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The Right to Open Justice: A Study of South Africa and Zimbabwe.

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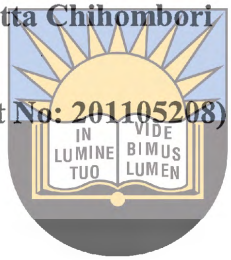

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DECLARATION

I **ANTONATTA CHIHOMBORI** declare that this dissertation which is hereby submitted for the award of Master of Laws (LLM), Faculty of Law, at the University of Fort Hare, is my own work and that all the sources that I have used or quoted have been indicated and acknowledged by means of complete references. I further declare that this dissertation has not been previously submitted for the award of a degree at this or any other tertiary institution and that this dissertation represents the state of law as at 30 November 2016.

Signed.....

Date.....03/05/2017

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ABSTRACT

The right to open justice is an indispensable facet of an open democracy premised on the rule of law. This venerable principle is derived from a cluster of rights such as freedom of expression, access to information and access to courts. One of the numerous benefits of an open justice system is that it enhances accountability and the rule of law by facilitating the exposure of corruption, maladministration and other illicit activities by government officials. Open justice also enables the public to evaluate the quality of justice rendered by the courts through the open court principle which enables the public to have unfettered access to the courts except in exceptional circumstances. Due to its importance, the open justice principle is deeply entrenched in both Western and African civilization. This is evidenced by the incorporation of the open court principle as well as the right of access to information in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights as well as the African Charter on Human and Peoples' Rights. The underlying principles of an open justice system are also contained in the Zimbabwean and South African Constitutions respectively.

This study reveals that the right to open justice is dependent on the dissemination of public interest information to the public to a larger extent. However, this causes potential problems due to the sensitive nature of various categories of information including information relating to an on-going trial as well as national security information. If not properly regulated, the right to open justice also has the potential to impinge on the security and safety of asylum seekers. Thus this study seeks to examine the nature and impact of the open justice principle on the fair trial rights of the accused including the impact of open justice on the confidentiality of asylum applications. In relation to the open court principle and accused fair trial rights, it is believed that open justice has the potential to interfere with the impartiality of the courts thereby impinging on the accused right to a fair trial. In that respect this study seeks to examine the impact of open justice on accused fair trial rights. Secondly this study will also examine the impact of open justice on the national security of a state. The role of the media in facilitating open justice will be emphasised in both respects.

Lastly in view of the findings, the study will suggest possible recommendations that can be gainfully employed in order to reconcile the competing interests of open justice and fair trial rights as well as national security.

DEDICATION

This dissertation is dedicated to my late mother Mary Grace Chihombori. A great woman who lived a fulfilling life. I love you.

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Firstly, I would like to thank the Almighty God for His faithfulness in my life. I have come this far because of your grace and mercy my Lord. I thank you Lord for being my pillar of strength during the duration of my studies, for providing for me and for being my Father. My gratitude also goes to Pastor Patrick Agbomere and Pastor Thembi Agbomere of Omega Fire Ministries. Thank you for your prayers. I am eternally grateful to you.

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CHAPTER ONE

Introduction and Overview of the Study

1 1 INTRODUCTION

Justice should not only be done, but should manifestly and undoubtedly be seen to be done.[1]

The impact of the open justice principle on fair trial rights and national security is a contentious issue and therefore open to debate.[2] Consequently, a comprehensive analysis of the meaning, contours, implementation, impact and limitations of the open justice principle in the context of nascent democracies such as Zimbabwe and South Africa is essential in order to establish whether the right to open justice in the modern context,[3] has an adverse effect on accused's fair trial rights and national security. It is also essential to establish whether a balance can be drawn between the competing values of open justice, fair trial rights and national security.

Open justice is a common law remedy which requires that court proceedings should be accessible and open to the public. This includes the contents of court files and the public viewing of trials.[4] In the case of *SABC v National Director of Public Prosecutions* open justice was defined as, the principle that gives effect to one's right to be tried in public thus guaranteeing the right to a fair trial.[5] The case of *M & G v Chipu*[6] concurred with this view by enunciating that, open justice is the p[illegible]ich forms the basis of one's right to be tried in public. This means that open justice requires that justice should be dispensed in the open. One of the main reasons for this requirement is to raise awareness on how justice is dispensed as well as raise public confidence in the justice system itself.[7] Thus open justice

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1 *R v Sussex Justices* 1924 1KB 256 259.

2 The right to open justice is derived from a cluster of related rights such as freedom of expression, access to courts access to information. There are numerous theoretical issues surrounding the right to freedom of expression. See Johnson *et al Jurisprudence* (2001) 5-44. The right to freedom of expression is inextricably linked to the right to open justice as this thesis shall reveal. Freedom of expression is a value which is deeply entrenched in the works of Scholars such as John Locke and Jean Jacques Rousseau. John Locke and Jacques Rousseau explored the relationship between freedom of expression and the right to liberty. These values will be explored in the course of this chapter in relation to open justice.

3 In this era of technological advancement the term 'open justice' has acquired a whole new meaning. Besides having access to the contents of court files, the public can now watch a trial as it unfolds through live broadcasting of trials. Moreover journalists are now making use of social media such as tweeter and facebook to impart information to the public.

4 Duhaime "Open Justice Legal Definition" www.duhaime.org> (accessed on 25-02-2015).

5 *SABC v National Director of Public Prosecutions* 2007 1 SA 523 (CC); 2007 2 BCLR 167 (CC) (SABC).

6 *M &G v Chipu N.O* 22013 6 367 (CC) (henceforth "*Chipu*").

entails the dispensation of justice in the open by allowing the general public to view trials, and ensuring that court files and records of previous trials are accessible to the public, plus more importantly the parties to litigation. The concept of open justice can alternatively be termed as, "open democracy".[8] This is probably due to the fact that open justice gives effect to the values that underlie a democracy, namely transparency, accountability and openness. Thus a justice system that is transparent and easily accessible to the general public is essential in order to ensure that justice is dispensed effectively and openly in a democratic society. Jeremy Bentham enunciated on the importance of this venerable principle when he opinionated that,

> Where there is no publicity there is no justice. Publicity is the very soul of justice. It is the keenest spur to exertion and the surest of all guards against improbity. It keeps the judge himself while trying under trial.[9]

Access to open courts raises public awareness on how justice is dispensed. Furthermore it encourages public participation in state policies and governmental decisions.[10] McLachlin elaborated on this view by propounding that, open justice is vital in raising awareness in ordinary citizens on how justice is dispensed and enabling litigants, the media, and legal scholars and ultimately the ordinary citizen to analyse and criticize the decisions that are made in the name of justice.[11] However when the reasons for a judicial decision are made public, it becomes more probable to ascertain the requirements of the law which enhances certainty on how the justice system works. Moreover, when justice is dispensed in the open there is less likelihood of corruption and maladministration.

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7 See Warren, "Open Justice in the Technological Age." https://www.monashedu/data/assets/pdf-file/0009...warrenpdf (accessed 01/03/2015). Warren argues that the rationale behind the origins and implementation of the open justice system is to enhance public confidence in the justice system itself. He also highlights that an efficient and impartial judiciary is crucial to the achievement of democracy. Secondly the public do not have the power to vote for members of the judiciary therefore it is essential for the public to entrust their confidence in the justice system. Jeremy Bentham who is believed to be the first person to enunciate the theoretical basis for open justice in the nineteenth century also viewed open courts as an essential tool in ensuring that judicial accountability is enhanced. See also Wright "The Open Court the Hallmark of Judicial Proceeding." 1947 *Can Bar Review* 721 721.

8 Klaaren"Open justice and Beyond: *Independent Newspapers v Minister for Intelligence Services: In Re Masethla.*" 2009 *SALJ* 24 26

9 *A.G Nova Scotia v MacIntrye* 1982 ISCR para 183.

10 Currie &Klaaren *The Promotion of Access to Information Commentary* (2002) 16; See also Herdeen *et al* "The Constitutionality of Statutory Limitation to the Right of Access to Information Held by the State in South Africa" 2014 *THRHR* 27 27.

11 McLachlin "Openness and the Rule of Law"2014 *SALJ* 1 2. McLachlin who happens to be the Chief Justice of Canada also advanced another function of the open justice system. He stated that, "It performs a therapeutic function by permitting the community to see that justice is done."

The right to open justice gives effect to the values of accountability, transparency, responsiveness and openness,[12] thus protecting the integrity of the justice system. When the justice system is open to scrutiny, there is less likelihood of corruption. This ensures that the rule of law prevails no matter the status of the person under trial. McLachlin enunciates that when justice is rendered in the open judicial accountability is guaranteed and enhanced, thereby deterring judges and police officers from acts of misconduct.[13] This shows that the right to open justice is essential to uphold the rule of law.

Due to its importance, the open justice principle is contained in various international and regional instruments. Article 14(1) of the International Covenant on Civil and Political rights states that, "Everyone shall be entitled to a fair and public hearing...."[14] Article 10 of the Universal Declaration of Human Rights also gives everyone the right to a public hearing.[15] The right to a fair and public hearing is also recognised by regional instruments such as the African Charter on Human and Peoples' rights. Reference can be made to Articles 3, 7 and 26 of the African Charter on Human and Peoples' Rights in relation to open justice and fair trial rights.[16] The European Convention also provides for fair trial rights and open justice.[17] It should be noted that the right to a fair and public hearing is a component of the right to a fair trial which is essential in proving guilt or innocence.

The right to open justice is essential in enhancing the protection of human rights both nationally and internationally. Consequently, the legislature in South Africa enacted legislation which is specifically aimed at enabling individuals to gain access to information held by both private and public bodies so as to facilitate the protection and exercise of their rights and to promote the ideals of transparency and accountability in both public and private bodies. The Promotion of Access to Information Act was enacted in order to enable an applicant to acquire information which is needed for the protection or exercise of certain human rights.[18] This Act enhances access to information considerably. The Promotion of Administrative Justice Act on the other hand promotes transparency and accountability in

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[12] The values of accountability, openness and responsiveness are essential to a democracy. These values preserve the integrity of the justice system because they give the public the opportunity to see how justice is dispensed in the relevant state.

[13] McLachlin 2014 *SALJ* 4.

[14] Article 14(1) of the International Covenant on Civil and Political Rights.

[15] Article 10 of the Universal Declaration of Human Rights states that, "Everyone is entitled to full equality to a fair and public hearing by an independent and impartial tribunal in the determination of his rights and obligations and of any Criminal charge against him."

[16] Articles 3, 7 and 26 of the African Charter on Human and People's Rights.

[17] Article 6 of the European Convention on Human Rights.

[18] Act 2 of 2000.

relation to public bodies by requiring public officials to give written reasons, upon request for any administrative decision that they would have taken against an applicant.[19]

This study will demonstrate that open justice relies on the right to freedom of expression for the full realisation of its potential. The Constitution of South Africa promotes the right to freedom of expression.[20] Section 16 promotes the free flow of ideas by granting the public the freedom to receive and impart information.[21] Media freedom is also taken into cognisance. At the interface of the open justice *vis a vis* individual rights and national security debate there is an essential element namely freedom of expression. Free expression makes it easier for the media to impart information and exercise their role as a watchdog more efficiently. This is because the media is responsible for imparting matters of public interest to the public including court cases and corruption by public official's thereby enhancing openness and the rule of law. Section 35 of the Constitution also guarantees the right to a fair and public hearing. This can be viewed as a component to the open justice system which requires that court proceedings should be open and accessible to the public.

In Zimbabwe, there is a relatively new [redacted] which serves the essential purpose of ensuring that justice is dispensed in the open. Section 61 of the Zimbabwean Constitution of 2013 contains the right to receive and impart information.[22] There are striking similarities with the South African Constitution in the sense that the rights of the media are explicitly stated. This enhances the right to open justice in a remarkable way. Section 69 of the Zimbabwean Constitution also grants the right to a fair and public hearing to accused persons.[23] This enhances the principle of open justice. Before 2013, Zimbabwe enacted various laws to regulate the flow of information. Certain privacy laws were enacted. The Access to Information and the Protection of Privacy Act [24] and the Broadcasting Services Act 3 of 2001[25] among others were passed by parliament. These Acts will be relevant to the research although they have been criticised on the basis that they limit the media in terms of accessing and imparting information to the public. Thus there is a possibility that these Acts impede on the open justice principle and will not be able to survive constitutional scrutiny.

[19] Act 3 of 2000.
[20] Act 108 of 1996 ("the 1996 Constitution").
[21] S 16 of the 1996 Constitution.
[22] Act of 2013. (Hereafter referred to as, "the 2013 Constitution").
[23] S 69 of the 2013 Constitution.
[24] Act 1 of 2002/ Chapter 10; 27. (Hereafter referred to as AIPPA).
[25] Act 3 of 2001.

However it should be noted that the legislature was attempting to draw a balance between the competing values of open justice on one hand and privacy and free expression on the other.

One of the major issues that surround the implementation of the open justice principle is that it has a potentially adverse impact on the privacy and dignity of individuals. When court proceedings are publicised there is a possibility that the privacy and dignity of the parties to the proceedings can be compromised. Thus it is essential to highlight the nature and importance of the right to human dignity and the right to privacy. The right to privacy[26] is enshrined in the South African bill of rights as well as the Zimbabwean Constitution. Privacy and dignity are two interrelated human rights which are engraved in Roman Dutch law. However problems arise in instances whereby there is the right of the media to report on matters which may infringe the privacy of an individual and possibly his human dignity as well. The right of the media to report constitutes an essential element of open justice while personality rights such as human dignity and privacy have proven to be essential values as well.

Burns acknowledges the right to human [redacted] one of the fundamental cornerstones of South African democracy. The right to human dignity is not only safeguarded by section 10 of the South African Bill of Rights but it is also included as a foundational value in section 1 of the South African Constitution.[27] Peculiarly human dignity forms part of the limitation clause in section 39.[28] Furthermore the right to human dignity is one of the non-derogable rights which cannot be suspended during a state of public emergency.[29] The case of *Makwanyane*[30] in no uncertain terms affirmed the importance of human dignity. It was stated that the right to life and dignity are of fundamental importance and they are the source of all other personal rights in the Bill of Rights.[31] The achievement of a society in which all human

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[26] S 10 of the 1996 Constitution, see also s57 of the 2013 Constitution 2013.

[27] Burns *Communications Law* (2001) 154.

[28] The Constitution, s39 states that in interpreting the Bill of Rights a court must promote the values that underlie an open and democratic society based on human dignity equality and freedom. This also elaborates on the essentiality of human dignity as a foundational value.

[29] S 37 of the 1996 Constitution.

[30] *S v Makwanyane* 1995 3 SA 391 (CC) ("*Makwanyane*").

[31] "At the heart of the prohibition of unfair discrimination" the Constitutional Court has declared "lies a recognition that the purpose of a society in which all human beings will be accorded equal dignity and respect regardless of their membership of a particular groups," and "[t]he achievement of such a society" is "the goal of the Constitution" in *President of the Republic of South Africa v Hugo* 1997 6 BCLR 708 (CC) para 141. In *Harksen v Lane No* 1997 11 BCLR 1489 (CC) para 53 the Constitutional Court observed that "whether or not there is discrimination will depend on upon whether, objectively, the ground is based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human or to affect them in a comparably serious manner." See too *Fedsure Life Assurance Ltd v Greater Johannesburg*

beings will be accorded equal dignity and respect regardless of their membership of a particular group has been the abiding theme of the Chaskalson Court.[32] The right to human dignity originated in Roman Dutch law. Subsequently the right to human dignity is protected by the *actio injuriarum* which is a common law remedy.[33] Notably human dignity and privacy are intrinsically linked as well. The invasion of a person's privacy may have the consequence of infringing on his dignity. According to Lewis, a person whose dignity is infringed upon may subsequently bring an action for damages.[34] However this is a rare occurrence because the mere breach of this fundamental right rarely leads to litigation.[35] The intentional publication of an unlawful and injurious statement usually leads to a defamatory case. In cases of defamation usually the human dignity and privacy of an individual would have been infringed on by the publication of private matters concerning the plaintiff. Thus the courts frequently encounter situations whereby they have to balance various competing interests before reaching a conclusion

The importance of the right to open justice cannot be overemphasised. However it is vital for legal scholars, the media, the legislature and the judges to critically examine the effect of the open justice principle on other equally fundamental rights such as the right to privacy, human dignity, a fair trial, security and lastly national security.[36] This means that a balance should be drawn between competing interests which are equally important. There is no formula that can be applied in order to achieve this goal and usually the judge has to use his or her discretion.

The right to open justice is similar to other rights in the sense that it can be justifiably limited to an extent that it is reasonably justifiable in a democratic society.[37] However it is not clear what the phrase "reasonably justifiable" really means because what is reasonable to one

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Transitional Metropolitan Council 1999 1 SA 374 (CC) paras 121-122; *Brink v Kitshoff No* 1996 6 BCLR 752 (CC).

[32] Generally *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 1 SA 765 (CC); *City Council of Pretoria v Walker* 1998 3 BCLR 257 (CC); *Dawood v Minister of Home Affairs* 2000 3 SA 936 (CC); *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC); *Hoffman v South African Airways* 2001 1 SA 1 (CC); *Minister of Health v TAC (NO 1)* 2002 (5) SA 703 (CC).

[33] S 10 of the 1996 Constitution. See also s 51 of the 2013 Constitution.

[34] Lewis "Privacy and Freedom of Expression. Too Private to Publish? Privacy and the Individual." Sabra.co.za/law-journals/2012/December/2012-december/vol025-no3-pp28-33pdf. (accessed 01-03-2015). (Henceforth "Privacy and the Individual"). The right to dignity is part of the common law. An infringement of privacy and dignity could subsequently lead to the crime of *crimen injuria.* Lewis highlights the relationship between the essential values of human dignity and privacy. These are important values which should not be curtailed without just cause. ("Privacy and the Individual.").

[35] Lewis "Privacy and the Individual."

[36] For nuanced exposition: Cameron "When judges fail justice" 2004 *SALJ* 580, 586-594 and Right Hon Lady Justice Arden DBE "Balancing human rights and national security " 2007 *SALJ* 57.

[37] S 36 of the 1996 Constitution.

decision maker may seem unreasonable to another decision maker. Thus the correct implementation of the open justice principle is not an exact science, especially in cases where the right exists in tension with other fundamental rights. It is interesting to note that the right to open justice exists in tension with the right to privacy which is protected in both the South African and the Zimbabwean Constitution as well.[38] The right to privacy is one of the rights that are essential to all individuals. It is also linked to the human dignity of all humans.[39] There has been an increasing emphasis on the importance of privacy in accordance with recent developments.

