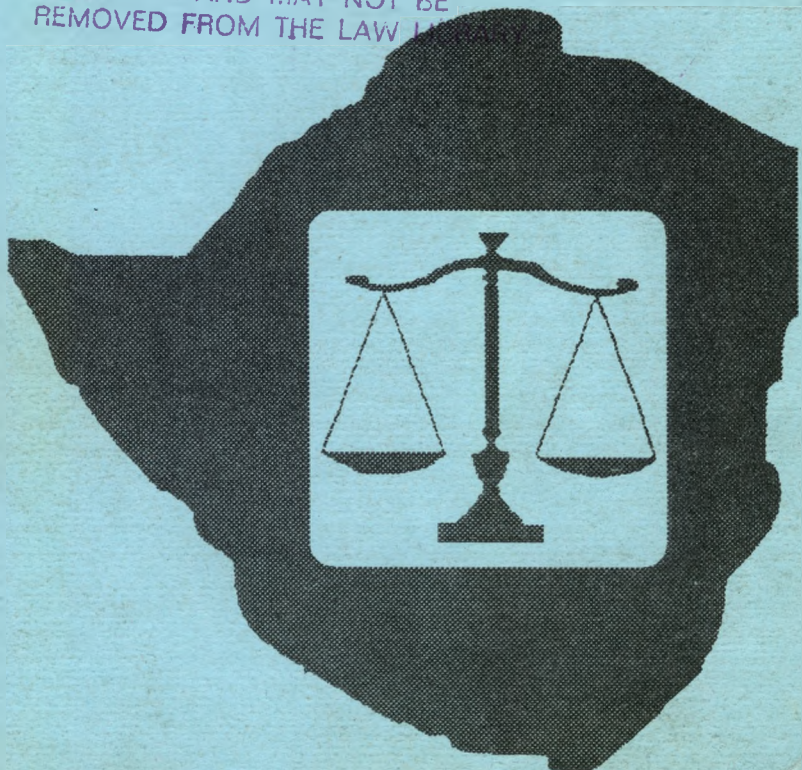


# Zimbabwe Law Review

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# THE RIGHT TO INFORMATION AND THE REGULATION OF BROADCASTING IN ZIMBABWE: TOWARDS A MORE LIBERAL FRAMEWORK

*Welshman Ncube*

*Professor of Law, Department of Private Law, University of Zimbabwe*

## INTRODUCTION

The debate over the broadcasting legal regulatory framework in Zimbabwe falls within the general discourse on freedom of expression, information and the media. Accordingly, issues relating to the reform of the laws governing broadcasting have to be discussed within the general context of the rights to freedom of expression, access to information and freedom of the media. Within this context important constitutional and human rights imperatives arise which have to be reviewed so as to properly understand the issues which are crucial in the process of regulating broadcasting and broadcasting services. Broadcasting does not and cannot take place in a vacuum. It is not and cannot be a purposeless exercise without social ends. The essence of broadcasting includes or encompasses the obligation to inform, the right of citizens to be informed, their right to acquire knowledge and information, their right to entertainment and recreation and indeed their right to be educated. It is for this reason that broadcasting is an important social and political issue which ought to concern all those who believe in democratic government. This paper is divided into four parts of which this introduction is the first. The second part discusses the importance of free speech and freedom of information to individual self realisation and to the institution and maintenance of democratic and accountable government. The third part discusses the scope of the right to free speech within the context of international human rights instruments. The fourth part discusses the recognition and implementation of the right in Zimbabwe and also analyses the broadcasting laws within the context of the Constitution. The fifth and final part suggests recommendations to create a more liberal legal regulatory framework for broadcasting.

## THE IMPORTANCE OF FREE SPEECH

The right of free speech or the freedom of expression is universally recognised as one of the most precious of all political rights which is central to democratic governance and which is a precondition of republican government. One of the most influential founding fathers of the American Constitution, James Madison, perceptively observed a long time ago that:

A popular government without popular information or the means to acquire it is but a prologue to a farce or a tragedy; or perhaps both. Knowledge will forever govern ignorance; and a people who mean to be their own governors must arm themselves with the power which knowledge gives.<sup>1</sup>

Information and knowledge are essential preconditions for the effective operation of a representative and democratic government. Information and knowledge are not only necessary for the personal self-fulfillment and realisation of each and every individual but

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<sup>1</sup> *The Complete Madison*, 1953, p.335.

are also necessary to enable each person to participate meaningfully in public affairs. In this sense the rights of free speech and access to information are preconditions for the effective functioning of a democracy.

