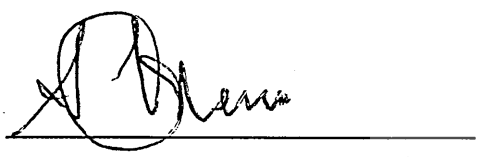
DECLARATION

I HENDERSON MANDISILE MDLELENI do hereby declare that the work contained in this dissertation is entirely my own work with the exception of such quotations or references which have been attributed to their authors or sources and that all photographs, sketches, maps, plans, overlays, graphs and pictograms are made or drawn by me save where I have acknowledged that another is the author.



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ABSTRACT

Under the apartheid regime, a public servant was prohibited from, inter alia, disclosing official information, criticizing government policy or joining a political party. With the ushering in of constitutional democracy based on an enshrined Bill of Rights for everybody, the question which arises - which question is engaged in the opening chapter - is whether indeed, bureaucrats should not be accorded equal rights to political activity and freedom of expression as enjoyed by other persons.

In order to locate the research question within a global context, a comparative study of the rights and freedoms of government workers in certain Western countries is undertaken in Chapter 2. Chapter 3 follows through the comparative approach with a specific focus of the rights of public officials in South Africa. Gauged against such an international backdrop, the shortcomings in our public law become much illuminated. In that event, a clear way is paved for law reform.

Statistical data illustrating the perceptions of career public servants form the basis of the findings and analysis in Chapter 4. Essentially this interpretation of statistical data is meant to fortify the proposals for law reform, which logically interface with the recommendations set out in the concluding chapter. Besides a call for policy and legislative intervention, the dire need for continuous research in this area of our public law is emphasized. Furthermore, it is also submitted that public servants should be equally free to disclose information if such disclosure is in the public interest. Finally, it is recommended that the opinions of public servants' representative organisations on their political rights and other freedoms should be considered in any future law reform.

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1.1 INTRODUCTION

Until 1984, the approach of the South African government to the extension of political rights to public servants[1] was extremely conservative. Public servants could not join a political party, let alone serve in its management. Likewise, the government consistently placed limitations on the public servants' rights to freedom of expression in the form of criticizing government policy and disclosing confidential information. This investigation, therefore, is going to centre on the debate regarding the granting of freedom of expression and political rights to public employees. The presentation involves a comparative study of the legal systems of the United States of America, Great Britain, Canada, South Africa, France and Germany. In the process, various viewpoints will be empirically tested.

There are valid arguments for and against the imposition of restrictions on the two forms of civil rights which, as will be seen below, are theoretical.

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[1] "Public servants", "Civil servants", "Public officials", "Public employees" and "officers" will be used interchangeably.

Such restrictions can be justified on the following grounds:-

(i) They are necessary for the viability of the democratic system as administrators exercise a public interest rather than a partisan political role. As such, public servants are representatives of the State.

(ii) They guarantee the maintenance of discipline as well as the principle of confidentiality. With regard to the latter, for example, it is difficult to counter a statement by a public servant who, in view of his or her position, has greater access to confidential information. At the same time, public statements by public servants might impede the proper performance of duties and jeopardise close and personal relations.

(iii) Without restrictions, a conflict may arise between the desires and interests of a public servant regarded as a citizen and the duty of the public servant regarded as such.

(iv) In the absence of restrictions, the public might lose confidence in the impartiality of a public service and ministers might become uncertain of the support of their subordinates.

(v) By accepting appointment in and the accompanying benefits of the public service, public servants implicitly surrender certain political rights enjoyed by other citizens.

(vi) Restrictions protect public servants against coercion and financial blackmail by unscrupulous political superiors.

On the other hand, the argument for the emancipation of public servants from political restraints and censorships runs thus:-

(i) Public servants are not second class citizens and, therefore, should be as militant and honest about their political principles as other ordinary citizens. In other words, public servants may not and should not be expected to develop a split personality to be one person in thought and belief and another in action as the administrative agent of political superiors.

(ii) Since, in most countries, the public service is burgeoning in numbers, it is considered unfair to remove millions of the electorate from full participation in political matters which ultimately decide their destiny. This argument must be coupled with the need that, owing to the high standard of efficiency required, any public service worth its salt should employ the best educated and informed persons in the country. Obviously talented citizens would be reluctant to join a public service which would restrict their political activities.

(iii) The freedom of expression of a public servant should not be limited only for purposes of regulating labour relations, as the need for the former may outweigh the latter in practical situations.

(iv) In democratic and transparent government, the protection of "confidential information" cannot be accepted without qualifications.

1.2 THE CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA

An important development, towards the necessary solution of the above-mentioned conflict in South Africa, was the promulgation of the Republic of South Africa Constitution Act No. 200 of 1993 (Interim Constitution) which, for the first time in the history of South Africa contained a Bill of Rights. In this respect it must be pointed out that the concept of an enshrined Bill of Rights was actually carried over from the interim Constitution into the Constitution of the Republic of South Africa of 1996.

The Bill of Rights, *inter alia*, guarantees the protection of the "first generation" rights[2]. The relevant provisions of the new constitutional text are the following:-

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[2] The first generation rights comprise, mainly civil and political rights. For the purpose of this investigation, the discussion will be restricted to political activity and freedom of expression.

Section 16(1) provides: "Everyone has the right to freedom of speech and expression, which includes:

a) freedom of the press and other media,

b) freedom to receive and impart information and ideas;

c) freedom of artistic creativity; and

d) academic freedom and freedom of scientific research."

According to section 19(1), "Every citizen is free to make political choices, which includes the right:-

a) to form a political party;

b) to participate in the activities of or recruit members for, a political party; and

c) to campaign for a political party or cause."

Section 19(2) provides: "Every citizen has the right to free, fair and regular elections for any legislative body established in terms of the Constitution." In terms of section 19(3) "Every adult citizen has the right

a) to vote in election for any legislative body established in terms of the Constitution, and to do so in secret; and

b) to stand for public office and, if elected, to hold office."

In terms of section 36(1) rights entrenched in Chapter 2 of the Constitution may be limited by law of general application. Such limitation, however, must be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. Another safety valve is the directive that the limitation shall not negate the essential content of the right in question.

Another provision in the Constitution which is relevant to this discussion is section 197 which provides as follows:-

"(1) Within public administration there is a public service for the Republic, which must function, and be structured, in terms of national legislation, and which must loyally execute the lawful policies of the government of the day.

(2) ....

(3) No employee in the public service may be favoured or prejudiced only because that person supports a particular political party or cause."[3]

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3 All the provisions of this section, read in conjunction with sections 16 and 19 of the Constitution shall be dealt with in depth in Chapter 3.

1.3 RESTRICTING ACTS, REGULATIONS AND THE STAFF CODE

Restrictions on the freedom of expression of public servants in South Africa are imposed by the Public Service Act 300 of 1994, the Public Service Regulations, the Public Service Staff Code[4] and the Protection of Information Act 84 of 1982. There are two basic categories of restrictions:

(i) Provisions which limit the public servant's right to disclose and publish confidential information.

(ii) Provisions which impose restrictions on the public servant's right to criticize official policy.

1.4 AREAS OF CONCERN

One of the purposes of this study is to examine whether the constitutional freedom of expression of a public servant should be limited in order to maintain sound, normal and orderly labour relations in the public service.[5] Another important question is whether the concept of "confidential information" includes information which, for the general good, should be made public if it discloses violation of law, corruption, gross

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4 The Public Service Act, the Regulations and the Code also restrict the public servants political rights.

5 For an interesting discussion of the public employee's freedom of expression, see Nina Zaltzman 'Restrictions on the freedom of expression of the state employee in Israel (1981) II Israel Yearbook on Human Rights, 307.

mismanagement, gross waste of funds, abuse of authority and specific danger to public health and safety.

The prohibition of a public servant from publicly commenting on the administration of the government is another matter of concern. The stage has to be established at which a statement would be considered as criticism of official policy, which is forbidden, and the one at which it would be considered merely a descriptive review of a political situation or a permissible disclosure of information.

As regards the political rights of public servants, the provisions of sections 19 and 197 of the Constitution have already been cited. These provisions and those of section 36 of the Public Service Act will be revisited in Chapter 3. The latter section enables an officer or employee to be a member and serve on the management of a political party;[6] to attend a political meeting but not to preside or speak thereat. It, however, denies the public servant the right to draw up or publish any writing or deliver a public speech to promote or prejudice the interests of any political party.

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6 It is reasonable to construe this provision to include a political organisation.

1.5 CONCLUSION

It is of utmost importance to investigate the point at which the authority of the government to protect itself from the danger of disloyal public servants runs into conflict with the guarantee of freedom in political expression and to devise methods that can be used to balance the two constitutional doctrines.

For purposes of comparison and theoretical expositions, Chapter 2 will focus on the evolution of public servants' political rights and rights to free expression within Anglo-American and Continental European countries. Chapter 3 offers an exposition of the development of South African law on the subject-matter. Findings from an empirical survey among public administrators on the advisability or otherwise of limitations are analyzed in Chapter 4. Chapter 5 evaluates the findings and suggests law reforms.

CHAPTER 2

HISTORICAL BACKGROUND

2.1 INTRODUCTION

In many countries, the fundamental rights of public employees have often been differentiated from those of other ordinary citizens. The restrictions imposed to achieve this objective are justified on the grounds that they are necessary for the viability of the democratic system[7]. The irony of this basis, however, is that the freedom of expression and rights to political activity of all citizens should, arguably, be the cornerstones of any democracy, and enjoyed without discrimination and on the basis of equality.

2.2 THE AMERICAN PERSPECTIVE

The history of the freedom of expression and political rights of civil servants in the United States of America is characterised by three major historical phases[8], namely, the era of "gentlemen" (1789-1829), the "spoils system" (1829-1882), and the "merit system" (1883-present). Of importance also is the emergence in the 1870's of the civil service reform movement which

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7 F.C. Mosher Democracy and the Public Service, 2nd ed. (1982) 23-24.

8 David H. Rosenbloom Public Administration: Understanding, Management, Politics and Law in the Public Sector 2nd ed., (1989) 182.

sought to address the political and administrative effects of the spoils system[9].

2.2.1 The era of "gentlemen"

This era of "gentlemen"[10] began with President Washington's first administration in 1789 and ended with the assumption of office by President Jackson in 1829. Jackson's criterion for making appointments was "fitness of character". In the eyes of Jackson, fit characters were those with a high standing in the community and personal integrity. Mostly, these characters came from the upper class and sometimes lacked the necessary qualifications for the positions to which they were appointed.

By 1795, however, Washington had realized that politics could be important in selecting and assigning civil servants. He was of the opinion that appointing an administrator who was opposed to his policies was tantamount to "political suicide". What he sought, therefore, was political loyalty as well as social and administrative fitness.

President John Adams, who succeeded Washington, put emphasis on politics, though he still made appointments from the upper class. President

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9 David H. Rosenbloom 'Citizenship Rights and Civil Service: An Old Issue in a New Phase' (1970) Public Personnel Review, 181.

10 S.E. Finer 'Patronage and the Public Service: Jeffersonian Bureaucracy and the British Tradition' (1952-1953)30 Public Administration 342; Op cit note 8 at 184-186.

Jackson, in turn, complained that Adams had filled the federal government's administrative apparatus with members of the opposition Federalist party. He, hence, banned federal employees from taking part in electioneering which, according to him, was inconsistent with the spirit of the constitution. He saw administrators as people who exercised a public trust in the public interest rather than a partisan political role.

2.2.2 The "spoils system"

Under the "spoils system"[11] public employment was a reward for party service. Public employees were, hence, required to contribute to and work for their party organisation. Accordingly, they were replaced when their party or sponsor left office.

The system was introduced by President Jackson when he took office in 1829. It enabled the newly-elected President to distribute "the spoils of victory" among his supporters. This, obviously, resulted in a highly politicized public personnel system and bureaucracy. Spoils developed, partly, as a reaction to the upper-class bias of the civil service and the notion that a government job was a kind of property to which the incumbent had a right. The inevitable results, however, were the abridgement of the constitutional rights of civil servants, increase in the importance of political selection and removal, and coercion of political activity including voting and

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11 Milton J. Esman 'The Hatch Act - A Reappraisal' (1951) 60 Yale Law Journal 986.

financial contribution from civil servants. This system's effects, inter alia, were: a decline in administrative ethics, efficiency and performance as well as an intermixing of public administration and partisan politics.

The other name for this system was the "rotation of office". Jackson established a maximum term of four years which coincided with the new presidential administration, thus avoiding the unpleasant dismissal of incumbents.

In the 1870's the civil service reform movement emerged. It sought to reduce the impact of politics on administrative agencies by introducing selection and retention on the basis of merit[12].

2.2.3 The Merit system

The commitment to a merit system[13] which began to develop in the 1860's and 1870's, was written into law in 1883, through the Pendleton Act (Civil Service Act of 1883). The cornerstone of the merit system was an open and competitive examination for selecting civil servants. The passing of the Act also saw the establishment of the Civil Service Commission, a central

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12 D.E. Klingner and J. Nalbandian Public Personnel Management: Contexts and Strategies 2nd ed. (1985), 364-365.

13 Esman op cit note 11 at 986-987; Rosenbloom (1989) op cit note 8 at 188-192.

personnel agency whose duty it was to protect the public service against incursions by politicians.

According to Esman, the civil service reform movement was "a sustained campaign to eliminate partisan political consideration from public employment, to select candidates in open competition according to 'merit and fitness', to protect their careers from political influence, to professionalize and otherwise raise the standards of government employees..., to protect public employees from political exploitation, from pay deductions and kick-backs, from any obligation to perform partisan political service of any kind, and to make unlawful political coercion and political reprisals against civil servants".[14]

In 1883 a set of rules (prepared by the Civil Service Commission) were promulgated by President Arthur. Rule 1 read as follows:-

"No person in said service shall use his official authority or influence either to coerce the political action of any person or body or to interfere with any election"[15].

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14 Esman op cit note 11 at 986-987.

15 For a further discussion of this Rule, see Herbert W. Cornell 'Legal Restraints on Political Activity by Public Employees' (1947) Public Management 190.

Though the rule was criticized for being vague and uncertain, it succeeded in restraining government employees from involving themselves in politics and in deterring politicians from demanding political services from employees.

Determination of the proper relationship between government employees and partisan politics, however, continued to be a perplexing issue until President Theodore Rooseveldt amended Rule 1 in 1907 at the instance of the Civil Service Commission, as follows:-

"No person in the executive civil service shall use his official authority or influence for the purpose of interfering with an election or affecting the result thereof. Persons who, by the provisions of these rules are in the classified service, while retaining the right to vote as they please and to express privately their opinions on all political subjects, shall take no part in political management or in political campaigns"[16].

As can be seen, although the concept of political neutrality for American civil servants dates back to Jefferson, it was only in 1907 that it was effectively applied to classified civil servants.

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16 Dalmas H. Nelson 'Political Expression under the Hatch Act and the Problem of Statutory Ambiguity' (1958) Midwest Journal of Political Science 76; As regards doubts to the amendment's legal validity, see note 15 at 191.

2.2.4 The Hatch Act

Owing to the vagueness of Rule 1 of 1907 there developed a body of case law of over 3000 decisions in the 33 years it was interpreted by the Civil Service Commission[17]. Thus between 1907 and 1939 regulations protecting civil servants from coercion were amended to include the prohibition of voluntary political activity[18].

In 1939 the Hatch Act[19] extended the political activity restriction, which previously had applied to those in the classified civil service only, to nearly all employees in the executive branch. Section 9(a), which is the key provision, reads:

"It shall be unlawful for any person employed in the executive branch of the Federal government or any agency or department thereof, to use his official authority or influence for the purpose of interfering with an election or affecting the result thereof. No officer or employee in the executive branch of the Federal government, or any agency or department thereof shall take

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17 Jeffrey C. Rinehart and E.Lee Bernick 'Political Attitudes and Behaviour Patterns of Federal Civil Servants' (1975) Public Administration Review, 605.

18 Ibid.

19 Public Law No. 252, 53 Statutes 1147 (1939); Op cit note 15 at 191-192; Op cit note 16 at 76-77. For an in-depth study of the provisions of the Hatch Act see Henry Rose 'A Critical look at the Hatch Act' (1962) 75 Harvard Law Review 510-526; David H. Rosenbloom "Forms of Bureaucratic Representation in the Federal Service" (1974) 8 Midwest Review of Public Administration, 163-165.

any active part in political management or in political campaigns. All such persons shall retain the right to vote as they may choose and to express their opinions on all political subjects".

Section 15 defines the limitations previously applied to civil service employees by the Civil Service Commission under Civil Service Rule 1 and the case law developed over the years was incorporated into the Act[20].

The 1940 amendment to the Hatch Act[21] extended the coverage of the original Hatch Act to state and local personnel mainly employed in activities partly or entirely supported from federal funds.

As expected, the constitutionality of this radical piece of legislation was attacked in the courts but, contrary to all expectations, it was finally held that the prohibitions of the Hatch Act are constitutionally valid[22].

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20 These limitations include such actions as, for example, holding office in a party committee, running office as a party candidate and initiating a political petition.

21 Public Law No. 753, 54 Statutes 769 (1940).

22 The statement is discussed under "Appraisal" infra; the validity of the restrictions was endorsed in *United Federal Workers of America* v *Mitchell*, 330 US75 (1947) and *Oklahoma* v *Civil Service Commission*, 330 US 127 (1947).

2.2.5 Loyalty, Order and Whistleblowing

The conception that a civil servant is a representative of the state has been brought about by the promulgation of regulations which enforce loyalty.[23]. Current regulations are an offspring of Executive Order 10450[24] which made the heads of departments and agencies "responsible for establishing and maintaining... an effective program to insure that the employment and retention in employment of any civilian officer or employee within the department or agency is clearly consistent with the interests of national security".