Private matters have been defined by the Constitutional Courts as those facts which would result in mental distress and injury to an ordinary individual who possesses normal feelings and intellectual abilities in instances where the person would have preferred to keep those facts private.[40] The right to privacy is broad and regarded as one of the most essential individual rights. Section 14 of the South African Constitution states that,

> Everyone has the right to privacy, which includes the right not to have
>
> (a) Their persons and homes searched
> (b) Their property searched
> (c) Their possessions seized or
> (d) The privacy of their communications infringed

According to Milo and Stein privacy comprises of a number of interrelated components which give effect to the essential concept of, "individual identity" and which subsequently acknowledge the desire of humans to be free from unsolicited intrusion into one's private life by the state and other individuals including the media.[41] Thus the media is in a precarious position because the right to privacy allows individuals to decide the fate of their private information.[42] Unwarranted publication of such private information could result in a lawsuit. In the case of *Bernstein v Bester*[43] the court offered examples of information which can be considered to be private. This includes information relating to one's family home, financial

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[38] S 14 of the 1996 Constitution .See also s 57 of the 2013 Constitution.
[39] S 10 of the 1996Constitution.
[40] *National Media Ltd v Jooste* 1996 2 All SA 510 (A).
[41] Milo &Stein *A Practical Guide to Media Law*(2013) 51.
[42] Milo and Stein 51 It should be noted that the right to privacy can be limited by various factors including the limitation clause contained in s36 of the Bill of Rights. It can also be limited by other competing interests such as the right to open justice. The relevant case which deals with the public disclosure of private information is *Tshabalala-Masimang v Makhanya* 2008 3 BCLR 338 (W).
[43] *Benstein v Bester* 1996 (4) BCLR 449 (CC). See also *Prinsloo v RCP Media t/a Rapport* 2003 SA 456 (T).

affairs, health and sexual life. However there are various instances whereby one may enter into the public arena thereby limiting his right to privacy.[44]

In order to determine the extent of privacy rights the Constitutional Courts applies the doctrine of legitimate expectation of privacy. This requires an assessment of a reasonable person's subjective expectation of privacy to be objectively reasonable.[45] Thus the mere anticipation of the enjoyment of privacy rights should be reasonably justified. Milo et al advanced that the expectation of privacy should not be based on hypersensitivity.[46] Lewis concurs with this view. According to Lewis, "the debate between privacy and freedom of expression has not been principled or legal but primarily emotional."[47] Thus it is essential to analyse the essential value of freedom of expression and open justice and also ensure that it is not trumped by unfounded allegations that the privacy or dignity of a certain individual has been violated. The doctrine of legitimate expectation would apply, for instance when information regarding a person's health is at stake. Every individual would expect to keep information related to their health confidential. Thus whenever information which relates to a person's health is published without express consent from the person, the defence of public interest would suffice. However Milo and Stein comments that the public interest in such an instance must be overwhelming. In the case of *NM v Smith*,[48] the complainant's privacy was violated by the unwarranted disclosure of private facts concerning their HIV status. This was held to be an infringement of the right to privacy and the complainants were awarded damages.

Technological advancement has made it necessary for legislatures to enact various privacy laws in order to protect the security and privacy of citizens. In the case of *Zuma v Goodman Gallery* where there were various competing rights namely freedom of expression on one hand then privacy and dignity on the other it was stated that there is no hierarchy of rights in the Bill of Rights.

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[44] Milo &Stein 51. See also Lewis, *"Privacy and Freedom of Expression: Too private to publish? Privacy and the Individual."* Sabra.co.za/law-journals/2012/December/2012-december/vol 025-no3-pp28-33pdf. See also the case of *Prinsloo v RCP Media t/a Rapport* 2003 4 SA 456 (T) in which it was held that the fact that the plaintiffs had become a renounced public figures did not that they had forfeited their right to privacy in relation to the publication of photographic material of sexual activities that occur between two consenting adults in the privacy of their home. It was held that the degree of public interest required in this matter would be overwhelming.

[45] Milo and Stein52.

[46] Milo and Stein 52.

[47] Lewis "Privacy and the Individual."

[48] *NM v Smith* 2007 5 SA 250 CC. See also *Van Vuuren v Kruger* 1993 2 All SA 619 (A).

Thus no right is more important than the other. In *Chipu* it was held that where certain rights are in conflict it is essential for the presiding officer to balance such conflicting rights.[49]

Secondly the right to open justice has the potential to impinge on the confidentiality of asylum applications thereby endangering the security of asylum seekers and their families.[50] When the flow of information is not properly regulated, it is inevitable that the security of some humans may be compromised in the process. In the case of *Chipu* the court dealt with the question whether it was justifiable to censor information relating to asylum seekers completely. In this case the right to open justice was limited in order to protect the security of asylum seekers and their families. The rationale behind the censorship of such information was to protect the security of asylum seekers and their families. Therefore there was the right to open justice on one hand, namely the right of the media to report and also the need for confidentiality in asylum applications on the other hand. The case of *Chipu* highlights that, there are instances in which the right to open justice must be compromised in order to protect individual rights. This research analysed the court's decision concerning the Constitutionality of the limitation of access to asylum applications as contained in section 21 (5) of the Refugees Act 130 of 1998.[51] Therefore, in as much as the media has a right to report on various matters the security of both asylum seekers and their families should not be compromised in the process. This research attempted to establish whether a balance can be drawn between these competing interests.

Thirdly the right to open justice has the potential to impinge on an accused's right to a fair trial. The right to a fair trial is one of the most internationally acclaimed and protected human rights. Article 14(1) of the International Covenant on Civil and Political Rights and Article 10 of the Universal Declaration of Human Rights are both International instruments which protect the right to a fair trial. The right to a fair trial is also enshrined in regional instruments for instance, Articles 5, 6 and 7 of the African Charter on Human and Peoples' Rights protect the right to a fair trial. However the African Charter on Human and Peoples' Rights operates in Africa only. Sections 35 and 69 of the South African and Zimbabwean Constitutions respectively also guarantee an accused right to a fair trial.[52] If the right to a fair trial is undermined, the liberty of innocent individuals could be arbitrarily limited. See chapter 3 for a more thorough analysis on the importance of the right to a fair trial.

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[49] *Zuma v Goodman Gallery* Case No: 17978/2012 PH NO.342.
[50] S 12 of the 1996 Constitution. See also s 52 of the 2013 Constitution.
[51] See Chapter 3.
[52] S 35 of the 1996 Constitution. See also s 69 of the 2013 Constitution.

Fourthly, the right to open justice does not seem to exist harmoniously with a state's need for national security. The burden to protect human rights rests on the state, thus the state has the duty to protect individuals from both internal and external threats.[53] There has been a greater emphasis on the importance of national security during the last few years due to the emergence of terrorist activities both in Africa and Internationally. The recent kidnapping of school children by Boko Haram is recent example of terrorist activities in Africa.[54] The terrorist attacks which occurred in Kenya, in which innocent civilians were massacred at a mall in Kenya also exposed the brutality of terrorist activists in Africa.[55] This shows the importance of preserving national security. If the state divulges all information relating to the resources available to its army, the general state of security and other relevant information the country and its inhabitants will be left vulnerable to terrorist attacks. Thus it is important for the state to keep certain information confidential in order to protect the human rights of its citizens. However there is a risk that a blanket of secrecy can be utilised to cover illegal and unethical practices by state officials. Accordingly the limitation of the right to open justice based on national security should be approached with caution. To highlight the dangers inherent in always sacrificing open justice to protect national security this research will analyse the Protection of the State Information Bill (B28-2008)[56] which was considered in the parliament of South Africa in May 2008 until it was withdrawn in October. Although the Bill was later withdrawn it is essential to scrutinize its contents in order to establish whether it would have complied with the ideals of a nascent democracy such as South Africa.

Lastly in cases involving minors the court can also place a limitation on the open court principle by ensuring that proceedings are closed to the general public as contained in section 56 of the Children's Act 38 of 2005.[57] The Act only allows certain persons who are specifically mentioned in that section to attend a court case which involves a child. This is a justifiable limitation on the open justice principle because it serves the purpose of protecting

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[53] Office of the United States High Commissioner of Human Rights, "Human Rights, Terrorism and Counter – Terrorism-Ohchr"www.ohchr.org/documents/Publications/Factssheet32EN.pdf (accessed 14-10-2016).

[54] National Consortium for the Study of Terrorism and response to Terrorism, "Background Report: Boko Haram Recent Attacks" https://www.start.umd.edu/pubs/START_%20SMA-AFRICOM_Boko%20Haram%20Deep%20Dive_Jan2015.pdf (accessed 14-02-2016).

[55] National Consortium for the Study of Terrorism and Responses to Terrorism " Background Report Al-Shabaab Attack on Westgate Mall in Kenya" start.umd.edu/sites/default /files/publicationslocal-attachments/STARTBackgroundReport-alShabaabKenya-sept 2013.pdf. (accessed 25 -05-2016). See also X22 Report "US views Kenya Attack as a Direct Threat to National Security" xx2report.com/US-views-Kenya-attack-direct-threat-to-national-security. (accessed 25-05-2016).

[56] The Protection of the State Information Bill of 2008. This Bill was widely disregarded because its definition of classified information was too wide. It also sanctioned heavy punishments to those who revealed such classified information.

[57] Act 38 of 2005.

the rights of the child. Hence, the principle of open justice has the potential to infringe on individual rights if it is not properly regulated. As a result, the application of the open justice principle requires careful consideration on the part of the decision maker.

Therefore in as much as it is important to uphold the principle of open justice, one should not be oblivious to the detrimental impact that it is likely to have on equally fundamental values such as privacy, security, right to a fair trial and lastly national security. Consequently it is essential to establish whether a balance can be drawn between these equally essential values. It is equally essential to ascertain the methods that one should use in determining the value that should be held to the detriment of the other when faced with such an unfortunate situation.

1 2 RESEARCH PROBLEM

The open justice principle is fundamental in upholding democracy. Yet open justice though crucially important, comes at a cost. This is due to the fact that it has the potential to impinge on other equally important values namely the need for confidentiality in asylum applications, the accused's right to a fair trial and lastly national security. Consequently, the courts are constantly confronted with situations where they have to choose between equally important but conflicting values. Thus it is important to establish whether a balance can be drawn between these conflicting values. This study seeks to address the following pertinent questions:

a) What is the meaning of open justice and what is the impact of open justice on the accused's fair trial rights, the need for confidentiality in asylum applications and national security?
b) How is the open justice principle currently being implemented in South Africa and Zimbabwe respectively? Can Zimbabwe borrow something from South Africa and vice versa?
c) To what extent does the right to open justice impinge on individual rights such as privacy, security, right to a fair trial as well as national security?
d) What measures can be implemented to create a balance and reconcile the above competing interests?

1 3 AIMS OF THE STUDY

This research aims to establish whether a balance can be drawn between the conflicting values of open justice, human rights and national security. This research seeks to highlight the importance of these competing interests and then analyse the methods and techniques that may be used to reconcile these competing interests thereby establishing a balance between them. The research is a comparative analysis of Zimbabwe and South Africa.

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

- The meaning, origins, contours and impact of open justice on accused's fair trial rights, the confidentiality of asylum applications and national security with reference to South Africa and Zimbabwe.
- An examination of how the open justice principle is being implemented in Zimbabwe and South Africa respectively. Can Zimbabwe borrow something from South Africa and vice versa?
- To determine the extent to which the right to open justice impinges on individual rights namely privacy, security, fair trial rights and also national security.
- To identify the steps that policy makers and the legislature in both Zimbabwe and South Africa have taken to reconcile or balance the competing interests of privacy, security, fair trial rights and lastly national security.
- The research will suggest measures that can be implemented in order to balance these competing interests.

1 4 OBJECTIVES OF THE STUDY

To do justice to the above aims, the research's main objectives are to:

- To examine the nature and impact of the open justice principle on fair trial rights, the confidentiality of asylum application and national security.
- Critically examine how the principle of open justice is implemented in two different jurisdictions, namely Zimbabwe and South Africa.
- To identify the extent to which the open justice principle impinges on the confidentiality of asylum applications, fair trial rights and national security
- To examine the steps that have been taken by policy makers and legislatures in both South Africa and Zimbabwe to balance and reconcile these fundamental principles.

- Propose measures that can be implemented to reconcile or balance the conflicting values of open justice, individual rights and national security on the other hand

1 5 ASSUMPTIONS UNDERLYING RESEARCH

- States that are parties to International Human rights Instruments such as treaties and Conventions also facilitate and ensure the enjoyment of such human rights at the national level.
- The right to open justice must be properly regulated so that it does not compromise the privacy, security and fair trial rights of the individuals within a particular state as well as the national security of that particular state.
- The press is responsible for informing the public on matters of public interest thereby executing its duty of being a watchdog and disclosing unethical and corrupt activities by both private and public officials.
- Citizens of South Africa and Zimbabwe are generally aware of their right of access to information which may be necessary or relevant for the protection of their human rights.

1 6 RESEARCH METHODOLOGY

A qualitative approach was used in order to determine the extent to which the open justice principle infringes on essential rights, such as fair trial, the right to security in relation to asylum seekers and the national security of a state. The same approach was similarly used to establish whether it is possible to establish a balance between these competing values. The qualitative approach is more appropriate for this research as it allows the researcher to unravel the mechanisms which connect particular variables, by having access to explanations or accounts provided by those involved.[58]

The research falls within the interpretive research paradigm because the researcher aims to understand how the right to open justice is implemented, the extent to which the right to open justice impinges on individual rights as well as national security and also establish whether a balance can be possibly drawn between these competing interests through the knowledge, practical experiences as well as beliefs of those involved. The researcher intends to obtain a

[58] Bryman, *Handbook of Data Analysis* (2004) 549.

full and detailed explanation of how the right to open justice is implemented in Zimbabwe and South Africa respectively.

This study was conducted mainly by way of literature search in order to conduct an investigation on the implementation and effect of the open justice principle. The University of Zimbabwe Law Library contains material on the right to freedom of expression which lays the legal and theoretical foundation of the right to open justice. The researcher made use of recent textbooks and journal articles from the University of Zimbabwe Law Library in order to see how legal scholars have comprehended and enunciated the relationship between the principles of open justice and freedom of expression.

The University of Fort Hare Library (East London) was used so that the researcher could analyse the textbooks and journals which deal with the right to freedom of expression and most importantly the right to freedom of expression thereby gaining an insight on the similarities and differences in the application of open justice principle in Zimbabwe and South Africa respectively. Journals and textbooks are essential to gain an insight on the origins, contours and implementation of the open justice in both Zimbabwe and South Africa. This enables one to be in a better position to determine whether these competing values can be reconciled or balanced. The Oliver Tambo Human Rights and Documentation Centre was particularly helpful as it contains comprehensive human rights documents on the right to open justice. This enabled the researcher to compare the methods that have been proposed by various scholars in order to balance the competing interests of open justice, the need for confidentiality in asylum applications, fair trial rights as well as national security on the other hand.

The researcher made use of Zimbabwean and South African legislation in order to determine the approach that is used by the legislatures in these two countries in order to give effect to the right to open justice. The researcher analysed judicial decisions from both the South African and Zimbabwean jurisdictions in order to comprehend how these different countries are balancing the right to open justice with national security and individual liberties. Cases such as *Gumbura*,[59] the *Tsvangirai*[60] treason case, the *Pistorius*[61] and *Independent Newspapers*[62] cases feature highly in this regard

[59] *Robert Martin Gumbura v The State* SC 78/2014.
[60] *S v Tsvangirai* HH -119-03.

Internet resources are essential to establish the effect of technology on the principle of open justice. Internet sources were also used to gather the views of International retired judges, prominent defence lawyers and other legal academics on issues such as national security and the accused fair trial rights. The Media Institute of Southern Africa[63] contains relevant information on the role of the press, open justice, freedom of expression and democracy in general. The Freedom of Expression Institute of South Africa was particularly relevant to this research.[64] Websites such as Article 19 were utilised to obtain relevant information on *inter alia* the right to freedom of expression.[65] University websites were also utilised together with websites of law firms and various media firms both in South Africa and Zimbabwe, for instance the Zimbabwe Human Rights Commission website.

1 7 LITERATURE REVIEW

While consensus exists regarding the importance of the right to open justice, there is considerable dissention regarding the scope and limitation of the right. Jeremy Bentham was one of the earliest scholars who propounded on the importance of open justice. He expressed that, "Publicity is the very soul of justice."[66] Lord Scarman also enunciated on the importance of open justice when he stated that, "Justice must be dispensed in the open so that the public may be given an opportunity to evaluate the quality of justice rendered by the courts."[67] One of the reasons for this view is because open justice enhances judicial accountability. However in as much as it is widely acknowledged that open justice is an important principle, there are different views regarding the extent and limitation of this right. McLachlin acknowledged the importance of open justice but went on to expose its potential to impinge on other equally fundamental rights such as privacy and security.[68] Klaaren also highlighted the tensions that exist between open justice and national security.[69] Thus it is important to note that the right to open justice is not absolute. Milo and Stein also dealt with the potentially adverse effect of

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[61] *Multichoice (Proprietary) Limited v National Prosecuting Authority In re Pistorious; In re Media 24 Ltd v DPP* 2014 2 ALL SA 446 (GP) 2014 SACR 589 (GP).

[62] *Independent Newspapers v Minister for Intelligence Services; In re Masethla v President of the Republic of South Africa* 2008 5 SA 31 (CC).

[63] www.misa.org.

[64] www.fxi.org.za.

[65] www.article19.org.

[66] Quoted in A.G *(Nova Scotia) v MacIntrye* 1982 I.S.C.R 175 at 183, per Dickson J (as he then was).

[67] *Home Office v Harman* 1982 1 All ER 532, 547.

[68] McLachlin "Open Justice and the Rule of Law" www.iclr.co.uk> Blog> Open Justice. (accessed 14-06-2015).

[69] Klaareen "The Judicial Role in Defining National Security and Access to Information in South Africa."wiser.wits.ac.za/sites/default/files/2015-09-16-The%20Judicipdf. (accessed 24-06-2015) ("Defining National Security"). (Henceforth "Defining National Security").

open justice on other fundamental values including privacy.[70] This shows that the correct implementation of open justice in itself is a problematic issue.