Knowledge is interwoven with the concept of man. Every person must have the possibility of knowing the elements of his environment, the intellectual and scientific achievements of his fellowmen, the facts and the developments that affect or may affect his life and generally all those elements and facts which will enable him not only to survive but also freely to develop his personality. Knowledge cannot and should not be the monopoly of the few. It is a wealth which must be accessible to everybody. Those who lack knowledge are doomed to be always victims of those who know; victims of deceit and distortion of facts; victims of irrationality because undoubtedly every person who is ill-informed cannot think correctly.<sup>2</sup>

This same point has received widespread judicial recognition and is most elegantly made by Mr Justice Cardozo in *Palko v Connecticut* 302 US 319 at 327 as follows:

Freedom of thought and speech . . . is the matrix, the indispensable condition, of nearly every other form of freedom.<sup>3</sup>

The very first comprehensive Declaration of Human Rights, the French Declaration of the Rights of Man and the Citizen of 1789, in its Article 11 declared and categorised the right to free speech as the most precious of all the rights of man. In *RD DSU Local 580 v Dolphin Delivery Ltd* (1986) 33 DLR (4th) 174, McIntyre J put the same point somewhat differently but with equal elegance:

Representative democracy, as we know it today, which is in great part the product of free expression and discussion of varying ideas, depends upon [the] . . . maintenance and protection [of the right of free speech].

For its part, the Zimbabwean Supreme Court has also underlined the importance of the right to freedom of expression. In *In re Munhumeso and Others* 1994(1) ZLR 49(S) Chief Justice Gubbay emphasized the importance and centrality of free speech in the following words:

The importance attaching to the exercise of the right to freedom of expression and freedom of assembly must never be under-estimated. They lie at the foundation of a democratic society and are one of the basic conditions for its progress and for the development of every man. Freedom of expression, is one of the most precious of all the guaranteed freedoms.

The Chief Justice reiterated the same point in *Woods and Others v Minister of Justice and Others* 1994(2) ZLR 195(S) as follows:

In *In re Munhumeso* . . . this court characterised the right to freedom of expression as among the most precious of all the protected freedoms, lying at the very foundation of a democratic society; and one always to be jealously guarded by the courts.<sup>4</sup>

Freedom of expression is thus not only of itself central to democracy but is also important for the enjoyment of other human rights. Conceptually, freedom of expression is founded on two theoretical or philosophical bases, namely its importance for the establishment, operation and maintenance of democratic political and social processes and institutions

2 Andras Sajo, *Rights of Access to the Media*, at p. 3.

3 At page 56-57.

4 At page 198.

and its necessity for the self-fulfilment, actualisation and realisation of each individual in the process of his intellectual and personal development as a human being participating in all aspects of human endeavour. One of the most important indicators of the freeness of any people is the level and depth of the exercise of their right to free speech. The freer and more democratic a nation is, the less are the restrictions and constraints on its people to express themselves through the various modes of expression. More importantly, a true measure of whether or not any nation is a functional democracy is the extent to which its media institutions are capable and in fact do operate freely allowing all citizens the maximum degree of access to information on every aspect of social and political life. A media under captivity either of the state or the ruling elites or a few powerful individuals regardless of whether it is in public hands or private ones is the very antithesis of the right to free speech and freedom of expression and inevitably undermines both individual self-fulfilment and the capacity of the people to participate effectively in public affairs.

### FREE SPEECH IN HUMAN RIGHTS INSTRUMENTS

The right to free speech is recognised and protected in varied formulations in virtually all international and regional instruments on human rights. Article 19 of the Universal Declaration of Human Rights provides that:

Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

In similar vein the International Covenant on Civil and Political Rights in its Article 19 states that:

- (1) Everyone shall have the right to hold opinions without interference.
- (2) Everyone shall have the right to freedom of expression; the right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

Article 10 (1) of the European Convention on Human Rights provides that:

Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers . . .

