (a) (b) and (c) were found to be unconstitutional.

The United States of America, which has the most liberal laws with regard to freedom of speech, advocates the 'clear and present danger' test. This effectively means that speech or conduct is prohibited where there is a 'reasonable ground to believe that the danger apprehended is imminent' and may lead to 'immediate serious violence.' The Court further held that[107]:

> No danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is an opportunity for full discussion.

The Zimbabwean Court was therefore right to find unconstitutional false news provisions. In the United States of America for example, Congress should not make law abridging the freedom of speech and the press, and all progressive democracies ought to follow this example. Despite these laws in the United

[106] *Nyambirai v NSSA & Anor* 1995 (2) ZLR 1 (S).
[107] *Whitney v California* 268 US 652 (1925) at 377.

States, in practice it is ironic that it is illegal for example to film and publish the funeral of any soldier killed in Iraq. Journalists are also jailed for refusing to divulge or reveal their sources.

In the environment prevailing in Zimbabwe however, the clear and present danger test bears more serious implications than in other democracies. For example, under what one might term an 'ideal democracy' publishing a statement that a supporter of an opposition party was beheaded will have different implications than when the same story is published in Zimbabwe. Hence if an MDC supporter reads that ZANU PF is cutting of peoples' heads they will in turn most likely become violent.

4.9.4 Dissenting Judgment of Justice Sandura

Justice Sandura agreed with Chief Justice Chidyausiku on several points, namely, that section 80 (1) (a), (b), and (c) were unconstitutional and that section 85 (1), (3), (4), (6), and (7) were constitutional. However, he disagreed on the constitutionality of sections 79, 80 (1) (d), 80 (2), 83 and 85 (2) and held that these sections did infringe the right to freedom of expression. He stated that the two issues raised in this case were:

i) whether the provisions of the Act being challenged constituted restrictions on the right to freedom of expression,

ii) if so, whether they were saved by section 20 (2) of the Constitution on the basis that they are reasonably justifiable in a democratic state.

Comparing Article 13 of the American Convention and section 20 of the Constitution, Justice Sandura held that these two sections were very similar.

In his dissenting judgment, Justice Sandura emphasized the importance of the right to freedom of expression.[108] Quoting the Advisory Opinion of the Inter-American Court of Human Rights, he stated that there was no difference between the freedom of expression and the professional practice of journalism as both are obviously intertwined.[109] As a result, accreditation of journalists did constitute a restriction on the right to freedom of expression.

The learned judge held that section 79 of AIPPA constituted an infringement to the right of freedom of expression. This was due to the fact that a journalist had to apply for accreditation and pay an application and accreditation fees. Furthermore, he held that the accreditation was not a mere formality as the approval of the Permanent Secretary was required. These factors contributed to the unconstitutionality of the section.

[108] Justice Sandura also quoted *In re Munhumeso & Ors* 1994 (1) ZLR 49 (S) where the court said 'The importance attaching to the exercise of the right to freedom of expression and freedom of assembly must never be under-estimated. They are at the foundation of a democratic society and are one of the basic conditions for its progress and for the development of every man.'

[109] See page 30 of the *Association of Independent Journalists and Others v The Minister of Information* case (Justice Sandura's dissenting judgment).

To the question whether the restrictions were reasonably justified in a democratic state, the judge held that it was important to apply the test from the *Nyambirai* [110] case strictly considering the importance of the right to freedom of expression. The first respondent advanced two reasons on the need for the accreditation of journalists, to ensure the accountability of journalists and easy access to events. To the second, it was held that this could be easily achieved by voluntary accreditation. The accountability of journalists could also be as easily achieved by self-regulation.

Countries like Zambia and Tanzania have voluntary media councils which have been formed by the journalists themselves. It has been proved in these countries that voluntary councils are the best way to make journalists accountable for their actions. At the near launch of the Media Council of Zimbabwe, the executive Secretary of the Media Council of Tanzania said that self-regulatory media councils are more effective than statutory bodies especially in complex democracies. [111] The trend in these countries however is that the media is more extensively utilised by the elite in society.

The second respondent however, did not state how accreditation would lead to the accountability of journalists. This led to the conclusion that the legislative

[110] Supra Note 105.

[111] The Media Institute of Southern Africa Zimbabwe, Media Monitoring Projects of Zimbabwe, and the Association of Independent Journalists of Zimbabwe facilitated the launch of the Media Council of Zimbabwe which was to be held on the 26th of January 2007. Due to some technicalities the launch did not take place.

objective given was not sufficiently important to justify limiting the right to freedom of expression. Section 79 therefore failed the first leg of the test.

As to whether the measures designed to meet the legislative objective were rationally connected to it, the Judge said he did not see any rational connection between the accreditation requirement and accountability to society. This was mainly because in his opening affidavit, the first respondent did not specify how these were connected. It was also held that the measures imposed by section 79 were not the least drastic measures. This was due to the fact that the accountability of journalists was already catered for by common and criminal law. Justice Sandura therefore found that the provisions of section 79 of AIPPA were not reasonably justifiable in a democratic society. The compulsory accreditation of journalists was therefore held to be unconstitutional. The judge also found that sections 80 (1) (d), 83 and 85 (2) were unconstitutional and should therefore be stuck down. He rejected the argument that accreditation fell within the public order exception.

4.9.5 Conclusions from Association of Independent Journalists and Others

The right to freedom of expression is a corollary of every democratic society. This right cannot be overemphasized. Professor Feltoe rightly stated that a judge properly attuned to democratic values will liberally interpret the right to freedom

of expression and narrowly construe provisions that limit this right.[112] The majority judgment is the complete opposite of this. It gives a narrow interpretation of the right to freedom of expression and gives a different view on the conventional understanding of the right. The minority judgment is however more in tune with the internationally accepted values of freedom of expression.

The approval of accreditation applications by the Permanent Secretary is also cause for great concern. This makes the accreditation system in Zimbabwe subject to political control, meaning that the Ministry of Information is given the authority to choose who does and does not practice journalism. In essence, this means that the ministry effectively chooses what information is available to the society.

The majority judgment on the false news provisions is also a cause of great concern. Such a decision from the highest court in the land is very worrying. Falsehood can be very difficult to ascertain and the Act does not come up with a way of doing so. Besides, where a journalist publishes false news, this can be dealt with under the common law. Where the false news falls within the public order limitation clause it can be dealt with accordingly. People in democratic societies ought to be given an opportunity to have access to different views and choose for themselves what truth is.

[112] Supra, Note 100 at pg 14.

Self-regulation has also proven to be the best way of ensuring the accountability of journalists in democratic states. Self-imposed rule is obviously more effective. It is therefore recommended that the journalists must further engage the government, which seems to be opposed to the proposed Media Council of Zimbabwe. The government must also be more sensitive to the needs of journalists. It is also important that the government recognize that journalism is not a privilege, but a right. This is essentially due to the fact the journalism profession borders around the right to freedom of expression. Principle X of the Declaration of Principles of Freedom of Expression in Africa explicitly states:

i) Media practitioners shall be free to organize themselves into unions and associations.

ii) The right to express oneself through the media by practicing journalism shall not be subject to undue legal restrictions.

Principle VII of the declaration further states that 'any registration system for the print media shall not impose substantive restrictions on the right to freedom of expression.'

The mandatory licensing system created by AIPPA represents a substantial limitation to the right of freedom of expression and this is further compounded by the lack of independence of the MIC which administers this system. Not only should this system be struck down, there must also be greater effort put by both the government and journalists community towards self-regulation.

What further exacerbates the situation is that the license obtained by the journalist is only for a period of one year. This means that journalists have to come up with application fees every year, which cannot be good especially considering the harsh economic conditions in Zimbabwe.

4.10 Summary

The first two cases discussed above are an indication of the advances made in the protection of the rights in the Declaration of Rights, more so, the right to freedom of expression. This is shown by the importance, which the Supreme Court has attached to this right. Despite the challenges to its authority by certain members of the community, the judiciary in these two cases unwaveringly upheld this right. The judiciary was however faced with non-compliance from the executive and legislative arms of government as in the *Retrofit* case.[113] The executive refused to comply with the court order to issue the applicants a license for a cellular phone telecommunications service. This was done by the issuing of the Presidential Powers (Temporary Measures) (Cellular Telecommunications Services) Regulations,[114] which provided that it was an offence for anyone to operate a cellular telecommunications service without a license issued under the Regulations. This effectively did away with the ruling of the court in *Retrofit*.[115] The decisions of the court are therefore rendered ineffective by the actions of the

[113] Supra Note 39.
[114] SI 15A of 1996.
[115] Supra Note 39.

executive and the court does not have any access to adequate redress, as it is not empowered to enforce its own decisions.

There was however a twist in the last two cases. The Court, instead of preventing oppression became the purveyor of injustice. The two decisions marked a decline in the protection of the right of human rights in general and freedom of expression in particular. The dirty hands doctrine, which was upheld by the Supreme Court, has been criticized in legal circles. The *ANZ case* also spelt doom for journalists as their rights were greatly infringed especially by upholding the false news provisions. The fact that some parts of sections 79 and 80 were found unconstitutional was an important advance to the freedom of expression and should not be underestimated.

The state of the judiciary in Zimbabwe is in a very appalling condition as a result of the blatant disregard of this institution by the other organs of state. As David Coltart stated, it is really a farce taking an issue before the courts in Zimbabwe, taking into cognizance that the rulings will be ignored if they are against government policy. The best way for this institution to return to its former glory is for the executive to comply with the orders, which are issued by the courts. It is also recommended that the executive must not do away with court decisions by the issue of regulations which are contrary to such decisions.

Newly appointed judges ought to adhere to the judicial oath by applying the law 'without fear favour or prejudice.' The executive also has a duty to provide an enabling environment for judicial officers to properly carry out their duties. Where members of the bench are threatened and even physically harmed they will not express their views in their judgments for fear of the consequences of such actions. Without such an enabling environment there can be no judicial independence as the decisions of the courts would be overshadowed by executive actions.[116]

Based on the above arguments, the impartiality of the judiciary is very questionable. The fact that some members of the judiciary were allocated farms also puts a degree of suspicion on the independence and impartiality of those judges. The question would be asked: can one bite the hand that feeds him/her? As to the independence of the judiciary, the recent speech of justice Makarau (Annexure 1) reveals that this does not exist in Zimbabwe. The judiciary is inadequately funded and under resourced. The environment under which the judiciary works is not conducive to judicial independence therefore, the latter cannot thrive under such an environment.