Various literary works have been written which reflect the tension between the right to open justice and other fundamental values including fair trial rights and national security as highlighted earlier. However there is hardly any relevant literature which is dedicated towards providing solutions on how these competing interests can be balanced or reconciled. The sources that are available on this issue are mostly judicial decisions. These include *Chipu* and *Independent Newspapers*. Thus this study will attempt to identify methods that can be used to reconcile these competing interests namely open justice, accused fair trial rights as well as national security. Thus, in as much as this study seeks to highlight the importance of the open justice principle, it also seeks to expose the potentially adverse impact of the right to open justice on the right to privacy, security, fair trial rights of the accused and lastly on the national security of a state as well as provide recommendations or possible solutions to the problem. Unfortunately open justice is a right which cannot be totally dispensed with. Hence it is essential to establish methods which can be used to balance the countervailing interests of open justice on one hand and also other relevant human rights on the other hand.

One of the questions which may arise when addressing the issue of implementing the right to open justice, is whether the right to open justice can be justifiably limited, and if so to what extent. Section 36 of the South African Constitution enunciates that every right can be limited but certain factors have to be taken into account. These factors are similar to the ones found in section 86 of the Zimbabwean Constitution.[71] Thus the right to open justice can be limited, "provided that the limitation is fair, reasonable and justifiable in a democratic society based on openness, justice, human dignity, equality and freedom."[72] However what is reasonable and justifiable is an elusive concept.[73] Thus determining whether a limitation is reasonable and justifiable would require aptitude and impartiality on the part of the decision maker to ensure that his decision is both reasonable and just.

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[70] Milo and Stein 51.
[71] S 36 of the 1996Constitution and s86 of the 2013 Constitution.
[72] S 86(2) of the 2013 Constitution.
[73] In the case of *National Coalition for Gay and Lesbian Equality v Minister of Justice* it was highlighted that the factors contained in s 36 of the 1996 Constitution do not constitute an exhaustive list. 2000 (2) SA 1 (CC). .

1 7 1 The Impact of Open Justice on the Confidentiality of Asylum Applications.

In the case of *Chipu*, the tension between open justice and the confidentiality of asylum proceedings was exposed. The right of the media to report is an essential component of the open justice system. Ngcobo CJ identified the media as agents that facilitate the achievement of democracy.[74] Burns also acknowledged the media's role in imparting matters of importance to the public thus fulfilling their desire for self-fulfilment.[75] The Constitution also guarantees freedom of expression including the right of the media to receive and impart information.[76] Article 19 of the International Covenant on Civil and Political Rights states that, "the right to freedom of expression includes, freedom to seek receive and impart information and ideas of all kinds, regardless of frontiers either orally, in writing or print, in the form of art or through any other media of his choice.[77] The role of the media in imparting information to the public is essential to our democracy. The media also ensures that basic human rights are protected by state parties. For instance the media can quickly expose human rights violations such as police brutality and the unnecessary use of force by the state. Thus the media is essential for the preservation of our democracy.[78] Hence in this 21st century where the media plays a major role in imparting information, the question relating to the ideal extent of such freedom is of paramount importance.

However there are instances whereby media freedom and open justice exists in tension with the confidentiality of asylum proceedings as well as the security of asylum seekers and their families. The issue in *Chipu* was whether section 25(1) of the Refugees Act which provided for the absolute confidentiality of asylum proceedings constituted a reasonable and justifiable limitation on the right to freedom of expression or not. The purpose of the legislation was to protect the identity and possibly the security of asylum seekers and their families.[79] Section 25 (1) of the Refugees Act abolished the disclosure of information relating to the applications of asylum seekers. The intention behind the enactment of this legislation was to protect the security of asylum seekers and their families. This is due to the fact that o nce the information

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[74] Ngcobo CJ "The Media and Open justice." http://www.mediaclubsouthafrica.com/images/stories/february2010/Chief_Justice_Sandile_NgcoboSpeech.pdf 2010. (accessed 02-03-2015).

[75] Burns *Communications Law* (2009) 356-357.

[76] S 16 of the 1996 Constitution.

[77] Article 19 of the International Covenant on Civil Political Rights.

[78] See *Holomisa v Argus Newspapers Ltd* 1996 6 BCLR 836 (W).

[79] S 21 (5) of the Refugees Act classified all information relating to asylum seekers as confidential on the basis that such individuals were at risk of persecution or even death in their countries. Hence their identity is protected for their safety and also to protect their families.

became public, the asylum seeker could face persecution in his country of origin and his family could possibly be harmed as well. However the applicants in this case, namely the media contended that in certain circumstances the media should be have access to such information. Hence in this situation the right to open justice happened to collide with other fundamental rights such as privacy and security.

1 7 2 The Impact of Open Justice on the Accused's Right to a Fair Trial

Although the right to a fair and public trial is one of the most essential facets of an open justice system, there are instances where this right which was designed to protect the right to a fair trial, could infringe on the very right that it was designed to uphold. One could take into account the case of *Pistorius* in which the events were highly publicised before judgement was handed down by the court. According to Pretorius one is bound to question whether the right to open justice upholds the values of accountability and transparency at the expense of individual liberties.[80] Tricchinelli also commented that the tension between the right to open justice and fair trial rights tries the abilities of the courts.[81]

Often times the publicity which stems from open justice extends to instances in which one finds the media interviewing retired judges or prominent lawyers from another jurisdiction on what the likely outcome of a case might be. Robert Shapiro, a prominent lawyer who was OJ Simpson's defence lawyer among other celebrities was given a platform to comment on the likely outcome of the Pistorius case before the final verdict was issued.[82] Wardle enunciated that this raises a series of questions including whether or not the *subjudice* rule still applies in this era of technological advancement.[83] Moreover one is also inclined to enquire on whether it is possible for a judge to be influenced by the comments and views of defence lawyers and

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[80] Pretorius "Freedom of Expression and the Broadcasting of Public Enquiries and Judicial Proceedings" 2006 *SALJ* 40 41 In his work Pretorius refers to two methods that can be implemented to reconcile the countervailing interests namely open justice and the accused's right to a fair trial. These are the restrictive approach and the generous approach. These approaches will be discussed more fully in the following chapters.

[81] Tricchinelli "Pre-trial publicity limited effect on the right to a fair trial." https://www.rcfp.org/browse-media-law-resources/news-media-law/news-media-and-law-spring-2013/pretrial-publicitys-limited (accessed on 11-10-2015).

[82] Journeyman Pictures "The OJ Simpson Verdict on Pistorius" https;//www.youtube.com/watch?v=EIdF-PUthgyG. A brief commentary on the Pistorius case was issued to the public by the media through the use of you tube. One is bound to question whether such comments are likely to influence a judge's final decision regarding the trial.

[83] Wardle "The *Subjudice* Rule and the Oscar Pistorius Case: Will the Crime of contempt of Court *ex facie curiae* become Abrogated by disuse" 2014 *De Rebus* 138 138.

other retired judges who would have commented on the issue. These issues are yet to be thoroughly addressed hence the matters remain obscure and therefore open to debate,

The other issue that has not yet been addressed in recent literature relates to whether one can appeal on the grounds that there was too much publicity regarding his trial. In as much as the media has a right to report the courts must avoid a case where there is "trial by the media". This could be fatal as it could result in a wrongful conviction. Moreover the right to open justice can infringe on the human dignity and privacy of the individuals involved in delicate cases. In South Africa the names of rape victims are usually withheld, possibly to protect the identity and privacy of the victim as evidenced by the case *of S v Zuma.*[84] In contrast in the Zimbabwean case of *The State v Robert Martin Gumbura* in which a prominent pastor was accused of raping female congregants. The names of the victims were disclosed.[85] The question would be what was the impact of the disclosure on the lives and rights of the victims who were allegedly raped by Robert Martin Gumbura? An analysis on the impact of free expression on individual liberties is needed in order to determine the limits that should be placed on the principle of open justice in Zimbabwe. If not properly regulated, the open court principle has the potential to infringe upon individual rights. Section 56 of the Children's Act for instance enunciates the limitations that can be placed on the public's right of access to information. Secondly, in cases involving a minor, proceedings are not open to the general public except for a few exceptions as listed in the Act.[86] Hence certain restrictions on the freedom of the media to impart information are justified.

1 7 3 The Impact of Open justice on National security

International law accords the state, the duty to protect its citizens from harm.[87] Hence the state should protect the human rights of its citizens. This gives the state the mandate to render certain information as confidential in cases where the release of such information is likely to endanger its citizens.[88] Thus in cases where the existence of the state is at risk the state has the duty to withhold information thereby restricting the right of the media to report and the right of the public to receive information. However scholars have not been able to come up

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[84] *S v Zuma*(2006) SACR 191 WLD. . This case was highly publicised but the name of the victim does not appear in the case law. This is unlike the case of Robert Martin Gumbura in which the identity of the victims were publicised even in case law.

[85] *Robert Martin Gumbura v The State* Judgment No SC 78/2014 This case shows that South Africa and Zimbabwe have different approaches in relation to the protection of the human dignity, privacy and identity of rape victims. (Henceforth "*Gumbura*").

[86] Act 38 of 2005 see also *Media 24 Ltd v NPA; In re Mahlangu* 2011 2 SACR 321 (GNP).

[87] Universal Declaration of Human Rights; see also International Convention on Civil and Political Rights.

[88] Freedom Forum "Defending Freedom of Expression: Article 19." (accessed 05-08-2015).

with a clear cut definition of the exact matters that fall under national security. This is due to the fact that such information is usually accessible to the state and it is difficult to determine whether a risk of harm actually exists. Klaaren suggests that the judiciary has gone a long way in attempting to define the term national security.[89] However this continues to be an obscure issue because there seems to be no concrete definition of national security yet.

There is certainly information which could endanger the lives of the whole populace within a state if it is leaked to the public. The Freedom Forum suggests that such information includes information relating to the movement of troops and military encryption codes among other things.[90] Hence it is widely accepted that national security is a valid tool that can be utilised to restrict freedom of expression for the purposes of preserving the human rights of the larger populace. However there are instances whereby the state can use this tool in order to hide documents that could expose corruption activities and maladministration practices of top government officials. Moreover there is no clear cut method which distinguishes matters of national security which should not be accessible to the press and the public from mere issues that are not likely to endanger the general populace. For instance, the jamming device that was used in parliament to ensure that there would be no cell phone signal was justified by the South African Government as a means of protecting national security.[91] This leads to the question of which limitations are justified on the basis of national security. There is certain information which could endanger the lives of the whole populace within a state if leaked to the public.

In the case of *Independent Newspapers (Pty) Ltd v Minister of Intelligence: In re Masetha v President of the Republic of South Africa*,[92] there were conflicting views from judges regarding the approach that should be taken when balancing the countervailing interests namely the right of the media to access evidence which related to matters of state security versus the security of the state. The issue was whether the restricted documents should be disclosed to the public or not.

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[89] Klaaren "Defining National Security".

[90] Freedom Forum "Defending Freedom of Expression: Article 19."https://www.article19.org/pages/en/national-security-morehtml (accessed 05-08-2015).

[91] News 24 "Reports of A cell phone Jammer in Parliament" www.news24.com(accessed 05-08-2015).

[92] Klaaren2009 *SALJ* 25 29. See also *Independent Newspapers v Minister for Intelligence Services In re Masethla v President of the Republic of South Africa* 2008 1 SA 566 (CC).
(Henceforth "*Independent Newspapers*").

However, the interests of justice were considered to be of paramount importance in determining whether the material should be disclosed to the media or not. There was a right on one side and a state interest aimed at the benefit of the people on the other hand.

In as much as most scholars agree that the principle of open justice is important one has to draw a balance between the principle and other fundamental rights that may be compromised as a result of this principle. This research thus seeks to examine the works that have been cited in this literature review as well as other works that have been published on the right to open justice in South Africa and Zimbabwe. This is done with a view of coming up with different kinds of methods that can be implemented in order to ensure that the right to open justice is implemented effectively. This area of law is fraught with uncertainties and dilemmas thus this research was undertaken in order to explore the extent of the problem as well as provide solutions.

1 8 JUSTIFICATIONS AND LIMITATIONS OF THE STUDY

1 8 1 Justifications of the Study

In the past the right to open justice only entailed the viewing of trials by the public and having access to court files. However in these recent times the term open justice has acquired a whole new meaning. Presently the term open justice can be translated to mean the live broadcasting of trials,[93] the imparting of information by the media through twitter, facebook and other social networks and also the production of documentaries on a case that is in the process of being resolved by the trial courts.[94] Waites enunciates this dilemma as follows,

> Until recently, the only pre-trial publicity that most trial attorneys experienced was an occasional mention of a case buried deep inside the local newspaper.[95]

However in this era of technological advancement open justice entails so much more. Thus this research will play a very crucial role in analysing the significant impact of technological advancement on the principle of open justice in the context of the rights of accused persons and also the rights of asylum seekers. Recent developments reveal that the principle of open justice has a potentially adverse effect on the fair trial rights of the accused, the privacy, dignity and security of asylum seekers and the national security of any state. The dilemma is

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[93] *Pistorius.*
[94] *Midi Television (Pty) Ltd v Director of Public Prosecutions*(WC) 2007 3 All SA (SCA).
[95] Waites "The Effects of Pre-trial Publicity on Judges, Jurors and Arbitrators." http://www.theadvocates.com/The%20Effects%20of%20Pretrial%20Publicity.pdf (accessed 15-02-2016).

that the courts should be cautious before arbitrarily limiting the right to open justice because it is equally essential. It promotes the values of accountability, responsiveness and transparency whilst giving effect to the right to freedom of expression. Hence this research will be very important in providing a solution.

This study seeks to explore the implementation of the open justice principle in nascent democracies namely South Africa and Zimbabwe and explore its impact on the accused fair trial rights, the rights of asylum seekers and also its impact on national security. This study will assist policy makers, the legislature, academics and legal practitioners who are eager to research on the impact of the right to access to information and its limitations.

1 8 2 Limitations of the Study

The researcher has limited financial resources and this affects the scope of this study which will only focus on Zimbabwe and South Africa.

The researcher is aware that there are various categories of human rights, but due to time and financial constraints this study will only f[illegible] impact of the open justice principle on civil political rights such as the fair trial rights of the accused and the right to freedom from torture and other *jus cogens* with regard to asylum seekers as well as national security concerns.

The researcher does not have enough financial resources to conduct a thorough investigation on the challenges that Zimbabwean journalists face when trying to access to access information from State departments. Due to time and financial constraints the researcher could not make use of the observatory method in order to observe how the right to open justice is impacting on media freedom in Zimbabwe.

The researcher does not have enough money to make use of the University of Zimbabwe Library whenever she needs to obtain information. As an approved reader the researcher is expected to pay a stipulated amount weekly in order to use this library.

1 9 ETHICAL CONSIDERATIONS

The research is based on reviewing of material which has been previously published. Hence, the reviewer does not require ethical permission to conduct this study. Given the extensive use of the literature, a potential ethical problem that may arise will be copyright issues. To

prevent this, the researcher will acknowledge all sources used in accordance with the University of Fort Hare research policy.

1 10 OUTLINE AND OVERVIEW OF CHAPTERS

The study consists of five (5) chapters. Chapter one is a general introduction of the study. The chapter consists of the background to the study, the research problem, the purpose and objectives of the study, the significance of the study, the methodology to be used, the literature review as well as the limitations of the study.

Chapter 2 provides the historical context of the right to open justice. It illustrates the legal historical Foundation of the Open Justice system and Theoretical Underpinnings: Thus Chapter 2 contains the legal historical foundation of access to open justice (within the context of the right to freedom of expression). This chapter explores the origins, contours and implementation of the right to open justice in both South Africa and Zimbabwe.

Chapter 3 is made up of two parts. Part A examines the impact of the open justice principle on the fair trail rights of the accused. The chapter analyses the extent to which the open court principle interferes with the impartiality of the courts thereby adversely affecting the accused's right to a fair trial. Part B investigates the extent to which the right to open justice impacts on the confidentiality of asylum applications with reference to the case of *Chipu.*

Chapter 4 examines the impact of open justice on national security matters. It investigates the role of the media in imparting matters of public interest to the public in accordance with the principle of open justice.

Chapter five provides a summary of the findings and draws conclusions to the thesis. The chapter also offers recommendations to the factual and legal issues discussed within the thesis.

CHAPTER TWO

Legal Historical Foundation of the Open Justice System: Theoretical Underpinnings.

2 1 INTRODUCTION

The open justice principle is a venerable and deep-rooted value which is engraved in both Western and African civilization. Thus the origins of the open justice system, particularly the open court principle cannot be confined to Western countries alone. There is evidence which suggests that Traditional courts were applying the open court principle even during the pre-colonial era.[96] This illustrates the importance of open justice as a universally accepted norm which has found some measure of acceptance in diverse communities.[97] Hence this chapter will explore the origins of the open justice principle and possibly advance reasons why the open justice principle was introduced in mediaeval communities. This will enable one to understand the importance of this principle even in this modern age. Secondly the chapter will highlight the legal historical foundation of the open justice principle. Open justice is derived from a cluster of related rights such as freedom of expression, access to information, access to courts as well as the right to a public hearing. Some of these factors, especially the right to freedom of expression which includes media freedom and the right of access to information will be explored in detail. Lastly the chapter will outline the implementation of the open justice system in both South Africa and Zimbabwe.

Most legal scholars would identify with the popular maxim, "...it is not merely of some importance but it is of fundamental importance that justice should not only be done, but should manifestly be seen to be done."[98] This indicates that the dispensation of justice should occur in public unless specific considerations[99] dictate otherwise.[100] The openness of the

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[96] South African Law Commission "Traditional Courts and the judicial function of Traditional Leaders." www.justice.gov.za/sarc/dpapers/dp82-prj90-trd/1999pdf (accessed 25-02-2015).It is generally accepted that the open justice system originated in Britain before the signing of the Magna Carta. However in as much as the author accepts this argument, it is important to add that the traditional courts in Africa were open to the public even during the pre-colonial era. Thus open justice was acknowledged even in Africa.

[97] Although the open justice principle has found universal acceptance, it is not being implemented effectively in some nascent democracies such as Zimbabwe. This will be discussed further in the course of this chapter.

[98] *R v Sussex Judges; Ex parte McCarthy* 1924 1KB 256.

[99] These include privacy and national security as discussed in the previous chapter.

judicial system enhances judicial accountability. This is due to the fact that when a trial takes place, important values such as the liberty of individuals are at stake.[101]

Lord Bowen in the case of *Leeson v The General Council* articulated on the importance of open justice in enhancing accountability when he stated that "...judges like Caesars wife should be above suspicion."[102] Justice in this sense is not limited to judicial proceedings only, it includes hearings which are held before the refugee board. In that respect it is readily apparent that judicial proceedings should be open to public scrutiny so as to enhance judicial accountability. Furthermore open justice can be implemented through access to information. For example, public officials such as the Department of Home Affairs are required to provide written reasons for their refusal to grant certain basic documents such as passports in accordance with the Promotion of Administrative Justice Act. Thus when certain rights are being withheld, there has to be clear and transparent justifications for the withdrawal or limitation of such rights.