Similarly Article 9 of the African Charter on Human and Peoples Rights provides that:

- (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.<sup>5</sup>

Clearly that the protection of free speech as a human right is well established in international human rights instruments is beyond dispute. Indeed, there is a large body of jurisprudence on this right in international law.

Freedom of expression as a fundamental right is provided for in Section 20(1) of the Constitution of Zimbabwe which states that:

Except with his own consent or by way of parental discipline, no person shall be hindered in the enjoyment of his freedom of expression, that is to say, freedom to hold

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5 See also Article 13 of the American Convention on Human Rights.

opinions and to receive and impart ideas and information without interference, and freedom with his correspondence.

This formulation is essentially modelled on the various international human rights instruments cited above. It is clear from the Zimbabwe provision that conceptually the right to freedom of information embraces five distinct but related elements or notions, namely:

- (i) the right to form and hold opinions;
- (ii) the right to impart, receive and seek information;
- (iii) the right to generate, impart, receive and seek ideas;
- (iv) the right to express opinions and ideas;
- (v) the right not to have one's correspondence interfered with.

While it is clear that the right to freedom of expression includes freedom of the press and other media, it is noteworthy that the current formulation of this right in the Zimbabwean Constitution is old fashioned. More modern formulations which expressly encompass freedom of the media, freedom of artistic expression, freedom of scientific research and academic freedom are to be found, for example, in the Constitutions of South Africa, Namibia and Canada. Section 16(1) of the South African Constitution states that:

- Everyone has the right to freedom of expression, which includes:
- a) freedom of the press and other media;
  - b) freedom to receive or impart information or ideas;
  - c) freedom of artistic creativity; and
  - d) academic freedom and freedom of scientific research.

Section 21(1)(a) of the Constitution of Namibia provides that:

- (1) All persons shall have the right to: (a) freedom of speech and expression, which shall include freedom of the press and other media.

Similarly, Section 2(b) of the Canadian Charter of Rights and Freedoms states that:

Everyone has the . . . freedom of thought, belief, opinion and expression, including freedom of the press and other media communication.

In Zimbabwe the Ministry of Justice, Legal and Parliamentary Affairs has taken the view, as expressed in its Policy Document on Press Freedom, that since there are judicial decisions and pronouncements from renowned jurists to the effect that the term "freedom of expression" includes the freedom of the media there is no need to reformulate section 20(1) of the Zimbabwean Constitution to specifically include an express reference to freedom of the media. In the policy document it is somewhat naively asserted that:

To create now a special statement of the freedom of the Press would be taken to mean that the Constitution is granting to the Press something more or something different to that which is enjoyed already by everybody, including the press. To alter the Constitution to provide for this would be unnecessary and undesirable.

This view is not only conservative but runs contrary to international trends, particularly from within the region which has seen a progressive development of formulations which expressly state that the right to freedom of expression includes freedom of the media, academic freedom and artistic expression. It is noteworthy that both the Ministry and the office of the Attorney-General have often taken highly conservative and sometimes anti-democratic positions on many areas involving not only expansion of human rights but also clearer, more modern and inclusive human rights formulations. It is as if these public offices are incapable of developing both in terms of their capacity for visionary thinking and also in terms of familiarity with modern debates on human rights formulations.

The effectiveness of the protection of the right to freedom of expression in a democratic and free society, largely depends on the capacity and ability of individuals to access information and yet it is clear that as presently formulated freedom of expression in the Zimbabwean Constitution does not include freedom of access to information. In interpreting the similarly worded Article 10 of the European Convention quoted above, the European Court has rejected the argument that Article 10 must be understood to encompass a right to access to information on which to base an opinion.<sup>6</sup> More modern National Constitutions expressly provide for the protection of an independent right of access to information to complement the protection of freedom of expression. For example, section 32 of the South African Constitution states that:

- (1) Everyone has the right of access to:
  - a) any information held by the state; and
  - b) any information that is held by another person and that is required for the exercise or protection of any rights.