What the judiciary ought to do is actively protect the rights freedoms of individuals. Where draconian pieces of legislation are passed the judges must

[116] Gugulethu Moyo in this regard comments: 'The lasting, devastating, impression created about the Zimbabwean courts is that the long arm of the Zimbabwean executive has now supplanted the long arm of the law. See "How Zim's Judiciary Toes the Line," *Weekly Mail and Guardian*, 28 October 2004.

not be executive minded. Individuals ought to have a refuge in the judiciary no matter what the situation in the country is.[117] Judicial activism is one of the remedies for the protection of citizen's rights. So where the situation permits, judges should be more proactive in their interpretation of human rights issues but also employing international law in their interpretation of national statutes. What then occurs when the judiciary has effectively performed its function is another area to be discussed.

[117] In *Radebe v Minister of Law and Order* the court held that ''the disturbed state of the country ought not, in my opinion, to influence the Court, for its first and sacred duty is to administer justice to those who seek it and not to preserve the, peace of the country. The civil courts of the country have but one duty to perform and that is to administer the laws of the country without fear, favour and prejudice independently of the consequences which ensue."

Chapter 5

Freedom of Expression: Comparative Perspective

5.1 Introduction

South Africa has a long history of denial of fundamental rights and freedoms, not least in the area of freedom of expression and freedom of the press. Censorship and closure of newspapers were some of the measures used to control the free flow of information. These were for many years a prominent feature of the legal order. The 1996 Constitution however brought along the protection of fundamental rights in the Bill of Rights and a new democratic order. The rights in the Bill of Rights are intended to safeguard against the established pattern of censorship and secrecy of the apartheid era by entrenching a set of rights that is not open to abuse by future governments.

This chapter draws a comparative analysis between Zimbabwe and South Africa. Comparison has been drawn between the two countries due to the similarities in the countries' legal systems and historical backgrounds. South Africa, like Zimbabwe is a democratic state which has a constitution as its supreme law. The country was colonised by the British and has a Roman-Dutch law and English law background. It is for these reasons that a comparison between South Africa and Zimbabwe is appropriate.

The South African Constitution like that of Zimbabwe has a Bill of Rights. Within this Bill of Rights the right of freedom of expression is protected by section 16 of the Constitution. South Africa also has legislation that directly and indirectly affects the fundamental right to freedom of expression. These include among others: the Promotion of Access to Information Act No, 2 of 2000, the Broadcasting Act No, 4 of 1999, the Films and Publications Act No, 65 of 1996 and the Anti Terrorism Bill of 2002. In this chapter, these will be discussed and compared with their Zimbabwean counterparts.

The judiciary in South Africa has a mandate to protect the rights that are listed in the Bill of Rights and the Constitution. A comparison will also be made between the South African judiciary and the Zimbabwean judiciary and how the two systems have handled cases deal with the right to freedom of expression.

5.2 Freedom of Expression in the South African Constitution

The Constitution of South Africa is the supreme law of the land. Any law or conduct, which is inconsistent with the Constitution, is invalid.[1] Section 1 (c) of the Constitution further states that the Republic of South Africa is a democratic state which is founded on the supremacy of the Constitution and the rule of law. These are fundamental conditions which must be present for adequate protection

[1] Section 2 of the Constitution of South Africa.

of the right to freedom of expression. These concepts are discussed in chapter 3 above.

Section 16 of the Constitution of South Africa protects the right to freedom of expression. The right to freedom of expression is guaranteed to everyone in South Africa.[2] This includes government employees, teachers, members of the South African Police Service and the National Defence Forces.[3] Chaskalson and others have submitted that while not free from doubt, a principled approach to freedom of expression would focus on the nature and value of expression rather than on the identity of the speaker.[4] The Constitutional court has also ruled on the importance of the rights protected in section 16 stating that, individuals in a state need to be able to hear, form and express their opinions freely on a wide range of matters.[5]

Juristic persons are also 'entitled to the rights in the Bill of Rights to the extent required by the nature of the rights and the nature of the juristic persons.'[6] Close corporations and companies are therefore given the right to express themselves and this includes advertising. The press is also included within the ambit of this

[2] The Constitutional Court *in Laugh it Off Promotions CC v SAB International Finance BV t/a Sabmark International* 2005 (8) BCLR743 (CC) at para 55 held that: 'the constitutional guarantee of freedom of expression is available to ***all under the sway of our constitution***, even where others may deem the expression unsavory, unwholesome or degrading.'

[3] *South African National Defence Union v Minister of Defence and Another* 1999 (4) SA 469 (CC), where the Court held that members of the defence forces do not forfeit their rights to freedom of expression.

[4] Chaskalson, et al, Constitutional Law of South Africa, at 20 - 16.

[5] See Balule B. T, and Kandjii K, Undue Restriction: Laws Impacting on Media in the SADC, Media Institute of Southern Africa, 2004, at pg 66.

[6] Section 8 (4) of the South African Constitution.

protection since it is also a juristic person. The Constitution also explicitly protects freedom of the press.[7] It may be argued that this is due to the crucial role that the press plays in any democratic society.

The importance of the press[8] was highlighted in *Holomisa v Argus Newspapers Ltd*[9] where it was held that:

> In a system of democracy dedicated to openness and accountability, as ours is, the especially important role of the media, both publicly and privately owned, must in my view be recognised. The success of our constitutional ventures depends upon robust criticism of the exercise of power. This requires alert and critical citizens. But strong and independent newspapers, journals and broadcast media are needed also, if those criticisms are to be effectively voiced and if they are to be formed with the factual content and critical perspectives that investigative journalism may provide.

The Supreme Court of Appeal also quoted this passage with approval emphasising that the common good is best served by the free flow of information and the media plays a very important role in this process.[10] This however does

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[7] 16 (1) (a).

[8] In *Khumalo and Others v Holomisa* 2002 (5) SA 401 (CC) at para 24 the court held that: 'In a democratic society… the mass media play a role of undeniable importance. They bear an obligation to provide citizens both with information and with a platform for the exchange of ideas which is crucial for the development of a democratic culture. As primary agents of the dissemination of information and ideas, they are, inevitably extremely powerful institutions in a democracy and they have the duty to act with vigour, courage, integrity and responsibility. The manner in which the media carry out their constitutional mandate will have a significant impact on the development of our democratic society. If the media are scrupulous and reliable in the performance of their constitutional obligations, they will invigorate and strengthen our fledging democracy. If they vacillate in the performance of their duties, the constitutional goals will be imperiled. The constitution thus asserts and protects the media in the performance of their obligations to the broader society, principally through the provisions of section 16.'

[9] 1996 (2) SA 588 (W) at 608J – 609D.

[10] *National Media Ltd & Others v Bogoshi* 1998 (4) SA 1196 (SCA) at 1210H.

not give the press any special rights, which are above those of the ordinary citizen. This was shown in *Nel v Le Roux*[11] where the court upheld the validity of section 205 of the Criminal Procedure Act.[12] This section compels persons to reveal information in relation to suspected offences but allows a witness to refuse to answer a question provided they have a just excuse. The court however left open the question what constitutes a 'just excuse?' There is therefore a leeway for the press/journalists or any other person for that matter, to rely on the 'just excuse' where the disclosure of sources would unjustifiably infringe the freedom of the press. Section 16 (1) (a) of the Constitution of South Africa may also afford to the press access to information held by the government as well as the police.[13] This is due to the fact that freedom of expression also includes the right to access information.

Sections 16 (1) (a) and (b) guarantee two dimensions of the freedom of the press.[14] The freedom implies on the one hand, the right to print and publish reading materials and on the other the right to disseminate views and opinions by printing reading materials. This effectively means that the press is given the right not to be prevented by the state from performing acts of printing and publishing. It also means that the press is not to be subjected to censorship of that which is

[11] 1996 (3) SA 562 (CC).
[12] 51 of 1977. The European Court of Human Rights in *Godwin v United Kingdom*, Judgement of 27 Mach 1996, (1996) 1 BHRC 37 (ECt HR) emphasised that 'the protection of journalistic sources is one of the basic conditions of press freedom.'
[13] Supra Note 4 at pg 20-21.
[14] Pretorius D. M, "Freedom of Expression and the Regulation of Broadcasting," *South African Journal of Human Rights*, 2006 at pg 60.

being printed and published. Due to the fact that section 16 (1) (a) also protects other media, the above therefore equally applies to electronic media. Both radio and television[15] are protected by section 16(1) (a). It is also important to note that all types of expression not specifically excluded by section 16 are protected under freedom of expression.[16]

Freedom essentially entails that one is allowed to act in a certain way without fear of hindrance or reprisal. Hence where one is compelled to act in a certain way or constrained from acting, this means that there is absence of freedom or the freedom is impaired. A failure or omission to take positive steps that are designed to facilitate the enjoyment of a freedom would not per se constitute an interference with that freedom.[17] Hence it can be concluded from the above assertions that freedom of the press and other media means the absence of governmental interference or restraint on the press.[18]

Also included in the freedom of expression is the freedom to receive or impart information or ideas.[19] The right to access information is also separately protected in section 32 of the Constitution. Persons have the right to access information, which is either held by the state or other persons. Access is

[15] The court in *SABC v National Director of Public Prosecutions and Others*, infra note 7, held that the right to freedom of expression and the media includes the right of the media to televise and broadcast court proceedings.
[16] *Islamic Unity Convention v Independent Broadcasting Authority and Others* 2002 (4) SA 294 (CC) at para 15-16.
[17] See *Christian Education South Africa v Minister of Education* 2000 (4) SA 757 (CC) paras 18 and 19.
[18] Burns Y, Communications law, 2001, Butterworths, at pg 56.
[19] Section 16 (b) of the South African Constitution.

therefore granted to information held by both public and private bodies. The right is qualified however in that such information must be required for the exercise or protection of rights. The rights to be protected are not necessarily those in the Bill of Rights but all legal rights.[20] The section also specifically instructs the legislature to enact national legislation that gives effect to this right. This legislation has been enacted, namely, the Promotion of Access to Information Act No, 2 of 2000.