2 2 Origins of the Open Justice Principle

The open justice principle is widely acknowledged and implemented in legal systems based on British Law such as the United Kingdom and in commonwealth countries such as South Africa, Canada, Australia and former British colonies such as the United States.[103] Open justice has been described as an, "underlying core in British law." Henceforth one would be inclined to think that the open justice principle originated in Britain. The exact date that the open justice principle was introduced is not clear. Some scholars propound that the open justice principle is a common law principle which originated in Britain before the signing of the Magna Carta.[104] In the case of *Raybos v Jones*, Kirby J stated that, "...the courts of England were open from the earliest times."[105] This implies that the open justice system is

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[100] Constitution, s36 see also Constitution 2013, s86. These sections demonstrate that there is no right which is absolute. The Acts also offer specific guidelines which must be followed before one can justifiably limit a Constitutional right. The right to open justice is no exception.

[101] Liberty is an essential value which relates to freedom in general. Freedom of movement is also a component of liberty. See the Zimbabwean case of *S v Mwonzora* (Const Application No CCZ 287/11 2015 ZWCC 09 (11 June 2014).

[102] *Leeson v The General Medical Council* 1889 59 LJCHNS 233 at 241. For serious extended discussion: Juma "International Dimensions of the Rules of Impartiality and Judicial Independence: Exploring the Structural Impartiality Paradigm" 2011 *SJ* 17;

[103] Wikipedia "Open Justice." https://en.wikipedia.org/wiki/Open Justice (accessed 20-03-2016).

[104] *Terry v Persons Unknown* 2010 EWHC 119 (QB) 106.

[105] *Raybos v Jones* 1985 2 NSWLR 41, 50-52.

deeply entrenched in the British justice system. Hence it becomes plausible to state that the open justice principle is an old principle which has developed over the years.

However the open justice system has had a potentially adverse effect on certain individual rights. This is partly as a direct result of technological advancement.[106]

This has affected the privacy rights of individuals as well as national security. With the advent of technology, there are now more efficient and faster ways of imparting information which makes it difficult to regulate the right to open justice.[107] Consequently one would be tempted to enquire whether it is possible to regulate the dissemination of information effectively in this era of technological advancement. Thus it is essential to establish the purpose for which the open justice principle was originally intended in order to establish whether this right is still serving that purpose or whether the right to open justice is being undermined by the haphazard way in which information is disseminated and acquired in this era.

2 3 Open Justice in the Traditional Courts

Traditional leadership is regarded as an important facet of the African justice system. Therefore it is essential to highlight the importance of traditional leadership in African societies. Tshehla states that traditional leadership is, "an integral part of the current democratic dispensation and consequently an institution that cannot be ignored in South Africa and Africa as a whole."[108] This could be due to the fact that some Africans in rural communities still rely on the chief or headman to settle disputes relating to maintenance, land boundaries and other relatively minor issues. Access to justice in the official courts is still a problem in most African communities, including Zimbabwe and South Africa. Traditional courts are important in facilitating access to justice. Thus since traditional courts and traditional leadership are central to the African court system this essay will briefly discuss the concept of open justice in African courts.

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[106]Warren "Open Justice in the Technological Age" https;//www.monash.edu/-data/assets/pdf-file/0009…warren.pdf (accessed 05-03-2016) "Open Justice in the Technological Age".

[107]Warren "Open Justice in the Technological Age".

[108]Tshehla "Traditional Justice in Practice. A Case Limpopo Case Study" https;//www.issafrica.org/UPLOADS/115FULLPDF.(accessed 25-03-2015). See also s2 of The Customary Law and Local Courts Act.

The origins of the open justice principle, specifically the open court principle should not be confined to the West alone. There is evidence to suggest that in Traditional African courts the open justice principle was being implemented even before the colonial era.[109] Ngcobo CJ, concurs with this view. He states that, "... open justice is rooted in African tradition." This shows that there was judicial openness in traditional courts in historical times.

He goes on to enunciate that,

> Trials were conducted under a tree; the courtroom had no walls, only a roof of leaves and branches to provide shade from the sun and shelter from the elements. Members of the community were allowed to attend the proceedings. Secret trials were foreign to traditional justice.[110]

Additionally, it is important to note that open justice in the African context encouraged not only public attendance but also public participation. Members of the community were allowed to pose questions to the parties involved in the dispute.[111] This enhances public confidence in the justice system because the members of the general public are not reduced to mere spectators. Thus the right to open justice was implemented in different nations across the world even during the mediaeval period. This shows that it is an essential principle. Therefore it becomes plausible to state that one of the main reasons for the origins and development of the open justice principle was to enhance public confidence in the justice system itself.

2 4 Cluster of Rights Constituting Open Justice

2 4 1 Freedom of Expression

The open justice principle is inextricably linked to one of the most essential and internationally acclaimed Constitutional rights, namely the right to freedom of expression. Free expression has received recognition and considerable protection worldwide because freedom of expression "lies at the heart of any democracy."[112] Freedom of expression has also been described as, "the lifeblood democracy."[113] Thus the absence of free expression

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[110] Ngcobo CJ "The Media and Open Justice" http;//www.mediaclubssouthafrica.com/images/stories/febuary 2010/Chief_Justice_Justice_Sandile_Ngcobo_Speech.pdf2010 (accessed 25-03-2016). This is an extract from a speech made by Chief Sandile Ngcobo to the South African Editors forum. (Hereafter "The Media and Open Justice").

[111] South African Law Commission "Traditional Courts and the judicial function of Traditional Leaders" www.justice.za/salrc/dpapers/dp82-prj90-tradl-1999.pdf. (accessed 25-02-2016).

[112] *Khumalo v Holomisa* 2002 5 SA 401 (CC).

[113] Martin *Haperland: The Politics of control* (2010). This book enunciates the importance of freedom of expression as well as access to information as illustrated by Former Prime Minister of Canada Stephen Joseph Harper. It highlights the role that access to information plays in informing the public about

compromises the existence of a democracy. It is the free flow of information and ideas that facilitates democracy. The right to freedom of expression is one of the most essential human rights because it facilitates the enjoyment of other rights including the right to open justice. Cardozo captured the essence of this view by stating that, "Freedom of thought and speech…is the matrix, the indispensable condition of the enjoyment of nearly every other form of freedom."[114] However there are various controversies surrounding this right. According to Marcus, freedom of expression is not absolute.[115] Thus freedom of expression requires the courts to balance various competing interests because the right to freedom of expression has the potential to impinge on the right to privacy, dignity and national security.

Various International Instruments protect the right to freedom of expression. According to Article 19 of the International Covenant on Civil and Political Rights, "the right to freedom of expression includes freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers either orally, in writing or in print, in the form of art or through any other media of his choice."[116] Article 19 of the Universal Declaration on Human Rights also provides for the right to freedom of expression. Various Regional instruments equally protect the right to freedom of expression. The African Charter on Human and Peoples' Rights also protects the Right to freedom of expression.[117] In Article 9, the African Charter on Human and Peoples' Rights firstly provides for the right of access to information.[118] Secondly it states that every individual shall have the right to express and disseminate his opinions and views.[119] This shows that at the interface of freedom of expression and open justice, there is an essential value, namely the right of access to information. The Declaration of Principles on Freedom of Expression in Africa provides for the right to freedom of expression.[120] It links freedom of expression with the right of access to information.[121] Secondly it enunciates that freedom of expression entails the right to seek, receive and impart information and ideas.

governmental policies and programs thereby ensuring that citizens make informed decisions. Freedom of expression also leads to the exposition of incompetent and corrupt governments.

[114] *Palko v Connecticut* 302 US 329.

[115] Marcus "Freedom of Expression under the Constitution"1994 *SAJHR* 140 141.

[116] Art 19 of the International Covenant on Civil and Political Rights. See also Art 19 of the Universal Declaration of Rights which states that. "Everyone has the right to freedom of opinion and expression, this includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers."

[117] Article 9 of the African Charter for Human and People's Rights states that, Every individual shall have the right to receive information. It also states that everyone shall have the right to express and disseminate his opinions within the law. This provision seems to suggest that each country has the discretion to enact relevant laws which govern the dissemination of information.

[118] African (Banjul) Charter on Human and People's Rights (1981).

[119] ACHPR.

[120] Declaration of Principles on Freedom of Expression in Africa (2002).

[121] Articles 1 and 11.

Lastly it reinforces the rule of law by prohibiting the arbitrary curtailment of free expression.[122] Thus the right to freedom of expression is the cornerstone of our democracy as evidenced by its application in the African Charter on Democracy, Elections and Good Governance of 2007.

Freedom of expression is enshrined in both the South African and Zimbabwean Constitution. The right to freedom of expression is contained in sections 61 and 16 of the Zimbabwean and South African Constitutions respectively. Section 61 of the Zimbabwean Constitution states that,

> (1) Every person has the right to freedom of expression, which includes-
> (a) Freedom to seek, receive and communicate ideas and other information
> (b) Freedom of artistic expression and scientific research and creativity; and
> (c) Academic freedom
> Every person is entitled to freedom of the media, which freedom includes protection of the confidentiality of journalist sources of information.[123]

This demonstrates that in this Constitutional dispensation the right to freedom of expression should be safeguarded as an essential value which facilitates the achievement of democracy. Zimbabwe has adopted a new Constitution and consequently the right to freedom of expression is now expressly guaranteed. This is different from the previous position in which citizens were hindered from enjoying the right to freedom of expression by a list of unnecessary exceptions and conditions.

2 5 The Role of the Media: Facilitating Justice

It is interesting to note that the right to freedom of expression in both South Africa and Zimbabwe also includes the right of the media to report. The role of the media in upholding human rights and facilitating democracy should not be undermined. The media has the right to impart and receive information.[124] Consequently it is the role of the media to access matters of public interest and impart any relevant information to the public. In most prominent cases the general public cannot afford to attend all court sessions or visit public bodies for information. In this modern age there is a reliance on the media to summarise court cases and ensure that the public is aware of any matters of public interest.

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[122] Article 1V.
[123] S 61 of the 2013 Constitution. See also s 16 of the 1996 Constitution
[124] S 61 of the 2013 Constitution. See also s 16 of the 1996 Constitution.

There are various ways in which the media enhances access to justice.[125] Ngcobo CJ in his speech to the South African National Editors Forum highlighted various factors that may hinder vulnerable citizens from attaining justice.[126] These factors include lack of sufficient funds to hire legal counsel, the distance factor especially in rural areas where they may be far from courts and also lack of understanding of the complexities of the legal process.[127] In as much as the media would be unable to deal with these issues effectively since it is the mandate of the judicial system to do so. The media can also play a vital role in ensuring that there is access to justice.

The informative function of the media facilitates access to courts and also justice. The media creates awareness on the legal rights and remedies in a way which is easy for the ordinary individual to understand.[128] Ngcobo CJ enunciated that the media does not only facilitate democracy by informing the public on crucial matters. It also creates awareness on the people's rights and ensures that the people are aware of ways in which they can enforce such rights.[129] Burns concurs with this view but articulates if differently. Burns submits that the media provides an individual with vast amounts of information which assist the individual in his search for self-fulfilment.[130] Thus the media's informative and educative function facilitates access to justice, especially in cases involving the marginalised and vulnerable groups in society. When the media reports on court cases, a simple method of imparting information is adopted thereby creating awareness on one's rights and remedies which are available once that right is breached. The media also provides a platform for the public to present their remarks and opinions on matters of public interest.[131] This creates a platform for different individuals to present their thoughts and ideas and it also enables policy makers and legislatures to implement new policies if necessary. Thus the media promotes public participation in matters that affect human rights.

[125] Constitution, s 34 contains the right of access to courts.
[126] Sections 88 and 11 of the Constitution. Justice should be equally accessible to all individuals, especially the marginalized and oppressed groups in society such as women, children and the poor. The South African Constitution provides that everyone is equal before the law and has the right to equal protection and benefit from the law.
[127] Ngcobo CJ "The Media and Open Justice."
[128] Ngcobo CJ "The Media and Open Justice."
[129] Ngcobo CJ "The Media and Open Justice."
[130] Burns *Communications Law* (2009) 356-367.
[131] Burns 356-367.

It is generally accepted that the media also acts as a watchdog over the three branches of government namely, the executive, the legislature and the judiciary.[132] Corruption of government officials, human rights violations which include the unnecessary use of force by public officials and also incompetence of public officials are all matters of public interest which can be exposed by the media. In that respect, the media enhances accountability in the administration of justice. Unlimited powers can result in the gross violation of human rights thus the media curtails the arbitrary use of power by watching over the three most powerful organs of state. Consequently freedom of the press, free flow of information and the free flow of information are afforded considerable protection in democratic countries such as South Africa and hopefully Zimbabwe since there is a new Constitution. Thus it becomes plausible to state that the media plays a vital role in the administration of justice and also in the protection of human rights. The right to freedom of expression and also freedom of the press is important to safeguard democracy and the rule of law. Thus it is essential for one to understand that freedom of expression is a fundamental value. Consequently this research will analyse the various theories underlying the right to freedom of expression and open justice.

2 6 Theoretical Foundation of the Right to Freedom of expression and open justice

There are various theories surrounding the right to freedom of expression. However this chapter will only focus on the theories which relate to open justice as well. This is due to the fact that freedom of expression and open justice are two closely intertwined principles. They have a symbiotic relationship and both facilitate the achievement of democracy. As Lord Bridge observed in the case of *Attorney-General v Guardian Newspapers*, "freedom of information and expression is always the first casualty under a utilitarian regime."[133] A totalitarian regime would seek to hinder the free flow of information and this would inevitably extend to the arbitrary curtailment of all rights which necessitate openness and accountability. Therefore the first theory that will be dealt with is the argument from truth theory. The marketplace of ideas theory originated as a direct consequence of this theory. Thus it is essential to explore this concept.

[132] *Holomisa v Argus Newspapers Ltd* 1996 6 BCLR 836 (W).
[133] *Attorney-General v Guardian Newspaper Ltd (NO2)* 1990 1 AC 109.

2 6 1 The Argument from Truth Theory

The argument from truth theory is one of the foundational theories surrounding the right to freedom of expression. John Milton initially advanced the Argument from truth theory in his speech for the liberty of unlicensed printing before the English Parliament in 1644. In his theory he envisioned both truth and falsehood struggling for recognition in an open society. This theory places emphasis on the ability of an individual to distinguish between truth and falsehood. The theory was later developed by John Stuart Mill who established that the arbitrary curtailment of free speech was unjust because it is through the collusion of different opinions that the truth finally emerges.[134] John Stuart Mill argued that even in situations where the power of government is supported by the majority of its citizens, that power should not be utilized as a tool for the suppression of a few dissenting opinions.[135] The realization of truth can be hindered by the repressive policies of some dictators who restrict the free flow of information. John Stuart Mill further stated that the free flow of information assists in the pursuit for truth. He argued that the arguments advanced by the dissenting minority may still contain some truth. Therefore majority opinion does not necessarily constitute the truth.[136] Ideally, there should be a variety of dissenting opinions and contradictory arguments so that one may have a broader understanding of the truth. This access to information is essential to this theory. This is due to the fact that individuals should have access to different arguments before they can reach a conclusion. The right of access to information will be dealt with in this chapter.

The argument from truth theory was later developed by Justice Holmes in the case of *Abrams v US*[137] in which he advanced that each individual must be free to express his ideas. This has been termed as the market place of ideas theory. In the case of *New York Times Co v Sullivan* the court referred to the marketplace of ideas as the unrestricted exchange of ideas and also, "...faith in the power of reason as applied through public debate."[138] Consequently the argument which is true is likely to be accepted in the competition of the market. The theory depends on the ability of the individual to discern truth from lies. Thus all ideas are placed on the market and it is envisaged that the argument which contains the truth will be accepted

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[134] Nicol *et al Media Law and Human Rights* (2001) 2-3. This argument has been attributed to the works of Milton. *"Areopagitica: A speech for the Liberty of Unlicenced Printing."* (1644).
[135] Nicole *et al* 2-3.
[136] Mill *On Liberty* (1644) 230-260.
[137] *Abrams v US* 250 US (1919) 616-630.
[138] *New York Times Co v Sullivan* 376 US 254 1964 269- 270.

while the weak arguments are rejected. Hence the marketplace of ideas theory argues that the best test for truth is its ability to be approved in the competition of the market.[139]

This theory encourages free speech in order to expose individuals to a variety of adverse perspectives and opinions with the belief that the truth will inevitably gain acceptance in the competition of the market. The continuous collusion of dissenting opinions also ensures that the truth does not turn into dogmatic beliefs which lack substance and which are not susceptible to change.[140] John Milton also advances that despite the truth inherent in a particular concept or argument, if it is not subjected to criticism and inspection there is a risk that it will become more of a dogma than, "a living truth."[141] Thus the on-going exchange of ideas assists in ensuring that the information obtained is current and relatively true in a developing society. However free speech can be limited to protect the values of public interest, national security and privacy. The marketplace of ideas theory is not exempt from criticism. Barker named a factor which would impede the marketplace of ideas theory from working efficiently. The poor and marginalised may not have access to the information which is essential for them to make informed decisions.[142] Thus governments should ensure that access to information is enhanced especially in poor communities.

2 6 2 The theory of Democratic Self-Governance

The theory of self-governance enunciates the difficulties that are inherent in selecting leaders without an in-depth knowledge and understanding of the nature of their policies and goals for the nation. Thus the theory encourages free speech and public debate on matters of public interest in relation to politics.[143] This theory was advanced by Alexander Micklejohn. It includes artistic expression, literary works and scientific forms of expression as means that can facilitate the achievement of democracy.[144] The relationship between artistic expression and democracy was articulated in the *Zuma* spear painting case.

Freedom of expression can be viewed as a guard against the arbitrary abuse of power and also a means to be free from totalitarian control. It enhances the accountability of state bodies by

[139] *New York Times Co v Sullivan* 376 US 254 1964 269- 270.
[140] Habermas *The theory of Communicative Action* (1984) 96. See also Marcus 1994 *SAJHR*141.
[141] Milton *On Liberty* (1859) 230-231.
[142] Burchell *Personality Rights and Freedom of Expression: The modern Actio Injuriarum* (1998) 14.
[143] Micklejohn *Free Speech and Its Relation to Self-Government* (1948) 39.
[144] Micklejohn *The First Amendment Is an Absolute* (1961) 245. See also The Zuma spear painting case.

exposing corruption and other unethical activities by state officials.[145] Thus free speech enhances the accountability of the state. When various atrocities are exposed by the media, while the public is not restricted from commenting on these atrocities, rights will be likely to be afforded more protection in future. Accordingly Nicol *et al* concur that freedom of expression is central to the achievement of democracy and the protection of human rights.[146]

Freedom of expression also enables the citizens to comprehend issues of political concern so that they participate meaningfully in a democratic process.[147] In the case of *New York Times v Sullivan* the court held that government interference in matters involving public criticism of government officials was unpalatable.[148] Thus citizens should be free to discuss issues of public interests such as corruption and incompetence of public officials. However in Zimbabwe the Official Secrets Act was enacted to prohibit government employees from disclosing information acquired in the course of employment, this is evidenced by the secrecy clause contained in section 4 (1) (c) of the Act.[149] This could have the effect of covering corruption and mismanagement of top government officials.