It is clear that the right to freedom of expression when cast as a right to information is still in the process of development, particularly in the light of technological developments in the field of information dissemination. Freedom of expression together with the right of access to information make up the right which today is generally known as the right to information. This right embraces five distinct and related ideas or elements:

- 1 The right of each individual to obtain or receive information on any issue of his choice, either directly or through the media without state or other interference.
- 2 The right to access private sources of information and ideas without any obstruction by the state.
- 3 The right to access state sources or state controlled sources of information in relation to any matter of personal or public interest.
- 4 The right to seek, receive and impart information by any means without interference and without censorship or alteration of its contents.
- 5 The right or freedom to constitute, create or establish news agencies or organs or institution for the dissemination of information without interference. This includes the maintenance of the independence, impartiality and objectivity of such organs, agencies and institutions; and the exclusion of monopolies over news and information dissemination.

The right to information requires the free and unhindered flow of information and ideas to and within the public in general. Included within this right are the various modes of expression or information dissemination, that is to say, oral and verbal speech, written speech; cinema, theatre, dance, paintings, exhibitions, radio, television, newspapers and magazines (the press) and music. The right to information embraces not just the content of the speech or what has to be said or published or disseminated but also the means or the mode of transmitting or receiving the information concerned.

## **BROADCASTING LAWS AND FREEDOM OF INFORMATION IN ZIMBABWE**

That the electronic broadcast media, namely radio and television, is the most important medium of mass communication in Zimbabwe is beyond dispute. Radio broadcasts are

<sup>6</sup> See generally, *Leander v Sweden* 1987(9) EHER 433 where the Court remarked that: "... the right to freedom to receive information, basically prohibits a government from restricting a person from receiving information that others wish or may be willing to impart to him ... [It does not] confer on the individual the right of access to a register containing information on his personal position, nor does it embody an obligation on the Government to impart such information to the individual" (at p.456).

particularly important as radio communications reach practically every corner of the country whereas television and the press (newspapers and magazines) are largely limited to urban areas and often to the middle and upper classes.

Broadcasting in Zimbabwe, or rather the electronic broadcasting media, was from the outset exclusively in the hands of state monopolies under the framework of the Broadcasting Act which has remained virtually intact from the days of its inception during the colonial period.

The Broadcasting Act, Chapter 12:01 regulates and controls all broadcasting, that is radio and television communications in Zimbabwe. The principal provision in the Act is section 27 which prohibits all persons, other than the Zimbabwe Broadcasting Corporation (a state owned and controlled entity), from carrying on any broadcasting service. It reads:

No person other than the Corporation shall carry on a broadcasting service in Zimbabwe.

Broadcasting service is defined in section 2 as meaning any "radio communication service for reception by members of the general public", while radio communication service is defined as "the transmission, emission or reception of writing, signs, signals, pictures, impulses or sounds of any description whatsoever wholly or partly by means of Hertzian waves". Taken together and read within the context of section 27 these definitions mean that the Act establishes a state monopoly over radio and television broadcasting and makes it unlawful for any person other than the Zimbabwe Broadcasting Corporation to carry out any broadcasting service in Zimbabwe.

Thus no broadcasting service, not even under license, may be carried out by any person other than the Zimbabwe Broadcasting Corporation ("the ZBC") which is itself created and perpetuated by section 3 of the Act. The ZBC is placed under the general control of a Board of Governors appointed by the Minister of Information, Posts and Telecommunications "after consultation and in accordance with any directions the President may give him".<sup>7</sup> Members of the Board of Governors are removable by the Minister, who in any event has sweeping powers over the operations and activities of the ZBC. For example, the Minister may direct the Corporation to broadcast, without charge any announcement or statement of public importance which the Minister may supply in writing.<sup>8</sup>

The functions of the Corporation are spelt out in section 14 of the Broadcasting Act which provides that:

The functions of the Corporation shall be:

- a) to carry on broadcasting services for the information, education and entertainment of listeners in Zimbabwe; and
- b) if the Minister so requires, to carry on, in accordance with conditions specified by the Minister, broadcasting services for such purposes as the Minister may specify for reception by listeners outside Zimbabwe; and
- c) to provide or, subject to section 28, permit others to provide diffusion services; and
- d) to carry on or operate such undertakings as, in the opinion of the Board, are incidental or conducive to the exercise of one or more of the functions specified in paragraphs (a) and (c) as the Board may consider expedient.