This Order did not specify the specific behaviour it sought to prohibit but, instead, listed the activities on the basis of which adverse decisions could be taken, namely, engaging in espionage, sabotage, treason, advocacy of revolution, force or violence to alter the constitutional form of government in the United States, intentional disclosure of confidential information, acting primarily in the interests of another nation, and membership of totalitarian, fascist, communist or subversive organisations.

All this, understandably, led to the suppression of unorthodox and liberal attitudes and behaviour, and a reluctance on the part of many federal civil

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23 Rosenbloom (1947) op cit note 19 at 165-167.

24 US Federal Register, XVIII, Part 4, 2489 (April 27, 1953).

servants to join political organisations, express political opinions or engage in political activity.

"Whistleblowing"[25] is a relatively new term in the American public service. "Whistleblowers sound an alarm from the very organisation within which they work, aiming to spotlight neglect or abuses that threaten the public interest"[26].

According to the US Code of Ethics government servants must "expose corruption wherever uncovered."[27] In addition, it specifically stipulates that loyalty to the country be put above particular loyalties to persons, party or government department. The Civil Service Reform Act of 1978 takes the matter further by protecting employees who ostensibly expose what they consider to be violations of law, policy or sound management practice. This Act empowers the Merit System Protection Board to guarantee such protection.

In 1989 the Civil Service Reform Act was, once again, amended to strengthen protection for federal government employees who disclose illegal

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25 Sissela Bok 'Blowing the Whistle' in J.L. Fleishman, L. Liebman and M.H. Moore Roles and Institutions (1981) 204-218; O.G. Stahl 'Public Service Ethics in the United States' in K. Kernaghan and O.P. Dwivedi Ethics in the Public Service: Comparative Perspectives (1983) 22-31.

26 Bok op cit note 25 at 204.

27 Code of Ethics for Government Service passed by the US House of Representatives in 1954 Congress and applying to all government employees and office holders.

or improper conduct. The Act prohibits retaliation for disclosure if the employee reasonably believes the disclosure concerns an illegal act, gross mismanagement, gross waste of funds, abuse of authority or a substantial or specific danger to public health or safety.

2.2.6 Rights to free speech

Rubin is of the opinion that "individuals employed by the state have a dual identity: as employees they are expected to support the interests of their employer in performing public services; as citizens they have a responsibility to speak out on issues of public concern. However, the interests of the state sometimes demand that its employees do not exercise their First Amendment rights to the same extent that private citizens may."[28] Faced with this problem, the Supreme Court[29] came up with a test to balance a public employees' right to free speech against the desire by the state, as an employer, to limit that right. In formulating the test, the Court had to strike a "balance between the teacher, as a citizen, in commenting upon matters of public concern, and the interest of the state, as an employer, in promoting the efficiency of the public services that it performs through its

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28 Richard S. Rubin 'When the Governed criticize their Governors: Parameters of Public Employees' Free Speech Rights' (1984) 104 Employee Relations Law Journal 106.

29 In *Pickering* v *Board of Education* 391 US 563 (1968).

employees"[30]. As to whether Pickering was justified in publicly criticizing the way in which the Board of Education handled proposals for tax increase, the Court held that, Pickering's interest as a citizen outweighed the interest of the state as an employer[31].

2.2.7 Appraisal

During the "era of gentlemen", some incumbents from the upper-class lacked the necessary qualifications due to the fact that political loyalty was an important criterion for employment in the public service. Despite this observation the federal service was well managed, honest, efficient and effective. In the opinion of Rosenbloom, "historical consensus holds that it reflected the highest ethical standards in the nation's history"[32].

Though these facts cannot be disputed, it is doubtful that the abovementioned historical occurrences can reproduce the same results everywhere and at all times. What must be borne in mind is that at that

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30 *Pickering* case supra note 29 at 813: Pickering a teacher, was dismissed because he sent a letter to a local newspaper criticising the way the Board of Education handled proposals for a tax increase. The Supreme Court held (at 813-814) that the dismissal reflected a difference of opinion between the teacher and the school board on an issue of general public interest that merited free and open debate. "In cases where the fact of employment is only tangentially and unsubstantially involved in the subject matter of the public communication made by a teacher, we conclude that it is necessary to regard the teacher as a member of the general public he seeks to be... and a teacher's right to speak on issues of public importance may not furnish the basis for his dismissal from public employment."

31 *Pickering* case supra note 29 at 813.

32 Rosenbloom (1989) op cit note 8 at 186.

stage the public service, was small in numbers and manageable. In 1790 the American public service had 1500 employees and the number had grown to 9000 in 1828, that is, at the end of the "era of gentlemen"[33]. In 1939 there were 850 000 employees[34] and millions by 1947[35].

As far as the spoils system is concerned, it can be justified, theoretically, by suggesting that, since politicians formulate policies, they must be at liberty to appoint those candidates who will enthusiastically implement them. In practical situations, however, it becomes nepotism which, as mentioned elsewhere, brings about a serious decline in administrative ethics, efficiency and performance. Another disadvantage is that the line of demarcation between public administration and partisan politics becomes blurred. It is suggested that allowing civil servants to take part fully in political activity does not necessarily lead to political patronage as long as merit selection and promotion are enforced by law.

It is submitted that there is nothing to beat merit selection if one believes that the fundamental principle for the proper functioning of the public service is political impartiality and competence.

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33 Finer op cit note 10 at 330.

34 Leon D. Epstein 'Political Sterilization of Civil Servants: The United States and Great Britain' (1950) 104 Public Administration Review 282.

35 *Mitchell* case supra note 22 at 131.

The Hatch Act, which may be viewed as espousing political neutrality of civil servants, has been a subject of debate since 1941[36]. Before examining the criticism levelled against it, it is important to stress that though the general purpose was to remove the rank and file employees as pawns in the political game and to prevent misuse of positions of public trust for private and partisan ends, the general effect was "to take cautious federal servants out of the normal forms of political participation and to place a major barrier in the way of some forms of political representation that federal servants might seek to provide"[37].

In 1947 the constitutionality of the Hatch Act was challenged on the grounds that the second sentence of section 9(a)[38] was repugnant to the First Amendment. In particular, the provision was alleged to infringe the constitutionally guaranteed freedom towit, freedom of speech, press and assembly.[39]

In this case the majority view per Justice Reed, *inter alia*, was that:

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36 Cornell op cit note 15 at 191.

37 Rosenbloom (1974) op cit note 19 at 164.

38 The sentence read: "No officer or employee in the executive branch of the Federal Government... shall take any active part in political management or political campaigns".

39 *United Public Works* v *Mitchell* 91 L.ed. 509 67 S Ct (1947).

* The fundamental rights guaranteed by the Constitution are not absolute[40].

* The extent of the guarantees of freedom against a congressional enactment to protect a democratic society must be balanced against the supposed evil of political partisanship by classified employees of government[41].

* Congress may regulate the political conduct of public employees within reasonable limits, even though the regulation interferes, to some extent with unfettered political action[42].

* The aim of Congress is to promote efficiency and integrity in the discharge of official duties, and to maintain proper discipline in the public service[43].

* Congress forbids only the partisan activity of federal personnel deemed offensive to efficiency[44].

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40 *Mitchell* case supra note 39 at 770.

41 *Mitchell* case supra note 39 at 771.

42 *Mitchell* case supra note 39 at 771, 774.

43 *Mitchell* case supra note 39 at 771.

44 *Mitchell* case supra note 39 at 772.

* Expressions, public or private, on public affairs, personalities and matters of public interest, not an objective of party action, are unrestricted by law so long as the government employee does not direct his activities toward party success[45].

The minority opinion, per Justice Black, *inter alia*, was that:

* Laws which restrict the liberties guaranteed by the First Amendment should be narrowly drawn to meet the evil aimed at and to affect only the minimum number of people imperatively necessary to prevent a grave and imminent danger to the public[46].

* The Constitution prohibits legislation which prevents millions of citizens from contributing their arguments, complaints and suggestions to the political debates which are the essence of our democracy; prevents them from engaging in organisational activity to urge others to vote and take an interest in political affairs. Such drastic limitations on the right of all the people to express political opinions and take political action would be inconsistent with the First Amendment's guarantee of freedom of speech, press, assembly and petition[47].

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45 *Mitchell* case supra note 39 at 773.

46 *Mitchell* case supra note 39 at 778.

47 *Mitchell* case supra note 39 at 779.

* The Constitution guarantees to federal and state employees the same right that other groups of citizens have to engage in activities which decide who their elected representatives shall be[48].

* The section of the Act reduces the constitutionally protected liberty of several million citizens to less than a shadow of its substance. It relegates millions of federal, state, and municipal employees to the role of mere spectators of events upon which hinge the safety and welfare of all the people, including public employees. It removes a sizeable proportion of the electorate from full participation in affairs destined to mould the fortunes of the nation[49].

Justice Douglas dissented in part from the majority decision as follows:-

* A distinction must be made between the core of the civil service occupying positions where partisanship might colour or corrupt the processes of administration and industrial workers who are remote from contact with the public or from policy making or from the functioning of the administrative process[50].

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48 Ibid.

49 *Mitchell* case supra note 39 at 781.

50 *Mitchell* case supra note 39 at 784.

Firstly, the majority decision seems to equate political partisanship with administrative partiality which are poles apart. Secondly, Morris-Jones[51] is correct in concluding that the decision by the majority was a desire on their part not to be considered "obstructive". Their claim that the Court would not interfere with what had been clearly judged desirable by Congress and the President[52] is totally inexplicable. The better view is that of Justice Black and, incidentally, it fully substantiates the research hypothesis[53].

Justice Douglas' assertion that a line of demarcation be drawn above which political activity should be prohibited but below which it should be allowed is not supported for the reasons advanced by Esman[54] :-

* Employees must be treated equally.
* No group should be penalized or favoured over others.
* It would be administratively impossible to draw the line.
* The spoils systems may crop up as strongly among industrial as among administrative and clerical employees.

After all has been said and done, a glaring result of the *Mitchell* decision is

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51 W.H. Morris-Jones 'The Political Rights of Civil Servants' (1949) 20 The Political Quarterly 370.

52 *Mitchell* case supra note 39 at 772.

53 This viewpoint will be fully canvassed in Chapter 4.

54 Esman op cit note 11 at 997.

that entrance into the public service means entrance into a second class status,[55] since the Hatch Act takes from public servants constitutional rights which are retained by private citizens. The ground of justification for this discrimination is the doctrine that "working for the government is a privilege and not a right, and that, therefore, the public employee is a special case"[56]. The employee's constitutional right of political expression is hence, separated from his or her right to a public job and since holding a government job is voluntary rather than compulsory, the government can impose restrictions on political activity without interfering with the employees' First Amendment rights[57].

In the words of Holmes, J (as he then was), the rationale behind this doctrine was that:

"The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman. There are few employments for hire in which the servant does not agree to suspend his constitutional right of free speech, as well as of idleness, by the implied terms of his contract. The servant cannot complain, as he takes the employment on the terms

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55 Nelson op cit note 16 at 35.

56 Nelson op cit note 16 at 28; "If the civil servant is to be denied the responsibilities and rights of citizenship, if he is to be denied active participation in the discussion of political issues, he will be in fact reduced to a sub-citizen status, a status which will be unattracting to the ablest members of the community", Esman op cit note 11 at 992.

57 Klingner and Nalbandian op cit note 12 at 369.

which are offered him. On the same principle, the city may impose any reasonable condition upon holding offices within its control"[58].

The first flaw in this line of thinking is that this doctrine overlooks that the government is not just an employer. It is a "trustee of the public interest, and the general public has a stake in the exercise of their freedom of expression by government employees"[59]. In any event, a contract of employment cannot be upheld without considering the constitutional prohibitions involved[60]. The second anomaly is that in this doctrine government employees have no constitutional rights at all[61].

As mentioned above the Supreme Court held in a later case[62] that, although it cannot be deemed that the State has interests, as an employer, in regulating the freedom of speech of its employees that differ from those it has against citizens in general, the test is whether the interest of the state in limiting public employees' opportunities to contribute to public debate is significantly greater than its interest in limiting a similar contribution by any member of the general public. But again the question is why should there

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58 *McAuliffe v Mayor*, 155 Mass, 216, 220, 29 NE 517 (1892).

59 Nelson op cit note 16 at 40.

60 Ibid.

61 Nelson op cit note 16 at 41.

62 *Pickering v Board of Education* US 563, 568, 573 (1968).

be discrimination between government employees and other citizens. The opinions expressed in the two previous Supreme Court cases are to be preferred. *In Keyishian v Board of Regents*[63], the court had to address the question whether individuals give up certain constitutionally protected rights as citizens when they accept public employment. The court's declaration that "the theory that public employment may be subjected to any conditions... has been uniformly rejected"[64] is welcomed. In *Garrity v New Jersey*[65] it was decided that public employees cannot be subject to "a watered down version of constitutional rights"[66]. This decision served to place the rights of public employees on the same footing as those of private employees and the citizenry as a whole[67]. Rosenbloom[68] summarizes the six elements which, according to the Court, would generally enable the state to abridge public employees' freedom of expression:

* The need for maintaining discipline.
* The need for confidentiality.

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63 385 US 589 (1967).

64 *Keyishian* case supra note 63 at 605-606.

65 385 US 493 (1967).

66 Ibid.

67 Rubin op cit note 28 at 109.

68 David H. Rosenbloom 'Public Personnel Administration and the Constitution: An Emergent Approach' (1975) 35(4) Public Administration Review 54.

* The possibility that an employee's position is such that his statements might be hard to counter due to his presumed greater access to factual information.
* The situation in which an employee's statements impede the proper performance of duties.
* The case where the statements are so without foundation that the individual's capability to perform his duties comes into question.
* The jeopardizing of a close and personal loyalty and confidence.

The submission here is that in a democratic country which is characterised by transparency and freedom of information, the aforementioned criteria for the abridgement of the public employees' freedom of expression are not necessary. Surely, the government should have nothing to hide. It is also felt that, except for top-secret, security or military information, the same argument holds for whistleblowing.

The protection of whistleblowers by law is salutary. It is, however, felt that such protection should cover the disclosure of any information, as long as it is in the public interest to do so. In that case, the question of whether such information is considered confidential or not by the bureaucrats becomes immaterial.

2.2.8 Summary

All the historical development in the restriction of the American public employees' freedom of expression and rights to political activity culminates in the controversial provisions of the Hatch Act of 1939. Currently they are bound to its do's and don'ts.

In general, the following types of activity constitute an "active part in political management or in political campaigns":

"1. Participation, except as a spectator, in political conventions.

2. Active participation, including speaking, in party primary meetings or caucuses.

3. Organising, conducting or addressing a public political meeting or participating in a political parade.

4. Holding of the office of political committeeman.

5. Organising, holding office in, or addressing a political club or committee thereof.

6. Soliciting, receiving or otherwise handling political funds.

7. Distributing campaign literature.

8. Publishing or contributing to a partisan newspaper or publishing any letter or article for or against a party candidate or faction.

9. Any activity at the polls except voting.

10. Initiating or circulating nominating petitions.

11. Running for public office.

12. 'Employees are forbidden to become prominently identified with any political movement, party, or faction, or with the success or failure of any candidate...'"[69].

On the positive side, a public employee may: "vote; contribute to campaign funds (but not in a Federal building or to another Federal employee); join political organisations; attend political meetings; participate actively in civic associations or civic betterment groups; sign petitions; wear badges (but not at work); speak or write publicly on political subjects so long as they are not connected with political campaigns"[70].

It appears that the last chapters have been written on the opposition to the Hatch Act. In 1974, Congress repealed federal restraints on state and local government employees' political activities and in 1976 President Gerald Ford vetoed a bill that relaxed restrictions on federal employees[71]. In 1987 and 1989 similar bills permitting federal workers to participate in partisan political campaigns were introduced but the resolutions failed in the Senate as well.

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69 Esman op cit note 11 at 990.

70 Esman op cit note 11 at 990-991.

71 William M. Pearson and David S. Castle 'Political Activity Among State Executives: The Effect of Hatch Act Repeal' (1990) 19(4) Public Personnel Management 399.

On the question of freedom of expression, a public employee has the same right as a private citizen when it is in the public interest to exercise such right.

2.3 THE BRITISH PERSPECTIVE

In contrast to the American situation, Britain does not have a formal written constitution.[72] The actual conduct of a civil servant is guided by a set of basic working assumptions ("a network of understandings and practices") regarding, for example, civil service neutrality, maintenance of anonymity and service to the Minister[73]. "Civil servants are formally the servants of the Crown; in practice they serve the government of the day and, except in that capacity, have no constitutional existence (emphasis supplied)"[74]. Lowell further states that the security of tenure in the English service, like the abstinence from party politics, is secured by custom, not by law[75].

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72 A.L. Lowell The Government of England Vol. 1 (1924), 145; C.F Strong Modern Political Institutions (1972), 34; O. Hood Phillips and P. Jackson O. Hood Phillips' Constitutional and Administrative Law (1985), 23; I.M Rautenbach and E.F.J Malherbe Constitutional Law (1996), 29.

73 Morton R. Davies and Alan Doig 'Public Service Ethics in the United Kingdom" in K. Kernaghan and O.P. Dwivedi Ethics in the Public Service: Comparative Perspectives (1983) 49.