Baker advances two theories on the demo[illegible]ss. Firstly he argues that free debate on issues of public interest will further democracy.[150] Secondly he argues that freedom of speech is integral to self-governance. Thus free speech is mandatory whether the progression of free debate results in the achievement of truth or not. Thus Baker enunciates the nature of the relationship between freedom of expression and the achievement of democracy.

2 6 3 The Self Fulfilment theory

This theory asserts that freedom of expression contributes immensely to the self-realisation of the individual.[151] Freedom of expression serves as an essential tool which guarantees the self-realization of the individual. Ideally, every individual deserves adequate protection from unnecessary intervention in order to express his or her thoughts while free form coercion and other threats.[152] Accordingly the theory of self-realization illustrates the symbiotic

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[145] Vollenhoven "The Right to Freedom of Expression: The Mother of our democracy" http://www.scielo.org.za/scielo.php?script=sci_arttext&pid=S1727-37812015000600009 (accessed 03-04-2016).
[146] Nicol et al *Media Law and Human Rights* (2001) 3.
[147] Nicol et al *Media Law and Human Rights* (2001) 3.
[148] 376 US 254 1964.
[149] Chapter 11:09.
[150] Baker *The image of man: A Study of the idea of human dignity in Classical antiquity, theMiddle Ages and the Renaissance* (1961). (Hereafter "The Image of Man").
[151] Emerson "Toward a General Theory of the First Amendment" 1963 Yale Law Journal 877 879.
[152] Alfredsson and Eide The Universal Declaration of Human Rights (1999) 394.

relationship which exists between freedom of speech and the self-development of the individual. In that respect Burns advanced that the individual person has the right to develop his or her intellectual capacity as well as the right to express his ideas and opinions.[153] Therefore unwarranted restrictions on what an individual is permitted to read, hear, say or write impedes the development of his personality.[154] The theory of self-realization shows the relationship between the enjoyment of free speech and the achievement of human dignity. Most individuals have an inherent desire to communicate and contribute liberally to discussion and debate. Therefore the arbitrary curtailment of the person's desire to contribute his ideas is injurious to his human dignity.

One of the advantages of freedom of expression and self-realization is that it promotes self-growth and enhances social stability.[155] The idea that free expression enhances social stability was explored in the case of *Re Munhumeso*.[156] The case analysed the adverse effect of unjust laws which limit freedom of expression. The arbitrary curtailment of free expression could result in societal unrest. The case of *Retrofit* found that the furtherance of free expression promotes stability in society.[157] It enables individuals to adapt to changing circumstances.[158] This means that when an individual is exposed to different kinds of information and also allowed to express himself freely there is a sense of self-fulfilment within that individual. Consequently social stability is enhanced because there is a minimal level of resentment and societal unrest. Thus an individual should not be hindered from expressing his or her opinion in a democratic society.

The theory of self-fulfilment argues that free speech is an essential part of each person's right to self-development. Thus the ultimate objective is the realisation of one's personality and potential. Burns argues that the goal of self-fulfilment is to develop one's personality while forming opinions and being able to fulfil them.[159] Thus self-realisation is accomplished by the unfettered right to express one's thoughts and feelings. Barendt asserts that the unwarranted

[153] Burns 39.
[154] Brandedt *Freedom of Speech* (1985) 8.
[155] Baker *The Image of Man.*
[156] *Re Munhumeso* 1995 2 ZLR 199 (SC). See also *Retrofit* 1 SA 551 (SC).
[157] Retrofit Pvt Ltd v PTC 1995 2 ZLR 199.

[158] Retrofit 1995 2 ZLR 199.
[159] Burns 39.

censorship of reading material and other forms of media limits the growth of human personality.[160]

The protection of free speech is controversial. Especially in instances whereby the theory of self- fulfilment is advanced as a justification for free speech.[161] This raises a myriad of philosophical questions. Thus one would be inclined to question the reason why freedom of speech is internationally acclaimed and afforded adequate protection instead of other rights which may seem equally important. First it should be noted that there is no right which is superior to the other. However free speech is important due to the fact that it enjoys a symbiotic relationship with the value of liberty.[162] Greenawalt describes free speech as a liberty against the state.[163] It controls the potentially unlimited power of the state to control human personalities. However the application of the theory of self-realization is problematic. This is due to the fact that certain categories of rights may seem like freedom of expression whereas in reality that will not be the case. One may wonder whether the freedom to advertise goods or make donations to political parties constitute freedom of expression. In the case of *Retrofit* the court looked at the facts of the case and established that the application was motivated by commercial self-interest and not the desire to vindicate the right to freedom of expression.[164] One needs to establish whether the activities are connected to the intellectual or moral development of the individual. If they are not connected to the above values then they cannot be protected as free expression.

2 7 Access to Information

Access to information is a constitutional value which underlies the right to open justice. There are various regional and International legal frameworks which provide for access to information. Notably, access to information and freedom of expression are two intricately linked principles which facilitate the achievement of democracy.[165] This is due to the fact that the right to freedom of expression confers the right to receive and impart information on an

[160]Barendt *Freedom of Speech* (1985) 21-23.
[161]Greenawalt Speech, *Crime and the use of Language* (1989) 15.
[162] Greenawalt 15.
[163]Greenawalt 27.
[164] 1995 2 199.
[165] Principles 1 and 2 of the Declaration of Principles on Freedom of Expression in Africa state that freedom of expression and information forms a, "Fundamental and inalienable right and an indispensable component of democracy." Thus, "Everyone shall have an equal opportunity to exercise the right to freedom of expression and to access information without discrimination." See also Art 2(10) of The African Charter on Democracy Elections and Good Governance which seeks to, "promote the establishment of the necessary conditions to foster citizen participation, transparency, access to information, freedom of the press and accountability in the management of public affairs."

individual. It is the right to receive information which forms an inseparable component of the right to freedom of expression. The right of access to information enhances public participation in governmental policies and decisions, enhances the accountability of the state and also creates awareness on rights and remedies which are available when the rights are breached. The right of access to information facilitates democracy. Thus this chapter will discuss the right of access to information in Zimbabwe and South Africa.

2 7 1 Access to Information in Zimbabwe

In this democratic dispensation, access to information has become an indispensable component for the fulfilment of democracy. Zimbabwe is one of the nascent democracies which have participated in ensuring that the right of access to information is realized at national level. There are several International and regional instruments which have been ratified by Zimbabwe to enable its citizens to enjoy the right of access to information. By virtue of signing these instruments, the government of Zimbabwe acquired a legal obligation to guarantee and safeguard the right of access to information in Zimbabwe. For instance Article 19 of the Universal Declaration of Human Rights and Article 19 of the International Covenant on Civil and Political Rights are both International Instruments which provide for the right of access to Information.[166] Article 9 of the African Charter on Human and Peoples' Rights merely states that, "Every individual shall have the right to receive information." Zimbabwe ratified these instruments hence there is an obligation to give effect to the right to access information in Zimbabwe. Section 45 of the 2013 Constitution of Zimbabwe requires the judiciary to take into account international law as well as all treaties and conventions to which Zimbabwe is a party. This shows that Zimbabwe has an obligation to promote, protect and fulfil the rights contained in all international instruments to which it is a party.

The right of access to information is beneficial because it enhances the enjoyment of democratic values. The World Bank noted that access to information is a fundamental element of the four key elements of empowerment and poverty reduction. It effectively facilitates a participatory democracy whereby citizens are aware of the governmental policies and decisions before they participate in governmental activities and it ensures that state parties are held accountable for their actions.[167] Thus access to information enhances

[166] Art 19 of the UDHR. See also Art 19 of the ICCPR. Zimbabwe ratified both these instruments. Thus Zimbabwe has the mandate to fulfil the obligation of providing access to information in Zimbabwe.

[167] The World Bank "Empowerment and Poverty Reduction: A Sourcebook" http;//documents.worldbank.org/curated/en/827431468765280211 (accessed 05-04-2015).

accountability and participatory democracies. The United Nations concurred with the above position. The United Nations Development Programme: Human Development Report[168] argued that access to information enhances the ability of the poor and marginalized to organise themselves for collective action and to influence the decisions which impact on their livelihood. Thus the right of access to information facilitates the achievement of human rights by creating awareness on human rights and available remedies in the event that such rights are infringed. Therefore the deprivation of information results in lack of accountability on the part of government officials, citizen's inability to fully appreciate and participate in governmental policies and also the inability to take part in class action in order to evoke the available remedies in cases whereby fundamental rights have been breached. Hence the right of access to information is inextricably linked to democracy. Access to information is not the end; however it is the means through which the values of good governance and democratisation can be achieved.

State parties have an obligation to enact legislation which facilitates the enjoyment of human rights. Article 9 of the African Charter on Human and Peoples' Rights requires states to promulgate legislation which deals with access to information. However one would be inclined to wonder whether this would be an effective way of ensuring that citizens of a state are afforded the right to information. This is due to the fact that in nascent democracies such as Zimbabwe, there is an adjacent relationship between state power and information in general. Martin describes the situation as follows, "...by becoming increasingly enigmatic the...regime strutted the stage, tolerating neither opposition nor dissent, emasculating the courts, cowing the press, stifling the Universities and demanding servility."[169] Thus for most governments the free dissemination of different kinds of information is an immediate threat because some of the information would alert citizens on the corruption, incompetence and other unpalatable activities of government officials. Zimbabwe is not an exception.

2 7 2 Access to Information during the Pre-Constitutional Era

In order to promote access to information in Zimbabwe, the Promotion of Access to Information Act was enacted in 2002. The Act was enacted as a means to provide individuals with the right to access information held by public bodies as stated in its Preamble. Nevertheless the Access to Information and Privacy Act [Chapter 10:27] has been criticised

[168]UNDP Human Development Report "Empowerment and Poverty Reduction" http://hdr.undp.org/en/content/empowerment-and-poverty-reduction (accessed 06-09-2015).
[169]Martin *The State of Africa: A History of Fifty Years of Independence* (2006) 378.

on the basis that it contains so many limitations and exclusions which makes the enjoyment of the right virtually impossible. The Access to Information and Privacy Act was previously operating with the Zimbabwean previous Constitution which had no right of access to information. During the pre-constitutional era section 20(1) of the Constitution of that time the right to information was applied and interpreted within the wider context of free expression. Section 20(1) provided that

> Except with his own consent or by way of parental discipline, no person shall be hindered in the enjoyment of his freedom of expression that is freedom to hold opinions and receive and impart ideas and information without interference and freedom from interference with his correspondence.[170]

Thus there was no express provision which guaranteed and protected the right to freedom of expression in Zimbabwe before 2013. In the case of *Matabeleland Zambezi Water Trust v Zimbabwe Newspapers (1980) Limited and the Editor of the Chronicle* it was held that section 20(1) did not include instances whereby an individual could approach and request for information held by another party.[171] Thus the previous section did not provide for the right of access to information held by a third party. It was held that the onus was on the party requesting the information to prove that he/she had a right to access such information.

The case of *Zimbabwe Lawyers for Human Rights and the Legal Resources Foundation v The President of the Republic of Zimbabwe and the Attorney General*[172] established that rights which are contained in the Constitution are not absolute and thus they are subject to limitation. It was stated that limitations on human rights include public interest and also the rights and freedoms of other persons. The facts of the case are as follows. The Government was requested to grant public access to the Dumbutshena Commission Report on the Matabeleland massacres popularly known as *Gukurahundi*[173] which occurred in the early 1980's. The government reiterated that the Commission of Enquiry Act did not impose an obligation on it to publish the report. It argued that the findings and recommendations were exclusively for governmental use and there was no legal responsibility to divulge the findings. In enforcing its argument the government cited section 31 of the Constitution which prohibited the court from enquiring into the manner in which the President had exercised his

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[170] S 20 of the 1980 Constitution 1980 Emphasis added.

[171] *Matabeleland Zambezi Water Trust v Zimbabwe Newspapers (1980) Limited and the Editor of the Chronicle* SC3/03.

[172] *Zimbabwe Lawyers for Human Rights and the Legal Resources Foundation v The President of the Republic of Zimbabwe and the Attorney General* SC 12/03.

[173] This is a massacre which is believed to have occurred soon after Independence whereby the Ndebele who are the minority in Zimbabwe were allegedly butchered by government agents.

discretion.[174] Hence the previous Constitution conferred uncontrollable power on the Executive to make decisions while minimising its accountability. The judiciary did not have power to check and balance the powers of the judiciary.

It was during this Pre- Constitutional era that contentious legislation which impacted negatively on the media and also the public in general was enacted. Laws that limited public engagement and local organisation were enacted to ensure that the government could control the dissemination of information. The Public Order and Security Act [Chapter 11:17]. The Official Secrets Act [Chapter 11:09] was also enacted. The Official Secrets Act has the effect of creating a system of secrecy thereby hiding corruption, incompetence and other malpractices by government officials effectively.

2 7 3 The Access to Information and Protection of Privacy Act

The Promotion of Access to Information and Protection of Privacy Act, herein after referred to as AIPPA was promulgated in 2002. Ironically it was enacted the same year that the 32nd Ordinary session of the African Commission on Human and People's Rights held in Banjul, the Gambia resulted in the adoption of the Declaration of Principles on Freedom of Expression in Africa. The Declaration of Principles of Freedom of Expression notes *inter alia* that, public bodies do not hold information for themselves but as custodians of the public good and everyone has the right to access this information subject to clearly defined rules established by law. Similarly the Commonwealth Human Rights initiative confirmed that there are two key requirements which facilitate the provision of access to information. Firstly there should be a right of the public to request access to information and on the other hand there should be a duty on the government to meet this request. Secondly the government has a duty to provide certain fundamental information even where there was no specific request for such information.[175]

AIPPA was enacted to give effect to the right of access to information. However various scholars criticised this Act on the basis that it is not effective in enabling citizens to acquire the relevant information. Most legal scholars and policy makers agree that all rights are not absolute and that they can be subject to limitation. However the rights enshrined in Access

[174] S 31 of the 1980 Constitution 1980.

[175] Commonwealth Human Rights initiative "The Right to Information: Strengthening Democracy and Development"http://www.humanrightsinitiative.org/programs/ai/rti/articles/RTI%20Paper%20-%202005%20Ombuds%20Conf.pdf. (accessed 06-09-2016). However it should be noted that Zimbabwe is no longer a member of the commonwealth.

to Information and Protection of Privacy Act are furnished by so many exceptions and exclusions that the enjoyment of the right became difficult. This is particularly reflected in Part 111 of the Act.[176] For instance section 9(4) gives three reasons upon which the head of a public body can refuse to grant a request for information.

(1) If the result contravenes AIPPA
(2) Were disclosure will result in exposing personal information protected under part III of AIPPA
(3) If it is not in the public interest to grant disclosure of such requested information.

The Act does not offer an exact definition of public interest. Consequently this ambiguity could be utilised to deny citizens their right of access to information. Additionally Part III protects the deliberations of the cabinet, local government and respective committees from public disclosure, unless the deliberations were made in the presence of members of the public, [177] and in the case of deliberations that have been on record for twenty five years or more.[178] The Act also protects information relating to intergovernmental to intergovernmental relations,[179] and the financial and economic interests of a public body or state[180] as well as information that impacts on national security.[181] AIPPA has also been criticised on the basis that it does not provide for the right of access to information which is held by private bodies regardless of the fact that some formerly public entities in Zimbabwe have been privatised.[182] Since these are relatively large entities, matters relating to their financial exploits should qualify to be deemed as matters of public interest.

2 7 4 Access to Information in the Constitutional Era (Post 2013)

In 2013, Zimbabwe adopted a new Constitution thereby putting an end to many years of upheaval, ignorance and injustice. The 2013 Constitution of Zimbabwe provides for the right of access to information. Section 62 provides that,

(1) Every Zimbabwean citizen or Permanent resident, including juristic persons and the media, has the right to any information held by the state or by any institution or agency of government at every level, in so far as the information is required in the interests of public accountability.
(2) Every person, including the Zimbabwean media, has the right of access to any information held by any persons, including the state, in so far as the information is required for the exercise or protection of a right.

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[176] Act 1 of 2002 Chapter 10:27. (Hereafter referred to as AIPPA).
[177] S 14 (5) of AIPPA.
[178] S 14 (3) of AIPPA.
[179] S 18 of AIPPA.
[180] S 19 of AIPPA.
[181] S 17 of AIPPA.
[182] The Cotton Company of Zimbabwe and the Dairy Marketing Board of Zimbabwe are both private entities which were formerly public entities. Their financial endeavours are matters of public interest because their economic and financial exploits can affect the lives of Zimbabweans either positively or negatively.

(3) Every Person has the right to the correction of information, or the deletion of untrue, erroneous or, misleading information, which is held by the state or any institution or agency of the government at any level, and which relates to that person.
(4) Legislation must be enacted to give effect to this right, but may restrict access to information in the interests of defence, public security or professional confidentiality, to the extent that the restriction is fair, reasonable, necessary and justifiable in a democratic society based on openness, justice, human dignity, equality and freedom.

The Access to Information and Protection of Privacy Act is unlikely to survive Constitutional scrutiny. The provisions of the current 2013 Constitution expressly provide for the right of access to information, including the information that is held by private bodies.

2 8 Access to Information in South Africa

Unlike Zimbabwe, South Africa adopted a transformative Constitution soon after independence. This enabled the state to refrain from continuing to implement the apartheid policies which were both repressive and secretive in nature. However as a nascent democracy South Africa is still in the process of achieving the objectives that seek to erase the injustices of the past.[183] One of the methods that were implemented to curtail the potentially unlimited power of the government to repress its citizens is the Promotion of Access to Information Act. This Act enhances openness and subsequently the rule of law. It also promotes transparency. Access to information is a fundamental component of the open justice system justice principle because it enhances openness. Consequently the state branches namely the executive, the legislature and the judiciary are subjected to public scrutiny thereby improving their accountability and also justifiably limiting their power to discharge their powers arbitrarily.[184]

The Constitution of South Africa safeguards the right of access to information.[185] The Promotion of Access to Information Act was subsequently passed to give effect to the right of access to information. The Promotion of Access to Information Act enables an individual to

[183] McKinley "The State of Access to Information in South Africa.
www.humanrightsinitiative,org/.../southafrica/McKinley%20%F01%2... (accessed 20-05-2015). McKinley draws a link amongst values such as the right of access to information, democratic accountability and transparency. He goes on to compare those values with the secretive and unresponsive culture in both public and private bodies during apartheid were there was the unpalatable abuse of power and massive human rights violations (Henceforth "The State of Access to Information in South Africa").