Freedom of expression also includes freedom of artistic creativity. Chaskalson and others state that a broad definition should be given to artistic creativity to reduce the dangers of judges having to decide whether something is indeed art for purposes of constitutional protection.[21] Academic freedom and freedom of scientific research is also protected as part of the right to freedom of expression.

[20] The requirement that only information required for the exercise of a person's rights can be made accessible is problematic. If the language is retained certainly it can be argued that the phrase extends to the right to political participation and to an informed citizenry, but it could also be argued that the right is limited to personal rights. Furthermore, it has been argued that although some limitation of the right is understandable, the requirement that the information must relate to the exercise of a person's rights is an unduly onerous one because it imposes an onus on the person seeking information, to prove that it is 'required' for the protection or exercise of a right. This will often be impossible to do, precisely because the citizen is denied access to the very information he or she requires to prove the point. See Johannessen L, "Freedom of Expression and Information In the New South African Constitution and its Compatibility with International Standards," *South African Journal of Human Rights*, 1994 at pg 221.

[21] Supra Note 4 at pg 20-23.

5.2.1 Limitation of the Right

The right to freedom of expression in the South Africa, like in many other democracies, is not absolute. The South African Constitution has specific and general limitations on the freedom of expression. Freedom of expression is subject to the internal modifier in section 16 (2) of the Constitution.[22] Section 36,[23] which is the general limitation clause, includes legitimate limits set by common law and legislation. The Court considers factors which include, but are not limited to, those listed in section 36. Freedom of expression can also be restricted by common law.[24] The First Amendment in the United States is not subjected to such explicit limitations although the judiciary has attempted to impose such limitations.[25]

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[22] The right in subsection (1) does not extend to – (a) propaganda for war;
(b) incitement of imminent violence; or
(c) advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.'

[23] (1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including –
(a) the nature of the right;
(b) the importance of the purpose of the limitation;
(c) the nature and extent of the limitation;
(d) the relation between the limitation and its purpose; and
(e) less restrictive means to achieve the purpose.

[24] See *Treatment Action Campaign v Rath and Others* C2897/05 where it was held that defamation was a lawful restriction to the right of freedom of expression. It was further held that a juristic person could also be defamed. The court quoted with approval the remarks of Corbett J *in Financial Mail (Pty) Ltd v Sage Holdings* LTD 1993 (2) SA 451 at 462A where it was held: 'Although a corporation has 'no feeling to outrage or offend' … it has a reputation (or *fama*) in respect of the businesses or other activities in which it is engaged which can be damaged by defamatory statements and it is only proper that it should be afforded the usual legal processes of vindicating that reputation.

[25] Examples where the Supreme Court has devised such limitations are: *Roth v United States* 345 US 476 (1957) – obscenity is not within the area of constitutionally protected speech; *Osborne v Ohio* 495 US 103 (1990) – the possession of child pornography in the privacy of home could be regulated because of the compelling state interest in safeguard the physical

The limitation test is driven by two main concerns.[26] Firstly, it provides a vehicle for subjecting infringements of fundamental rights to vigorous review (this stage may also be called the right analysis stage). This means that fundamental rights are to be protected and not subjected to any unnecessary limitations. Secondly, the limitation test provides a mechanism which permits the government or some other party to undertake some other actions which, although at face value are unconstitutional, serve pressing public interests (also called limitation analysis). This again serves shows that even fundamental rights are not absolute. With regard to hate speech, the United States of America, unlike South Africa, allows virtually a free course to any kind of political expression. In the *Skokie* case the court of appeals held that a ban on Nazi demonstrations, even in a village whose inhabitants included survivors of the holocaust, violated the First Amendment.[27]

Using section 36, the court has to determine whether the law was a law of general application. The yardstick used for this is that the law must not be vague and ambiguous. A law of general application[28] must satisfy the requirements of

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and psychological well-being of a minor and that it is reasonable for the state to conclude that the production of child pornography will decrease if demand is decreased by punishing possession; *Chaplinsky v New Hampshire* 315 US 568, 86 L Ed 1031 at 1036

– words having a 'direct tendency to cause acts of violence by the persons to whom, individually, the remark addressed'; the 'test is what men (sic) of common intelligence would understand would be words likely to cause an average addressee to fight.'

[26] Supra Note 4 at pg 12-47.

[27] *Collin v Smith*, 578 F.2d 1197 (7th Cir. 1978) as quoted in Jackson V. C, Tushnet M., Comparative Constitutional Law, Second Edition, Foundation Press, 2006 at pg 1482.

[28] A case which examined at length whether legislation fails to meet the 'law of general application' tests is *De Lille and Another v Speaker of the National Assembly* 1998 (3) SA 430 (C). The applicant was found by parliament to have violated the laws of parliamentary privilege. The court found that this violated section 57(1)(a) and it also was not justifiable under section 36 as the law was not of general application. This was firstly because the law was not codified or capable of ascertainment (at 455A).Secondly it was based on a clear system of precedence, in other words, it was not precise. Thirdly, there was no guarantee of parity of treatment as it

generality, non-arbitrariness, precision and publicity. The rule of law requires that the law is supreme and general (that is, it applies to citizens and governments alike) and that citizens must know what is required of them by the law (the law must be accessible to the citizens and it must also be precise). Such law must also be justifiable in an open and democratic society. In determining what constitutes a limitation that is reasonable and justifiable in a democratic society, the court has to weigh up competing and conflicting values and undertake an assessment based on proportionality.[29] There is however no absolute standard that can be laid down to determine reasonableness and justifiability, as the application of established principles will vary on a case-to-case basis.[30]

The first factor to take into account, according to section 36 of the 1996 Constitution, is the nature of the infringed right. This will then determine the level of scrutiny which will be given to the stated limitation. If the right infringed is deemed essential to democracy and the constitution then this will tighten the limitation requirements that follow.[31]

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was essentially ad hoc jurisprudence which applied unequally to all parties.

[29] The proportionality test is also used in the Canadian jurisdiction. The Court has to first determine whether the impugned government action is of sufficient importance to warrant overriding the constitutionally protected right. The government objective must relate to concerns which are pressing and substantial in a democratic society. If the objective passes this first test then the means used to achieve it must pass the proportionality test. The proportionality test has three parts, firstly, the government restriction of the right must be rationally connected to the objective and ought not to be arbitrary, unfair or based on irrational considerations. Secondly, the government restriction must impair the right as little as possible. And thirdly, the restriction's effects on the limitation of the rights and freedoms must be proportionate to the objective.

[30] *The Director of Public Prosecutions (Western Cape) v Midi Television (Pty) Ltd t/a E-TV* 2006 (3) SA 92 (C) at para 36.

[31] Supra Note 4 at pg 12-50.

The second factor is the importance of the purpose of the limitation. The question asked with regard to the purpose is if the objective of the limitation serves the values that underlie the Bill of Rights and the Constitution. In determining the purpose of the limitation, the court must take into account the objective of the legislation as a whole. The proportionality test is raised here. It has to be determined what benefit the limitation will have on society and if it will suffice when weighed up with other rights.[32] In other words, the objective has to justify the infringement of the right in a manner that justifies the fundamental values that underlie the Bill of Rights and the Constitution as a whole. The act or conduct need not be harmful but if there is a reasonable apprehension of harm,[33] it will be found unconstitutional.

In order for a government restriction to pass the reasonable restriction test, the restriction in question must be a means for effecting a pressing and substantial objective.[34] The Court must then determine the nature and extent of the limitation, which is the third factor. The Constitutional Court has highlighted that freedom of expression:

> …lies at the heart of a democracy. It is valuable for many reasons, including its instrumental function as a guarantor of democracy, its implicit recognition and

[32] In the case of *De Reuck* it was held that child pornography was a form of expression and its prohibition constituted a limitation of the right to freedom of expression. The Court stated that child pornography was seen as an evil in all democratic societies. This was due to the fact that it was harmful to the right to dignity of the child. It affected not only the children who were used in the production of the pornography but it was also potentially harmful due to the attitude which it fostered which could lead to grooming children to engage in sexual conduct.

[33] The question of reasonable apprehension of harm was raised in *S v Jordan and Others (Sex Workers Education and Advocacy Task Force and Others as Amicus Curiae)* 2002 (6) SA 642 (CC).

[34] Supra Note 4 at pg 12-34.

> protection of the moral agency of individuals in our society and its facilitation of the search for truth by individuals and society generally. The Constitution recognizes that individuals in our society need to be able to hear, form and express opinions and views freely on a wide range of matters.[35]

It is therefore important to note that expression which is limited is that which is of little value and is not protected in many democratic societies.[36] Chaskalson and others[37] are of the opinion that the third factor is ill placed. They state that it should rather be the last factor as this is where the determination of costs and benefits will be made. A justifiable limitation will therefore not impose costs or burdens upon the holders of the right that outweigh the benefits that flow to other members of society.

The fifth factor employs the government or some other party who restricts the exercise of a fundamental right to use less restrictive means when doing so.[38] Section 36 (2) states that no law may limit a fundamental right except as provided for by section 36 (1) or other provisions in the Constitution. This section seems to imply that where other provisions in the Constitution limit fundamental rights then such restrictions need not be subjected to section 36 (1). In the *De Lille*[39] case, the court held that where another provision in the Constitution limits

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[35] *De Reuck v Director of Public Prosecutions and Other* CCT 5/03 at para 59.
[36] Ibid.
[37] Supra Note 4 at pg 12-50.
[38] In *S v Makwanyane And Another* 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC) at para 128, the state did not discharge the burden of justification under section 33 of the Interim Constitution because it could not prove that the death penalty was a more effective deterrent than life imprisonment which least impaired the Constitutional right at issue.
[39] *De Lille and Another v Speaker of the National Assembly* 1998 (3) SA 430 (C): 1998 (7) BCLR 916 (C), at para 455. This is contrary to the Zimbabwean view. In a case very similar to *De Lille*, *Mutasa v Makombe NO* 1998 (1) SA 397 (ZS) it was found that the Zimbabwean

a fundamental right, no such limit should be permitted without clear and convincing textual evidence.