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<sup>7</sup> Section 4.

<sup>8</sup> Section 29(1). See also the powers of the Minister in sections 28, 36 and 38.



The Broadcasting Act must be read together with the Radiocommunication Services Act, Chapter 12:04 whose purposes are given as "to provide for the control of and supervision over radio communication services within, into and from Zimbabwe" and "to provide for the provision of radiocommunication services by the Posts and Telecommunications Corporation" ("the PTC"). Under this Act the PTC is given power to "regulate, control and supervise . . . radio stations and radio communications services in Zimbabwe".<sup>9</sup> The PTC may also establish such radiocommunication services, other than broadcasting services, as it may consider necessary or desirable in the public interest.<sup>10</sup> Clearly, the Radio Communication Services Act allows the PTC to control and regulate private radio communication excluding broadcasting services of any description. Thus public broadcasting remains a ZBC monopoly.

### **The Right to Information and Broadcasting Monopoly**

Pluralism is an essential element of the freedom of information. As Mr Justice Holmes remarked in *Abrams v U.S.*, L. Ed.<sup>11</sup>

The ultimate good desired is better reached by free trade in ideas — the best test of truth is the power of the thought to get itself accepted in the competition of the market.

The purpose of the right to freedom of information is to allow the maximum degree of contestation of different, varied and sometimes opposed ideas and views in the market place of ideas. Each individual should have the opportunity to hear, to receive and to consider all the available ideas and information and to come to his own conclusions and to make his own judgements on what is true, valid and persuasive. This can only be achieved if and when the diversity of existing ideas is recognised, channelled and allowed full expression within a framework recognising and promoting the existence of a variety of independent and autonomous media. Independent and autonomous media inevitably permits the processing and reflection of diverse and varied ideas and opinions. Free speech and free dissemination of both speech and information are the essence of self-government. Citizens have a right to receive and to choose information and ideas from varied and competing sources or broadcasters.

In this context it is clear that any monopoly in providing broadcasting services is inherently undemocratic and hinders the full and harmonious realisation or enjoyment of the freedom of free speech and information. In modern society, radio and television are undoubtedly the most important and most effective means of communication to the generality of the public. In Zimbabwe, radio and television communication as methods of mass media communication have the greatest penetration across the length and breadth of the country.

State monopoly and indeed any monopoly of radio and television is incompatible with the right to information. Both the European Commission of Human Rights and the European Court of Human Rights have held that the refusal by a state party to grant permits to private individuals to establish broadcasting stations because of the existence of a state monopoly amounts to a violation of the right of freedom of speech and the right to information protected and guaranteed by Article 10 of the European Convention. In *Informationsverein Lentia and Others v Austria* in EC HR, Series A, Vol. 276 the European Court remarked:

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9 Section 4.

10 Section 5.

11 63–64, at pp. 1173.

The Court has frequently stressed the fundamental role of freedom of expression in a democratic society, in particular where, through the press, it serves to impart information and ideas of general interest, which the public is moreover entitled to receive. Such an undertaking cannot be successfully accomplished unless it is grounded on the principle of pluralism, of which the state is the ultimate guarantor. This observation is especially valid in relation to audio-visual media, whose programmes are often broadcast very widely. Of all the means of ensuring that these values are respected, a public monopoly is one which imposes the greatest restrictions on the freedom of expression, namely the total impossibility of broadcasting otherwise than through a national station . . . The far-reaching character of such restrictions means that they can only be justified where they correspond to a pressing need.