[184] The three arms of government namely the executive, the legislature and the judiciary wield excessive powers which can be used to violate human rights and repress freedom of expression. Thus access to information regarding the policies and activities of these three arms of government is essential to enhance judicial accountability. An example of the abuse of state power would be the secretive laws that were enacted and implemented during apartheid. Thus access to information, (open justice) is essential to ensure that these governmental departments are held accountable for their actions.

[185] S32 of the 1996 Constitution.

gain access to information which is held by the state or another individual which is necessary for the exercise or protection of any rights. Thus the Promotion of Access to Information Act is an essential legislative piece which safeguards individuals from the arbitrary abuse of power thereby protecting human rights. The Promotion of Access to Information Act also provides for the Human Rights Commission and requires it to assess, monitor and implement various facets of the legislation.[186] One would argue that the Promotion of Access to Information Act is the solution to the achievement of a democracy based on openness, transparency and the rule of law. However various criticisms have been brought forward regarding the contents of this legislation.

According to McKinley, the Promotion of Access to Information Act limits the right of access to information in a way which is contrary to the Constitution.[187] This is due to the fact that it provides for the right of access to records only, to the detriment of all other types of information which are not contained in records.[188] This is contrary to section 32 of the Constitution which provides for the right of access to information held by both private and public bodies. Moreover section 27 of the Promotion of Access to Information Act also provides that if any officer who has the duty to supply information fails to give a decision within the prescribed 30 days then such a request is deemed to have been refused.[189] This is a loophole because a public official who is in possession of vital information can simply ignore a request until the 30 day period passes. This is contrary to the main objectives of PAIA which is, "To promote transparency, accountability and effective governance of all public and private bodies."[190] The officials should not be given the mandate to refuse to acknowledge a request in instances whereby the rights of individuals are at stake.

The Promotion of Access to information Act also sets out the grounds for refusal whenever there is a request for information in both public and private entities.[191] Commercial information is one of the types of information that are protected from disclosure. This poses various problems especially with regard to large entities which may possess information

[186] ss83 and 84 of the PAIA. However this has been criticised on the basis that the crucial functions of the Human Rights Commission are dependent on the government. See s85 of the Act under discussion. In order to be effective the work and functions of the Human Rights Commission should be independent from the government.
[187] McKinley "The State of Access to Information in Africa."
[188] McKinley "The State of Access to Information in South Africa."
[189] S27. See also McKinley, "The State of Access to Information in South Africa."
[190] s9 of the PAIA.
[191] Ss34-45 and also ss62-69 of Zimbabwe'sAIPPA. See also s18 of the Access to Information and Protection of Privacy Act of Zimbabwe which protects information concerning the financial and economic interests of a public body or state from disclosure.

which is directly relevant to the protection of human rights. Moreover other public entities tend to be privatised in the course of business thereby leading to the anticipation that their financial and economic policies should be subjected to public scrutiny. Furthermore cabinet deliberations are exempted from disclosure. Section 12(a) provides that the Act does not apply to a record of the cabinet and its Committees. According to McKinley, "The exemption of cabinet records effectively renders the right of access to major policy decisions and processes inaccessible to the public (For example state policy on reparations.)"[192] This is contrary to the right of access to information which is held by any public body.

2 8 1 Legislation which is Contrary to the Values of PAIA

The Promotion of Access to Information Act promotes the values that underlie a system based on open justice. These include accountability, transparency and openness. However there are certain pieces of legislation that have been identified as a hindrance to the free flow of information. These include the National Archives of South Africa 1996 which presents potential problems with regards to the nature of the information which may be made available to the public. The National Archives of S[illegible] provides that only information which is more than 20 years old can be automatically dispatched to the public.

The reason for this provision is to protect privacy rights. This research highlighted earlier that there is an inevitable tension between the values of openness and privacy on the other hand. However the Promotion of Access to State Information Act does not provide for any time limits with regard to access to information.[193] This poses potential problems in cases where a decision maker is faced with a request for information which is less than 20 years old. The interests of privacy would potentially be at stake while the right of access to information would also demand protection. Thus these pieces of legislation need to be reconciled.

The Protected Disclosures Act seeks to maintain the confidentiality of an employee in both the private and public sector who would possibly have disclosed unlawful or irregular conduct by their employers or by another employee of their employer in accordance with section 9(3)(d).[194] McKinley propounds that this has the potential effect of covering important information on the conduct of an official of a public or private official.[195] Coupled with the

[192]McKinley, "The State of Access to Information in South Africa."
[193]Ss 14 and 15.
[194] Act 26 of 2000.
[195]McKinley "The State of Access to Information in South Africa."

commercial confidentiality clause in the Promotion of Access to Information Act these two Acts have the capacity to promote secrecy.

The Promotion of Equality and Unfair Discrimination Act 4 of 2000 also poses potential problems with regard to access to information and also the dissemination of information.[196] This Act was enacted specifically to give effect to section 9 of the Constitution which prohibits unfair discrimination. Section 12 of the Act prohibits the dissemination of or publication of any information that could be interpreted to demonstrate the objective to discriminate against another person. However this contradicts with the Promotion of Access to Information Act in instances whereby someone who conducts a research on discrimination disseminates the relevant information.[197] Moreover section 5 of the Promotion of Access to Information Act and section 5(2) of the Promotion of Equality and Unfair Discrimination Act of 2000 are in direct contradiction. The Promotion of Equality and Unfair Discrimination Act provides that in the event of a conflict relating to any law the provisions of this Act would apply.

Ironically the Promotion of Administrati Act 3 of 2000 also contains a provision which arbitrarily limits the right of access to information.[198] A decision to grant or reject a request for access to information under the Promotion of Access to Information Act is considered to be an administrative action and thus subject to the provisions of PAJA.[199] However the Promotion of Administrative Justice Act provides certain exceptions of acts that do not constitute administrative action. For instance it states that, "any decision taken or failure to take a decision, in terms of any provision of the Promotion of Access to Information Act"[200] This buttresses the notion in the Promotion of Access to Information that if there is no reply to a request for access to information in 30 days then the request for information is deemed to have been refused. Moreover it reduces accountability on the part of the administrator or decision maker.

Therefore the right of access to information is inextricably linked with the right to open justice. Without access to information there is secrecy and consequently the enjoyment of the right to open justice is suspended. Thus it is vital to ensure that the state implements

[196] McKinley "The State of Access to Information in South Africa."
[197] McKinley "The State of Access to Information in South Africa."
[198] S 33 of the Promotion of Administrative Justice Act 3 of 2000 gives effect to section 33 of the Bill of Rights which provides for, "the right to administrative action that is lawful, reasonable and procedurally fair."
[199] McKinley "The State of Access to Information in South Africa.
[200] S 1 (1) (h) of PAJA.

mechanisms that facilitate the free flow of information so as to facilitate a democracy. Moreover legislation which hinders the free flow of information should be invalidated, especially legislation which was utilised as a tool of oppression and authoritarianism during the apartheid era. In this new dispensation where the emphasis on the protection of human rights is absolute, it is only reasonable that oppressive legislation from the apartheid era in both South Africa and Zimbabwe should be eliminated so as to facilitate the achievement of democracy. Thus access to information is one of the essential constitutional principles which underlie the right to open justice.

2 9 Open Justice-Theoretical Underpinnings

Open justice is an essential feature of democracy and the rule of law. Therefore there are various theories surrounding the emergence and implementation of the right to open justice. The most dominant theories include that of judicial accountability, the enhancement of public confidence in the justice system and the need for transparency. All these theories justify the necessity of open justice in a democratic society. These will be discussed in more detail below.

2 91 Judicial Accountability

The foundation of the open justice principle lies in an essential Constitutional Principle which was termed by English Philosopher Jeremy Bentham as, "The English tradition of holding court proceedings in public."[201] Jeremy Bentham apprehended that it is unpalatable that the only single arm of government which the public could not elect into office should continue to exercise its functions without a measure of accountability.[202] Thus he introduced the notion of checks on the performance and conduct of judges.[203] Bentham also advanced that publicity plays a supervisory role and ensures that judges render justice efficiently and effectively thereby curtailing public accusations of incompetency on the part of the judiciary. This judicial accountability also enhances public confidence in the justice system as will be discussed in the course of this chapter. Australian and Canadian jurisprudence tends to concur with the idea that open justice enhances judicial accountability. In the Canadian case of *Scott v Scott* Lord Atkinson noted that the public trial was the, "best security" for the attainment of

[201] Wright "The Open Court; The Hallmark of Judicial Proceedings." 1947 *Can B.R.* 25.
[202] Bentham, "Bentham for the Organisation of Judicial Establishments, Compared with that of the National Assembly, with a commentary on the same" in Bowring (ed), Toit *"The Works of Jeremy Bentham."* 1843 305 see also *RaybosAustralia Pty Ltd v Jones* 1985 2 NSWR 47, 52.
[203] *RaybosAustralia Pty Ltd v Jones* 1985 2 NSWR 47, 52.

public confidence with regard to the justice system.[204] According to Milo and Stein, "Open Courtrooms foster judicial excellence and renders courts accountable and legitimate..."[205] Thus the openness of judicial proceedings enhances judicial accountability.

2 92 Public Confidence in the Justice System

The right to open justice enhances public confidence in the justice system. When court proceedings are open to the public, each interested individual is granted an opportunity to see how justice is dispensed. In the case of *Sv Shinga* it was stated that open justice boosts public confidence in the criminal justice system thereby assisting victims, the accused and the community at large in acknowledging the legitimacy of the process.[206] Warren notes that the judiciary is a peculiar arm of government in the sense that the public does not have the opportunity to vote for it.[207] This places a burden on the judiciary to exercise their functions in such a manner that guarantees public confidence in the justice system.[208] Thus open justice is a value which may have been introduced to uphold the rule of law and ensure that when justice is dispensed in the open public confidence is enhanced.

2 93 Transparency

The right to open justice also promotes transparency. In the case of *S v Mamabolo* it was stated that the right to open justice plays a critical role in ensuring that the public are aware of current events so as to facilitate debate and discussion on the conduct and efficacy of the courts.[209] Moreover openness educates the public on the policies, methods and general conduct of the judiciary so as to facilitate the participation of members of the public in issues relating to democracy.[210] Hence judicial openness enhances transparency which is an essential feature of our Constitutional democracy.[211] Thus the right to open justice is an indispensable facet of a democratic system which values accountability and transparency to its citizens.

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[204] 1913 AC 447,463 see also the Australian case of *Russel v Russel* 1976 134 CLR 495, 520 The case of *Russel v Russel* propounds the role of open justice in maintaining public confidence in the justice system and thereby ensuring that the integrity of the justice system is maintained.

[205] Milo and Stein 79.

[206] *S v Shinga (Society of Advocates Pietermaritzburg Bar as Amicus Curiae) O' Connell v S* 2007 5 BCLR 474 (CC).

[207] Warren, "Open Justice in the Technological Age."

[208] Warren, "Open Justice in the Technological Age."

[209] *S v Mamabolo* 2001 5 BCLR 449 (CC) para 29.

[210] *S v Shinga* 2007 5 BCLR 474 (CC).

[211] Constitution, s 1 (d) of the 1996 Constitution transparency, accountability and responsiveness are foundational values of a Constitutional democracy.

An illustration of the function of open justice was witnessed in the Bo Xilai trial in China. In this case one of the Chinese government officials was accused of corruption. The most significant aspect of this trial was the open approach adopted by both the Chinese government as well as the Jinan Intermediate Court. The case was live streamed on *weibo* a social network site which has been described as the Chinese equivalent of twitter.[212] Bo Xilai was subsequently handed a hefty sentence of life imprisonment.[213] Therefore open justice in this case served various functions one of which was encouraging openness and transparency as well as possibly deterring future criminal activity of this nature by government officials.

2 94 The Implementation of the Open justice system in South Africa and Zimbabwe

Due to its potential to impinge on other equally fundamental rights, the open justice principle should be applied cautiously. The court should avoid the unsystematic application of the right to open justice. The open justice principle requires a correct approach with regards to its implementation. This is due to the fact that when applying the right to open justice, caution should be taken to in order to safeguard other essential rights. This research will analyse the respective approaches that both Zimbabwe and South Africa have taken in order to restrict the open justice system from impinging on other fundamental rights and interests. These include the protection of children, victims of sexual offences, privacy and national security.

2 95 Access to Court Proceedings

It is essential to note that court proceedings are generally open to the public except for a few justifiable circumstances where the court has the discretion to restrict access.[214] In terms of the Superior Court Act the general rule is that proceedings are held in open court except in special circumstances where the court may direct otherwise.[215] Moreover proceedings in every criminal case and civil case conducted in the Magistrate Court should also be carried on in open court according to the Magistrate Court Act.[216] However the Magistrate Court Act mentions factors that may negatively impact on openness namely, good order and public morals. According to section 152 of the Criminal Procedure Act, "except where otherwise

[212]Zhang "Microblogging the Bo Xiali Trial: Transparency or theatre?" http://www.bbc.co.uk/news/world-asia-china-23806657(accessed 11-09-2016). (Henceforth "Microblogging the Bo Xiali Trial."
[213]Zhang " Microblogging the Bo Xiali Trial"
[214] Milo and Stein 80.
[215] Act 10 of 2013.
[216] Act 32 of 1944.

expressly provided by this Act, or any other law, criminal proceedings in any court shall take place in open court."[217] Thus there is a general right of access to court proceedings.

The right of access to court proceedings also applies to more specialised courts. These include the inquest courts[218], the small claims courts[219], the labour court[220], the equality courts[221], the competition tribunal[222], the land claims court[223] and the military courts.[224] An evaluation of the relevant sections would reveal that the court has discretion to decide whether a case should be heard in public or not. Moreover the interests that should be taken into account when making a decision include public order, public morals and the safety of witnesses.

One of the reasons for the closing of criminal proceedings is to protect witnesses and complainants. Section 153(2) of the Criminal Procedure Act enunciates circumstances where courts may be closed to the public in order to protect witnesses from harm especially in instances where there is a, "safety risk."[225] Protection is afforded to witnesses under the age of 18 and also to complainants in cases involving sexual offences or extortion.[226] Section 153(2) provides for the protection of witnesses by directing that the witness testify in private to the exclusion of the public. Only those persons whose presence is necessary or who are authorised by the court may attend.[227] The court may impose a reporting restriction thereby

[217] Act 51 of 1977.

[218] S 10 (1) of the Inquests Act 58 of 1959 requires that court proceedings should be held in public unless the giving of oral evidence is dispensed with. S10 (2) of the Act goes on to mention factors which could result in a need for privacy. Firstly if it appears to the judicial officer that, "it would be in the interests of the safety of any witness or of good order to the administration of justice" that the inquest be held in public, then the presiding officer, "may direct that members of the public in general or any particular category, or that particular person, shall not be present at the inquest or any part thereof."

[219] S 4 (1) and (2) of the Small Claims Court Act 61 of 1984. The court should take into account the interests of "the administration of justice or of good order or of public morals or at the request of the parties to the proceedings for reasons considered sufficient by the court, order that the proceedings shall be held behind closed doors or that specified persons shall not be present."

[220] S 160 (1) of the Labour Relations Act 66 of 1995. Subsec (2) of the same Act allows the presiding officer to exclude members of the public from attending court proceedings for similar reasons to those of the High Court.

[221] S 19 (2) of the Promotion of Equality and Unfair Discrimination Act 4 of 2000. This Acts states that all proceedings should be held in an open court unless the court dictates otherwise taking into consideration the interests of justice.

[222] S 52 (2) (a) of the Competition Act 89 of 1998.

[223] S2B of the Restitution of Land Rights Act 22 of 1994 provides for the hearings to be in open court unless the court directs otherwise.

[224] S 33 (3) of the Military Discipline Supplementary Measures Act 16 of 1999. This is a peculiar case whereby the Prosecutor may apply for the court to be closed. A court may also make an order for closure on its own accord.

[225] S153 (2) of the CPA. See also Milo and Stein 85.

[226] Milo and Stein 85.

[227] Act 51 of 1977.

limiting press freedom by restraining the press from disclosing the identity of the victim. An example is the Zuma rape trial where the identity of the victim was not disclosed.[228] However harm to the witness must be a reasonable possibility, and not a remote fantasy in order for the court to grant such a ban.[229] Thus the right to open justice can be justifiably limited to protect witnesses and complainants from harm.

Section 153(5) of the Criminal Procedure Act also offers protection to child witnesses. The Act provides that where a person under the age of eighteen is giving testimony the court may direct that no other person apart from the guardian or parent of such child may be present at the hearing.[230] The only exclusion is when the presence of such person is necessary or authorised by the court.[231] In this case there is also a reporting restriction in the unlikely event that access is granted. Section 154(3) of the Criminal Procedure Act prohibits the publication of information which reveals the identity of the child but the judicial officer has the discretion to determine whether it would be "just and equitable and in the interest of any particular person."[232]

In sexual cases as well as bribery case[illegible] further restriction on the open court principle. Section 153(3)[233] authorises the courts to close court proceedings at the request of the complainant who may be a victim of sexual crime or the common law crime of extortion. The Criminal Law (Sexual Offences and Related Matters) Amendment, Act, 2007, lists a number of sexual crimes which include rape, sexual assault, incest and statutory rape. Some of the victims of sexual crime are children, thus parents or guardians are entitled to request that the proceedings be held in camera. With regard to extortion cases there is a degree of force or cohesion required thus the victim may be afraid to testify in open court. Section 153 (3A) of the Criminal Procedure Act requires that proceedings should automatically be closed

[228] *S v Zuma* 2006 6 BCLR 790 (W) 794.
[229] *S v Madlavu* 1978 4 All SA 330 (E) 333-334 see also the case of *S v Baleka* 1986 4 All SA 428 (T) in which a former member of the ANC testified in camera due to a reasonable apprehension that his safety would be at risk.
[230] S153 (5) of the CPA 51 of 1977.
[231] S153 (5) of the CPA.
[232] S 154 (5) of the Criminal Procedure Act states that the fine for contravening the prohibition on disclosing the identity of a child is a fine and or imprisonment not exceeding five years. See also the case of *Prinsloo v Bramley Children's Home* 2005 2 SACR 2 (T). In this case where minors were victims of sexual assault as well and child pornography, Bertelsmann J commented that the accused as well as Bramley Children's Home should not have disclosed the children's names and also put a ban on further disclosure.
[233] S153 (3) of the CPA.

where a victim of sexual offences is testifying.[234] Moreover the identity of victims of sexual crimes should not be disclosed.