5.2.3 Comparative Analysis

The Constitutions of Zimbabwe and South Africa play a very important role in the protection of the individual's fundamental rights. These rights exist as a minimum standard by which to test all laws in the country. The inclusion of fundamental rights in the Constitution is to limit the government from passing laws or from using its executive power in conflict with those rights. The duty of the courts is to examine whether such laws are compatible with the constitution. Those laws, which the courts regard as violating the fundamental rights in the Constitution, will be invalid, or invalid to the extent that they violate those rights.

It is clear from the above that there are various points of convergence and divergence between the South African and Zimbabwean Constitution. The points of convergence revealed by this study include:

- The constitution is the supreme law of the land in both countries.

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constitution confers upon Parliament the power to institute disciplinary proceedings. In this case, an inquiry was held pursuant to a motion to investigate allegations that the appellant had breached parliamentary privilege by making certain utterances in public, the essence of which impinged on the conduct of members of Parliament. He was found guilty and a recommendation suspending him from the service of Parliament was laid before it. He was subsequently ordered, after much debate in Parliament, to attend Parliament, stand in his place and be reprimanded by the Speaker of the House. In this case the court found that the appellant's public utterances indeed touched directly and contemptuously on Parliament's business. It concluded, therefore, that there was no abridgement of the freedom of expression as complained of by the appellant.

- Juristic persons are also guaranteed the right to freedom of expression.
- Freedom of the press is included in the right to freedom of expression
- The right to receive and impart information is guaranteed under the right to freedom of expression.
- The right to freedom of expression is not absolute and is subject to limitations that are stipulated in the constitution.

The points of divergence as revealed by this study include:

- The Constitution of Zimbabwe only subjects law to constitutional scrutiny. Conduct is not subjected to this scrutiny. The South African Constitution, on the other hand, subjects both law and conduct to constitutional scrutiny.
- Freedom of the press is explicitly protected in the South African Constitution whereas it is not in the Zimbabwean Constitution.
- The right to access to information is explicitly protected as a separate right in South Africa. In Zimbabwe, there is no separate protection of this right but it is protected under freedom of expression.
- The South African Constitution has both an internal limitation of the right to freedom of expression as well as a general limitation clause which applies to all rights. The Zimbabwean Constitution only has an internal limitation clause on the right to freedom of expression.
- The limitations to the right to freedom of expression differ to some extent. The South African Constitution allows the judiciary to consider factors that

are listed therein and determine whether the limitation of the right is justifiable. It also lists specific types of speech in section 16 (2) that are not protected under the right to freedom of expression. The Zimbabwean Constitution, on the other hand, specifically states that conduct performed by the government for specific purposes, e.g., for public morality and health shall not be held to be in contravention of the right to freedom of expression.

5.3 Legislation Regulating Freedom of Expression and the South African Courts

5.3.1 The Promotion of Access to Information Act (AIA)[40]

The purpose of the AIA is to give effect to the constitutional right to access information which is either held by the government or another party. The constitutional right, however, is not abrogated by the enactment of the AIA. 'Give effect to' simply means that legislation makes the right more effective through providing a more detailed framework or elaboration of both the scope and content of the right.[41] The Act also provides an institutional framework for the implementation and enforcement of the right. Such information must be required

[40] Ammendments have been made to this Act but have not been passed into law and therefore will not be discussed in this research.
[41] Supra Note 4 at pg 62-4.

for the exercise of the protection of any rights[42] and any matters connected therewith.

The preamble to the AIA raises several very important points. It points out that the secretive and unresponsive culture of the apartheid government led to the abuse of power and violation of human rights. This therefore means that in order to avoid the abuse of power and violation of human rights, future governments must respect, protect, promote and fulfil, the rights in the Bill of Rights and more so, the right to access to information. Such right must be made available to everyone. This is to enable the people of South Africa to fully exercise and protect their rights. The right of access to information is also meant to foster a culture of transparency and accountability in both private and public bodies.

Section 5 and 6 of the AIA deal with the relationship between the Act and other legislation. Section 5 states that were such other legislation is materially inconsistent with the AIA, the provisions of the AIA will apply to the exclusion of such other legislation.[43] The Act, as stated in section 6, does not restrict the

[42] In *Goodman Bros (Pty) Ltd v Transnet Ltd* 1998 (4) SA 989 (W), the court refused to order the disclosure of certain documents relating to a tender on the basis that the applicant had not been able to establish that its constitutional rights had been infringed. In *ABBM Printing and Publishing (Pty)* Ltd v Transnet Ltd 1998 (2) SA 109 (W) the court held that an unsuccessful tanderer was entitled to access to the other relevant documentation 'in order to determine whether the tender process complied with the requirements of s33 of the Constitution.' It was held that 'until it has had sight thereof, it cannot decide whether it has any claim for relief against the respondent.'

[43] Supra Note 4 at pg 62-8.

application other legislation set out in the schedules which provide for access to information.[44]

The AIA may be divided into two categories. There are those sections which define and detail substantive rights, and those that set out procedures and structures to enforce the relevant rights. It deals separately with access to information held by public bodies, in part 2, and access to information held by private bodies, in part 3. Section 10 of the AIA instructs the Human Rights Commission to compile a guide on how to use the Act. This guide includes among other things, the objects of the Act, particulars of private as well as public bodies. This guide is generally meant to make it easy for applicants to access information.

The Act excludes certain types of information from being disclosed to the public. Such records may therefore not be requested in terms of the AIA even where there are certain overriding interests. The records that are specifically excluded from being accessed by the public are:

- records that are requested for criminal or civil proceedings,[45]
- records of cabinet meetings,

[44] The only legislation which is currently listed in the schedule are the National Environment Management Act 107 of 1998 and the Finance Intelligence Act 38 of 2001.

[45] See section 7 of the AIA. The Court in *DPP v Midi Television*, supra note 30, also held that the applicant's reliance on the Act was ill-founded and its contention was accordingly dismissed. This was due to the fact that it requested the information for the purposes of criminal proceedings and this was explicitly prohibited by the Act.

- records of judicial functions of a court as stipulated in section 166 of the Constitution,
- records of members of parliament in their official capacity as such.

5.3.1.1 Comparison with AIPPA

There are several similarities between AIPPA and the AIA which have been revealed by this study. Both Acts are meant give effect to the right to access to information that is held by public bodies. In addition, the constitutional right of access to information is not replaced by the Acts but continues to exist. This means that the constitutionality of both Acts can still be constitutionally challenged. The right in the Constitution also assists in interpreting the Acts. Further, the need for access to information is very important for both Zimbabwe and South Africa given their histories of colonialism and apartheid where there were extreme levels of government secrecy and abuse. Citizens of both countries were virtually not consulted when major decisions which affected their rights were made. These two Acts therefore enable the public to be involved in the decision making process.

Another important similarity between the two Acts is that they both deal with access to recorded information. This means that persons will not be granted access to information which an entity has but is not yet recorded. An example is where the media wishes to have access to an event in order to record such

event. Both Acts will not cover the realm of unrecorded information. With regard to the relation between the two Acts (AIA and AIPPA) and other legislation dealing with access to information, the Acts will be applied to the exclusion of any other legislation. Finally, the Acts contain certain types of records that are excluded from the application of the Acts. Both Acts exclude records of the cabinet. As has been advanced in chapter two such exclusions may arguably be unconstitutional.

There are also points of divergence between the two Acts which have been revealed by this study. Firstly, the South African AIA gives access to information that is held by 'any other person.' On the other hand, the Zimbabwean legislation only grants access to information that is held by public bodies. Secondly, the South African AIA specifically states that the information sought by the applicant must be for the purposes of the exercise of rights and any matters that are connected to the exercise of rights. AIPPA on the other hand is silent on the purpose of such access to information. Thirdly, the AIA is constitutionally mandated to give effect to the right of access to information whereas AIPPA is not. Fourthly, whereas the AIA basically regulates access to information and procedures relating to such access, AIPPA also regulates the mass media and journalists and establishes the Media and Information Commission.

Fifthly, the AIA makes provision for a guide on how to use the Act whereas there is no such Provision in AIPPA. This guide generally makes it very easy for

members of the public to access information from public and private bodies. It is recommended that the Zimbabwean legislature also develop a similar guide so that members of the public will be well equipped or more equipped to exercise their right to access information. Sixthly, the AIA excludes from its ambit records of judicial functions as well as records that are requested for civil and criminal proceedings. On the other hand, AIPPA has wider variety of exclusions and arguably contains some duplication. The client-attorney privilege is for instance already provided for by common law so one might argue there is no need for legislative regulation. AIPPA also excludes the disclosure of advice relating to policy, information relating to inter-governmental relations, information relating to the financial or economic interests of a public body or the state and information whose disclosure will be harmful to the law enforcement process and national security. All these exclusions, as argued in chapter 2, are open to abuse and may be arguably unconstitutional.

Finally, under the Zimbabwean Access to Information Act, defamation is a criminal offence whereas in South Africa defamation is a civil wrong. It is recommended that the Zimbabwean legislature decriminalise defamation.

5.3.2 Protected Disclosures Act

South Africa also has provisions for the protection of whistleblowers through the Protected Disclosures Act, No. 26 of 2000. This Act protects employees in both

the public and private sector who disclose information regarding unlawful or irregular conduct by their employers or fellow employees in the employ of their employers. Such disclosures must be protected in terms of the Act. The Act promotes a culture which facilitates the disclosure of information by employees relating to criminal and other irregular conduct in the workplace. It is therefore an advancement of the principles of democracy and transparency. Zimbabwe does not have such legislation in place. This may arguably be an indication of the high levels of corruption in the highest offices which government officials do not want to disclose. On the other hand it may be inaction or just an oversight on the part of parliament. It is however recommended that Zimbabwe also adopt this culture of democracy and transparency by adopting similar legislation.