Thus it cannot be in dispute that the establishment and maintenance of a broadcasting monopoly be it public or private amounts to an abridgement of the freedom of expression and the right to information. The only question is whether such an abridgement of so fundamental a right can be justified against a pressing need. In Zimbabwe, *prima facie*, it appears as if the ZBC monopoly is authorised by the Constitution within the framework of the protection of freedom of expression in section 20. While sub-section 1 of section 20 quoted above, protects the freedom of expression and information, paragraph (b)(iv) of sub-section (2) appears to permit derogation from this right through the establishment of a broadcasting monopoly by providing that:

- (2) Nothing contained in or done under the authority of any law shall be held to be in contravention of sub-section (1) to the extent that the law in question makes provision —
  - a) .....
  - b) for the purpose of —
    - i) .....
    - ii) .....
    - iii) .....
    - iv) regulating the technical administration, technical operation or general efficiency of telephony, telegraphy, posts, wireless broadcasting or television or *creating or regulating any monopoly in these fields* except so far as that provision or, as the case may be, the thing done under the authority thereof is shown not to be reasonably justifiable in a democratic society (my emphasis).

On face value this provision appears to authorize the making of provisions allowing for the establishment of a monopoly in broadcasting and hence would appear to save the provisions of section 27 of the Broadcasting Act which creates a broadcasting monopoly in favour of the Zimbabwe Broadcasting Corporation.

In *Retrofit (Pvt) v The PTC and Another* SC 136/95 and in *Retrofit (Pvt) Ltd v The Minister of Information Posts and Telecommunications* SC 238/95 the Supreme Court ruled that section 26(1) of the Postal and Telecommunications Services Act, Chapter 12:02 which granted the PTC a monopoly over the provision of cellular telephone service, was unconstitutional as it violated the constitutional guarantee of freedom of expression. The above quoted provision of section 20(2)(b)(iv) of the Constitution which envisages the establishment of a monopoly on both the provision of broadcasting and telephony services did not, it was held, save section 26(1) of the Posts and Telecommunications Act which created the PTC monopoly. The Supreme Court found that that provision went further than was reasonably justifiable in a democratic society and therefore failed to pass the test implicit in the proviso inherent in that provision.

During the course of its judgement the Supreme Court had occasion not only to make reference to judgements from other jurisdictions dealing with state monopolies in the provision of broadcasting services but also to discuss the broad purposes served by the protection of freedom of expression. In respect of the latter the Supreme Court observed that:

- ... freedom of expression has four broad special purposes to serve. These are:
- a) It helps an individual to obtain self fulfillment. Speech is an expression of self, whether effected by face to face exchange, or over the telephone, by writing, by pictures, or by any other mode. The desire to communicate, to express feelings thoughts and to contribute to discussion and debate, is an essential attribute of human nature. To unreasonably prevent a person from expressing a view, belief or emotion is to deny his or her basic dignity, freedom and individual autonomy as a human being . . .
  - b) It assists in the discovery of truth. The search for truth rationale has been articulated in terms of the famous 'market place of ideas' concept. This holds that truth will emerge out of the competition of ideas . . .
  - c) It strengthens the capacity of the individual to participate in decision-making . . .
  - d) It provides a mechanism by which it would be possible to establish a reasonable balance between stability and social change . . . . Restraint impedes rational discussion and reduces society's ability to adjust to changing circumstances. The experience of participation makes it easier for those whose views are rejected or criticised to accept and abide by decisions reached through an open, objective and non-coercive process. The uninhibited exchange of ideas, opinions and information is, after all, the very lifeblood of democracy.<sup>12</sup>

The Court went on to say that the right to freedom of expression "enjoins not only that persons be free to express themselves, but also that they are not hindered in the means of their expression". Thus the right 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".<sup>13</sup>

Further on the Court made reference to a variety of cases from other jurisdiction holding that a monopoly by its very nature inhibits freedom of speech and concluded that:

These cases, and there are others, underline the principle that restriction upon or interference with the means of communication, whatever form it may take, abridges the guarantee of freedom of expression. *A fortiori* any monopoly which has the effect, whatever its purpose, of hindering the right to receive and impart ideas and information, violates the protection of this paramount right.

Clearly, therefore, the approach of the Supreme Court is that *prima facie* any monopoly in the field of broadcasting and telecommunication hinders the exercise of the freedom of expression. By the same token this should mean that the broadcasting monopoly granted to the ZBC by section 27 of the Broadcasting Act hinders the free exercise of the freedom of speech and information. The only question is whether such a monopoly is reasonably justifiable in a democratic society so as to be saved by the provisions of section 20(2)(b)(iv) which envisage the establishment, maintenance and regulation of a broadcasting monopoly provided that such a monopoly is reasonable and justifiable in a free and democratic society.