74 Ibid.

75 Op cit note 72 at 153.

2.3.1 The era of patronage

As early as 1702 "spoils for victors" threatened to become the law of English politics[76]. Though there were obstacles to a thorough-going spoils system, the following were its effects:-

In the administration of land tax there were with changes in government in 1706, 1711-12 and 1715-16 many purges of the civil service establishment[77]. During this period "a major object of faction was to use public patronage to mortify opponents and confer favours upon friends"[78]. One of the worst purges "the massacre of the Pelhamite innocents" occurred in 1762 subsequent to the resignation of the Duke of Newcastle. As Horace Walpole put it, "a more severe political persecution never raged. Whoever, holding a place, had voted against the preliminaries, was instantly dismissed. The friends and dependants of the Duke of Newcastle were particularly cashiered; and this cruelty was extended so far, that old servants, who had retired and been preferred to very small places, were rigorously hunted out and deprived of their livelihood"[79]. This purge was followed by the insistence of the Rockingham Ministry in 1765, not to

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76 H. Parris Constitutional Bureaucracy: The development of British Central Administration since the eighteenth century (1969) 29.

77 Parris op cit note 76 at 30.

78 Ibid.

79 Ibid.

perpetuate a counter-purge, but instead to restore to their posts all those who had been ejected[80]. The permanent tenure of offices in the British Civil Service during the eighteenth century may be partly attributed to this policy decision.[81]

The spoils system obtained no foothold in Britain because, prior to the nineteenth century, a post was considered as something similar to freehold property and could in some cases be sold[82]. On the suppression of that freehold, the holder was entitled to compensation for disturbance[83].

The system started receding in 1780. It took time to disappear, however, and in the 1850's political nominations were still rife. Nevertheless, incessant criticisms of the system in 1853 and 1854 led to its total demise.[84]

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80 Finer op cit note 10 at 356.

81 Ibid.

82 Lowell op cit note 72 at 153; Parris op cit note 76 at 30.

83 Finer op cit note 10 at 356.

84 G. Kitson Clark 'Statesmen in Disguise: Reflexions on the History of the Neutrality of the Civil Service' (1959) 2(1) The Historical Journal 21-22.

2.3.2 Reforms

The first reform came as a means of diminishing the influence of the Crown on appointments in the public service[85]. This reform, in the guise of the Act of Settlement of 1701, sought to limit the political activities of minor office-holders. In terms of this Act, all holders of an office of profit under the Crown were to be ineligible to sit in parliament, though the provision was not to come into effect until the reigning monarch died. The second stage of the process began in 1782 under the programme of economic reforms. Parris describes the programme as a "process by which the central executive was subjected to investigation and reform by parliament was begun... not in order to increase administrative efficiency, but to diminish the royal influence based on patronage which threatened to impair the balance of the constitution and the independence of the legislature"[86]. The process ended in 1830 when the civil service became a distinct entity, at the service of each successive cabinet[87]. Finally, in 1912, the Patronage Secretary announced that he had transferred his remaining patronage to the departments.

The second reform commenced in 1853 when Sir Stafford Northcote and Sir Charles Trevelyan, who were appointed to inquire into the condition of the

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85 Parris op cit note 76 at 35.

86 Ibid.

87 Parris op cit note 76 at 45.

civil service in England, reported in favour of a system of appointment by open competitive examination[88]. An order of Council was accordingly made in 1855, creating Civil Service Commissioners, who were to examine all candidates for the junior positions in the various departments of the civil service[89]. The Northcote-Trevelyan report, however, failed to touch on the neutralization of the civil service, that is, "the prevention of civil servants from taking action which is likely to land them in party controversy"[90].

Having disposed of political and personal patronage, Britain was confronted with the conflict between the needs of neutrality and the citizen rights of the administrator[91]. In the event, the MacDonnel commission was appointed in 1914 to examine the problem of permissible political activities for civil servants. In its report, the Commission addressed itself to the fundamental questions whether it is "necessary or desirable in the public interest to place any restriction on the exercise of full rights of citizenship by citizens who are members of the civil service? Does any conflict arise between the desires and interests of the civil servant regarded as a citizen

88 Lowell op cit note 72 at 156.

89 Lowell op cit note 72 at 156-157.

90 Kitson Clark op cit note 84 at 22.

91 Morris-Jones op cit note 51 at 336-337; Epstein op cit note 34 at 284.

and the duty of the civil servant regarded as such, and if so, to what degree should either claim prevail over the other?"[92]

The Commission found that such conflicts would result if complete political liberty were extended to all officials, and that "such conflicts could not fail to have a disastrous effect on the morale of the public service." It added that it would be disastrous "if the feeling should arise that the effectiveness of a legislative policy were in any degree dependent upon the political bias of those administering it." According to the Commission, the public would lose confidence in the impartiality of the service and ministers might cease to be confident of the support of their subordinates. This, the Commission said, could be detrimental to the service, and might even lead back to patronage as a means of filling posts with loyal supporters. Finally, it recommended a strict ban on political activity by administrative personnel but suggested that certain subordinate employees might be enjoined only from using their official positions to influence elections.

In 1925 the Blanesburgh Committee[93] examined particularly whether civil servants should be allowed to be parliamentary candidates. It came to the conclusion that if that was permitted all other political activity would have to be dealt with likewise. Impartial administration as far as they were

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92 Report of the Royal Commission on the Civil Service, Cmd 7338 (1914) 95-97.

93 Epstein op cit note 34 at 284-285; Morris-Jones op cit note 51 at 367.

concerned, required the bulk of the civil service to be prohibited from engaging in political activity.

The Committee further decided that for all grades of the service directly connected with departmental administration, restrictions on political activity were essential as a question of "administrative efficiency". On this basis, parliamentary candidatures were not to be allowed.[94] However, the committee decided that certain industrial employees should be permitted to become candidates, as well as to engage in other political activities, while retaining their status as government servants.

The position with regard to other forms of political activity is not clearly defined save that as a general departmental rule civil servants should exercise restraint as far as political matters are concerned. They should not be seen as openly supporting any political party. In 1928 the treasury also issued a circular to Departments, drawing their attention to the contents of a report of a commission of enquiry. The report, *inter alia* observed that there were spheres of activity in which, though open to ordinary citizens, the civil servant could play no part. He or she was not to indulge in political or party controversy, less by so doing he or she would not longer appear the disinterested adviser of ministers or able to execute their policies impartially.

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94 The Blanesburgh Report supported the 1910 Order in Council which made applicable to all civil establishments the rule that a civil servant seeking a seat in the House of Commons should resign his office as soon as he has issued an address to electors or in any other way announced himself as a candidate.

According to the report, a civil servant was bound to maintain a proper reticence in discussing public affairs and more particularly those with which his or her own department was concerned. In 1946 this observation was included in a handbook for civil servants. It decreed that a civil should not take any part in political controversy. Of course, none of these restrictions applied to industrial civil servants. The Staff Side of the Whitley Council[95] constantly voiced their opposition to this blatant discrimination until the Chancellor recognised the need to consider reforming the rules. He then set up the Masterman Committee in 1949. There were two opposing viewpoints, one from the Staff Side of the National Whitley Council, representing all the principal staff associations of the non-industrial civil service, and the other from senior officials. The Staff Side made three proposals:

* Any civil servant should be permitted to stand as a candidate to Parliament and, if successful, should not be regarded as breaking continuity of service.

* Political activities in general should be governed not by rules but by the following convention:

"Civil servants are free to engage in party political activity and it is left to their discretion and good sense to do so with due regard to

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95 This was a staff advisory body.

their rank, the functions of their department and their duties in it, on the understanding that an officer who by grossly negligent or wilful action or comment on a matter of party politics creates an intolerable position for his Department will be liable to disciplinary action".

* Any civil servant should be permitted to stand for election to a local council.

Counter-proposals from senior officials (the Official Side of the Whitley Council) centred on "the risk of creating a political service". They suggested that "the overriding consideration must be to maintain both the existing reputation of the service for political neutrality and public confidence in its freedom from all possibility of bias.

The committee tried to find a balance between the two principles in the following terms:-

"(i) In a democratic society it is desirable for all citizens to have a voice in the affairs of the State and for as many as possible to play an active part in public life.

(ii) The public interest demands the maintenance of political impartiality in the Civil Service and of confidence in that impartiality as an essential part of the structure of the Government in this country."

On the basis of the second principle, the Committee recommended further exemptions from the general ban and a greater uniformity of prohibition in respect of those whose activities were to remain curtailed. All industrial employees should be treated alike, those employed in non-industrial establishments should be permitted parliamentary candidature and the other freedoms enjoyed by industrial employees in predominantly industrial establishments. A line could be drawn, the Committee argued, between the administrative, professional, scientific, technical, executive, clerical and typing grades, on the one hand, and the minor and manipulative grades (mostly in the Post Office), on the other.

The second group, "below the line," were to be given all the freedoms enjoyed by industrial employees. According to the Committee, these minor and manipulative employees were far enough removed from administration so that a reputation for impartiality was not of the essence of the problem. Those "above the line", even typists, were considered too intimately connected with the process of administration to have political freedoms extended to them.

The report made recommendations under five headings:

- The existing prohibition on provincial candidature should remain.

- The existing code covering other political activity of a party character in the national field should be made more explicit by detailing some of the forms of activity (e.g. holding party office, public speaking, publication and canvassing) which are not allowed.

- Public affairs of a non-party character should be treated differently; public comment by a civil servant should be free provided his own Department is not concerned.

- There should be no prohibition relating to speeches or political matters at staff association conferences but "it should be understood that disciplinary action may follow if a delegate by his speeches creates a situation embarrassing for the service".

- Participation in local government should continue to be permitted at the discretion of the Head of the Department.

The response of the staff associations to the Government's initial acceptance of the report in June 1949 was so critical that the government was persuaded to look at the position again. As a consequence, on November 1, 1949, it was announced that effect would be given only to those committee recommendations that freed certain categories of civil servants from existing restrictions. For the rest each department was to keep in force the practice that prevailed before the report was received.

2.3.3 Confidentiality and the official Secrets Acts

Parliamentary enactments regulating official secrets have their origin in 1889. According to Thomas[96], they stand high among the list of laws in Britain that are persistently flouted, ignored or coolly broken. The reason lies in the fact that the words of such statutes tend to be broad in meaning and often vague. Section 2 of the Official Secrets Act of 1911, for example, made it a crime for any servant of the Crown to communicate any information gained in the course of his or her official duties.

It is noteworthy that the social evil which the official secrets laws were aimed at redressing manifested in a series of minor cases of disloyalty by officials. An interesting illustration was the case of Marvin[97], a clerk, who sold a description of a secret Anglo-Russian agreement to the Globe newspaper in 1878. Marvin's misconduct prompted a civil service rule prohibiting civil servants from writing about matters then being dealt with by their departments.

The first Official Secrets Acts of 1889 made it a criminal offence to make use of employment under the Crown to acquire information unlawfully or corruptly and contrary to one's official duty. This enactment also prohibited

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96 Hugh Thomas 'Towards a Revision of the Official Secrets Acts' in T. Balogh, R. Opie and D. Seers Crisis in the Civil Service (1968) 111-126.

97 Thomas op.cit note 96 at 113. The case is unreported.

a civil servant from communicating such information to persons to whom it was in the public interest not to communicate it. As already mentioned, section 2 of the Official Secrets Act of 1911 prohibited the communication of all information gained during one's official duties to unauthorised persons. The section also banned the unauthorised retention of any official document.

The Official Secrets Act of 1920 revised that of 1911. The retention of an official document by anyone was made illegal if the retention was prejudicial to the safety or interests of the State.

Though such pieces of legislation were directed by their drafters against espionage, they were used from the 1920's onwards as a means of protecting all government secrets and information of all sorts. According to Thomas[98] the Official Secrets Acts prevent law-abiding citizens from releasing the truth.

As regards the practice of confidentiality[99], it suffices to mention that in 1967 the Fulton Committee commended the steps that had already been taken towards wider and more open consultation in decision-making. The Committee suggested that the government get rid of unnecessary secrecy.

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98 Op cit note 96 at 119; He cites a statement at 120-121 made in 1938 by Winston Churchill, "one of the fathers of the Official Secrets Act": "The Official Secrets Act was devised to protect the national defences and ought not to be used to shield ministers who have strong personal interests in concealing the truth about matters from the country".

99 R.G.S. Brown The Administrative Process in Britain (1971) 98-99.

It also argued that the doctrine of ministerial responsibility, in the sense that the Minister has full knowledge and control of all the activities of his or her department, was untenable and that civil servants "should be able to go further than now in explaining what their departments are doing, at any rate in so far as it concerns managing existing policies and implementing legislation"[100].

2.3.4 Appraisal

Unlike the situation in America[101], the spoils system in Britain was never intended to manipulate government employees for political partisanship. Often, the patronage was administered disinterestedly but "the fact remained that those who entered the civil service under this system owed something to somebody's influence"[102]. Consequently, the establishment of the civil service commission ensured that the service became open to competition by all and that places were gained by merit alone. According to Greaves[103], "it was not the purpose of the Commission to end

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100 Fulton Report, Vol.1, pars. 277-284.

101 A comparative analysis of the American, British, Canadian, French and German perspectives will be made at the end of Chapter 2.

102 O.M. Attlee 'Civil Servants, Ministers, Parliament and the Public' in W.A. Robson The Civil Service in Britain and France (1956) 27.

103 H.R.G. Greaves The Civil Service in the Changing State: A Survey of Civil Service Reform and the Implication of a Planned Economy in Public Administration in England (1947) 14.

patronage but to see that nominees had the health, character, and knowledge requisite for their duties".

As may be seen, the justification for some curtailments of civil servants' rights in Britain is made in the name of the "common good" or the "public interest", but as long as such claims are not supported by empirical evidence, they remain hollow.

The statement of Morris-Jones[104] that "what is needed is not political neutrality but political reliability", is supported. However, for want of a better term, "disciplined politicking"[105] is preferred to "political reliability" owing to the vagueness and elasticity of the contextual meaning of "reliability". Political neutrality is a misnommer because, as Wheare[106] puts it, a civil servant is not expected to have no personal preferences. As he/she has a vote he/she must be able to express such preference like any other citizen. Neither can it be said that, as a member of the body politic, a public servant should have nothing to do with a party. Wheare, for example, argues that "the official in the higher ranges of the Civil Service is always working professionally and in his official position, with a party, the party in power. Most of what he touches has party implications". The

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104 Op cit note 51 at 365.

105 Arguably, "disciplined politicking" in this context includes administrative impartiality.

106 K.C. Wheare Government by Committee: An Essay on the British Constitution (1955) 26.

author adds that officials in the higher civil service must "work as hard as they can to execute the policy of one party and defend it against the opposition and then reverse it completely when the opposition becomes the government"[107].

There is no reason why the same cannot be said of the lower ranked officials as "... admirers of the British public service point with great pride to the complete impartiality, devotion and loyalty of the public service (emphasis supplied) to the Labour Party during its tenure in office in spite of the fact that most of the higher civil servants were, by temperament and orientation, devotees of the philosophy of the Conservative Party"[108]. Levitan[109] poses very legitimate questions in voicing his claim that "... the complete doctrine of neutrality is an anachronism and a fiction which may well be discarded":

- Is the public servant to be less militant, less honest about his political principles, than the ordinary citizen?

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107 Wheare op cit note 106 at 28.

108 David M. Levitan 'The Neutrality of the Public Service' (1942)2 Public Administration Review 318.

109 Levitan op cit note 108 at 320.

- Is the public servant expected to develop a split personality to be one man in thought and belief and another in action as the administrative agent of political superiors?

The answer to both questions is in the negative and for that reason the "above and below the line" classification of the Masterman Committee does not make sense. It is felt that, without resorting to discriminating between certain categories of public servants, there must be a way by which a political service can be avoided without the undesirable imposition of restrictions[110]. One of the options is that "the need for neutrality would be adequately met by disciplinary action directed at individual employees whose conduct violated service requirements, but it would not necessarily demand a ubiquitous denial of political liberties by government employees"[111].

"Official secrets" should be narrowly defined and should cease to restrict the public servants' freedom of expression generally.

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110 This question will form part of the research in Chapter 4.

111 M.R. Godine 'Political Activity of Civil Servants' in M.R. Godine The Labour Problem in the Public Service (1951) 189.

2.3.5 Summary

Currently, the British government's attitude on the issue of political activity for public servants, in a nutshell, is as follows:-

The principle of differential treatment entails the division of the British civil service into three major categories for purposes of political participation. The first group is the politically free one, which comprises all employees working in the industrial civil service and those in the non-industrial civil service falling within the manipulative grades of the post office and the minor grades of messengers and cleaners. This group may participate in national and political activities. They must, however, resign before nomination if they stand for elections. The second is the intermediate group which comprises the middle ranges from typists to higher clerical officers. These employees can participate in all forms of political activity save parliamentary candidature. The third is the restricted group which is composed of the executive, the professional, the scientific and technical, and the administrative grades. As they are very close to policy formulation, they are denied all political rights except voting, party membership and participating in local political activities which are not associated with national political organisations. This group can participate in such local activities with departmental permission subject to the acceptance of a code of discretion by the individual concerned. Confidentiality is effectively enforced by the Official Secrets Act of 1920.

2.4 THE CANADIAN PERSPECTIVE

The federal constitution of Canada enshrines basic rights in a chapter entitled "The Chapter of Rights and Freedoms"[112]. Its guarantees, however, have not as yet removed the common "conflict between the principle that all citizens should possess unrestricted right to political activity and the belief that a politically inactive and neutral public service is necessary for the proper functioning of government"[113].

2.4.1 Patronage

Though a Board of Examiners was created in 1868 to monitor appointments with an eye to a politically neutral public service in Canada, patronage was rife for the next fifty years[114]. In its quest for a patronage-free public service, the Borden government promulgated the Civil Service Act of 1908 whose "main objective was the eradication of appointment and preferment on the basis of political patronage"[115]. The jurisdiction of the Civil Service

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112 For example, political rights are guaranteed to all citizens by Section 1(d) of the Bill of Rights of 1960.

113 O.P. Dwivedi and J.P. Kyba 'Political Rights of Canada's Public Servants' in F. Vaughan, P. Kyba and O.P. Dwivedi Contemporary issues in Canadian politics (1970) 230.