The Protected Disclosures Act in a way advances the values of the Bill of rights and more specifically the right to freedom of expression. It further provides remedies for employees who suffer as a result of making protected disclosures. The disclosures may be made to a legal adviser, employer or a member of the cabinet or executive council. Such disclosure must be made *bona fide* and not for personal gain.

5.3.3 Promotion of Equality and Prevention of Unfair Discrimination Act

The Promotion of Equality and Prevention of Unfair Discrimination Act, No. 4 of 2000 also impacts on the right to freedom of expression by regulating hate speech. The Constitution in section 16 (2) (b) specifically excludes hate speech from the protection of the ambit of the right to freedom of expression. The Act further reinforces the prohibition of hate speech. It seeks to prevent discrimination and promote equality. To this end the Act has a section which is dedicated to hate speech, namely, section 10.[46]

Section 10 has been criticised for being too wide. Some material may clearly propagate or promote hatred but in less obvious situations it may be difficult to arrive at such a conclusion. For instance members of certain groups may subjectively have different interpretations to certain materials. One may find it offensive, another may be indifferent and another may find such material amusing. The danger for journalists is in reporting on matters that are construed

[46] This Section reads thus: 10 (1) Subject to the proviso in section 12, no person may publish, propagate, advocate or communicate words based on one or more of the prohibited grounds, against any person, that could reasonably be construed to demonstrate a clear intention to
(a) be hurtful;
(b) be harmful or to incite harm;
(c) promote or propagate hatred.
(2) Without prejudice to any remedies of a civil nature under this Act, the court may, in accordance with section 21(2*)(n)* and where appropriate, refer any case dealing with the publication, advocacy, propagation or communication of hate speech as contemplated in subsection (1), to the Director of Public Prosecutions having jurisdiction for the institution of criminal proceedings in terms of the common law or relevant legislation.
Section 12 of the Equality Act prohibits the dissemination or broadcast of any information, or the publication or display of any advertisement or notice, which demonstrates a clear intention to unfairly discriminate against any person.

as offending according to this provision. At the same time failure to report on such matters may be preventing the public from knowing what is happening in society.[47]

The line between what amounts to hate speech and permitted speech is very difficult to draw. In the United States of America for instance, hate speech is generally prohibited where it is directed at producing imminent lawless action or where it is likely to produce or incite such action.[48] In Canada, however hate speech has been defined as speech that promotes hatred against an identified group.[49]

5.3.4 Broadcasting

Broadcasting is arguably included in the right to freedom of expression under section 16 (1) (a) of the Constitution. Although there is a right to broadcasting, this right is not absolute. There is therefore no prohibition of the Regulation of speech which falls within the ambit of section 16 (2).[50] In instances where the state makes regulations which are beyond the scope of section 16 (2) this will clearly be invalid. Where the legislation is within the ambit of section 16 (2), it will be no bar to section 16 (1).

[47] Supra Note 5 at pg 70.
[48] *Brandenburg v Ohio* 395 US 444 (1968) at 447.
[49] *R v Keegstra* 3 CRR (2d) 193 at 205.
[50] *Argus Printing and Publishing Co Ltd v Inkatha Freedom Party* 1992 (3) SA 579 (A), 585B-C.

The closest the courts have come to in making a ruling on the right to broadcasting was the case of *Islamic Unity Convention v Independent Broadcasting Authority.*[51] In a public broadcast on radio 786 (the Islamic Unity Convention (IUC) being the licence holder), a participant in a programme stated that only one million Jews had died during the holocaust and these had died due to infectious diseases rather than being gassed. The South African Board of Jewish Deputies issued a complaint stating that Radio 786 had breached code 2 (a) of the Code of Conduct for Broadcasting Services.[52] The IUC stated that this section was inconsistent with the right to freedom of expression and was therefore invalid. The court held that the provision 'likely to prejudice relations between sections of the population' went beyond the scope of section 16 (2), hence it was invalid.

From the *Islamic Unity Convention* case Pretorius[53] draws certain guidelines which impact on the right to broadcasting.[54] Firstly, he states that section 16 does not confer an unqualified right to broadcasting. This is due to judge Langa's recognition that freedom of expression is neither paramount nor absolute. Secondly the learned judge stated that the statutory regulation of broadcasting is

[51] Supra Note 16.
[52] Schedule 1 of the IBA Act. This section provided that broadcasting licensees were not allowed to were not allowed to broadcast material 'which was likely to prejudice relations between sections of the population.'
[53] Pretorius, D. M., Freedom of Expression and the Regulation of Broadcasting, *South African human Rights Law Journal* at pg 64.
[54] He however says that it is important to note that 'the *Islamic Unity Convention* case was primarily concerned with the regulation of broadcasting *content* (that aspect of freedom of expression that is governed by sections 16(1)(b) and 16(2)), rather than with restrictions on the *activity* of broadcasting (that aspect of freedom of expression that is governed by s 16(1)(a))

in principle permissible.[55] Thirdly, it was held that all limitations in the public interest must comply with section 36 of the Constitution. The judge however did make a statement which is directly connected to the activity of broadcasting. He stated that section 192 of the Constitution made explicit provisions allowing for the regulation of broadcasting in the public interest. The purpose of regulation is to ensure fairness and a diversity of views broadly representing the South African society.[56]

The court also dealt with the issue of broadcasting in *Kingdom Radio Pty Ltd v The Chairperson, Independent Broadcasting Authority*.[57] The issue raised in this case was whether the refusal to issue a broadcasting licence infringed the rights to religion and the right to freedom of expression. With regard to the right to religion, it was held that this right had not been infringed by the refusal to issue a licence. This was due to the fact that the Universal Church of the Kingdom of God (UCKG) retained their right to practice their religion without hindrance. Failure to facilitate the practice of religion, in other words failure to act, did not

[55] Section 7 (3) of the Constitution read with section 36, permit the limitation of fundamental rights provided that such limitation is reasonable in an open and democratic society based on human dignity, equality and freedom. Section 192 also expressly allows for the enactment of legislation that creates an independent authority to regulate broadcasting in the public interests. Judge Smit in Radio Pretoria 2 [2006] 1 All SA 143 (T) (*Radio Pretoria 2* (T)) at 148j-e stated that section 192 of the Constitution requires that broadcasting be regulated by an independent authority established by national legislation.

[56] This means that, the broadcast media should not be instruments for thought control and indoctrination. Furthermore, for the purpose of achieving such diversity of opinions, the regulation of broadcasting should be designed to facilitate access to the broadcast media for a representative cross-section of our society. Access to broadcasting resources should not be the sole preserve of the wealthy and powerful sectors of society; marginalised communities should not be excluded from the *activity* of broadcasting.

[57] WLD 26474/1999 (19 December 2000) unreported, discussed in D. M. Pretorius 'Ten Years after the Transition: The Emergence of a Broadcasting Jurisprudence in South Africa' (2003) 19 SAJHR 593, 627ff.

restrict the right to religion.[58] Judge Fevrier also rejected the argument that the refusal to grant a broadcasting licence interfered with the right to freedom of expression.

It can therefore be concluded from case law in South Africa that there is indeed a right to broadcast. This right is however not unqualified. Legislation can therefore be enacted but it must not exceed the bounds of section 192. Such legislation must also be justifiable under section 36 of the Constitution. None of the legislation in South Africa grants a monopoly to the public broadcaster.

Among the laws regulating broadcasting in South Africa is the Telecommunications Act. Part 1 of this Act contains the Independent Communications Act of South Africa. It further provides for the amendment of the Broadcasting Act and the Independent Broadcasting Authority. The Act acknowledges the convergence of technological and other developments in the fields of broadcasting and telecommunications. It may also be noted that the legislatures in Zimbabwe and South Africa have identified the need for the regulation of the broadcasting field. It is only in Zimbabwe, however, where there is the regulation of the print media in AIPPA. The Zimbabwean counterpart of the Broadcasting Services Act is the Independent Communications Act. The reason

[58] Fevrier AJ said that the essence of freedom of religion was the right to hold and declare religious beliefs openly and without fear of hindrance or reprisal, and to manifest religious beliefs by worship, teaching and dissemination. Freedom implied an absence of coercion or constraint. Freedom of religion could be impaired by measures that force people to act or refrain from acting in a manner contrary to their religious beliefs. Accordingly, in the view of Fevrier AJ, the IBA's decision had not violated anybody's right to freedom of religion.

why licensing and regulation is constitutionally permissible in the area of broadcasting is that frequency is a limited public resource hence its use is made subject to the requirement that a diversity of voices representing South Africans must be given fair access to the airwaves.

The duty to license and compile to a code of conduct in the broadcasting industry lies with Independent Communications Authority of South Africa (ICASA), which replaced the Independent Broadcasting Authority. To prevent any bias on the part of ICASA councillors, it is parliament and not the government which is given the mandate to appoint them. Even the Minister of communication does not have a role in the appointment of councillors. This is yet another difference with the Zimbabwean scenario where the Minister is directly involved in the selection of members of the Broadcasting Authority. It is recommended that Zimbabwe also follow the example of South Africa by having a neutral body to appoint the members of the Broadcasting Authority.

The Films and Publications Act on the other hand gives the Minister a mandate to appoint the Chief Executive Officer who is also the Chairman of the Films and Publications Board. The President not only appoints the Chairman of the Review Board but also members of both the Board and the Review Board in consultation with an advisory panel which he similarly appoints. This may lead to abuse of power by the executive given the highly influential position of the both Boards in the broadcasting sector. The Films and Publications Amendment Act gives the

pre-broadcast jurisdiction over actual programme content to a three-person committee of "classifiers" appointed by the Board,[59] which is appointed by the Minister. This is an area where not even ICASA goes. This again must be subjected to constitutional scrutiny as it is an avenue for the possible abuse of power. It should only be after publication or airing that members of the public can then lodge complaints. This is also very unnecessary given the fact that the press has its Ombudsman (sic) and broadcasters use the Broadcasting Complaints Commission of South Africa which is a self-regulatory body.