The Superior courts Act specifies that it will only depart from open justice in, "special cases." However what constitutes a special case is not clear. Milo and Stein advanced that special cases are those that uphold the public interest and not merely the interests of the parties.[235] In the case of *Cerebos Food Corporation Ltd v Diverse Foods SA (Pty) Ltd* it was enunciated that if the presence of the public hinders or interferes with the proper administration of justice this would constitute a special case.[236] In the case of *Prinsloo v RCP Media t/a Rapport* the court refused to return an index containing indecent photographs of the applicants in intimate positions.[237] The court declined to acknowledge this as a special case stating that,

> Intimate personal details are often disclosed in courtrooms in front of members of the public and the media. This is unfortunate for the individuals involved, but their privacy in such cases is outweighed by values such that courts in a democratic country function with transparency, so that members of the public can see that justice is being done.[238]

This shows the tension between open justice and privacy as well as the need to define more clearly what special cases are. Open justice sometimes leads to humiliation and distress on the part of the parties involved in litigation. However its purpose and role in a democratic society should not be undermined. Thus open justice can only be limited in special circumstances. However it is the court which determines what a special case is.

In the case of *Botha v Minister van Wet en Orde* there was collision between open justice and national security.[239] In this case the father of a man who had been allegedly arrested unlawfully in terms of the Internal Security Act applied for the release of his son.[240] The Minister argued that the media and the public should be excluded from the hearing because the disclosure of the material facts would interfere with police investigations. He also advanced that the case had already stirred unsolicited public interest and debate. The court held that the purpose of open courts is to arouse public interest and also public debate and speculation is central to democracy. Moreover the facts were already known to the public and could not possibly interfere with the police investigation.

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[234] Note section 335A (1) of the CPA imposes a reporting restriction which prohibits the publication of the name of a victim of a sexual offence.
[235] Milo &Stein 87.
[236] *Ltd* 1984 4 SA 149 (T) 158.
[237] *Prinsloo v RCP Media t/a Rapport* 2003 4 SA 456 (T).
[238] *Prinsloo.*
[239] *Botha v Minister van Wet en Orde* 1990 4 All SA 461 (W).
[240] S 29 of the Internal Security Act 74 of 1982. This Act did not survive Constitutional scrutiny and has been repealed.

There are however certain instances where the court will allow closure of court proceedings on the basis that the relevant case qualifies as a "special case." Milo and Stein gave an example of an *Anton Piller* application.[241] This application is not granted easily because the privacy interests of an individual are at stake.[242] Another example is a case whereby the applicant seeks to restrain the media from publishing private information. In the case of *Malema v Rampedi*, Julius Malema sought to prohibit the media from disclosing information about his finances.[243] As discussed in the previous chapter a person's financial situation is private and rarely subject to disclosure. In this case Lamont J held that the press had been excluded initially in order to give the court a chance to determine whether the issues warranted a ban on disclosure. Thereafter the court decided that the issues did not warrant a ban on disclosure thus the records were made available for all who wished to see them. Moreover the public and the press were also allowed to view the proceedings as the judgement was being handed down. There are also instances where the interests of open justice would be undermined by other equally compelling interests such as the rights of the child. Other matters in which the general right of access does not apply include the family related matters such as divorce and tax ma[244]

Criminal matters involving children are generally inaccessible to the public in terms of the Child Justice Act.[245] However the presiding officer is granted with the discretion to allow access. Section 63(5) of the Child Justice Act provides that only persons whose presence is necessary in connection with the relevant proceedings may attend the child justice court.[246] Alternatively the presiding officer may grant permission for such persons to be present. Similarly section 56 of the Children's Act restricts access to the extent that the person is performing official duties or their presence is necessary.[247] In those exceptional circumstances where the media is granted access there is a prohibition against mentioning the

[241] An Anton Piller application is an ex parte application. (This means that it is made without notice to the opposing party). See *Anton Piller KG v Manufacturing Processes Ltd* 1976 1 All ER 779 (CA). It is made in camera. The purpose of an Anton Piller application is the preservation of evidence which is required for the purposes of a trial. The applicant is required to prove three things. Firstly he is required to prove that there is a cause of action which he intends to pursue. Secondly the respondent must be in possession of certain documents or items which constitute evidence. Lastly there must be a reasonable likelihood or apprehension that the relevant evidence may be hidden or destroyed if notice is given to the opposing party. See also *Shoba v Officer Commanding* 1995 4 SA 1 (A).

[242] The Anton Piller order allows the state to search the premises of any person be it human or legal persons.

[243] *Malema v Rampedi* 2011 5 SA 631 (GSJ).

[244] Milo and Stein 89.

[245] Act 75 of 2008.

[246] S 63 (5) of the Child Justice Act.

[247] People who are performing official duties include social workers.

name of the child or sufficient particulars to enable a reasonable person to identify the child.[248]

As stated earlier section 63(5) confers discretion on the presiding officer to determine who may be present. In the case of *Media 24 v National Prosecuting Authority In re: S v Mahlangu*[249] the media sought access to the murder trial of one Eugene Terre'blanche the leader of the right wing organisation the Afrikaner Weerstandsbeweging. Interestingly one of the accused was a minor under the age of eighteen. The court stated that in exercising his discretion, the presiding officer must take into account the Constitutional values of freedom of expression[250] and Access to Information[251]. However regardless of access it was held that section 154(3) of the Criminal Procedure Act which prohibits the exposure of the identity of a child should be upheld. Thus this is a situation whereby the media was given restricted access to a case involving a minor in order to protect the interests of a child. Section 5(1) of the General Law Amendment Act provides for the accessibility or lack thereof of proceedings involving a minor.[252] This Act prohibits the publication of information such as the name, address, school or place of employment or any other information which could reveal the identity of a minor child.[253] This applies to a civil case in which a child is involved perhaps as a witness.

In domestic violence and harassment cases there is also a prohibition on attendance. Section 11(1) of the Domestic Violence Act contains a bar on access to proceedings but not to the exclusion of parties to the proceedings, witnesses and any other person whom the court allows to attend.[254] The Protection from Harassment Act[255] also provides for closed proceedings. In harassment cases the alleged perpetrator is a person whom the victim could have a reasonable fear that he might cause him or her harm.[256] However in harassment cases there is a general right of access. The public may only be excluded in circumstances where it would be in the interests of justice to do so.[257]

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[248] S74, Children's Act.
[249] *Media 24 Limited v National Prosecution Authority In re: S v Mhlangu* 2011 2 SACR 321 (GNP).
[250] S 16 of the 1996 Constitution.
[251] S 32 of the 1996 Constitution.
[252] General Law Amendment Act 68 of 1957.
[253] The penalty for a violation of this is a fine or imprisonment not exceeding three months.
[254] Act 116 of 1998.
[255] Act 17 of 2011.
[256] Milo &Stein 9.
[257] S 8 (1) (a) of the Protection from Harassment Act.

In divorce cases the general rule was that matters relating to a divorce, including the fact that a divorce is pending, the judgement or order of the court as well as any other particulars relating to the divorce action could not be published in accordance with section 12 of the Divorce Act.[258] However these provisions were subjected to Constitutional scrutiny by the case of *Johncom Media Investments Ltd v M*.[259] In this case the parties were already divorced. The former husband had been led to believe that a boy child born of their marriage was his son while he was not. Therefore the former husband sought a rescission of the divorce order and claimed damages. He also sought a ban on the publication of the divorce. In this case it was acknowledged that the Act accords protection to children as well because it provides for a prohibition of disclosure in matters involving parties who have children as well as those who do not have children. The section did not survive Constitutional scrutiny because the media was allowed to publish divorce cases without mentioning names of the parties or their minor children.

2 9 6 The Application of the Open Justice Principle in Zimbabwe

The right to a fair and public hearing is an essential component of the open justice principle. It should also be note that proper access to courts is essential in upholding the right to a fair trial. Thus section 69 of the Zimbabwean Constitution guarantees the right to a fair and public trial.[260] Similarly section 18(10) of the previous Constitution of Zimbabwe contained the right to a public trial.[261] Thus the proceedings in a court of law as well as the judgement should be pronounced in open court. This requirement that court proceedings should be accessible and open to the public is also reflected in section 49 of the High Court Act of Zimbabwe.[262] This provision contains the requirement of openness in court proceedings.

However the open court principle in Zimbabwe is more thoroughly regulated by the Courts and Adjudicating Authorities (Publicity Restriction) Act.[263] Section 3 of this Act allows the court to make an order restricting publicity either *mero motu* or on application of either party.[264] However the power to restrict publicity should be exercised parsimoniously. The restriction of publicity in order to spare the accused and his family from embarrassment is not

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[258] Act 70 of 1979.
[259] *Johncom Media Investments Ltd v M* 2009 8 BCLR 751 (CC).
[260] Constitution 2013, s69.
[261] Section 18(10) of the Zimbabwean Constitution of 1980 stated that, "... all proceedings of every court, including the announcement of the decision of the court...shall be held in public."
[262] [Chapter 7:06].
[263] [Chapter 7:04].
[264] S 3 of The High Court Act of Zimbabwe.

in accordance with the interests of justice.[265] Thus a court may only order that a trial should be held in camera where it is satisfied that it is essential or expedient to exercise such discretion in the interests of defence, public order or the economic interests of the state.

The Courts and Adjudicating Authorities (Publicity Restriction) Act permits the court to make various orders to restrict publicity. Firstly the court may order all persons or categories of persons to be excluded from the proceedings. Secondly, the court may prohibit the disclosure of the name and address and any other information which would make it easier to identify anyone mentioned in the proceedings. Thirdly the court may order that the whole or part of the proceedings should not be disclosed. However there are special extraordinary circumstances in which these orders should be given.

1. Where publicity would prejudice the interests of justice
2. In the interests of public morality
3. In the interests of the welfare of persons under the age of 18
4. To protect the lives of persons concerned in the proceedings.[266]

Thus the circumstances which warrant the reasonable and justifiable restriction of publicity are limited. This is due to the fact that t of justice dictate that there should be a balance between different competing interests. Thus this chapter will explore various other legislation which deal with the limitation of open justice through restricting publicity.

In Zimbabwe the Criminal Procedure and Evidence Amendment Act provides for the protection of victims of sexual crimes in section 319B.[267] The Act stipulates that where the victim would suffer substantial emotional stress from the giving of evidence or where they are likely to be intimidated by the accused or any other person then the court may direct that the proceedings should be held in a place whether in or out of the accused's presence which would reduce the risk of the person suffering stress or being intimidated by the other person. The court may also exclude other persons from attendance.

Moreover, in Zimbabwe matters relating to customary law are governed by the Customary Law and Local Courts Act.[268] Section 7(3) of the Customary Law and Local Courts provides that proceedings should be open to the public.[269] However it goes on to list a number of factors that may justify the closure of proceedings to the general public. These include the

[265] *R v Miller* 1969 (2) RLR 472G.
[266] S 3 of the Courts and Adjudicating Authorities (Publicity Restriction) Act [Chapter 7:04].
[267] Chapter 9:07.
[268] S 2 of the Customary Law and Local Courts Act chapter 7:05 establishes that a traditional court is a court of law.
[269] Customary Law and Local Courts Act chapter 7:05 of Zimbabwe.

welfare of minors, protection of private lives and the interests of justice or injury to another person.[270] This shows that other factors have to be taken into account before implementing the open justice system.

In Zimbabwe proceedings in which a minor is involved are not subject to public attendance in accordance with the Children's Act.[271] This is similar to the position in South Africa. Children are considered as one of the most vulnerable groups in society thus it is essential for the state to afford them protection. The interests of children deserve protection due to their vulnerability, especially in cases whereby such children have been the victims of sexual crime. Thus open justice as important as it is tends to promote openness sometimes at the expense of other rights.

One of the occurrences which expose the uncertainties inherent in the implementation of the open justice principle occurred in Zimbabwe recently. In this case four accused were on trial at a magistrates court for allegedly plotting to bomb a dairy company owned by the President's family. The issue was before the magistrate court. Two of the men are allegedly linked to the military. Consequently, the he[illegible]military applied to the High Court for the proceedings to be held in camera. The High Court granted the request. However the Magistrate openly refused to follow the order and held that the proceedings should be held openly. Magaisa regarded this as un-procedural and unlikely that a magistrate will refuse to accept the orders of a higher court. This shows the inconsistencies inherent in the implementation of the open justice principle.[272] Moreover the case was being tried by the Magistrate court and it was bizarre that the head of the military applied to the High Court for the case to be held in camera. Conversely the conduct of the Judge constituted an irregularity as well. In the case of *Nyaguwa v Gwinyai*[273] it was also held that neither the High Court nor

[270]Section 7 (3) of the Customary Law and Local Courts Act of Zimbabwe.

[271] Chapter 5:06. S5 (5) of the Children's Act of Zimbabwe states that, " No person shall publish the name, address or any other information likely to reveal the identity of any child or young person who is or has been concerned in any proceedings in a children's court." However the Act gives the presiding officer the discretion to dispense with this requirement where the relevant publication would be, "just and equitable and in the public interest." S6 goes on to state the persons who may be present at the proceedings, these include the people whose presence is necessary in connection with the proceedings, the legal representative and the parents and guardians. Thus cases involving children are generally closed to the public in Zimbabwe.

[272]Magaisa, "The Bizarre case of a Clash Between a Magistrate and a Judge." Alexmagaisa.com/tag/open-justice. (accessed 01-03-2016).

[273]*Nyaguwa v Gwinyai* 1981 ZLR 25.

any other court may overrule the decision of another court save to the extent that the power to overrule such a decision has been conferred on it by statute.[274]

The Adjudicating Authorities (Publicity Restrictions) Act provides that a court has the discretion to exclude the public or it can exclude the general public at the request of the parties.[275] In this case the military was not a party to the proceedings and this raises the question of *locus standi*. It is unclear whether the head of the military had the right to make an application for the proceedings to be held privately. Secondly the application should have been made to the magistrate court since the law confers discretion on the magistrate court to determine whether the proceedings can be held in public or not. Thus Zimbabwe is still battling with the notion of open justice.

2 10 Conclusion

In this chapter it was observed that the origins of the open justice principle should not be confined to the Western countries alone. The right to open justice was already in practice through the open court principle during [illegible] colonial era. This application of the open justice principle world-wide may be attributed to the role of the open justice principle in enhancing openness and transparency. Moreover open justice enables citizens to, "evaluate the quality of justice rendered by the courts."[276] This shows that the emergence of the open justice principle was inevitable. Thus the evidence of open justice as a worldwide practice shows how central this common law principle is to our democracy.

In this chapter it was also noted that right to open justice derives from a cluster of interrelated rights such as freedom of expression, access to courts and the right to a fair hearing. These rights are essential elements in a democratic society. The right to freedom of expression includes the right of the media to report. This is particularly important in this Constitutional dispensation as it enhances the accountability of governmental institutions. It should be noted that proper access to courts is integral for the fulfilment of the right to a fair trial.

This chapter has highlighted that the advent of technology has impacted profoundly on the nature and impact of the open justice principle on other individual rights. Due to the emergence of faster communication, it has become easier for the media to impart information

[274] *Nyaguwa v Gwinyai.*
[275] S3 of the Adjudicating Authorities (Publicity Restrictions) Act.
[276] *Home Office v Harman* 1982 1 All ER 532, 542.

to the public. Access to information is an essential element of our democracy and it gives effect to the principle of open justice. However on the other hand technology has made it more difficult for the courts to regulate media publicity effectively when dealing with sensitive matters which involve national security or perhaps vulnerable accused persons. Technology therefore plays an essential role in the need for a more advanced approach in regulating the principle of open justice so that it does not impinge on the privacy, security and fair trial rights of individuals. Thus this study has identified open justice as a venerable and deep-rooted value which requires careful implementation due to its potentially adverse nature on other individual rights. This study has observed that the implementation of the open justice system in Zimbabwe and South Africa is relatively similar with regards to obvious issues such as the rights of children as well as victims of sexual abuse. However the centrality of open justice in a democracy is a matter that Zimbabwe is still grappling with. Nevertheless there is still a chance for open justice to be utilised more effectively as a tool of enhancing democracy.

However this study has highlighted that the ideal approach that should be taken when implementing the right to open justice has not yet been ascertained. This is due to the fact that if not properly regulated, the right to open justice has the potential to affect the enjoyment of other equally essential rights. This study has therefore highlighted the issues that are inherent in implementing the right to open justice while it exists in tension with fair trial rights as well as national security considerations.

It is with these controversies in mind that Chapter 3 will deal with the impact of open justice on the accused fair trial rights. These include the fair trial rights of an accused person before an ordinary court of law as well as the rights of an asylum seeker in asylum hearings/proceedings. This chapter will expose the potential that the right to open justice has to impinge on the fair trial rights of individuals.

CHAPTER THREE

The Tension between the Right to Open Justice and the Right to a Fair trial

3 1 Introduction

> A verdict of guilty and ensuing punishment must be a product of a fair trial. The rule of law can settle for nothing less. Trial by media cannot be tolerated in a civilised society.[277]

The right to open justice is unequivocally essential to any nascent democracy. However, the ideal extent and limitation of the right to open justice has not yet been specified especially in cases where it exists in tension with the accused right to a fair hearing as well as the confidentiality of asylum proceedings. A fair hearing in the context of this chapter refers to a hearing in an ordinary court of law as well as a hearing before a refugee Board. Moreover the right of access to courts is essential in order to uphold the right to a fair hearing. Thus this chapter seeks to explore the tension between the competing interests of open justice, the right to a fair trial and the need for confidentiality in asylum applications. This Chapter is divided into two sections. Part A of this chapter s[illegible]lyse the extent to which the right to open justice in this modern era undermines the accused right to a fair trial, the presumption of innocence and the *subjudice* rule in light of two recent cases namely *Pistorius* and *Gumbura* which were tried in South Africa and Zimbabwe respectively. Part A of this chapter also proposes that the right to open justice has the potential to interfere with the impartiality of the courts. Part B of this Chapter will determine the nature and extent of the tension between the right to open justice and the need for confidentiality with regards to asylum applications. This section will also analyse legislation which impacts on open justice with regard to asylum applications. Measures that were implemented to balance the competing interests of open justice and privacy, security as well as the right to a public hearing in the case of *Chipu* will also be evaluated.