114 Ibid.

115 Practices such as appointments for party service of government employees for partisan purposes, the holding of office at pleasure and rotation in office had all the hall-marks of the American spoils systems - W.D.K. Kernaghan Public Administration in Canada: Selected Readings 2nd ed. (1971) 386.

Commission which was established in 1908 for public servants residing in Ottawa only was extended to cover federal government employees. Though the Act introduced the merit system, which is still an integral part of the Canadian public service, it also "restricted all public servants in the exercise of all their political rights except the right to vote"[116].

The Civil Service Act of 1918 extended the merit system by providing for admission by competitive examination to all services. Exclusive powers of appointment and promotion were vested in the civil service commission and not in politicians[117]. All this was done to strengthen prohibition against political activity by civil servants. Thus, section 55 of the Act provided as follows:-

"No deputy head, officer, clerk or employee in the Civil Service shall be debarred from voting at any Dominion or provincial election if, under the laws governing the said election, he has the right to vote; but no such deputy head, officer, clerk or employee shall engage in partisan work in connection with any such election, or contribute, receive or in any way deal with any money for the funds of any political party".

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116 Dwivedi and Kyba op cit note 113 at 230-231.

117 Dwivedi and Kyba op cit note 112 at 231.

Though the proviso managed to reduce drastically the magnitude of partisan political activity, political patronage was still affecting civil service efficiency adversely in Canada by 1936[118].

In 1960 an Order-in-Council enabled public servants to participate in and be elected at municipal elections. The revised Civil Service Act of 1961, however, forbade public servants to engage in partisan work in connection with any election of a member of the House of Commons or a member of the legislature of a province or to contribute, receive or in any way deal with any money for the funds of any political party[119].

In 1967 the Pearson government made significant alterations in the federal legislation regulating political activities of government employees. In the words of Dwivedi and Kyba, the Public Service Employment Act of 1967 "marked the first step away from the belief that a politically neutral public service requires the denial of most political rights to all public servants and towards the understanding that political inactivity by all public servants is not necessarily prerequisite to their efficiency and loyalty"[120]

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118 R.M. Dawson 'The Canadian Civil Service' (1936) Canadian Journal of Economics and Political Science 291.

119 Section 61(1) of the Act.

120 Op cit note 113 at 231.

Two types of political activity were guaranteed by the Act. A public servant, in terms of section 32, does not commit an offence "by reason only of his attending a political meeting or contributing money for the funds of a candidate for election". As may be seen, the rights to full participation to Canadian public servants were not restored by the Act, as section 32(1) reads as follows:-

"No deputy head... and no employee shall

(a) engage in work for, on behalf of or against a candidate for election as a member of the legislature of a province or a member of the Council of the Yukon Territory... or engage in work for, on behalf of or against a political party; or

(b) be a candidate for election as described in paragraph (a)."

Section 32(3) of the 1967 Legislation effected an important improvement in the previous laws by providing that "upon application made to the Commission by an employee, the Commission may ...grant to the employee leave of absence without pay to seek nomination as a candidate and to be a candidate for election..."

2.4.2 Freedom of expression

According to Kernaghan[121], the unauthorized disclosure of information by public servants is ordinarily regulated by the initial oath or affirmation of office and secrecy[122]. Another restriction is that contained in Section 4 of the Official Secrets Act of 1952[123] which forbids public servants from divulging any official secret or to pass any official information to any person with whom they are not authorised to communicate. Section 4(1) of the Act provides:

"Every person is guilty of an offence... who having in his possession or control any secret official code word, or password, or any sketch, plan, model, article, note, document or information... that has been entrusted in confidence to him by any person under Her Majesty...

(a) communicates the code word, password, sketch, plan, model, article, note, document or information to any person other than a person to whom he is authorised to communicate..."

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121 Op cit note 115 at 390.

122 The Federal wording is as follows:-
"I (A.B.) solemnly and sincerely, swear (or affirm) that I will faithfully and honestly fulfil the duties that devolve upon me by reason of my employment in the Public Service and that I will not, without due authority in that behalf, disclose or make known any matter that comes to my knowledge by reason of such employment..." - Schedule C of the Public Service Employment Act.

123 This statute is identical to the British Official Secrets Act of 1911.

Although, according to Rankin[124], the Act was passed in order to deter espionage, it has served to codify the concept of government property in information.

2.4.3 Appraisal

The general nature of and the inadequate coverage by the Public Service Employment Act of 1967 provide very little direction to federal employees[125]. The discretion as to which activities are acceptable and forbidden lies with the Public Service Commission. For example, the statute is silent on political party membership. Despite this, federal employees do hold "inactive membership" in political parties.

Secondly, though there is no provision in the enactment for the fundamental political right to vote, it is inconceivable that it was the legislature's intention to prohibit any public servant from voting in an election.

Thirdly, to its credit, the legislation "recognises the fact that public servants do have the same political beliefs and prejudices as ordinary citizens, and in granting public servants the right of political attendance and donation, the

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124 T.M. Rankin Freedom of information in Canada: Will the doors stay shut? (1977) 32.

125 Kernaghan op cit note 115 at 389.

government departed from a pattern which had been constant for nearly fifty years"[126].

Fourthly, section 32(1)(a) of the Act forbids any public servant from offering any political service to any candidate or political party. Any public servant is, hence, forbidden from canvassing during a campaign or displaying any political symbol on his or her person, vehicle or residence.

Fifthly, contrary to expectations, restriction in exercising freedom of speech by public servants is self-imposed[127], as no statutory provisions prevent them from criticizing the government. These restrictions stem from the tradition that public servants should remain neutral on political issues. In fact, since 1918 the Canadian public service adopted Britain's Masterman Committee's belief that:

"the efficient and smooth working of a democratic government depends very largely upon maintaining that confidence and on people believing that ... the civil service will give completely loyal service to the government of the day"[128].

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126 Dwivedi and Kyba op cit note 113 at 232.

127 Dwivedi and Kyba op cit note 113 at 235.

128 UK Report of the Committee on Political Activities of the Civil Service, Cmnd. 7719 London 1949, 14.

Sixthly, there is no doubt that the integrity of the public service should be maintained at all times. This aim, however, may not only be achieved by politically emasculating the public service[129]. Nowhere is it shown empirically that public servants fail to maintain their efficiency and integrity, once they are accorded the fundamental right of political participation[130]. Dwivedi and Kyba[131] are of the opinion that in Canada a fair and proper approach to solving the conflict between the objectives of political participation and political neutrality might be achieved if public servants who have no influence in policy formulation were given the freedom to participate in all forms of political activity[132].

It is considered unfair that section 32(5) of the Public Service Employment Act of 1967 stipulates that, once a public servant is elected to the federal or provincial legislature, such a person then ceases to be an employee of the Crown. It has been pointed out by Dwivedi and Kyba[133] that, once elected, a public servant loses his or her right of tenure. It is suggested that

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129 Dwivedi and Kyba op cit note 113 at 236.

130 Ibid: "The Civil (now Public) Service Commission itself suggests that an efficient and loyal public service can be reconciled with political participation by public servants. In its brief to the Joint Committee of the Senate and of the House of Commons on employer-employee relations in the public service of Canada, the Commission furnished ample evidence to prove that in countries such as Great Britain, which adhere to the doctrine of ministerial responsibility, public servants have been granted the right to political participation without adverse effects on the functioning of government.

131 Ibid.

132 An across-the-board dispensation is preferred, as discussed in sub-headings 2.2.7. at 27 and 2.3.4 at 49-50.

133 Op cit note 113 at 238.

the right of tenure of the public servant should be suspended during the term of office in the federal or provincial legislature.

Canada needs not only a broader range of political rights for civil servants but also an explicit statutory pronouncement of permissible and prohibited political activities.

The Canadian legislature should also state unequivocally whether public servants may criticize government policy in the press or from the platform. It is also doubtful whether the Official Secrets Act, in its present form, is really necessary as public information should be made available to all citizens (except information classified as secret for security reasons). In the same breath, the legal basis of the oath of office and secrecy is questionable[134].

2.4.4 Summary

The merit system, which still forms an integral part of the Canadian public service, proved to be the death-knell of political patronage as early as 1908. The position as regards the political rights of public servants can be summarized as follows:-

(i) No statutory provisions exist for or against political party membership and the right to vote.

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134 Rankin op cit note 124 at 30-31.

(ii) It is not an offence to attend a political meeting or to fund a candidate's election campaign.

(iii) A public servant is not permitted, by law, to work for, on behalf of or against a candidate for election or a political party or to be a candidate for election.

(iv) The Commission may grant leave of absence without pay to an employee who seeks to be a candidate for election.

(v) Public servants may criticize the government but may not disclose, without authority, information gathered in the course of their employment.

2.5 THE FRENCH PERSPECTIVE

2.5.1 Patronage

Unlike the American administration, the French administration has never been afflicted with the spoils system. This explains why French civil servants always boast of a high degree of permanence. Chatenet provides a more fundamental rationale when he states that the French "civil servant

has almost never appeared bound to a government, still less to a party - he is the servant of the state which like him is permanent"[135].

In practice, however, the above assertion is not always true. Numerous changes in French governments have been accompanied by radical purges in which serving directors of state departments have been removed from office[136]. Throughout the nineteenth century, recruiting and posting of civil servants were discretionary[137]. The belief was that rulers should be allowed to place officials in senior posts[138].

2.5.2 The Merit System

During the second half of the nineteenth century, competitive examinations were conducted to recruit staff for the inspectorate general of finance and the various central administrations[139]. Recruits for the Council of State also had to submit themselves to the rigour of such public examinations.

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135 P. Chatenet "The Civil Service in France" in W.A. Robson The Civil Service in Britain and France (1956), 164.

136 J.L. Bodiguel "The political control of civil servants in Europe: Some aspects" in (1986) International Review of Administrative Sciences 225.

137 Bodiguel op cit note 136 at 191.

138 R. Gregoire The French Civil Service, Revised ed. (1954), 357.

139 Chatenet op cit note 135 at 170.

In France a minister's private office is composed of a structure of advisers who are chosen by him. These advisers change with the ministerial incumbent.[140] However, the establishment of open competition and the emergence of a career system, which ensure that competent civil servants can rise to the tope if their professions, have progressively eroded the traditional prerogatives of politicians. Nevertheless, as Bodiguel has pointed out, "prerogative powers are with us still, and traces of the old discretionary recruitment system can be found, maintained on the pretext that it is needed to keep the administration in check and to put government policy into effect."[141]

2.5.3 Political activity

Importantly, unlike the Anglo-American democracies, France does not only allow state officials to participate in political contests but goes to the extent of facilitating their admission to the parliamentary assemblies and to every form of political life[142].

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140 Bodiguel op cit note 136 at 189: "In addition to acting as the Minister's personal secretariat, its functions include assistance with his extra-departmental political duties (relations with his constituency, Parliament, his party), preparing his public appearances, helping him define his departmental policy, take decisions and run his Ministry".

141 Bodiguel op cit note 136 at 192. At 194 it is stated that the method of appointment which is a remnant of discretionary recruitment is called 'tour exterieur' in France. "It is a tool by which political leaders maintain their right to make partisan appointments to administrative posts".

142 Gregoire op cit note 138 at 358 and 361-363.

This liberalism can be attributed to the country's political history. The Restoration, the July Monarchy and the Second Empire had used the system of official candidatures to fill parliament with reliable people and half the government candidates were civil servants. According to the 1875 constitution, those civil servants who were elected to the senate (or the Chamber of Deputies) were to be on the reserve list. Their rights to promotion and retirement were suspended for the duration of their terms of office. The Law Act of 1946 went further by providing that civil servants would, for the duration of their elected offices, be seconded which meant that their rights to advancement were preserved. As a consequence, it was possible to promote officials while they were members of the legislature. This provision was, however, shortlived as Law No. 50-10 of 1950 amended and codified the law concerning public authorities thus:

"Article 11 - ... Any deputy of the National Assembly, whether a member of the Council of the Republic or of the Assembly of the French Union, appointed or promoted to a public office remunerated out of State funds or to any paid office in the appointment of the State, shall cease to belong to the Assembly of which he is a member by the very fact of his acceptance."

The intention of the legislature was to prevent members of the Assembly from being promoted in the civil service. Thus, the separation of powers between the legislature and the executive was ensured. This piece of legislation was, however, generally ignored. As a result, in 1959 the

legislature prescribed that any civil servant elected to the Assembly be replaced but such an official could retain the status previously held in the civil service.[143]

2.5.4 Freedom of expression

As regards freedom of expression on the part of civil servants, Gregoire states that "certain forms of behaviour in private life may so compromise the operation of the public service as to amount to professional misconduct"[144]. Though the approach of the French Council of State is flexible as far as public statements made by civil servants are concerned, it views those made by senior officials in a serious light. Unlike junior personnel, the positions of senior officials, according the Council, render them more susceptible to public scrutiny. Thus, all the outside activities of officials particularly their political activities come under scrutiny. In the opinion of the Council of State "any statement by a civil servant of his political opinions should be temperately formulated. Not only may it not take the form of insulting remarks about his chiefs, but also, in certain cases, may not imply a direct attack against the authority of the state, which the official personifies."[145].

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143 This amendment is contained in Ordinance No. 58-998 of 1959.

144 Op cit note 138 at 310.

145 Gregoire op cit note 138 at 319 quoting from the Council of State.

2.5.5 Summary and Appraisal

Since the French bureaucrats credit themselves with a high degree of permanence, the spoils system has never been practised as government policy in the country. This achievement, to some extent, was brought about by the introduction of the merit system in the second half of the nineteenth century.

State officials are allowed to participate in political contests and their admission to the parliamentary assemblies and to every form of political life is facilitated. This liberal approach is commendable.

The French government, moreover, permits civil servants to express their political opinions as long as their statements do not take the form of insulting remarks about their superiors or, in certain circumstances, imply a direct attack against the authority of the state.

Resimont's statement that government officials do not make up a special category of citizens is fully supported.[146] They enjoy political rights, he says, and thus have the right to express their opinions and participate in the political life of the country. Perhaps one may answer Resimont in the affirmative when he poses the question: "Is it not characteristic of a

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146 Free translation of F. Resimont "Les fonctionnaires generaux et la politisation de L'administration" in (1980) Socialisme 547.

democratic government to acknowledge that the Administration should reflect the diversity of opinions and interests which make up the political life of the country?"[147]

The above analysis of the French situation draws one finally to the conclusion that a civil servant's freedom of expression should only be suppressed or limited by statute solely for the purpose of preventing a direct threat to public order.

2.6 GERMAN PERSPECTIVE

2.6.1 Rights to freedom of political expression before and after 1848

Derlien[148] summarizes the history of the rights of German civil servants to freedom of expression and political activity before 1848 as follows.

The history of the Prussian and German higher civil service, which is a chain of events full of discrimination and negative patronage, contrasts to the norm of "Uberparteilichkeit" (being above parties and party interests). Until 1848, civil servants had no rights and were, as a result, hired and fired

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147 N'est-ce pas le propre d'un régime démocratique d'admettre quel'Administration puisse offir le reflet des diverses tendances et des intéréts divergents animent lavie politique du pays?"; For an in-depth discussion of the constitutional guarantees in respect of civil servants in the French constitution. See also A. Louvaris 'La constitutionalization du droit de function publique' (1992) 5 Revue de drouit public et de la science politique 1412-1449.

148 H.U Derlien, "Politicization of the Civil Service in the Federal Republic of Germany: Facts and Fables" in F. Meyers The Politicization of Public Administration, (1985) 14.

according to political opportunity. The social origin of recruitment was an important criterion when the political influence of the nobility was to be curbed by recruiting particularly from bourgeois background. Political attitudes were also closely supervised and remarked in the files (conduiten-listen). It was only after the 1848 revolution that disciplinary measures were codified. This codification served as a safeguard against arbitrary dismissal[149]. On the other hand, provision was made for the appointment of "political civil servants"[150] who were expected to be in full accord with the partisan goals of government and could be dismissed without justification at any stage in their careers, if found to be politically unorthodox. The ground of justification for these political appointments was the keeping of top civil servants from active political engagement, particularly in favour of opposition parties. These measures, hence, were not aimed at neutrality or universality as such, but at ensuring that the bureaucracy supported the established political order. Derlien emphatically states that this practice has been preserved and applied throughout German history since the 19th century, to carry out political purges... (emphasis supplied)"[151].

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149 Ibid.

150 The positions in the federal civil service having the status of political civil servants are the highest ones, namely secretaries of state and the ministerial directorate, see J. Caplan 'The imaginary universality of particular interests: the tradition of the civil services in German history' (1979) 40 Social History 306; H.U. Derlien 'Repercussions of Government Change on the Career Civil Service in West Germany : The Cases of 1969 and 1982' (1988) 1 Governance : An International Journal of Policy and Administration 54; R. Mayritz and H.U. Derlien 'Party Patronage and Politicization of the West German Administration Elite 1970-1987 - Toward Hybridization?' (1989) 2(4) Governance: An International Journal of Policy and Administration 385.

151 Derlien (1988) op cit note 150 at 54.

In addition, "from 1852 onward, what remained of liberalism in the bureaucracy was increasingly suppressed with a new disciplinary code, by various measures of personnel policy, (basically secret) political supervision, and careful recruitment. Above all, civil servants could be expelled on political grounds - a break with the principle of tenure, which had a strong disciplinary effect"[152]

2.7.2 Reforms

During the Weiner Republic[153] which immediately followed the "uncompleted revolution" of 1918/19, the federal constitution, in terms of its Article 129, for the first time in the Prusso-German history guaranteed the permanence of tenure of career civil servants. Civil servants were, however, required to swear that they would uphold the provisions of the constitution.

As a further innovation, the constitution, in terms of Article 130, granted civil servants the unrestricted right of political opinion. The effect of this right was that civil servants could become members of political parties and were eligible to parliamentary bodies.