The regulation of broadcasting is however not unique to South Africa and Zimbabwe. Several cases have also been brought before the courts in the United States challenging the regulation of broadcasting. One such case is *Federal Communications v Pacifica Foundation*[60] where it was held that '…all forms of communication, it is broadcasting that has received the most limited First Amendment protection.' It can be concluded from the Red Lion case that a

[59] According to Smuts D, "What you Can and Can't Say in South Africa," www.da.org.za/da/Site/Eng/campaigns/DOCS/Censorship-DeneSmuts.doc (accessed /03/07) 'The Film and Publications Board now proposes not only to override media freedom itself by requiring the media on pain of a fine or 5 years' imprisonment or both to submit to "classification", it not only fancies it can "refuse" publication unless material escapes banning by qualifying for a much distorted version of the literature, arts, politics, science (LAPS) test (art has disappeared and you need a combination of literature and science, both on matters of public importance); it also thinks it can do so on the basis of a wildly rewritten rendition of the constitutional s 16 (2) immunisation: "the advocacy of hatred based on any identifiable group characteristic". Half the constitutional standard has been abandoned, and the four grounds specified in s 16 have been diluted even further than in the case of the Equality Act. It would be attractive to think that this represents an aberration. But the Film and Publications Board signaled its clear intent to take jurisdiction over race with the 1994 amendments to the 1996 Act, when its existing power to prohibit works advocating religious hatred was expanded to include racial, ethnic and gender hatred. Its definition was taken verbatim from the Constitution, the work had still to be judged in context, the LAPS tests still applied and there was no attempt to take jurisdiction over the media.

[60] 438 US 726, 748.

broadcasting licence does not confer a right but it simply grants a temporary privilege.[61]

5.3.4.1 Comparison with Zimbabwean Broadcasting Services Act

This study has shown that the broadcasting systems of South Africa and Zimbabwe are similar in that the regulation of broadcasting is authorised by the Constitution. There is also a Broadcasting Authority which oversees broadcasting in both countries. Furthermore, in order for any persons to broadcast they have to be in possession of broadcasting licences,

The points of divergence between the Zimbabwean and the South African Broadcasting systems are, firstly, the Zimbabwean Broadcasting Authority Act grants excessive powers to the Minister while the Broadcasting Authority has virtually no real powers in comparison. The Minister, by virtue of the powers conferred on him is the broadcasting authority while in South Africa ICASA is the actual broadcasting authority. While it is the Minister who may issue licenses in Zimbabwe, ICASA in the South African context grants broadcasting licences. Secondly, the periods for which licenses are granted to broadcasters are also different. For example, in Zimbabwe, community broadcasting licences are valid for 1 year while in South Africa they are valid for 4 years; other categories of licences are valid for 2 years in Zimbabwe while in South Africa, television

[61] Quoted in note 55 above.

broadcasting licences are valid for 8 years, and radio broadcasting licenses are valid for 6 years.

Thirdly, whereas the Broadcasting Act of South Africa emphasises the independence of the broadcasting board, in terms of section 3(3)[62] of the Act, there is no such emphasis on the Zimbabwean Act. Fourthly, in South Africa, the President, on the advice of the National Assembly, appoints members of the Council.[63] Being the appointing authority the President is empowered after due inquiry to remove a Councilor from office.[64] The President in South Africa has no unfettered discretion to appoint Council members. He may only appoint members from a short list that 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 board members to appoint. In addition the Minister has power to suspend and terminate the employment of the Board members. The South African position, though not ideal, does provide some measure of security of tenure of office. In any event the President does not enjoy the same powers to interfere with programme content, as does the Zimbabwean Minister of Information. The President is not the licensing authority, and neither is he

[62] This section states that the broadcasting board: "…shall function without any political or other bias or interference and shall be wholly independent and separate from the state, the government and its administration or any political party, or from any other functionary or body directly or indirectly representing the interests of the state, the government any other political party".
[63] See section 4 of the South African Independent Broadcasting Authority Act.
[64] See section 8 of the South African Independent Broadcasting Authority Act.

involved in the amendment, suspension, and cancellation of licenses as in the Zimbabwean situation.

Fifthly, the ICASA Act requires the members to possess certain minimum professional qualification, represent plurality of society, be committed to various values, and be committed to the objects and principles of the Act.[65] There are no such requirements in the Zimbabwean Act. Finally, the ICASA Act sets a fixed term of office, and sets clear conditions on termination of tenure of office and most important of all, the Minister and all other political figures have no power to interfere with the work and affairs of the Authority. The same is not true with the Zimbabwean Act.

5.4 The judiciary and protection of freedom of expression

An overview of the cases in South Africa show that the judiciary has been vigilant, as compared with their Zimbabwean counterparts in protecting human rights in general and the right to freedom of expression in particular. Some might argue that South Africa is still nurturing a young democracy and hence is striving for the mastery of the art of democracy (just like Zimbabwe was when it was also in its early years of democracy, 1980 – 1990). The environment under which the judiciary operates is very different in the two countries. Some lessons can still be learnt by the Zimbabwean judiciary when dealing with issues relating to the

[65] See ICASA, section 5(3) and (4)

protection of freedom of expression. This is more especially considering that all the judges of the Supreme Court, with the exception of Justice Sandura were not on the bench during the 1980 – 1990 period.

The state in South Africa also operates on the separation of powers system having three legs, namely, the executive, the judiciary and the legislature. This system is the same as that which is operational in Zimbabwe. This means that rule of law as well as judicial independence to a great extent, prevails in South Africa.

In determining whether legislation is constitutional the courts follow a two-part test before proceeding with the determination whether freedom of expression has been infringed.[66] In the first part the court determines if there has been a violation of a right that is protected by the Constitution. If so, then the second part of the test is an enquiry as to whether the violation constitutes a permissible derogation under the Constitution.[67] The Court must give a broad rather than a narrow interpretation to the rights enshrined in the Bill of Rights.[68]

Like their Zimbabwean counterparts, the South African judiciary has on various occasions acknowledged the importance of the right to freedom of expression in

[66] *S v Williams and Others* 1995 (3) SA 632 (CC) at 649C-D.
[67] In *De Reuck v Director of Public Prosecutions and Other* CCT 5/03, the Court in Determining the Constitutionality of Section 27 of the Films and Publications Act, which prohibited child pornography, used this test. The Applicants alleged that this section among other things infringed his right to freedom of expression. The Court held that child pornography was a type of expression and was limited by section 27 of the Act. It then proceeded to determine whether such limitation was justifiable under the Constitution.
[68] *S v Makwanyane,* supra note 38, at para 100.

a democratic society. This, they have acceded, is more important taking into consideration South Africa's recent past of thought control, and censorship. The courts have therefore taken a stand to outlaw any form of thought control no matter how respectable it is dressed.[69] This stand of protecting the right to freedom of expression has been taken specifically bearing in mind the important function of the press and the media in a democratic society. The press is a means of creating an informed citizenry who then in turn participate in the democratic process.

The courts have in several cases however upheld other rights at the expense of the right to freedom of expression. One such case is *DPP v Midi Television*.[70] This case dealt with the screening of the 3rd Degree programme by E-TV on the Baby Jordan murder case. The Director of Public Prosecutions then made an urgent application stating that the right of freedom of expression of E-TV, the respondent, interfered with their right to a fair trial. In arriving at the decision, the court stated that although the right to freedom of expression was important, it was not superior to other rights. It must therefore be weighed up with other competing rights; in this case the right to a fair trial. The learned judge held that although issues surrounding the case had been in the public domain for sometime, there was a danger that the nature and scope of the interviews held for the 3rd Degree programme would focus on the events surrounding the murder. He stated that this is not what had been in the public domain. He also

[69] *S v Mamabolo* 2001(5) BCLR 499 (CC) at 468D-F.
[70] Supra Note 30.

stated that it was important for the witnesses' statements not to be in the public domain before completion of the investigation. It was for these reasons that the right to freedom of expression had to give way to the right to a fair trial.

The court further went on to state that the applicant did not seek to arbitrarily interfere with the respondents' editorial independence. Rather, 'it seeks to have access to the broadcast material in order to satisfy itself that its right to a fair trial is protected.' The court held that the limitation was reasonable as the interest that it sought to protect did not go beyond that interest.[71] There was also no less restrictive means to be employed as broadcasting the programme would bring irreparable damage to the case of the applicant.

Another important case which has been discussed briefly above is the *Islamic Unity v Independent Broadcasting Authority* case. This case dealt with the constitutionality of clause 2 (a) of the Code of Good Conduct for Broadcasting Services.[72] The applicant argued that the section was unconstitutional due to the fact that it was overbroad and vague. The Court held that it was clear that clause 2 (a) of the Code violated the right to freedom of expression. It was further held that the restriction went beyond section 16 (2) of the Constitution.[73] The court held that the phrase 'likely to prejudice relations between sections of the

[71] Supra Note 30 at para 46.
[72] Schedule 1 to the Independent Broadcasting Authority Act 153 of 1993. The section provides that: 'Broadcasting licensees shall . . . not broadcast any material which is indecent or obscene or offensive to public morals or offensive to the religious convictions or feelings of any section of a population or likely to prejudice the safety of the State or the public order or D relations between sections of the population.'
[73] Supra Note 16 at para 35.

population was cast in absolute terms and one would have difficulty in knowing beforehand what was prohibited.[74] It further held that there could be less restrictive means of impairing the right to freedom of expression and these would not be less effective in achieving the purpose of the regulation.

5.4.1 Comparison

It can be noted that the South African judiciary is more vigilant in its protection of the right to freedom of expression. The judges are not apologetic neither do they show any signs of fear in handing down their judgments. One might say that this is due to the fact that they are neither under attack by the executive and nor by some sections of the population. But the Zimbabwean Judiciary can certainly pick up a few tips from their South African counterparts, that is, they can be more vigilant when it comes to the protection of human rights and more specifically, the right to freedom of expression.