In a long line of cases, including *Woods and Others v Minister of Justice, Legal and Parliamentary Affairs and Others* 1995 (1) SA 703 (ZSC, the Supreme Court has observed that:

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12 At pp. 13-15.

13 At p.15.

What is reasonably justifiable in a democratic society is an elusive concept. It is one that defies precise definition by the Courts. There is no legal yardstick, save that the quality of reasonableness of the provision under attack is to be adjudged on whether it arbitrarily or excessively invades the enjoyment of the guaranteed right according to the standards of a society that has a proper respect for the rights and freedoms of the individual.

However, notwithstanding the difficulties of determining what is reasonably justifiable in a democratic society, the Supreme Court has sought to lay down a general three pronged test to determine whether or not any provision hindering a fundamental right is reasonably justifiable in a democratic society. This test was first enunciated in *Nyambirai v National Social Security Authority and Another* SC-110-95 where the Court held that in determining whether or not a limitation complained of is permissible or is reasonably justifiable in a democratic society it will ask the following questions:

- (i) Is the legislative objective sought to be achieved sufficiently important to justify the limitation of a fundamental right?
- (ii) Are the measures designed to meet the legislative objective rationally connected to that objective and are they not arbitrary, unfair or based on unreasonable considerations?
- (iii) Are the means used in impairing the right or freedom more than is necessary to accomplish the objective?

This test was also used in the Retrofit judgements referred to above where it was found that the stated objectives of the PTC monopoly were not of sufficient importance to warrant a serious inroad into the right of freedom of expression; that there was no rational connection between the granted monopoly and the stated objective of bringing order and method to the provision of a mobile cellular telephone service and also that the monopoly was not the least drastic means in achieving the objective of bringing order and method to the provision of cellular telephone services.

It is submitted that when measured against the above tests the broadcasting monopoly granted to the ZBC would also, like that of the PTC, fail and is thus likely to be declared unconstitutional if it were challenged. It seems, however, unlikely that the ZBC broadcasting monopoly will be challenged in the courts as the Minister of Information, Posts and Telecommunications is on record having said that government has agreed to amend the Broadcasting Act so as to remove the ZBC monopoly over the provision of broadcasting services. What is of concern though, is the fact that its more than two years since the government announced that it had decided to liberalise the airwaves by abolishing the ZBC monopoly and yet to date the Act has not been amended to implement this new policy. It remains to be seen as to when the government will finally repeal section 27 of the Broadcasting Act.

However, even when the ZBC monopoly is broken it will remain necessary and important, for the ZBC, to break out of its present situation where it has been largely reduced to a propaganda mouthpiece of the ruling party and government of the day. As a public utility the ZBC has a duty and obligation to balance its power with the right of those who do not share the ideas and views of the ruling party to be heard fairly and effectively. Thus it is incumbent upon the ZBC whether operating in a pluralistic broadcasting context or in a monopoly as is presently the case, and more so in a monopoly, to allow and to present all shades of opinion in a fair and balanced manner reflecting the generality and diversity of political, social, economic and cultural opinions of Zimbabweans.

To allow only the ruling party mainstream views to receive recognition and broadcasting, particularly during pre-election times, is undoubtedly an infringement of the people's right

to free speech and freedom of information. It must be appreciated that the essence of any freedom is the right of he who disagrees with popular sentiments and ideas not only to express himself but also to be heard. In this sense freedom of information is particularly important as the right of those with ideas and views which shock, offend or challenge the majority or mainstream ideas and views to be heard. There is profound wisdom in the words of the United States Supreme Court in *Terminiello v Chicago*, 93 L Ed. p. 1740 when it stated that the:

function of free speech . . . is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger.