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152 H.U. Derlien 'State and Bureaucracy in Prussia and Germany' in M. Heper The State and Public Bureaucracies: A Comparative Perspective (1987) 96.

153 The "Weiner coalition", which was formed by the Catholic Zentrum, Liberal Democrats and Social Democrats, lost its majority in 1923.

The Nazi Party (NSDAP), which at that time came to dominate the state without challenge and "was juridically defined as equivalent to the civil service," greatly abused the terms of the Constitution.[154]

The goals pursued by the Nazis were to purge the higher echelons, to safeguard the loyalty of the bureaucracy and, finally, to provide patronage for their followers. In fact, all civil servants had to pledge an oath of loyalty to Hitler personally.

After the collapse of the Nazi system, the bureaucracy, as a social system, operated as previously. The German civil service was reinstitutionalized without change by the 1949 constitution. As a matter of fact, as shown by the moderate reforms in 1969 and 1982, "the bureaucracy loyally serves its political masters"[155]

According to Derlien[156], the current Formal Regulations, firstly require that a civil servant, while in office, be neutral and non-partisan when taking discretionary decisions. Secondly, he or she has a right to be a member of a political party. Thirdly, he or she has a right to express his or her opinion and to campaign for a parliamentary mandate on local, state or federal level when still in active service. In that case, the service code requires such a

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154 Derlien (1987) op cit note 152 at 97; Derlien (1985) op cit note 147 at 3.

155 Derlien (1987) op cit note 152 at 99-101; Derlien (1988) op cit note 150 at 385.

156 Derlien (1985) op cit note 148 at 9-11.

politically active official to exercise self-restraint and mitigation[157]. Lastly, secretaries of state, division heads and lower ranks in the foreign office and the secret services are regarded as political civil servants.

2.6.3 Summary and appraisal

According to Mayntz[158] the top civil servants in Germany have never been apolitical and neither were they ever expected to behave otherwise. All that the civil service laws require is that they perform their jobs in a non-partisan way and observe such moderation and self-restraint in political activities as seems necessary in view of their position and official functions. In Germany, moreover, there is no discrimination between senior and junior officials when it comes to political activity and freedom of expression.

The Federal Republic of Germany should be commended for allowing civil servants to have unrestricted rights to political opinion, to be members of political parties, to be eligible to parliamentary bodies, and to campaign for parliamentary mandates at any level of government when still in active service. Of equal importance is the stipulation in the German civil service

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157 Derlien (1985) op cit note 148 at 10; Derlien also states that the normative conflict between the principle of neutrality and non-partisanship, on the one hand, and political rights, on the other hand, is theoretically resolved by a problematic distinction between the spheres of office and private life. However, party political convictions are not asked and do not enter their personal files.

158 R. Mayntz 'The Higher Civil Service of the Federal Republic of Germany' in B.L.R. Smith The Higher Civil Service in Europe and Canada: Lessons for the United States (1984) 68.

code that a civil servant should exercise self-restraint and moderation when politically active.

2.7 A COMPARATIVE ANALYSIS

2.7.1 Introduction

In the foregoing brief analysis of the five legal systems, considerable attention is given to the question as to whether the rights of public servants to political activity and freedom of expression are different from those of other ordinary citizens.

In France and Germany, the rights of civil servants are almost fully equated with those of ordinary citizens while in the American, British and Canadian legal systems a common attempt is made to strike a balance between the necessity for the political neutrality and administrative impartiality of public servants and the demand for equal rights for all citizens in a democratic state. A juxtapositioning of similarities and differences among the latter three systems reveals the following:-

2.7.2 Similarities

In all three systems -

(i) the merit system ensures a patronage-free public service;

(ii) disclosure of information, without authority, is an offence;

(iii) the following political activities are allowed:-

(a) Voting;

(b) Attending political meetings;

(c) Joining political organisations;

(d) Participation in civic associations;

(e) Contributing to campaign funds;

(iv) Candidates for election must either resign or retire from the public service.

2.7.3 Differences

(i) In America a public servant may speak or write publicly on political subjects so long as such subjects are not connected with political campaigns[159]. In Britain all civil servants are allowed such rights, excepting officials of the executive, the professional, the scientific and technical, and the administrative grades. In Canada a public servant is not permitted to work for, on behalf of, or against either a candidate for election or a political party.

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159 They may however, not organise, conduct or address political meetings or participate in political parades.

(ii) Only America bars -

(a) participation, except as spectator, in political conventions[160];

(b) active participation in primary meetings or caucuses;

(c) holding the office of committeeperson;

(d) organising, holding office in, or addressing a political club or committee thereof;

(e) soliciting, receiving or otherwise handling political funds;

(f) any activity at the polls except voting;

(g) initiating or circulating nominating petitions.

(iii) On the other hand, America is the only country which allows public servants to wear badges (but not at work), though Britain, with its liberal approach, would certainly grant them this right, with the exception of the restricted group or grades.

(iv) It is only in Canada and America where public servants are not prevented from criticizing the government. In Canada tradition restrains them from doing so.

160 Presumably, only policy formulators are prohibited in Britain.

2.7.4 Critical Analysis

The merit system has won the day because there is no place for political patronage in any of the countries under discussion. This, however, should not be a bar to the ministerial privilege of selecting personal assistants. The conditions of service of the latter should, however, be the same as those of other public servants.

In Canada there is no statutory provision for or against voting by public servants. This, however, is one fundamental right which cannot be taken away from citizens by any democracy.

Public servants should not only be allowed to attend political meetings, but should, as well, be able to participate fully in all proceedings thereat. Likewise, it does not make sense to allow a public servant to be a member of a political party or organisation and, at the same time, tie him or her down when it comes to the rights, duties and obligations flowing from the provisions of such a party's or organisation's constitution. In the same breath, to allow a public servant to contribute funds to a political campaign and, yet, deprive him or her of all other rights to take part in the same political campaign is a contradiction in terms.

There should be a blanket authorization for all public servants to participate in civic matters i.e. their participation should not be subject to anybody's

approval as civics affect each and every citizen directly. Parliamentary candidature should be allowed and the period of absence for the election campaign or the term of office as a member of parliament or provincial or regional government should be regarded as special leave without pay. To suggest that a potential candidate must resign his or her post, on accepting candidature, is punitive and can easily deter experienced and skilled public servants from their involvement in shaping the political future of a country.

Grouping public servants for purposes of granting full political rights to some and not to others is just not acceptable unless, of course, that particular group has itself chosen that path. It may as well be mentioned that, to its credit, the United States of America is the only country which has explicitly listed the permitted and prohibited political activities. However, such an exercise is considered uncalled for since public servants, as citizens, should share all the rights enjoyed by other citizens. In any case, a closer analysis of the prohibited activities shows that they are nothing but trivialities.

It must be reiterated that, if the government of the day has nothing to hide, it must permit public servants to criticise it publicly and the principle of confidentiality should be done away with, except in those few instances where the security of the state may be at stake.

In conclusion, it may be mentioned that all the above submissions and arguments are, at this stage, hypothetical. The suggested solutions are still

to be tested for their responsiveness to the social needs they seek to fill[161] and this will be done in Chapter 4.

161 K. Zweigert and H. Kotz An Introduction to Comparative Law: The Framework by Konrad Zweigert and Hein Kotz (1977), 44.

CHAPTER 3

RIGHTS TO POLITICAL ACTIVITY AND FREEDOM OF EXPRESSION OF PUBLIC EMPLOYEES IN SOUTH AFRICA

3.1 INTRODUCTION

The preceding comparative analysis has brought to light the fact that the American, British and Canadian legal systems differentiate between the rights of public servants to political activity and freedom of expression and similar rights of other ordinary citizens. Similarly, in South Africa, the political activities of public employees are limited by law. As is the case in the above Anglo-American countries, civil servants can vote, attend political meetings, join political organizations, participate in civic associations, and contribute to campaign funds. Candidates for election to public office, however, must either resign or retire from the public service. In addition, a public servant in South Africa may not preside or speak at a political meeting, or draw up or publish any writing or deliver a public speech to promote or prejudice the interests of a political party.

Another common feature is that in all the above countries, including South Africa, disclosure of information gained in the course of a public servant's employment, without authority, is a statutory offence.

The limitation of public servant's rights and freedoms in South Africa can be traced back, and attributed to, amongst others, the apartheid era. The system of apartheid was not only authoritarian and "disciplinarian", but also discriminatory on the basis of colour. In the process, the Black majority were deprived of free political activity and freedom of expression. Coincidentally, both black and white public servants became victims of the prevailing circumstances.

On the other hand, South Africa, an ex-British colony, adopted Britain's overemphasis on the perpetuation of a disciplined public service. Initially, this entailed that public servants had absolutely no political rights. As between racial groups, the only difference was that white public servants could vote. Furthermore, all public servants risked being dismissed if they disclosed confidential information or criticized government policy.

Fortunately, the rigours of apartheid were laid to rest on the 27th day of April 1994. This day saw a change from authoritarianism to democracy in the form of the first ever democratic elections and the adoption of a new Constitution with an entrenched Bill of Rights. This Bill of Rights embodies both human rights and constitutional principles which embrace a system of values for the new dispensation. Central to the Bill of Rights are fundamental principles such as equality, non-discrimination and justice which may create tensions with limitations of rights, however justifiable made. Indeed, the Bill of Rights as well as most human rights instruments, do

provide for limitation of rights provided that such limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.[162]

The new dispensation, hence, protects the fundamental rights and freedoms of all citizens. Such being the case, it is submitted that public servants should be accorded the same protection as that accorded to ordinary South African citizens.

Against this background, it is necessary to rethink the rights and freedoms of public servants because they constitute the bureaucracy which is essential for the smooth and efficient functioning of the entire system of government and of the values it underpins. In doing so, the strengths and weaknesses inherent in the functions of the civil service will be underlined with a view of bringing forward practical suggestions for policy and legislative intervention.

As a starting point, a historical background of the South African government's attitude towards public servants' rights and freedoms is sketched hereunder.

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162 Section 36(1) of Constitution of the Republic of South Africa of 1996.

3.2 HISTORICAL BACKGROUND

Until 1984, the approach of the South African government to the extension of political rights to public servants was extremely restrictive. Restrictions on freedom of expression, on the other hand, is presently as strong as they were in 1912. Unfortunately, literature on the development of this very important subject is virtually non-existent.

Prior to the establishment of the Union of South Africa in 1910, each colony had its own laws relating to the public service[163]. Section 104 of the South Africa Act of 1909 provided that all officers of the public service of the colonies became, at the establishment of the Union, officers of the public service of the Union.

3.2.1 Patronage

There is no evidence to show that patronage, as a practice, was at any stage endorsed by the South African government. Presumably, as a former British Colony, it took a leaf out of Britain's book. One of the earliest statutes on public personnel administration, the Civil Service and Pension Funds Act 32 of 1895[164] provided that all candidates for admission into the

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163 Butterworth's Statues of the Republic of South Africa: Classified and Anointed from 1910, Issue No. 18, "Public Service" 5; These laws are: the Civil Service and Pensions Funds Act 32 of 1895 (Cape of Good Hope) and Natal's Civil Service Act of 1894, 25 of 1898 and 43 of 1901.

164 Section 5.

Civil Service to fill any office were required to pass the civil service examination. For this purpose, the South African Act of 1909, in section 4(2), provided for the appointment of a permanent public service commission "clothed with such powers and duties relating to the appointment, discipline, retirement and super- annuation of public officers as Parliament shall determine". Thus, the Public Service and Pensions Act 29 of 1912 was the first Union law to give effect to the abovementioned provision[165]. Provision, in the 1912 Act, was made for the appointment of a public service commission and for the duties to be carried out by the commission in relation to those matters envisaged in the South Africa Act of 1909 .

In terms of the 1912 Act political appointments were limited to the office of secretary of a department of state, a provincial secretary, any professional office of senior rank, or to the post of private secretary to a minister[166]. Nowhere, however, was it mentioned that one of the

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165 Section 2.

166 Section 2(3) provided:
"The Commission shall, inter alia, ...
...(b) whenever it is necessary to make any appointment or promotion in the Administrative and clerical division (other than to the office of Secretary of a department of state or provincial secretary or to any professional office of senior rank or to the post of private secretary to a Minister) make recommendations as to the person to be appointed or promoted."

qualifications for appointment or promotion to these posts was political affiliation to a party or organisation. By 1923[167] the scope for political appointments and promotions had been narrowed down to the post of private secretary to a minister only.

In its endeavour to wipe out any vestiges of patronage that might have existed at the time, the government, through the 1923 Act, "sought to have a Commission which would protect the interests of the public by exercising the function of an important outside critic on the efficiency of individuals and of the organisation of the service. The government had tried to make this body impartial, to put it outside any political interest or consideration, and to free it from any suspicion of being a mere machine in the hands of government. It was also desired that if a man came into the Public Service he should be able to win promotion by merit, and thus be spared many years of disappointing drudgery"[168].

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167 Public Service and Pensions Act 27 of 1923. Section 3(2) provided that: "The Commission shall, inter alia, ...

(a) Whenever it is necessary to make any appointment or promotion in the administrative or the clerical or the professional division (other than to the post of private secretary to a Minister) or to a prescribed post in the general division make a recommendation as to the person to be appointed or promoted..."

168 Mr Duncan (Minister of the Interior) in "Debates of the House of Assembly" Vol. 18 1923, 68.

Apparently, before 1923 the practice in cases of promotion, was one of favouritism rather than patronage. Boydell (MP) commented that "in the past the public service had very largely been at the mercy of the heads of departments and Ministers, and frequently promotion went not by merit but by favour..."[169]

From 1957[170] onwards, however, the commission had to make recommendations for all appointments and promotions with the exception of instances where it was felt not necessary to approach it for a recommendation[171]. Political appointments, hence, became something of the past.

3.2.2 Political activity

The first statute to prohibit public servants from taking an active part in politics was the Public Service and Pensions Act 29 of 1912. Its section 16 provided as follows:-

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169 Ibid.

170 Public Service Act 54 of 1957, Section 6(2) of the Act provides:
"The Commission shall-
...(h) whenever it is necessary to make any appointment or promotion to a post in the administrative, clerical, professional or general A division... make a recommendation as to the person to be appointed or promoted..."

171 "... provided that in such posts in the general A division as may be specified by the Commission, appointments and promotions may be made without a recommendation of the Commission" - Section 6(2)(h) of Act 54 of 1957.

"Any person employed in the Public Service who contravenes any provision or a regulation or who...

(f) becomes a member of any political organization or takes an active part in political matters;

(g) becomes a member of any association or society or union the objects whereof are to secure advantages to offices by the exercise of political or undue influence;

shall be deemed to have been guilty of misconduct and may be dealt with as in this Chapter is provided."

With regard to the inclusion of section 16(f) of the Act, Duncan (then Minister of the Interior) observed that "it was not for the purpose of making a slave of a public servant, but to prevent him from being made a political tool"[172]. The Public Service and Pensions Act 27 of 1923 has a similar provision[173].

Section 17(f) of the Public Service Act 54 of 1957 and section 19(f) of Act 111 of 1984 deemed a public servant guilty of misconduct if he or she

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172 Debates of the House of Assembly, Vol. 8 1923, 85.

173 Section 20(1)(f).

made use of such an official position to promote or to prejudice the interests of any political party. This provision was a departure from the previous provisions which forbade a public servant from becoming a member of a political organization or an interest or pressure group whose aims were political in nature.[174]

Section 20 of the Public Service Act 300 of 1994 provides as follows:-

"An officer, other than a member of the services or an educator or a member of the National Intelligence Services, shall be guilty of misconduct and may be dealt with in accordance with section 21, if he or she-

(g) makes use of his or her position in the public service to promote or to prejudice the interests of any political party";

In terms of sections 30 of the Public Service Act 111 of 1984 and 36 of Act 300 of 1994 a public servant may be a member and serve on the management of a lawful political party provided he or she does not promote or prejudice the interests of any political party through the public office. He or she may attend a public political meeting, but may not preside or speak at such a meeting. Finally, he or she may not draw up or publish any

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174 It is assumed that the intention of the legislature, in barring public servants from becoming members of associations or societies or unions whose objects were to secure advantages to offices by the exercise of political or undue influence, was to strive for a non-partisan public service to avoid any possibility of an emergence of political patronage. This provision (Section 16(g) of the 1912 Act) was simply dropped in subsequent legislation and this may persuade one to conclude that the mischief which the legislature sought to cure, never existed in actual fact.

writing or deliver a public speech to promote the interests of any political party.

In the past, if an officer or employee accepted nomination as a candidate for election for parliament or a provincial council,such a public official was deemed to have voluntarily resigned from the public service with effect from the date on which he or she accepted such nomination. Currently, in terms of regulation A13 of the Public Service Regulations of 1994 he or she shall be deemed to have voluntarily *retired* (emphasis supplied) from the public service from the date on which the public servant is elected. An officer or employee may however, with prior permission from the "relevant executing authority" accept a nomination or requisition as candidate for election as member of a local government body or a school board without the sanction of a forced retirement.

3.2.3 **Freedom of expression**

Since 1912 the freedom of expression of public servants in South Africa has always been restricted. Section 16 of the Public Service and Pensions Act 29 of 1912 forbade "any person employed in the Public Service" from both speaking at a public meeting or contributing anonymously or otherwise to newspapers or other publications of a like nature on political or official subjects, without the permission of the relevant head of department or

minister[175]. Likewise the section barred disclosure of information, acquired in the course of a public employee's duties, otherwise than in the discharge thereof[176]. The requirement to obtain the permission of the head of department was left out in Act 27 of 1923. This Act deems a public servant guilty of misconduct if he or she "discloses otherwise than in the discharge of his or her duties, information, acquired in the course thereof, or uses for any purpose other than for the discharge of his or her official duties information gained by or conveyed to him through his connection with the public service, notwithstanding that he does not disclose such information"[177].