Another factor is that the South African judiciary has adequate resources and they have certainly not complained about their salaries in the recent past. The working conditions of the judiciary do impact on the quality of decisions of a particular bench and in some cases contribute to the independence of the judge. If the bench is under resourced then its decisions will also be shabby and worse still such decision might favour certain parties. The judiciary should not have to

[74] Ibid at para 44.

go to the extent of complaining about lack of resources. But for the effective administration of justice, the judicial branch of the state has to be well resourced. This is to be complemented by a good working relationship between the different branches of the state, mainly, the judiciary and the executive.

5.5 Summary

Despite the good record of press freedom and the right to freedom of expression, there have been concerns in some sectors of society of the growing restriction on these rights. Judges, for instance, granted interdicts against various newspapers which prevented them from publishing the controversial Danish cartoons.[75] This was before any of the newspapers had made any decisions as to whether or not they would publish these cartoons. There has also been increasing factor on journalists in South Africa to reveal their sources. For example, *The Mail and Guardian* and its internet provider, M-Web have been compelled to give evidence in the controversial 'Oilgate' matter.[76] Worse still, Willie Bokala and Saint Molakeng have been subpoenaed to testify in the fraud trial against Hilda Khoza.[77] This essentially means that they have to give testimony on the interview that Khoza gave to Molakeng. The right of journalists to protect their sources of information ought to be recognised in law and protected accordingly in both South Africa and Zimbabwe.

[75] Freedom of Expression Institute (FXI), Capsule Report: Media Freedom Declining, Says FXI, http://www.ifex.org/da/content/view/full/78506/ (last accessed on 13/02/07).
[76] Ibid.
[77] Ibid.

Another impairment to the right to freedom of expression has come in the form of the much talked about political blacklisting by the SABC. Reports reveal that the Group Executive of News, Dr Snuki Zikalala, has instructed his staff not to use specific political analysts and commentators because they have made critical comments against President Thabo Mbeki and the presidency.[78] There have also been shocking reactions at the comments of presidential spokespersons who have alleged that the anti-crime campaign by the First National Bank amounted to 'incitement' against the President.[79]

The Freedom of Expression Institute (FXI) also alleges that censorship is on the rise in South Africa. In her paper presented on press freedom day, Executive Director of FXI, Jane Duncan, states that new legislation is being passed to perpetuate press censorship. She gives an example of the Anti-Terrorism Bill which she says is lacking because of its failure to define what a 'terrorist act' is.[80] The South African media has often been accused of being elitist and this is true to some extent. This is due to the high press coverage that is given to top ranking

[78] Freedom of Expression Institute, "Broadcasting Corporation Refuses to Release full Report on Allegations of Political-Motivated "Blacklisting,"" http://www.ifex.org/da/content/view/full/78350/ (last accessed on 13/02/07). Among those included on the list are political editor, Karima Brown, independent political analyst Aubrey Matshiqi, Moeletsi Mbeki and Trevor Ncube. This blacklisting has led to the resignation of two prominent SAFM Morning Talk Anchors, Nikiwe Bikitsha and John Pearlman. See Ndlangisa S, 'Time for us to Talk' is Over, *The Daily Dispatch*, 31 January 2007 at pg 1.

[79] Du Toit C, FXI Slams Government Over FNB, *The Citizen*, 6 February 2007, at pg 7. Jane Duncan from the FXI stated that this was synonymous to the insult laws in other African countries, namely Zimbabwe.

[80] The Bill could be used to proscribe a whole range of legitimate civil and political activities in the country such as demands for land, demonstrations, pickets or civil disobedience campaigns. The actions of South African organisations such as the Treatment Action Campaign, which campaigns for affordable treatment for the HIV-Aids infection, and the Soweto Electricity Crisis Committee which opposes the cut-offs of electricity in poor areas, could be criminalised as 'terrorist acts'. In the process, their members and supporters could be subjected to some of the severest penalties possible in South African law.

officials at the expense of the ordinary person and events in society. This greatly hinders the freedom of expression as the views and opinions of the ordinary person receive little or no press coverage at all. Recently, members of FXI marched to the SABC offices complaining about the public broadcaster's elitist coverage of news.[81] When one looks at the Jacob Zuma case, and the attention that has been drawn to the Health Minister, Manto Msimang, this assertion is to a great extent true. Although these matters were important, it would seem they received more attention than was necessary.

The overall conclusion however is that, the right to freedom of expression is highly respected by the judiciary in both South Africa and Zimbabwe. The judiciary takes a very active role in ensuring that this right is not disregarded. The legislative framework in South Africa with regard to the right of freedom of expression is also very positive with little or no interference with the exercise of this right. However, there is generally an air of slackness in the protection of this right and there is a need for the legislature to take greater measures in ensuring that this right is adequately promoted. The executive also has to show some vigilance in the protection of this right by being more open to criticism which will in turn allow more public debate.

[81] Vumile Velaphi, spokesperson of FXI complained that: 'The current struggles and campaigns for social services that are wagged by the working class and the poor have received little or no coverage from the broadcaster.' He also accused the SABC of being a 'fully fledged mouth piece of the government.' See *The Star*, 'Angry Protestors March on SABC,' 7 February 2007, at pg 3.

Chapter 6

Conclusions and Recommendations

6.1 Introduction

The right to freedom of expression is far from a theoretical occupation. This right affects the functioning of democratic institutions in a democratic society in particular and the citizens in general. Access to information is a prerequisite to this right and without such access it is practically impossible for persons to express themselves effectively. Enabling legislation has to be enacted by the legislature, interpreted by the judiciary and executed by the executive for this right to be realised. Such legislation must not only be inline with the Constitution of Zimbabwe but it must also be in line with international standards to which Zimbabwe is a party to.

Citizens are being adversely affected by the lack of access to information at the writing of this dissertation as they do not know what is happening in their country. They are further not given an opportunity to express themselves. Not only do the citizens not know what is happening in government but the government also does not know what the people think on important issues. This is not what is ideal in a democratic country.

In this chapter, a summary of the conclusions drawn from the entire study is presented; and general and specific recommendations for the effective protection of the right to freedom of expression in Zimbabwe are proffered.

6.2 Conclusions

This study has made a case for the effective protection of the right to freedom of expression by the judiciary in Zimbabwe. Freedom of expression was broadly defined as including all forms of expression including conduct. Hence the notion of expression is broader in scope than speech. Freedom of expression also includes the right to receive and impart information. Any conduct by the government which hinders access to information and imparting information to other people would therefore be unconstitutional. Where the government therefore restricts access to information by the people or prevents newspapers from imparting information such conduct would be unconstitutional. As freedom of expression includes freedom of the press, government must by no means hinder the press from printing and publishing. As was revealed in Chapter 3, even minority views not accepted by the majority ought to be protected.

However the right to freedom of expression is not absolute. It must be subjected to constitutionally acceptable limitations that are reasonable and justifiable in an open and democratic society. Whatever limitations are set by the legislature, they must be within the ambit of section 20 (2) of the Constitution. The legislature is

therefore given the powers to pass legislation regulating the right to freedom of expression but this must not be *ultra vires* section 20 of the Constitution. In limiting the right to freedom of expression it also very important to take note of the theories upon which the right to freedom of expression is premised (see chapter 2). These will give a picture of the importance of the right in all democratic societies, volatile or not volatile.

This study also established that the judiciary are the guardians of the constitutional rights guaranteed in the Bill of Rights. It is for this reason that they must therefore vigilantly guard the rights of the individual from infringement by the state. People must be able to rely on the judiciary to effectively protect them from the abuse of power either by other persons or by other organs of the state. The role of the judiciary, which is to guarantee the rights in the Bill of Rights, must not change with the political condition in the country. The judiciary must ideally be guided by the Constitution and not by the whims of the majority through their elected representatives. That is one of the reasons of the existence of the Constitution, that is, to guard the 'all' individuals in a state against abuse of their rights.

This study analysed international and regional regulation of the right to freedom of expression. This was done with a view to establishing the background of the right to freedom of expression and analyse the nature and extent of its protection by legislation and the judiciary in Zimbabwe. The international and regional

instruments prescribed the minimum requirements of the right to freedom of expression which must be adhered to by state parties. The Human Rights Committee also provides guidelines in the form of case law as to the application of this right by national courts. Although the right to freedom of expression will be interpreted in different ways in various jurisdictions with diverse political environments, state parties must abide by their international obligations as they entered into such treaties and conventions with no compulsion.

The work also revealed that Zimbabwean legislation, namely, AIPPA, POSA, OSA and the debatable Interception of Communications Bill do not comply with the minimum requirements set by international law. These pieces of legislation are also arguably inconsistent with the provisions of the Constitution. The Supreme Court has already ruled that some of these sections are unconstitutional (see Chapter 3). Some of the sections in the legislations have not been brought under constitutional scrutiny but they also greatly restrict the right to freedom of expression.

The work also brought into light the cases dealt with by the judiciary which impact on the right to freedom of expression. The overall picture painted by these cases was that the current judicial bench is influenced by the executive due to several factors. These include among others, the low salaries received by the judiciary in light of the prevailing harsh economic conditions in Zimbabwe. These salaries make the judiciary susceptible to corruption with some of having received farms

from the controversial land reform programs carried out by the government. It is therefore very unlikely that the judiciary will bite the hand that feeds them. The appointment of the judiciary is also another area of concern with regard to the proper functioning of the judiciary. This is specifically with regard to the higher courts as they have the mandate to handle constitutional issues.

Comparison with South Africa revealed that Zimbabwe was seriously lagging behind when it comes to the protection of the right to freedom of expression. The South African courts have effectively discharged their role in protecting the right to freedom of expression and this is shown by the rich and authoritative case law on the right to freedom of expression in the country. The more robust debate in South Africa also reveals a permissive environment with regard to freedom of expression. The requirement of compulsory accreditation of journalists and the registration of mass media services in South Africa does not exist. The press is characterised by self regulation and the accreditation of journalists is not compulsory, by it there for purposes of obtaining certain privileges like for instance access to parliament. The large number of Radio stations also shows the lack of monopoly within the system of regulation in South Africa.