It is in this context that there is an obligation on the broadcasting media, particularly one enjoying a *de jure* or *de facto* monopoly, to provide the public with a balanced coverage of issues and events, particularly those that have a bearing on the political landscape of the country. It is crucially important for the broadcasting media in Zimbabwe, that is, radio and television, to cease operating as instruments of propaganda in the hands of governing political parties. In Rhodesia, they served the racist and fascist interests of the Smith government and in independent Zimbabwe, they have so far served the interests of ZANU (PF). The result has been that all Zimbabweans who do not share the ruling party's world view and even those who do, but are critical of the present leadership's style of government, have had no access or at best extremely limited access to the broadcasting media. No serious and self-respecting analyst would dispute the fact that in the post-independence period the national broadcasting media has been heavily used as a ZANU (PF) propaganda mouthpiece. Opposition political parties and critical and patriotic Zimbabwean analysts have been denied full and unhindered access to the public broadcast media which has acted as if it were merely the ruling party's information department. Clearly, ZBC practice has effectively hindered or altogether denied the right to information and the freedom of expression of many Zimbabweans who are not ZANU (PF) propagandists and admirers.

This has been made possible by two factors. Firstly, that the ZBC enjoys a legally sanctioned monopoly over the country's broadcasting airwaves. This monopoly means that the ZBC can broadcast any rubbish and deny alternative non ZANU (PF) views and ideas a forum and yet have no fear that competition may drive it out of business. Secondly, the overall control over the administration and management of ZBC has, in practice, been placed in the hands of persons chosen entirely on the basis of their loyalty and commitment to serving the interests of ZANU (PF). Even at the level of senior staff appointments membership or at the very least loyalty to ZANU (PF) appears to be a more important factor than professional integrity and competence. The result is a broadcasting media which is no more than an extension of the ruling party's information and propaganda machinery, at great cost to national integrity in that open, unhindered and honest debate, discussion and contestation of ideas on matters of national interest be it in politics, economics and science is completely negated.

Accordingly, broadcasting reforms, apart from abolishing the ZBC monopoly, must also go further and put in place an independent Board to run the publicly owned broadcasting media. All forms of Ministerial control of the ZBC should be removed and instruments and institutional mechanisms be put in place to achieve, develop and safeguard the independence of the administration of the public broadcasting media. Procedures to ensure or allow reasonable access to the broadcasting media by all shades of political opinion need to be instituted. The starting point is the establishment of an independent Board to be in charge of the public broadcasting media. Clearly such a Board cannot be independent if

the majority of its members are government appointees. The majority of Board members should be appointed or at least nominated by various organisations representing independent civil society such as trade unions, employers' organisations and human rights organisations. Ministerial appointees should be granted security of tenure once appointed. The Board should have full authority over ZBC and all political interference in the management and administration of the organisation should be brought to an end. Management and professional staff should be left to carry out their duties without political directives.

The abolition of the ZBC broadcasting monopoly and the opening of the airwaves to other players would obviously require the setting up and establishment of an independent broadcasting authority to set standards and issue licenses to all the possible players in the broadcasting industry. The authority would have general powers to regulate and monitor the broadcasting media in Zimbabwe.

## CONCLUSION

It is self-evident that freedom of speech and freedom of information and access to information are fundamental rights which are at the core not only of individual self-realisation but also democratic, accountable and representative government. These rights should be guarded jealously. A people who lose them ultimately lose their very freedom as a people.

In Zimbabwe, it is clear that there is a need for a review of the constitutional protection of these rights so that freedom of expression is expressly stated not only to include the freedom of the media but also freedom of access to information which is very important for the exercise of the right of free speech. Further, section 20(2)(b)(iv) of the Constitution which seems to allow the establishment of monopolies derogating from free speech should be repealed so that the constitution sets a standard which expressly disallows broadcasting monopolies of every kind. At the ordinary statutory level, the repeal of section 27 of the Broadcasting Act is long overdue.

Also long overdue is the removal of Ministerial and political control over the public broadcasting service which must be placed under an independent broadcasting authority, which must in turn set up a broadcasting framework which allows unhindered access to the broadcast media by all shades of opinion in Zimbabwe. Only in such conditions can it be said that Zimbabweans are a free people with the right and ability to exercise and enjoy free speech and freedom of information and access thereto.

Although not canvassed in this paper, there is also a need to revisit the widely formulated Censorship and Entertainment Control Act, Chapter 10:04 so as to curtail the sweeping powers of the Board of Censors or to abolish it altogether.



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