As can be seen, the only change is that the 1923 Act does not only prohibit disclosure of information but its use as well for any purpose other than for the discharge of duties notwithstanding that such information is not disclosed. The 1957[178], 1984[179] and 1994[180] Acts carry the same provision except that, in all of them, it is prefaced by the phrase "without first having obtained the permission of his head of department".

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175 Section 16(e) of Act 29 of 1912.

176 Section 16(k) of Act 29 of 1912.

177 Section 20(1) of Act 27 of 1923.

178 Section 17(m) of Act 54 of 1957.

179 Section 19(m) of Act 111 of 1984.

180 Section 20(m) of Act 300 of 1994.

Another new provision was contained in section 20(1)(e) of Act 27 of 1923 which prohibited a public employee from publicly commenting upon the administration of any department of the government of the Union or of any province or of the mandated territory. In the 1957 Act this provision was shortened to "publicly comments upon the administration of any department"[181]. A minor addition, made in the 1984[182] and 1994[183] enactments, was that an officer would be liable to a charge of misconduct only if such a bureaucrat "publicly comments *to the prejudice of* the administration of any department (emphasis supplied)".

Another provision, which, in a way, interferes with a public servant's freedom of expression is one contained in all the statutes and which prohibits an attempt "to secure intervention from political or outside sources in relation to his position, promotion, transfer or emoluments in the public service: Provided that nothing herein shall prevent any officer from endeavouring to obtain redress of any grievance through Parliament"[184]. The only substitution in the 1957[185], 1984[186] and 1994[187] statutes is

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181 Section 17(f) of Act 54 of 1957.

182 Section 19(f) of Act 111 of 1984.

183 Section 20(f) of Act 300 of 1994.

184 See for example section 20(g) of the 1923 Act.

185 Section 17(f) of Act 54 of 1957.

186 Section 19(h) of Act 111 of 1984.

187 Section 20(h)of Act 300 of 1994.

"conditions of employment" in the 1957 Act and "conditions of service" in the 1984 and 1994 Acts in the place of "his position, promotion, transfer or emoluments" contained the 1923 Act.

The English Official Secrets Act of 1911, which was made applicable in the Union of South Africa, was repealed after 45 years. Similar to its predecessor, the Official Secrets Act 16 of 1956 curtailed the freedom of expression of government employees. In terms of its section 3(1), any public servant who communicated confidential information or the contents of a secret document to any person other than a person to whom he or she was authorised to do so, committed an offence. The Official Secrets Act of 1956 mandated the declaration of secrecy which was signed by each and every officer or employee with effect from his or her date of assumption of duty[188].

Section 4(1) of the Protection of Information Act 84 of 1984, which replaced section 3(1) of the Official Secrets Act 16 of 1956, contains, largely, similar provisions.

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188 Section 3(1) of the Official Secrets Act 16 of 1956. The declaration of secrecy read as follows:-
"I, XY, do solemnly and sincerely declare that I will, in the office to which I have been appointed and in any office that may be assigned to me hereafter, faithfully and truly perform the duties and exercise the powers of every such office so far as it lies within my power, and that I will not directly or indirectly reveal, or use for private purposes, any information coming to my knowledge or acquired by me or the nature or the contents of any documents communicated to me either in the course of my duties or in my capacity as an officer or employee otherwise than in the proper discharge of my duties as authorised by law or competent authority..."

3.2.4 Appraisal

In 1957 the government was prepared to consider an amendment to the provision prohibiting officers from becoming members of political organisations or from taking an active part in political matters, but both the Public Servants' Association and the Public Service Advisory Board did not see the need therefor[189].

It cannot be said with certainty that the Public Servants' Association, at that stage, represented the aspirations of all public servants. It would be interesting to learn whether, at present, the Association holds the same view on public servants' political rights in view of the emerging culture of rights.

In 1984 the legislature shed its indifference over the political rights of public servants. For the first time provision was made for a public servant to be a member of a political party, serve on its management and attend political meetings[190]. Important questions, however, need to be answered: If a public servant does not use his or her position in the public service to

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189 "I asked the Public Servants' Association whether they had anything in mind in that respect, whether they wanted limited political rights, even membership of a party. They were not prepared to express themselves as being in favour of that. This particular clause has also been considered by the Public Service Advisory Board and a suggestion was made in regard to granting greater political rights to public servants, but it was rejected by the Advisory Board with an overwhelming majority" - Minister of the Interior in House of Assembly Debates, (1957), Vol. 16, 6266.

190 Section 30 of Act 111 of 1984.

promote or prejudice any political party or organisation, why should he or she be allowed to be a member and serve on the management of a political party and, yet, be denied the right to preside or speak at a public meeting? Why is he or she barred from drawing up or publishing written views or delivering a public speech? If he or she is granted the constitutional right to belong to a political party, the logical deduction is that nothing stops him or her from promoting or prejudicing any political party as long as he or she does not do so during official hours of duty.

Whatever the circumstances of a case at hand, a public servant can be charged with misconduct if he or she "conducts himself or herself in a disgraceful, improper or unbecoming manner..."[191]

The following comment on a parliamentary debate can be endorsed:

"The argument for the total liberation of the public servants from the prevailing restrictions was endorsed by the Minister of Internal Affairs where he stressed that the government was not disposed nor was it its policy to discriminate against officers on the grounds of their political convictions. As an example, he cited the co-operation the then Prime Minister had experienced as Minister of Defence while the entire top structure were not supporters of the Nationalist Party. Furthermore, with the calibre of officers the government had, the Minister of Internal Affairs was convinced that it

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191 Section 20(i) of the Public Service Act 300 of 1994.

was possible to ensure objective co-operation, as long as the officer concerned is prepared to practise his politics within the framework of legislation".[192] As the current legislation still falls short, by far, of granting full political rights to public servants, it is suggested that they be allowed to practise their politics as long as they do so outside the scope of their employment.

Furthermore, the assertion that the integrity of the public service and the confidence the public has in the service is dependant on the principle of confidentiality[193] may be accepted only if empirically tested.

In the Protection of Information Act 84 of 1982 a distinction is drawn by section 4(2)(b)(iv) between official information the disclosure of which would prejudice the security or interests of the State and information the disclosure of which would not result in such prejudice. Therefore, the prohibition contained in section 3(1) of the Official Secrets Act 16 of 1956 is relaxed since that section covers all information whether or not it would be prejudicial. It could be used to prevent the disclosure of information to which the public should have been entitled. Not much can be said on confidentiality at this stage, mainly because measures are afoot[194] to make

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192 House of Assembly Debates (1984) Vol.22, 10523.

193 Sive (MP) in "House of Assembly Debates" Vol. 22, 1984 10455-10456.

194 The Draft Open Democracy Bill. The resultant statute may repeal some provisions in the Public Service Act 300 of 1994, the Protection of Information Act 84 of 1982 and the Archives Act 6 of 1962 in so far as the Acts in question limit public servants' freedom of expression.

the public administration more transparent. This, it is presumed, portends reasonable access to information which is neither classified nor sensitive[195].

As regards the ambit of the right of access to information, all the affected person has to show is that an organ of state is in possession of information which is required for the exercise or protection of any of his or her rights. *In Uni Windows CC v East London Municipality*[196], the applicant, a building contractor, was obliged to cease building operations temporarily at the instance of the local authority when its official contended that the size of the dwelling units being constructed deviated from the rezoning conditions. It was then ascertained that the official who had approved the building plans had overlooked the provisions of the rezoning conditions in doing so. Thereafter the rezoning conditions were amended and the construction was able to recommence. The applicant felt that it had sustained damages as a result of the interruption in construction and wished to investigate what remedies were open to it. It alleged that, in order to do so, it required access to all information held by the respondent in respect of the construction project. Its claim for access to such information was based on section 23 of the interim Constitution. The respondent refused to provide access to the information requested. As a result, the applicant sought an

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195 Section 32(1) of the Constitution provides that "Everyone has a 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".

196 1995 (8) BCLR 1091 (E).

order from the court allowing access to all information held by the respondent. It was held by the court that the applicant was entitled to such access in order to enable it to investigate a potential claim, irrespective of the identity of the person against whom such claim may be instituted.

Section 23 of the interim Constitution does not limit in any way the rights for the exercise or protection of which a person is entitled to seek access to officially held information.[197]

3.2.5 Summary

It is noteworthy that the era of restricted political rights of public servants has now given way to a more liberal period where a public servant may be a member and serve on the management of a lawful political party and attend political meetings. Notwithstanding the relaxation of such restrictions, a public servant may not preside or speak at a political meeting or draw up or publish any writing or deliver a public speech or prejudice the interests of any political party.

With regard to the obligations imposed on a public servant by the law on secrecy and confidentiality, a public servant may not disclose any information without first having obtained the permission of his or her head

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197 *Van Huyssteen NO and Others v Minister of Environmental Affairs and Tourism and Others* 1995(9) BCLR 1191(C).

of department. Neither may he or she criticise the administration of any department publicly or disseminate any official information which puts state security in jeopardy. Lastly, he or she may not even attempt to secure intervention from any sources in relation to his or her position and conditions of service in the public service.

The next chapter describes a data collecting process which was used to investigate the advisability or otherwise of imposing limitations on public servants' rights and freedoms in South Africa.

CHAPTER 4

RESEARCH METHODOLOGY, THE PRESENTATION AND INTERPRETATION OF DATA

4.1 INTRODUCTION

To establish whether, according to the views of public administrators, the rights of civil servants should be curtailed or extended, an investigation was conducted which sought to answer the following questions:

* Should a public servant, irrespective of rank or designation, be allowed to take part in all forms of political activity?

* Should a public servant, irrespective of rank or designation, be required to resign, retire prematurely or be granted special leave without pay, if elected to public office?

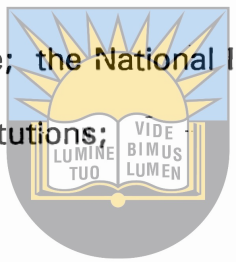
* Should a public servant, irrespective of rank or designation, be allowed to disclose information gained in the course of his or her official duties?

* Should a public servant, irrespective of rank or designation, be allowed to criticize government policy?

4.1.1 Definition of terms

For purposes of this study -

(i) "public servants" are officers and employees contemplated in section 8 of the Public Service Act, 1994 (excluding persons who hold posts on the fixed establishment in the Permanent Force of the National Defence Force; the South African Police Services; the Department of Correctional Service; the National Intelligence Services; and the State educational institutions;



(ii) "top officials or policy formulators" are public servants who hold posts of deputy director, director, deputy director-general and director-general as well as equivalent ranks and designations; and

(iii) "public office" is membership of Parliament and the Provincial Legislatures.

4.1.2 Hypotheses

The following four hypotheses constitute the principal foundations of this section.

(i) As a citizen, a public servant, irrespective of rank, should be allowed to take part in all forms of political activity;

(ii) In the event of a public servant holding a substantive political post his/her employment should be suspended (held in abeyance) for the duration of his/her term of office. Such suspension may serve as an incentive for the public servant to utilise his /her experience or expertise in public office.

(iii) Notwithstanding his or her official designation, a public servant should be allowed to disclose information gained in the course of his or her employment. A democratic administration, which is characterized by transparency and freedom of information, should entertain this disclosure. Such right, however, should exclude information which may endanger the security of the state or military information; and

(iv) A public servant, irrespective of rank, should be allowed to criticize government policy.

4.1.3 **Methodology**

For purposes of investigation, a data collecting process was employed. A structured questionnaire which contained thirty two items was prepared.

In administering the survey, a sample population considered representative of well-informed public administrators was targeted. Members of the South African Institute for Public Administration (SAIPA) constituted the ideal sample. The names and addresses of these members were obtained from SAIPA's head office.

To generate data, a random sample of 180 from a total of 1800 members of SAIPA (excluding corporate members) was selected to receive mailed questionnaires. In each case a stamped self-addressed envelope was supplied. Of the 180 public administrators, 110 (61,12%) returned their questionnaires. It must be noted that 70 (38,88%) of the respondents failed to return their responses to the questionnaires. This high number may be attributed to the fact that some recipients may not be keen to respond to any questionnaire. In research such lethargy is common.

4.2 PRESENTATION, ANALYSIS AND INTERPRETATION OF DATA

4.2.1 Presentation of data

For purposes of analysis and interpretation, the collected data is presented in tables which show the percentages of the responses to each of the questions. These responses are divided into four columns, namely, "agree", "disagree", "no opinion" and "no response". In this context, "no response" refers to a situation where the person answering the questions omits or fails

to indicate whether he or she agrees or disagrees with the statement or has no opinion. The questions posed are in the form of statements. In order to facilitate data analysis and interpretation, the questions have been grouped. Each hypothesis will also be restated in the process.

Hypothesis 1: "As a citizen, a public servant, irrespective of rank, should be allowed to take part in all forms of political activity". The questions whose responses test this hypothesis are the following: 1 and 17; 2 and 18; 3 and 19; 4 and 20; 5 and 21; 6 and 22; 7 and 23; 8 and 24; 9 and 25; as well as 10 and 26. The presented data will be analysed and interpreted in this order. The same procedure will be followed in the case of the other three hypotheses.

4.2.2 **Analysis and interpretation of data**

Table 4-1: Distribution of respondents to the question whether a public servant should have a right to be a member of a political party or organization: Question 1 1995 (N = 110)

COMMENT	NO	PERCENTAGE
Agree	97	88,18
Disagree	12	10,91
No opinion	1	0,91
No response	-	-
TOTAL	110	100

88,18 percent of the respondents agreed that a public servant should have a right to be a member of a political party. Though the percentage of those who did not agree with the statement is only 10,91 percent of the respondents, this figure cannot be regarded as totally insignificant. The respondents, in all likelihood, believed that allowing public servants to be members of political parties or organizations might lead to a politicized public service. On the contrary, the single percentage of those who expressed no opinion on the matter is minimal. Therefore, based on these facts, the hypothesis as far as question one is concerned is validated.

Table 4-2: Distribution of respondents to the question whether a top official/policy formulator (from deputy director to director-general and equivalent ranks) should have a right to be a member of a political party or organization: Question 17 1995 (N = 110).

COMMENT	NO	PERCENTAGE
Agree	81	73,64
Disagree	26	23,64
No opinion	3	2,72
No response	-	-
TOTAL	110	100

Virtually three-quarters of the respondents affirmed the statement. 23,64 percent disagreed with it while 2,72 percent offered no opinion at all on the issue. The fact that, with top officials, the percentage of disagreements has more than doubled, as compared to lower-ranked public servants, clearly shows that policy formulators are discouraged from taking an active part in politics. In any case, as is the case with the statement in question 1, both the statement and the hypothesis are overwhelmingly supported.

Table 4-3: Distribution of respondents to the question whether a public servant should have a right to serve on the management of a political party or organization: Question 2 1995 (N = 110).

COMMENT	NO	PERCENTAGE
Agree	48	43,63
Disagree	59	53,63
No opinion	3	2,74
No response	-	-
TOTAL	**110**	**100**

More than half of the respondents disagreed with the statement whereas just over two-fifths agreed with it. Though presently a public servant may serve on the management of a political party or organisation, more than half of the respondents indicated that the *status quo* should be changed. Again it is assumed that there is still a strong feeling that public servants should not be fully engaged in politics. The remainder of 2,74 percent which

represents those respondents who reserved their opinions is insignificant. In addition, the fact that the difference between those who agreed and those who did not is only 10 percent shows that there are valid arguments for and against the statement. Despite all that, however, the statement and the hypothesis are not supported.

Table 4-4: Distribution of respondents to the question whether a top official/policy formulator should have a right to serve on the management of a political party or organization: Question 18 1995 (N = 110).

COMMENT	NO	PERCENTAGE
Agree	41	37,27
Disagree	65	59,09
No opinion	4	3,64
No response	-	-
TOTAL	110	100

Compared with Table 4-3, the difference between the respondents who agreed and those who did not agree with the statement contained in Table 4-4 doubled. As can be seen, approximately three-fifths of the respondents felt that a top official should not serve on the management of a political party. On the other hand, 37,27 percent agreed with the statement while 3,64 percent had no opinion on the issue. Perhaps, some of the respondents who agreed with the statement in Table 4-3 were not sure of the position

to take in Table 4-4. In the circumstances, therefore, the hypothesis is not supported.

Table 4-5: Distribution of respondents to the question whether, as a member of a political party, a public servant should have a right to preside at a political meeting: Question 3 1995 (N = 110).

COMMENT	NO	PERCENTAGE
Agree	34	30,91
Disagree	73	66,36
No opinion	2	1,82
No response	1	0,91
TOTAL	**110**	**100**

Approximately two-thirds of the respondents did not agree that a public servant should preside at a political meeting. Just over a third agreed with the statement. Only 1,82 percent of them had no opinion and, all in all, the hypothesis with regard to the statement in Table 4-5 is not supported. In fact, so great a difference as 35,45 percent between those who agreed and those who did not leads one to conclude that a public servant should not preside at a political meeting.

Table 4-6: Distribution of respondents to the question whether, as a member of a political party, a top official/policy formulator should have a right to preside at a political meeting: Question 19 1995 (N = 110).

COMMENT	NO	PERCENTAGE
Agree	29	26,36
Disagree	75	68,18
No opinion	4	3,64
No response	2	1,82
TOTAL	**110**	**100**

The fact that more than two-thirds of the respondents disagreed with the statement, as against 26,36 percent who agreed with it, shows that the hypothesis is not supported. The percentages of those with no opinion and no response do not affect the result.

Table 4-7: Distribution of respondents to the question whether a public servant should have a right to participate freely in the deliberations of a public political meeting: Question 4 1995 (N = 110).