6.3 Recommendations

The recommendations advanced for the improvement of the fundamental right of freedom of expression in Zimbabwe are:

6.3.1 Legislative Reform

There is a general need for legislative reform in Zimbabwe in the field of the right to freedom of expression. The current legislation which regulates this right is restrictive in nature and does not allow for the full enjoyment of the right. Such legislation must be premised on the right guaranteed in section 20 of the Constitution. In making the reform, the legislature should take into account the relevant international law principles. The pieces of legislation which ought to be reformed include AIPPA and POSA among others. In addition, the executive has to come up with a manual which will before hand tell members of the public what kind of information is available with the different public bodies. Further, the whole Act should be repealed by one that is an Access to Information regulation in the true sense of the phrase rather than just in name. The MIC also ought to be replaced in favour of a body established by the journalists and publishing houses, which is self regulatory.[1] This is more so with regard to information that citizens need to make informed decisions when participating in the democratic process. These would include access to records of the cabinet which are not kept secret in the interest of national security.

[1] The Media Council of Zimbabwe (MCZ)is an independent body established by journalists but it is not legitimate as far as the government is concerned. The legislature amended AIPPA to do away with the MIC and also enacted the statutory Media Council of Zimbabwe after the formation of the MCZ by journalists. The statutory MCZ is however not yet functional and the MIC is still operational.

With reference to POSA the provisions impacting on the right to freedom of expression are generally restrictive. These sections include:[2] section 5 – this section makes it an offence for a journalist to advocate, urge or suggest the setting up of an organisation with a view to coercing or attempting to coerce the government or overthrowing the government or taking over through unconstitutional means; section 12 which makes it an offence to cause or attempt to cause disaffection among members of the defence forces or the police leading them to withhold their services; and section 16 which outlaws undermining the authority or insulting the President.

With regard to broadcasting, it must be noted that the Broadcasting Authority of Zimbabwe (BAZ) has not licensed a single broadcaster. Further, the BAZ has not called for license applications for Community Broadcasters thus defeating the ideal of a three-tier system. Moreover, the Zimbabwean broadcasting monopoly still persists. There has been absolutely no benefit of broadcasting liberalization for the public five years after ZBC's monopoly was declared unconstitutional, this is a violation of the public's right to freedom of expression through the medium of their choice. It is also a violation of the public's right to information, which is a necessary precondition for a vibrant participatory democracy. It is therefore recommended that the BAZ take a less stringent approach in granting licenses to broadcasters.

[2] See Chapter 2.4.2.

It is also recommended that the legislature ensure that the appointment process as well as security of tenure of the office is revised to ensure the independence of the Authority. It also recommended section 4 of the Act be repealed. This section deals with the composition and appointment of the Broadcasting Authority Board of Zimbabwe. There should be an independent body which is responsible for the appointment of members of the Board, preferably elected representatives of the people rather than the Minister of Information who is a government official and party functionary.

Under broadcasting, it is also recommended that the government in a bid to promote the right to freedom of expression make available resources for the establishment of community broadcasters. The promotion of community broadcasting, based on the Brazilian model, would also go a long way in advancing the right to freedom of expression. This would essentially mean that ordinary members of the community have access to mediums where they can express themselves rather than having a few broadcasters which are only available to the elite members of society or those who have the resources

At the time of writing this research there have been various developments with regard to legislative reform which have a direct bearing on the protection of human rights. Firstly, there was the amendment of the Constitution through the enactment of Constitutional Amendment No. 18. Amendment No. 18 establishes the Human Rights Commission of Zimbabwe. These could be a highly influential

body if it is given the sufficient powers and resources in the area of protection of human rights.

The legislature has also undertaken a piecemeal amendment of POSA,[3] AIPPA[4] and the Broadcasting Services Act of Zimbabwe.[5] The MIC[6] has been replaced by the Zimbabwe Media Commission. This Commission comprises of eight members who are appointed by the President from a list submitted by the Committee on Standing Rules and Orders.[7] However, the Commission is not yet functional. Sections 38, 39 and 40 have therefore been duly substituted by the Amendment Act. The Zimbabwe Media Commission essentially has the same powers as the MIC but it has an additional mandate of ensuring that the public is aware of the Act. Although in countries less beleaguered by volatile political environments the process of appointment of the Commission may ensure its independence, in the Zimbabwean scenario, this may not be the case. The majority of the members of the Committee on Standing Rules and Orders are drawn from the ruling party and therefore the Commission may not be completely at odds with the government.

The Act also establishes a Media Council which is a parallel structure to the journalist appointed Media Council of Zimbabwe. This again is contrary to the

[3] POSA has been amended by POSA Amendment Act No. 18 of 2007.
[4] AIPPA has been amended by the AIPPA Amendment Act No. 20 of 2007.
[5] This Act has been amended by The Broadcasting Services Act No. 19 of 2007.
[6] The MIC, in January 2008, invited the ANZ to submit their papers for accreditation and this has been hailed as a positive move.
[7] This is a parliamentary Committee and it can be stated that this is a move in the right direction as parliamentary committees have been very influential in positive reform.

preferred self regulation by journalists. The sections: 50; 52B; 65; 66; 67; 69;71; 72; 78; 79; 80; 90A; and 91 have been amended while sections 82; 83 and 85 have been repealed by the Amendment Act. The repealed sections do not introduce any fundamental changes with regard to the right of freedom of expression. Journalists still cannot practice journalism without accreditation neither can they be employed. However, the registration of mass media houses has been increased to five years. Furthermore, although section 66 has been amended, the registration of a mass media service is still not a purely administrative process.

POSA has also been amended and the Amendment Act became operational in January 2008. According to the Amendment Act, a convenor has the responsibility of notifying the police-officer-in charge seven days before the gathering or meeting. The police officer still has the discretion not to grant permission of the meeting or gathering. The positive aspect, however, is that the convenor can appeal against the decision of the officer in charge to the magistrates' court. The Act further prohibits gatherings in the vicinity of Parliament and the Courts. It is, however, notable that police officers are still granted permission to use force in dispersing gatherings. The Amendment Act however states that the force used by the police officers should be proportionate to the circumstances of the case and the object to be attained. The police officers are further prohibited from using weapons that may cause serious bodily harm or death in dispersing any gathering.

6.3.2 Self Regulation of journalists

It is also recommended that instead of the compulsory accreditation of journalists, there should rather be self-regulation. This is more effective as proven in the jurisdiction of Tanzania. The Media Alliance of Zimbabwe has made an attempt to establish a self-regulatory body, the Media Council of Zimbabwe. The government has however resisted the idea of self-regulation even stating that this system is parallel to the statutorily recognised system. It is recommended that the government works with civil society and journalists to establish a self-regulatory framework which will in time do away with the statutory regulation which is considered as restrictive to the right to freedom of expression.

6.3.3 Participation of NGOs

NGOs also have an important role to play with regard to promoting the right to freedom of expression. They can, like MISA,[8] assist the government in coming up with legislation which will foster a good environment for the right to freedom of expression. If NGOs therefore avail their expertise to the government, as they have more resources, this will mean an improvement in the application of human rights. Some of the projects which NGOs can undertake are:

[8] MISA has come up with an alternative Access to Information Act which has as its foundation AIPPA. This Act builds on the issues that are raised by AIPPA and makes various corrections to some of the issues that have been overlooked by the legislature in enacting it.

- training of journalists on how to correctly exercise the right to freedom of expression among other things,
- training of government officials on access to information and generally how to promote the right to freedom of expression in the various sectors of government,
- training of citizens on freedom of expression and access to information, or alternatively making available material on these issues. The NGOs can also initiate a project like the one envisaged by section 14 of the Access to Information Act 2000 of South Africa. This section provides for a basic manual of information that is held by all public bodies. Such a project would be best conducted in conjunction with the government.

6.3.4 Judicial Activism

It is also recommended that the judiciary be more active in the protection of human rights and in this particular case the right to freedom of expression. This is even more important in politically volatile environments where the abuse of the rights of individuals is rampant. In its endeavour to protect human rights the judiciary must ensure equal access to justice to all litigants.

The judiciary can also, like their Indian counterparts adopt the Public Interest Litigation (PIL).[9] PIL has distinctive characteristics which include;

- liberalisation of the rules of standing – under this characteristic public interest litigation must be capable of being initiated by individuals or organisations on behalf of individuals or other groups who cannot themselves initiate such proceedings,
- procedural flexibility – the judiciary should ideally be a body that guarantees the rights of all persons in society. The courts therefore are in the same manner ideally to be accessible to everyone in society. Judges can therefore encourage the litigants to bring in their petitions by allowing them to write letters to the courts or judges and in turn treating such letters as petitions to institute proceedings. This relaxation of the rules of procedure will encourage those members of society whose rights are violated but do not have the relevant legal expertise to also bring their grievances before the courts,
- A creative and activist interpretation of legal and fundamental rights – judges should therefore not escape from addressing substantial questions of social justice by simply following the legal text when they are aware that their actions will perpetuate inequality and injustice. They should take positive actions to ensure the protection of human rights,

[9] Jackson V . C, Tushnet M, Comparative Constitutional Law, Second Edition, Foundation Press, 2006 at pg 718.

- Remedial flexibility and ongoing judicial participation and supervision – this is specifically important considering the non-compliance by the executive of court orders.

Furthermore, there should be mechanisms put in place which enable the judiciary to be involved in the legislation making process. In such a situation the judiciary should be given an additional function of evaluating the constitutionality of legislation before it is passed into law, as was the case with the enactment of the South African Constitution. After the legislature has enacted a bill, the next step should be for such a bill to be brought before the courts for the determination whether such legislation is constitutional or not. This will help to eradicate the existence of unconstitutional sections in Acts which might never be challenged by a litigant in court but nevertheless infringe on the rights of members of society.

With regard to the judiciary, there are also areas that need transformation in this branch of the state. Firstly, with regard to the appointment of judicial officers, there ought to be an independent body of persons from the legal field (such persons ideally should be senior lawyers and senior magistrates and judges) to choose members of the Judicial Services Commission which will in turn be solely responsible for the appointment of judges of the High Court and Supreme Court without any interference from the executive.

Secondly the judiciary must be allocated its own funds so that it can make its own budget and allocation of resources instead of begging for funds from the executive. This will also go a long way in addressing the plight of the judiciary in Zimbabwe which is greatly under resourced.

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