COMMENT	NO	PERCENTAGE
Agree	77	70
Disagree	29	26,36
No opinion	2	1,82
No response	2	1,82
TOTAL	**110**	**100**

As much as 70 percent of the respondents advocated an unfettered participation by a public servant in the deliberations of a political meeting. Just above a quarter of the respondents disagreed with the statement. The 3,64 percent which resembled those with either no opinions or responses is regarded as inconsequential. The conclusion is that the hypothesis is vindicated.

Table 4-8: Distribution of respondents to the question whether a top official/policy formulator should have a right to participate freely in the deliberations of a public political meeting: Question 20 1995 (N = 110).

COMMENT	NO	PERCENTAGE
Agree	63	57,27
Disagree	43	39,09
No opinion	2	1,82
No response	2	1,82
TOTAL	110	100

Though the percentage of the respondents who agreed with the statement in Table 4-8 was more than half of the total respondents, its support was not as enthusiastic as the one in Table 4-7. The hypothesis is supported. The figures which happen to be even with those in Table 4-7, in respect of abstentions are insignificant.

Table 4-9: Distribution of respondents to the question whether a public servant should have a right to deliver a public speech to promote the interests of any political party or organization: Question 5 1995 (N = 110).

COMMENT	NO	PERCENTAGE
Agree	31	28,18
Disagree	74	67,27
No opinion	4	3,64
No response	1	0,91
TOTAL	**110**	**100**

More than two-thirds of the respondents did not agree that a public servant should have a right to deliver a public speech to promote the interests of a political party. In addition, far less than a third of the respondents agreed with the statement. The abstentions, which constituted 4,55 percent of the respondents, had no significant impact on the result. The hypothesis is, hence, not validated.

Table 4-10: Distribution of respondents to the question whether a top official/policy formulator should have a right to deliver a public speech to promote the interests of any political party or organization: Question 21 1995 (N = 110).

COMMENT	NO	PERCENTAGE
Agree	31	28,18
Disagree	77	70
No opinion	-	-
No response	2	1,82
TOTAL	**110**	**100**

Compared to Table 4-9 the result in Table 4-10 is even more resounding in dismissing the statement in the case of top officials. Of the respondents, 70 percent agreed as opposed to 28,18 percent who disagreed with the statement. Incidentally, the percentage of those who failed to respond, namely 1,82 percent is insignificant. In any event, the hypothesis is not supported.

Table 4-11: Distribution of respondents to the question whether a public servant should have a right to deliver a public speech to prejudice the interests of any political party or organization: Question 6 1995 (N = 110).

COMMENT	NO	PERCENTAGE
Agree	17	15,45
Disagree	88	80
No opinion	4	3,64
No response	1	0,91
TOTAL	**110**	**100**

Only 15,45 percent of the respondents agreed with the statement in Table 4-11, as opposed to a decisive 80 percent which opposed it. 3,64 percent had no opinion and less than one percent failed to respond. This failure to express opinions or respond may be attributed to the fact that, in the past, public servants could not even deliver a political speech. The hypothesis is not validated.

Table 4-12: Distribution of respondents to the question whether a top official/policy formulator should have a right to deliver a public speech to prejudice the interests of any political party or organization: Question 22 1995 (N = 110).

COMMENT	NO	PERCENTAGE
Agree	19	17,27
Disagree	87	79,09
No opinion	-	-
No response	4	3,64
TOTAL	**110**	**100**

Following the opinions expressed in Table 4-11, the fact that 17,27 percent of the respondents in Table 4-12 agreed with the statement and 79,09 percent disagreed is understandable. The hypothesis is not supported.

Table 4-13: Distribution of respondents to the question whether an off-duty public servant should have a right to recruit members for a political party: Question 7 1995 (N = 110).

COMMENT	NO	PERCENTAGE
Agree	58	52,73
Disagree	41	37,27
No opinion	10	9,09
No response	1	0,91
TOTAL	110	**100**

Just over half of the respondents agreed with the statement in Table 4-13 and, on the other hand, a little more than a third disagreed. This leads to two deductions. Firstly, the difference between those who agree and those who did not is 15,46 percent. Secondly, the fraction of those who decided to reserve their opinions stands at a tenth of the respondents. The statement is slightly supported and the hypothesis is validated.

Table 4-14: Distribution of respondents to the question whether an off-duty top official/policy formulator should have a right to recruit members for a political party: Question 23 1995 (N = 110).

COMMENT	NO	PERCENTAGE
Agree	52	47,27
Disagree	50	45,45
No opinion	8	7,28
No response	-	-
TOTAL	**110**	**100**

As compared with Table 4-13, the gradient between the population in terms of those who agreed and those who did not was less than two percent. Again, the 7,28 percent which comprises those who did not commit themselves one way or the other is exceedingly high. Arguably, their opinions could have tipped the scales either way. Empirically, however, the statement is supported and the hypothesis endorsed.

Table 4-15: Distribution of respondents to the question whether a public servant should have a right to campaign for a political party or cause: Question 8 1995 (N = 110).

COMMENT	NO	PERCENTAGE
Agree	42	38,18
Disagree	59	53,64
No opinion	6	5,45
No response	3	2,73
TOTAL	**110**	**100**

More than half of the respondents rejected the statement, as opposed to the 38,18 percent who agreed with it. Though the percentages of those who did not respond together with those who have no opinion are high, they had no telling effect on the result. Despite the difference of 15,46 percent between those who agreed with the statement and those who did not, the statement and hypothesis are not supported.

Table 4-16: Distribution of respondents to the question whether a top official/policy formulator should have a right to campaign for a political party or cause: Question 24 1995 (N = 110).

COMMENT	NO	PERCENTAGE
Agree	42	38,18
Disagree	62	56,36
No opinion	4	3,64
No response	2	1,82
TOTAL	**110**	**100**

The position in Table 4-16 is more or less the same as in Table 4-15, since the content of the statement is the same. The remarks made in the former, hence, apply equally to the latter. As a result, the statement in Table 4-16 is not supported and the hypothesis is disproved.

Table 4-17: Distribution of respondents to the question whether a public servant should have a right to vote: Question 9 1995 (N = 110).

COMMENT	NO	PERCENTAGE
Agree	108	98,18
Disagree	-	-
No opinion	-	-
No response	2	1,82
TOTAL	**110**	**100**

The prevailing universal right to vote may have influenced the high percentage agreement with the statement. Almost two percent of the respondents failed to air their views on the matter. Anyway, the hypothesis is almost fully supported.

Table 4-18: Distribution of respondents to the question whether a top official/policy formulator should nave a right to vote: Question 25 1995 (N = 110).

COMMENT	NO	PERCENTAGE
Agree	107	97,27
Disagree	3	2,73
No opinion	-	-
No response	-	-
TOTAL	**110**	**100**

It is totally inexplicable why there was a feeling, however minimal, that top officials should not have a right to vote. In any event, both the statement and the hypothesis are almost completely endorsed.

Table 4-19: Distribution of respondents to the question whether a public servant should have a right to stand for election to public office (Member of Parliament and Member of the Provincial Legislative): Question 10 1995 (N = 110).

COMMENT	NO	PERCENTAGE
Agree	81	73,64
Disagree	28	25,45
No opinion	1	0,91
No response	-	-
TOTAL	**110**	**100**

The fact that close to three-quarters of the respondents agreed with the statement in Table 4-19, with a quarter disagreeing therewith, is proof that

the statement and the hypothesis are supported. The single percentage which reserved its opinion is considered insignificant.

These results, however, show that some public administrators still believe that politics is for politicians only and not for civil servants. They, therefore, do not even see themselves as potential public office-bearers.

Table 4-20: Distribution of respondents to the question whether a top official/policy formulator should have a right to stand for election to public office (Member of Parliament, and Member of the Provincial Legislature) Question 26 1995 (N = 110).

COMMENT	NO	PERCENTAGE
Agree	81	73,64
Disagree	26	23,63
No opinion	2	1,82
No response	1	0,91
TOTAL	**110**	**100**

A very little difference exists between the attitudes portrayed in Table 4-19 and Table 4-20. The percentage of those who disagreed with the statement in Table 4-20 was reduced by 1,82 percent. Likewise, the increase in the number of those who had no opinion by 0,91 percent and the emergence of a similar figure in respect of those who did not respond do not alter the results of the investigation. More than anything else, the results confirm both the statement and the hypothesis.

Hypothesis 2: In the event of a public servant holding a substantive political post his or her employment should be suspended for the duration of his or her term of office. The questions whose responses test this hypothesis are the following: 11 and 27, 12 and 28 as well as 13 and 29.

Table 4-21: Distribution of respondents to the question whether a public servant should resign, if elected to public office: Question 11 1995 (N = 110).

COMMENT	NO	PERCENTAGE
Agree	87	79,09
Disagree	13	11,82
No opinion	9	8,18
No response	1	0,91
TOTAL	110	**100**

Four-fifths of the respondents agreed with the statement in Table 4-21, whilst just above a tenth disagreed. Though the 0,91 percent comprising those who did not respond is insignificant, the high percentage of 8,18 in respect of those with no opinions is significant. Perhaps this can be attributed to the fact that some of them either agree with the hypothesis or feel that an early retirement is even better. Notwithstanding this finding, the statement is supported but the hypothesis is not confirmed.

Table 4-22: Distribution of respondents to the question whether a top official/policy formulator should resign, if elected to public office: Question 27 1995 (N = 110).

COMMENT	NO	PERCENTAGE
Agree	87	79,09
Disagree	17	15,45
No opinion	4	3,64
No response	2	1,82
TOTAL	**110**	**100**

A juxtaposition of Tables 4-21 and 4-22 shows that in the case of the latter the percentage of those who agreed with the statement remained exactly the same whilst the percentage of those who had no opinion dropped by half. This difference, which accounts for 4,54 percent, served to increase the percentage of those who disagreed by 3,63 percent, and for those who did not respond by 0,91 percent. In any event, these fluctuations in the percentages do not detract from the responses which indicate, as in Table 4-21, that the statement is supported and the hypothesis is not validated.

Table 4-23: Distribution of respondents to the question whether a public servant should retire, if elected to public office: Question 12 1995 (N = 110).

COMMENT	NO	PERCENTAGE
Agree	53	48,18
Disagree	38	34,55
No opinion	18	16,36
No response	1	0,91
TOTAL	**110**	**100**

Less than half of the respondents agreed with the statement in line with the opinions in Tables 4-21 and 4-22 that a public servant should resign, if elected to public office. For the same reasons, therefore, the fact that 17,27 percent abstained and 34,55 percent did not agree with the statement is equally understandable. In any case, resignation and retirement as solutions to the problems posed cannot exist side by side. The statement and the hypothesis are supported.

Table 4-24: Distribution of respondents to the question whether a top official/policy formulator should retire, if elected to public office: Question 28 1995 (N = 110).

COMMENT	NO	PERCENTAGE
Agree	59	53,64
Disagree	34	30,91
No opinion	14	12,73
No response	3	2,72
TOTAL	**110**	**100**

The fact that in Table 4-24 the percentage of those who agreed with the statement is a little more than half of the respondents does not change the picture portrayed in Table 4-23. The trend is more or less the same, with abstentions remaining at 15,45 percent and dissenters at 30,91 percent. In any event, as was the case in Table 4-23 the statement is supported and the hypothesis is not validated.

Table 4-25: Distribution of respondents to the question whether a public servant should be granted special leave without pay for the duration of his or her term of office, if elected to public office: Question 13 1995 (N = 110).

COMMENT	NO	PERCENTAGE
Agree	21	19,09
Disagree	79	71,82
No opinion	9	8,18
No response	1	0,91
TOTAL	**110**	**100**

Close to a fifth of the respondents agreed with the statement. This result, of course, revolves around the fact that respondents felt that a public servant should resign, if elected to public office. Almost three-quarters of the respondents disagreed with the statement and 9,09 percent abstained. Both the statement and the hypothesis are, therefore, not supported.

Table 4-26: Distribution of respondents to the question whether a top official/policy formulator should be granted special leave without pay for the duration of his or her term of office, if elected to public office: Question 29 1995 (N = 110).

COMMENT	NO	PERCENTAGE
Agree	21	19,09
Disagree	81	73,64
No opinion	6	5,45
No response	2	1,82
TOTAL	**110**	**100**

The percentage in respect of those who agreed with the statement is an even nineteen, compared with the responses in Table 4-25. The justifications suggested in Table 4-25 carry the same weight in Table 4-26, despite the fact that, comparatively speaking in the latter those with no opinion decreased by 2,73 percent, with those who disagreed and those with no responses increasing by 1,82 percent and 0,91 percent respectively. The statement and the hypothesis are not supported.

Hypothesis 3: "Notwithstanding the official designation, a public servant should be allowed to disclose information gained in the course of his or her employment excluding top secret information or military information." The questions whose responses test this hypothesis are 14 and 30 as well as 15 and 31.

Table 4-27: Distribution of respondents to the question whether a public servant should have a right to disclose any information gathered in the scope of his or her employment: Question 14 1995 (N = 110).

COMMENT	NO	PERCENTAGE
Agree	16	14,54
Disagree	91	82,73
No opinion	2	1,82
No response	1	0,91
TOTAL	**110**	**100**

Slightly over fourteen percent of the poll agreed that a public servant should have a right to disclose information (without qualifications) gathered in the course of his or her employment. Four-fifths of the respondents rejected the statement. It is insignificant that 1,82 percent of the respondents had no opinion and 0,91 percent thereof did not respond. The hypothesis is confirmed only in so far as it advocates the disclosure of any information which does not endanger the security of the state.

Table 4-28: Distribution of respondents to the question whether a top official/policy formulator should have a right to disclose any information gathered in the scope of his or her employment to any person or persons. Question 30 1995 (N = 110).

COMMENT	NO	PERCENTAGE
Agree	14	12,73
Disagree	91	82,73
No opinion	2	1,82
No response	3	2,72
TOTAL	**110**	**100**

As the responses in Table 4-28 are more or less the same as in Table 4-27, the arguments advanced in the latter find the same application to the former. The observation that those who failed to respond or voice their opinions increased by 1,81 is insignificant.

Table 4-29: Distribution of respondents to the question whether a public servant should have a right to disclose any information which does not adversely affect the security of the state to any person or persons: Question 15 1995 (N = 110).

COMMENT	NO	PERCENTAGE
Agree	56	50,91
Disagree	49	44,55
No opinion	4	3,63
No response	1	0,91
TOTAL	**110**	**100**

Half of the respondents supported the statement. The difference of 6,36 percent between those who agreed with it and those who did not shows

that the respondents were, on the whole, widely divided on the issue. Nevertheless, the hypothesis is validated despite the fact that 3,63 percent of the respondents had no opinion and 0,91 percent did not respond.

Table 4-30: Distribution of respondents to the question whether a top official/policy formulator should have a right to disclose any information which does not adversely affect the security of the state to any person or persons: Question 31 1995 (N = 110).

COMMENT	NO	PERCENTAGE
Agree	46	41,82
Disagree	58	52,73
No opinion	5	4,54
No response	1	0,91
TOTAL	**110**	**100**

In Table 4-30 there is a total reversal of the opinions advanced in Table 4-29, with two-fifths of the respondents agreeing with the statement and just more than half disagreeing therewith. All this points to one thing and that is that top officials should have no right to disclose information of whatever nature.

The hypothesis is supported in Table 4-29 and invalidated in Table 4-30.

Hypothesis 4: "A public servant, irrespective of rank, should be allowed to criticize government policy". The questions which test this hypothesis are 16 and 32.

Table 4-31: Distribution of respondents to the question whether a public servant should have a right to criticize government policy: Question 16 1995 (N = 110).

COMMENT	NO	PERCENTAGE
Agree	77	70
Disagree	30	27,27
No opinion	3	2,73
No response	-	-
TOTAL	**110**	**100**

Exactly 70 percent of the respondents contended that a public servant should have a right to criticize government policy. Just over a quarter disagreed. This support for the statement renders the 2,73 percent of abstentions of no significance at all. For that reason the hypothesis is validated.

Table 4-32: Distribution of respondents to the question whether a top official/policy formulator should have a right to criticize government policy: Question 32 1995 (N = 110).

COMMENT	NO	PERCENTAGE
Agree	67	60,90
Disagree	39	35,46
No opinion	2	1,82
No response	2	1,82
TOTAL	**110**	**100**

Though the number of the supporters of the statement, compared to the position in Table 4-31 , was reduced by 9,1 percent in Table 4-32 and, on the other hand, the number of dissenters increased by 8,19 percent, the hypothesis is supported. The 1,82 percent which reserved their opinions and a similar figure in respect of those who did not respond could not have affected the result either way.

4.2.3 **Summary**

An interpretation of the accumulated data has elicited the following conclusions:-

Firstly, every public servant should have a right to be a member of a political party or organisation but should not serve on its management. Secondly, though he or she should have a right to participate freely in the deliberations of a political meeting, a public servant should not preside at such a meeting. Thirdly, a civil servant should have a right to recruit members for a political party outside the official hours of duty but should not be allowed to deliver

a speech to promote or prejudice the interests of a political party or organisation. Neither should he or she be allowed to campaign for a political party or cause. Fourthly, a public official should have a right to vote and stand for election to public office (a member of either the national or provincial legislature) but should resign or retire, if elected to such office. Fifthly, a public servant whose rank is lower than that of deputy director or its equivalent should have a right to disclose any information gathered in the course of his or her employment, to any person or persons as long as such information does not endanger the security of the state. On the contrary, top officials should be barred from disclosing official information of whatever nature. Finally, every public servant should have a right to criticize government policy.

In the next chapter the foregoing analysis of research data will form the basis of a report of the findings and the ensuing recommendations.

CHAPTER 5

FINDINGS AND RECOMMENDATIONS

5.1 INTRODUCTION

In this chapter, the results of the investigation conducted in the preceding chapter form the basis of its findings and suggestions for law reform in South Africa. The opinions contained in the analysis of research data are discussed briefly with reference to prevailing positions in the Anglo-American countries mentioned in Chapter 2 (United States of America, Britain and Canada) as well as South Africa. As mentioned in the same chapter, the selected European countries do not restrict the rights and freedoms of public servants.

5.1.1 Membership of a Political Party

In all the countries under study, including South Africa, public servants have a right to join political organizations

5.1.2 Serving in the Management of a Political Party

Only South Africa and America explicitly bar a public servant from serving in the management of a political party.

5.1.3 Participation in the Deliberations of a Political Party

All the legal systems concerned allow public servants to attend political meetings. From this observation, it can be inferred that they may also participate freely in the deliberations of such meetings. It must be mentioned, though, that in America a civil servant may not participate, except as a spectator, in political conventions. Apparently, Americans attach an important distinction between political meetings and political conventions. On the other hand, in South Africa a public servant may not preside or speak at a political meeting.

5.1.4 Recruitment of Members for a Political Party

The study has shown that this form of political activity, as far as public servants are concerned, is forbidden in all the countries. The same applies to South Africa.

5.1.5 Political Speeches and Publications

In America a public servant may speak or write publicly on political subjects so long as they are not connected with political campaigns. Conversely, in Britain all groups of civil servants are allowed to do so with the exception of the group which is composed of the executive, the professional, the scientific and technical, and the administrative grades. Though in Canada

the position is not clear, what is certain is that a public servant is not permitted to work for, on behalf of or against a candidate for election or a political party. Likewise, in South Africa a public servant may not draw up or publish any writing or deliver a public speech to promote or prejudice the interests of a political party.

5.1.6 Political Campaigns

No country allows public servants to campaign for political parties or causes and South Africa is no exception. As a matter of interest, the least America permits is the wearing of badges, but not at work.

5.1.7 Right to Vote

This right appears to be universal. Until recently, however, Black public servants in South Africa did not have a right to vote.

5.1.8 Standing for Election to Public Office

In South Africa and all the other countries, candidates for election to public office must either resign or retire from the public service.

5.1.9 Disclosure of Official Information

In all the countries in question, including South Africa, disclosure of official information, without authority is not allowed.

5.1.10 Criticizing Government Policy

Canada and America are the only countries which allow public servants to criticize the government. In Canada tradition only restrains them from doing so. In South Africa, on the contrary, criticizing government policy renders a public servant liable to dismissal.

5.2 EVALUATION AND RECOMMENDATIONS

At this juncture, the arguments for and against the imposition of limitations on the rights of public servants to free speech and political activity have to be revisited. Such arguments and the basis of the research will form the basis of the findings and the resultant recommendations. To begin with, one has to consider why restrictions are placed on public servants in this regard.

The first argument is that restrictions are necessary for the viability of the democratic system as administrators exercise a public trust in the public interest rather than a partisan political role[198]. On the face of it, this argument is valid and convincing. On the contrary, findings of the survey indicate a general favour for a limited political role for public servants. This entails membership of a political party, free participation in the deliberations of a political meeting and recruiting members for a political party. The findings are further supported by a brewing row over disclosures that several senior politicians hold top jobs in the Eastern Cape public service.[199] Among those named were:

* Dumisile Mafu - provincial chairman of the African National Congress (ANC) and permanent secretary for Safety and Security.

* Mzwake Ndlela - Eastern Cape secretary of the South African Communist Party (SACP) and administrative secretary in the Department of Agriculture and Land Affairs.

* Pumolo Masaulle - provincial chairman of the SACP and administrative secretary in the office of the Premier.

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198 See para 1.1 at p.2 supra.

199 Patric Cull "Row looms in Bisho over party links" (December 2, 1996) 152 (287) Eastern Province Herald, 1.

* Mncebisi Jonas - deputy secretary of the SACP in the Eastern Cape and director of the East Cape Socio-Economic Council.

Commenting on these disclosures, the Democratic Party leader, Eddie Trent said such disclosures served to substantiate the fear that "real power and decision-making lies in the hands of the bureaucrat-politicians"[200]. He added that what made matters worse was that the revelations appeared to indicate that "the numerically small junior partners in the Alliance - the SACP - have managed to manoeuvre themselves into the halls of real power"[201].

The second argument is that restrictions guarantee the maintenance of discipline as well as the principle of confidentiality[202]. On the question of discipline, it is submitted that provisions of the current statutory law go a long way to allay any fears in this respect.[203]

The principle of confidentiality has to be watered down as the research shows that a public servant whose rank is lower than that of deputy director or its equivalent should have a right to disclose any information gained in the

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200 Ibid.

201 Ibid.

202 See para 1.1 at p.2 supra.

203 "An officer... shall be guilty of misconduct and may be dealt with in accordance with section 21 if he or she -
(i) conducts himself or herself in a disgraceful, improper or unbecoming manner or while on duty is grossly discourteous to any person;
(ii) contravenes any provision of a prescribed code of conduct or fails to comply with any provision thereof.

course of his or her employment, to any person or persons, as long as that information does not endanger the security of the state. It is suggested, therefore, that subsections 20(h) and (m) of the Public Service Act 300 of 1994 be repealed[204]. The foregoing sentiments may, then, be contained in the Open Democracy Act when the Open Democracy Draft Bill of 1995 becomes law.

The third argument is that, without restrictions, a conflict may arise between the desires and interests of a citizen and the duty of the public servant regarded as such[205]. Though this statement cannot be disputed, it is felt that it has more to do with the maintenance of discipline, an issue that has been covered adequately already.

The fourth argument is that the public would lose confidence in the impartiality of a political service and ministers might cease to be confident

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204 Section 20 provides as follows:-

"An officer... shall be guilty of misconduct and may be dealt with in accordance with section 21, if he or she-

(h) attempts to secure intervention from political or outside sources in relation to his or her position and conditions of service in the public service, unless it occurs in an endeavour to obtain redress of any grievance through Parliament or a Provincial legislature;

(m) without first having obtained the permission of his or head of department, discloses, otherwise than in the carrying out of his or her official duties, information gained by or conveyed to him or her through his or her employment in the public service, or uses that information for any purpose other than for carrying out his or her official duties, whether or not he or she discloses that information.

205 See para 1.1 at p.2 supra.

of the support of their subordinates[206]. This appears to be so if one considers, that according to the investigation results, a public servant should not serve on the management of a political party or organisation; or preside at a political meeting; or deliver a speech to promote or prejudice the interests of a political party or organisation; or campaign for a political party or cause. In addition, a public servant should resign or retire, if elected to public office. As it has to be the one or the other, mention must be made of what the position was in the past in similar circumstances. If an officer or employee accepted nomination as a candidate for election for parliament or a provincial government, he was deemed to have resigned from the public service with effect from the date on which he or she accepted such nomination. Currently, however, in terms of regulation A.13 of the Public Service Regulations of 1994 he or she shall be deemed to have voluntarily retired.

It is felt that retirement is more beneficial to the public servant in the sense that it entitles him or her to leave benefits, a pension gratuity and a pension annuity whereas with resignation, he or she is only entitled to a refund of his or her pension contributions. For that reason it is suggested that the *status quo* should remain.

The fifth argument is that, by accepting appointments and the accompanying benefits in the public service, public servants implicitly

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206 See para 1.1 at p.2 supra.

surrender certain political rights enjoyed by other citizens[207]. As regards this argument, it must be stated that the results of the research have proved beyond doubt that a public servant is, in fact, a second class citizen whose political rights have to be curtailed. One of the reasons, of course, may be the sixth and final argument which states that restrictions protect public servants against coercion by unscrupulous political superiors.[208].

On the other hand, as stated in Chapter 1, there are four arguments for the emancipation of public servants from political restraints and censure. The first argument is that public servants are not second class citizens and therefore, should be as militant and honest about their political principles as other normal citizens[209]. In other words, the argument is that public servants cannot be expected to develop a split personality to be one person in thought and belief and another in action as the administrative agent of political superiors. Unfortunately, as stated above, this argument cannot be accepted without qualifications.

The second argument is that since, in most countries, the public service is ever-growing, it is considered unfair to remove millions of the electorate from full participation in political matters which ultimately decide their

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207 See para 1.1 at p.3 supra.

208 See para 1.1 at p.3 supra.

209 See para 1.1 at p.3 supra.

destiny[210]. Though this argument has merit, this eventuality is one of the implied terms of the contract of employment between the government as employer and the public servant as employee.

The third argument is that the freedom of expression of a public servant should not be limited only for purposes of using such limitation as a means of regulating labour relations, as the need for the former may outweigh the latter in practical situations[211]. This statement is regarded as quite correct, since the results of the research show that all public servants should be allowed to criticize government policy. It is precisely for this reason that it is recommended that sub-section 20(f) of the Public Service Act 300 of 1994 be repealed[212].

The fourth argument is that, in a democratic government, the protection of confidential information cannot be accepted without qualifications[213]. This issue has already been addressed. It is also felt that, assuming that the whole of the Protection Act 84 of 1982 will be repealed, provision should made in the relevant legislation (if and when the Open Democracy Draft Bill

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210 See para 1.1 at p.3 supra.

211 See para 1.1 at p.4 supra.

212 Section 20 reads as follows:-
"An officer... shall be guilty of misconduct and may be dealt with in accordance with section 21, if he or she-

(f) publicly comments to the prejudice of the administration of any department".

213 See para 1.1 at p.4 supra.

of 1995 becomes law) for the prohibition of the disclosure of information, which endangers the security of the state, by any public servant. Such a provision should also prohibit a public servant who holds the rank of deputy director or higher from disclosing any confidential information. In the same breath the protection of whistleblowers[214] from reprisals cannot be overemphasized.

It is doubtful, however, whether information of a personal nature such as an income tax return should be disclosed without the owner's consent. A further investigation into this aspect may prove interesting and fruitful. Comparatively, sections 16(5)(d) and 89(2)(d) of the Labour Relations Act 66 of 1995 provide that an employer is not required to disclose information that is private personal information relating to an employee, unless the employee consents to the disclosure of that information.

As far as political rights of public servants are concerned, it is strongly recommended that section 36 of the Public Service Act 300 of 1994 be amended to bring the provision into line with the views of the majority of respondents in the survey. To start with, where the section provides that an officer or employee may be a member and serve on the management of a lawful political party, the new provision should allow him or her to be a member of such party but not to serve on its management. Secondly, the proposed amendment should allow a public servant to attend a political

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214 For a definition of this class of persons, see para 2.2.5 at p.19 supra.

meeting and speak but not preside thereat in contradistinction with the present provision. Such provision permits a public servant to attend a political meeting but not to preside or speak thereat. Thirdly, the present legislation prohibits a public servant from drawing up or publishing any writing or delivering a public speech to promote or prejudice the interests of any political party. This provision should remain unchanged. Finally, it is recommended that a provision which is not in the current legislation be added for purposes of legal certainty. The proposed amendment is that a public servant may recruit members for a political party after the official hours of duty but not campaign for a political party or cause.

The amended section 36, therefore, should read thus:-

"Subject to the provisions of section 20(g), an officer or employee may-

(a) be a member of a lawful political party;

(b) not serve on the management of a lawful political party;

(c) attend and speak at public political meeting, but may not preside at such meeting;

(d) not draw up or publish any writing or deliver a public speech to promote or prejudice the interests of any political party;

(e) recruit members for a political party after the official hours of duty; and

(f) not campaign for a political party or cause".

5.3 CONCLUSION

In conclusion, it may be mentioned that in Chapter 1 it is stated that the first generation rights, under discussion, are not absolute[215]. On the basis of this, it is quite clear that, though the results of the research fell far short of expectations[216], two competing constitutional doctrines have been balanced. The first doctrine is the authority of the government to protect itself from the dangers of disloyal public servants and the second is the freedom if political expression[217]. As already mentioned, public servants may participate, albeit not fully, in political activities; may criticize government policy; and within certain limits, may ignore the confidentiality principle.

In the entire study, an encouraging aspect is that legalized patronage is something of the past. It is also envisaged that in future those liberal and militant sections of the trade union movement which represent public

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215 See para 1.2 at p.5 supra.

216 See the hypotheses advanced in para 4.1.2 at p.98 supra.

217 See para 1.5 at p.8 supra.

servants will clamour for the extension of first generation rights to their memberships as well. So far, they have been concentrating on socio-economic or second generation rights. The suggestion here is that any restrictions in South Africa may lead to an endless conflict between the high echelons of government and the representative organizations. In fact, a similar investigation with trade unions or staff associations as objects of research may be a rewarding exercise.

Furthermore, an extensive investigation into what types of information should be divulged, in the public interest, by public servants is deemed necessary. A public servant for example, should know exactly what type of information is seen as endangering the security of the state or, as already mentioned, whether it is in the public interest to divulge the contents of a person's income tax return.

Finally, emphasis should once again be placed on the fact that public servants in France and Germany are as free to exercise their rights and freedoms as other citizens. It is,of course, remarkable that this liberal approach has not led to administrative disorder in any of the two countries' public services, as Anglo-American countries seem to expect.

As South Africa is a new democracy, it is felt that the German and French approach should be its ultimate goal. It is strongly suggested, therefore, that a similar investigation should be an on-going exercise as perceptions

change from time to time. As a matter of fact, the scope of the investigation could be extended to include other categories of staff which were not included in this study such as, police, military and intelligence officers, correctional services personnel, municipal workers and teachers.

ANNEXURE A

SUMMARY OF AN OPINION POLL OF THE RIGHTS OF PUBLIC SERVANTS

	QUESTION	AGREE	DISAGREE	NO OPINION	NO RESPONSE	TOTAL
1.	A public servant should have a right to be a member of a political party or organization.	88,18%	10,91%	0,91%	-	100%
17.	A top official/policy formulator should have a right to be a member of a political party or organization.	73,64%	23,64%	2,72%	-	100%
2.	A public servant should have a right to serve on the management of a political party or organization	43,63%	53,63%	2,74%	-	100%
18.	A top official/policy formulator should have a right to serve on the management of a political party or organization.	37,27%	59,09%	3,64%	-	100%
3.	A public servant should have a right to preside at a political meeting.	30,91%	66,36%	1,82%	0,91%	100%
19.	A top official/policy formulator should have a right to preside at a political meeting	26,36%	68,18%	3,64%	1,82%	100%
4.	A public servant should have a right to participate freely in the deliberations of a public political meeting.	70%	26,36%	1,82%	1,82%	100%
20.	A top official/policy formulator should have a right to participate freely in the deliberations of a public political meeting.	57,27%	39,09%	1,82%	1,82%	100%
5.	A public servant should have a right to deliver a public speech to promote the interests of any political party or organisation.	28,18%	67,27%	3,64%	0,91%	100%
21.	A top official/policy formulator should have a right to deliver a speech to promote the interests of any political party or organisation.	28,18%	70%	-	1,82%	100%

QUESTION		AGREE	DISAGREE	NO OPINION	NO RESPONSE	TOTAL
6.	A public servant should have a right to deliver a public speech to prejudice the interests of any political party or organisation.	15,45%	80%	3,64%	0,91%	100%
22.	A top official/policy formulator should have a right to deliver a public speech to prejudice the interests of any political party or organization.	17,27%	79,09%	-	3,64%	100%
7.	An off-duty public servant should have a right to recruit members for a political party	52,73%	37,27%	9,09%	0,91%	100%
23.	An off-duty top official/policy formulator should have a right to recruit members for a political party.	42,27%	45,45%	7,28%	-	100%
8.	A public servant should have a right to campaign for a political party or cause.	38,18%	53,64%	5,45%	2,73%	100%
24.	A top official/policy formulator should have a right to campaign for a political party or cause.	38,18%	56,36%	3,64%	1,82%	100%
9.	A public servant should have a right to vote.	98,18%	-	-	1,82%	100%
25.	A top official/policy formulator should have a right to vote.	97,27%	2,73%	-	-	100%
10.	A public servant should have a right to stand for election to public office (Member of Parliament and Member of the Provincial Legislature)	73,64%	25,45%	0,91%	-	100%
26.	A top official/policy formulator should have a right to stand for election to public office.	73,64%	23,63%	1,82%	0,91%	100%
11.	A public servant should resign, if elected to public office.	79,09%	11,82%	8,18%	0,91%	100%
27.	A top official/policy formulator should resign, if elected to public office.	79,09%	15,45%	3,64%	1,82%	100%
12.	A public servant should retire, if elected to public office.	48,18%	34,55%	16,36%	0,91%	100%

QUESTION		AGREE	DISAGREE	NO OPINION	NO RESPONSE	TOTAL
28.	A top official/policy formulator should retire, if elected to public office.	53,64%	30,91%	12,73%	2,72%	100%
13.	A public servant should be granted special leave without pay for the duration of his or her term of office, if elected to public office.	19,09%	71,82%	8,18%	0,91%	100%
29.	A top official/policy formulator should be granted special leave without pay for the duration of his or her term of office, if elected to public office.	19,09%	73,64%	5,45%	1,82%	100%
14.	A public servant should have a right to disclose any information gathered in the scope of his or her employment.	14,54%	82,73%	1,82%	0.91%	100%
30.	A top official/policy formulator should have a right disclose any information gathered in the scope of his or her employment to any person or persons.	12,73%	82,73%	1,82%	2,72%	100%
15.	A public servant should have a right to disclose any information which does not adversely affect the security of the state to any person or persons.	50,91%	44,55%	3,63%	0,91%	100%
31.	A top official/policy formulator should have a right to disclose any information which does not adversely affect the security of the state to any person or persons.	41,82%	52,73%	4,54%	0,91%	100%
16.	A public servant should have a right to criticize government policy.	70%	27,27%	2,73%	-	100%
32.	A top official/policy formulator should have a right to criticize government policy.	60,90%	35,46%	1,82%	1,82%	100%

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