3 2 Part A The tension between the Right to Open Justice and the Accused Fair Trial rights: A Tale of Two Cases *Gumbura* and *Pistorius*.

It is imperative for one not to undermine the significance and effect of the open justice[278] principle on essential individual rights such as the accused fair trial rights.[279]

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[277] *Attorney General (NSW) v X* 2000 49 NSWLR 653 184.

In as much as the open justice principle is of fundamental value in a democracy, its potential to impinge on the rights of the accused should be taken into cognisance. If not properly regulated, the open justice principle could result in the wrongful conviction of an innocent person through a "trial by the media"[280] in which the presumption of innocence is grossly undermined.

Technology has also impacted on the right to open justice by ensuring faster and more efficient communications between the media and the public.[281] In this era of technological advancement, the term open justice has acquired a whole new meaning. Not only does the public have access to court files but it has become possible for the public to view a trial as it unfolds through the live broadcasting of trials.[282] Hence the courts are constantly plagued with circumstances in which they have to uphold the fundamental principle of open justice while ensuring that the competing interests such as the accused right to a fair trial and the presumption of innocence are not impinged.

The accused has a right to be tried by an independent and impartial tribunal. However it is not clear whether the right to open justice interferes with the impartiality of the courts. It is particularly difficult to ascertain whether the judge presiding over a case may have been prejudiced by the excessive media publicity. This is especially relevant in cases where the views of other legal experts or retired judges concerning the case, are publicised by the media. If a judge is prejudiced by such views it may result in a wrongful conviction thereby

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[278] The open justice principle has a potentially adverse effect on the accused right to a fair trial. The reasons for this assumption will be highlighted later on in the Chapter.

[279] Section 35 (3) (h) of the 1996 Constitution states that, "Every accused person has a right to a fair trial, which includes the right to be presumed innocent, to remain silent and not to testify during proceedings." The privilege against self-incrimination and the right to remain silent are a direct result of the presumption of innocence which places the burden on the prosecution to prove the accused's guilt beyond reasonable doubt. Section 69 of the Zimbabwean Constitution 2013, confers upon the accused a right to a fair hearing. Section 69 (1) of this Constitution is particularly interesting as it states that, 'Every person accused of an offence has the right to a fair and public trial within a reasonable time and before an impartial tribunal.' The public hearing is an element of the open justice principle which requires that justice should be dispensed in the open. Section 70 (1) of the 2013 Constitution, also states that an accused person has the right to be presumed innocent. Hence an essential element of the right to a fair trial is the presumption of innocence. Thus it is also vital to analyse the extent of media publicity on the accused presumption of innocence.

[280] The court, in the *Multichoice* case in which the underlying matter was the Pistorius matter, restricted excessive media publicity which would be likely to interfere with the administration of justice. The court stated that, "… the so called trial by the media inclinations cannot be in the interests of justice as required in this matter and have the potential to seriously undermine court proceedings that will soon start as well as the administration of justice in general."

[281] Warren "Open Justice in the Digital Age." https://www.monashedu/_data/assets/pdf-file/0009.../warren.pdf (accessed 01-03-2016). (Henceforth "Open Justice in the Digital Age").

[282] *Multichoice case.*

impinging on the accused's right to a fair trial. Hence the question relating to the extent and limitation of the right to open justice in view of the accused right to a fair trial is of vital importance as it relates *inter alia* with the issue of wrongful convictions. This chapter suggests that a balancing approach should be used in order to reconcile or balance the two competing interests namely, the common law principle of open justice on one hand and the accused fair trial rights on the other hand.

Hence Part A of this chapter seeks to explore the Constitutional implications of the open justice principle in relation to the fair trial rights of the accused, in the context of ordinary court proceedings. The chapter will firstly offer a general overview of the origins of both the Zimbabwean and South African Constitution in the context of the fair trial rights of accused persons. This chapter will then offer a comparative analysis of the *Gumbura*[283] and *Pistorius*[284] cases in light of the excessive media publicity that surrounded both cases. Central to these cases is the question whether an appeal on the basis of excessive media publicity is likely to succeed.

3 3 The Concept of a Fair Trial

It is essential to define the right to a fair trial in this chapter. It is equally essential to evaluate the role of fair trial rights in a democratic society in which the rights of individuals are protected. The right to a fair trial is one of the most internationally acclaimed and protected human rights.[285] A fair trial has been defined as the most effective way of separating the guilty from the innocent.[286] It enhances public confidence in the justice system.[287] The Lawyers Committee for Human Rights in America enunciated that the right to a fair trial is an International norm which serves the essential purpose of protecting citizens from the unlawful and arbitrary curtailment of their rights especially the right to life and liberty of the person.[288] This is due to the fact that if not properly administered, the justice system has the capacity to unjustly infringe on the liberty and human dignity of its citizens. Thus it is essential for every justice system to ensure that the trial of an accused person is both

[283] *Robert Martin Gumbura v The State* SC 78/2014.
[284] *Multichoice.*
[285] Article 14(1) of the International Covenant on Civil and Political Rights states that, 'everyone shall be entitled to a fair and public hearing by a competent and impartial tribunal established by law.'
[286] Fair Trials "The Right to a Fair Trial." www.fairtrials.org/about-us/the-right-to-a-fair-trial/ (accessed 11-10-2015).
[287] Fair Trials "The Right to a Fair Trial."
[288] Lawyers Committee for Human Rights "What is a Fair Trial? A Basic Guide to Legal Standards and Practice" https://www.humanrightsfirst.org/wp-content/uploads/pdf/fair-trial.pdf (accessed 12-06-2016).

procedurally and substantively fair.[289] This should be done in order to guard against the possibility of securing wrong convictions.

It is imperative for the justice system to ensure that the innocent are not wrongly convicted because this undermines the integrity of the justice system and also infringes on the liberty[290] of the accused. A criminal trial has been defined as the most effective way of separating the guilty from the innocent. Thus the right to a fair trial serves the essential purpose of ensuring that innocent people are not wrongly convicted. Article 14(2) of the International Covenant on Civil and Political Rights[291] contains the presumption of innocence. The presumption of innocence serves the purpose of ensuring that an accused should be proven guilty beyond reasonable doubt[292] before the state can convict him. Hence the presumption of innocence is an essential component of the accused's right to a fair trial. This chapter seeks to propose that pre-trial media publicity interferes with the accused's right to a fair trial.

The right to a public hearing is also inextricably linked to the right to a fair trial.[293] This is due to the fact that the right to a public hearing gives effect to the right to a fair trial. The right to a public hearing can facilitate the [illegible] of the facts in dispute in a criminal case in numerous ways. For instance, publicity could result in the obtaining of more evidence as unknown witnesses come forward so that their information can be considered thereby facilitating the resolution of the facts before court.[294] Secondly the right to a public hearing ensures that the administrators of justice in a criminal court will act fairly because of the public scrutiny surrounding a case.[295] Burd and Horan identified the role of open justice in

[289] *S v Ntuli* 1997 3 SA 772 (CC) para 1. In this case it was stated that the 1996 Constitution of South Africa imposes a burden on the South African justice system to ensure that the accused's trial is both substantively and procedurally fair.

[290] Lawyers Committee for Human Rights "What is a Fair Trial? A basic Guide to Legal Standards and Practice" https://humanrightsfirst.org/wp-content/uploads/pdf/fair-trial.pdf (accessed 11-10-2015).

[291] Article 14(2) of the International Covenant on Civil and Political Rights.

[292] Section 18 of the Criminal Law Codification and Reform Act of Zimbabwe states that, "No person shall be held to be guilty of crime in terms of this Code or any other enactment unless each essential element of the crime is proved beyond reasonable doubt." In *S v Isolano* 1985 1 62 (S) The issue regarding the difficulties of the court in precisely defining reasonable doubt was addressed. 'It was held that the degree need not reach certainty but it must carry a high degree of certainty. It was also held that proof beyond reasonable doubt does not mean proof beyond a shadow of doubt.' See also *S v Tsvangirayi* HH-169-04It was held that were doubt exists it must be resolved in favour of the accused.

[293] Article 14 of the International Covenant on Civil and Political Rights enunciates that an accused person has a right to a fair and public hearing. Section 69 of the 2013 Constitution of Zimbabwe also states that an accused person has a right to a fair and public hearing. See also Constitution s35.

[294] Howe "Publicity in Criminal Cases-Difficulty For The Trial Judge in Assessing Prejudice, Judicial Rules Governing Prejudice Assessments, Overcoming Prejudicial Publicity"law.jrank.org/pages/1894/Publicity-in-Criminal-Cases.html/. (accessed 01-03-2016). (Henceforth "Publicity in Criminal Cases- Difficulty for the Trial Judge in Assessing Prejudice").

[295] Howe "Publicity in Criminal Cases-Difficulty for the Trial Judge in Assessing Prejudice."

deterring criminal conduct.[296] Media coverage can facilitate the improvement of the justice system by exposing weaknesses in the justice system and facilitating the implementation of necessary changes.[297] Thus the right to open justice is an integral part of any justice system.

However the right to open justice as exercised by the press can pose grave problems especially in this 20th Century where open justice is no longer restricted to access to court documents only, but also entails the broadcasting of trials. Waites enunciates on the effect of technology on media law as follows,

> Until recently, the only pre-trial publicity that most trial attorneys experienced was an occasional mention of a case buried deep inside the local newspaper. With the advent of faster communications and web based news sites, news organisations find out about court trials more rapidly…Judges and jurors are often greatly affected by the information about particular situations… '[298]

Waites highlighted the issues that have inevitably resulted from technological advancement in relation to media law. The principle of open justice has acquired a whole new meaning. Consequently the fair trial rights of the accused have been subjected to potential infringement because of the publicity that is likely to surround a criminal case, especially where prominent figures are involved.[299] The courts are th[illegible]urdened with the duty of balancing two competing interests namely the right to open justice on one hand and the accused right to a fair trial on the other hand. Tricchinelli enunciates this dilemma as follows, "*The tension between pre-trial publicity and conducting a fair trial tests the abilities of trial courts.*"[300] In as much as defendants have the Constitutional right to a fair trial, but open courts are also an integral part of the justice system.[301] Hence the ability of the courts to reconcile two conflicting interests is put to the test in such instances where the right to open justice has the potential to infringe on the fair trial rights of the accused.

There are various reasons why the principle of open justice requires proper administration.

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[296]Burd and Horan, 2012 *Crim LJ* 104.
[297]Burd and Horan, 2012 *Crim LJ* 104.
[298]Waites "The effects of Pretrial Publicity on Judges, Jurors and Arbitrators" www.theadvocates.com/the%20Effects%20of%20Pretrial%20Publicity.p... (accessed on 11-10-2015).
[299]Uelmen "Jury-Bashing and the O.J. Simpson verdict" http://digitalcommons.law.scu.ed/cgi/viewcontent.cgi?article=1370&context=facpubs. (accessed 06-09-2016). (Henceforth "The Effects of Pretrial Publicity on Judges, Jurors and Abitrators.").
[300]Tricchinelli "Pre-trial publicity limited effect on the right to a fair trial" https://www.rcfp.org/browse-media-law-resources/news-media-law/news-media-and-law-spring-2013/pretrial-publicitys-limited (accessed on 11-10-2015)
[301]Tricchinelli "Pre-trial publicity limited effect on the right to a fair trial"

Firstly the open court principle has the potential to infringe on the accused fair trial rights as well as the human dignity[302] of the accused. Unregulated publicity can have an adverse effect on the reputation of the accused and certain witnesses as well as expose him to threats from the public or certain individuals.[303] Secondly pre-trial publicity has the potential to undermine the justice system by unduly influencing judge's decisions thereby prejudicing the accused.

Another issue which is central to the open justice and fair trial rights debate relates to the impact of open justice on the impartiality of the courts. The human nature of judges exposes them to undue media influence just like anyone else. Hence pre-trial publicity has the potential to unfairly bias the judge against the criminal defendant.[304] In the Zimbabwean case of *Standard Chartered Finance v Georgias* it was stated that the test for bias on the part of the judicial officer is objective in nature.[305] Firstly the test seeks to ascertain whether as a matter of fact there is an actual probability of bias. Secondly the test also seeks to determine whether there is a reasonable belief on the part of the litigant that a real likelihood of bias exists. Thus the accused's is required to show a reasonable fear, based on objective grounds that the trial will not be impartial.[306] Everyone has the right to a fair trial by an impartial judicial officer. Article 14 (1) guarantees that the accused has a right to be tried by a competent, independent and impartial tribunal established by law.[307] The rationale behind this principle is to ensure that criminal charges brought against the defendant are heard by a court that has already been established by the law.[308] However the question is whether or not this right can be violated by pre-trial publicity. Other scholars have submitted that pre-trial publicity does not have the potential to undermine the accused's case and that the judges are not susceptible to bias emanating from media publicity. This is a highly contentious issue which will be discussed more thoroughly in the course of the chapter.

There are certain instances where the right to open justice is justifiably limited. These instances have already been established as fair and reasonable. Hence they will be mentioned

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[302] S 51 of the 2013 Constitution. See also s 9 of the 1996 Constitution.

[303] The 2013 Constitution of Zimbabwe guarantees that everyone has the right to personal security in section52. Section 12 of the South African Constitution also guarantees that everyone has the right to security. Hence it is essential to measure the importance of open justice against the dignity and security of the accused as well as the witnesses.

[304] Howe "Publicity in Criminal Cases-Difficulty For the Trial Judge In Assessing Prejudice." See also Waites "The effects of Pretrial Publicity on Judges, Jurors and Arbitrators."

[305] *Standard Chartered Finance Ltd v Georgias* 1998 2 ZLR 547 A.

[306] *Standard Chartered Finance.*

[307] ICCPR.

[308] Lawyers Committee for Human Rights "What is a Fair Trial? A basic Guide to Legal Standards and Practise" https://www.humanrightsfirst.org/wp-content/uploads/pdf/fair-trial.pdf. (accessed 25-08-2015).

in this chapter but they will not be thoroughly analysed since they are not contentious. The right to open justice may be justifiably limited for reasons relating to 'morality.' This is especially prevalent in sexual cases and sexual crimes.[309] Hence victims of sexual rape are usually vulnerable and they need the protection of the law in order to maintain their dignity and security. Section 319 of the Criminal Procedure and Evidence Act[310] of Zimbabwe protects victims of sexual crimes by making their oral testimony inaccessible to the public in certain instances. This is clearly a justifiable limitation on the right to open justice.

The public may also be excluded where it would be in the interests of justice to do so. For instance in South Africa, cases involving children are not susceptible to public scrutiny. This is due to the fact that children are also one of the vulnerable groups in society.[311] Hence there are certain specified circumstances where the rights of the media to report are severely curtailed in order to protect the essential rights of the vulnerable persons such as victims of sexual crimes and children. However it is essential to establish whether or not the accused fair trial rights should also be part of that list of closely guarded issues. It also essential to analyse the various ways in which the court can balance the two competing interests namely the accused's fair trial rights on one hand and the right to open justice on the other hand.

3 4 Is the *Subjudice* Rule Sustainable in the Face of Open Justice?

The *subjudice* rule entails that one cannot comment on issues that are currently before court. This is an essential principle which respects the mandate of the courts to resolve the issues that are before it. Burd and Horan described the *subjudice* rule as the rule that strikes a balance between open justice and fair trial rights.[312] The British case of *Attorney General v Times Newspapers Ltd* illustrated the tension between open justice and the *subjudice* rule.[313] In this case several British women gave birth to babies with severe deformities after taking a sedative called "thalidomide." This drug had been manufactured and marketed by a company called Distillers. Problems arose when Distillers sought an order prohibiting the Sunday Times from publishing an article relating to its previous associations with the drug as well as the checks that had been taken before distributing the drug. Distillers claimed that the

[309] Section 319 of the Criminal Procedure and Evidence Act of Zimbabwe provides that the court can make an order excluding all persons or a class of persons from the proceedings while a victim of sexual crime is giving evidence.
[310] S 319 of the CPE.
[311] Section 52 of the Children's Act 2005.
[312] Burd and Horan 2012 *Crim LJ* 108.
[313] *Attorney General v Times Newspapers Ltd* 1973 1 QB 710

publication of the article would interfere with their freedom of action in the relevant proceedings. However Lord Denning stated *obiter dictum* that apart from the right of the parties to a fair trial or fair settlement, there is another essential consideration namely, the interest of the public to be informed about matters of national concern as well as the freedom of the press to make fair comment on such matters.[314] Finally the Sunday Times was permitted to publish the article albeit with certain exceptions. The Sunday Times was prohibited from publishing issues of negligence, breach of contract, breach of duty and any issues arising from actions pending or imminent against Distillers Company.[315]

In Zimbabwe, the case of *S v Tsvangirai*[316] remains the leading authority on the subject. In this case the allegations against the accused included incitement to public violence,[317]and high treason. *The Herald*, a Zimbabwean newspaper went on to print a headline stating that the applicant, (Tsvangirai) had been denied bail. Hence the issue was whether or not the *subjudice* rule had been violated with regard to the applicant's impending bail hearing. Page 10 of the newspaper contained a cartoon of Tsvangirai counting his days as a prisoner until July which was the date set for the trial. Hence there are two conflicting interests in this case namely the right to freedom of expression and possibly the freedom to artistic creativity and also the accused right to a fair hearing with regards to his bail application. Thus in the face of such uncertainty, one would be tempted to inquire whether the courts should be prepared to sacrifice the fundamental right to a fair trial on the altar of the open justice principle. If one principle has to be sacrificed the question is which one. It can be suggested that the right to a fair trial should be protected. This is due to the fact that the liberty and security of a citizen is involved.

It is difficult to ascertain whether publicity interferes with the impartiality of judges. However it is a general rule of law that judges are not influenced by what they hear or what they read in the newspapers.[318] In the Canadian case of *Hubbert*[319] the Ontario Court of Appeal held that, it is common for a judge to read about a case in a newspaper before trying

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[314] *Attorney General v Times Newspapers* paras 726-727 A.

[315] *Attorney General v Times Newspapers*. See also Duffy "The Sunday Times Review: Freedom of Expression, Contempt of Court and the European Convention" 1980 The Human Rights Review *17.*

[316] *S v Tsvangirai* HH-119-03.

[317] The accused was charged with incitement to public violence in contravention of s19(1)(b) of The Public Order and Security Act.

[318] *R v HorshamJustices, ex parte Farquharson* 1982. See also the Canadian case of *Regina v Hubbert* 1975 11 OR (2D) 464. These cases both contain the presumption that a judge cannot be influenced by pre-trial publicity.

[319] *R v Hubbert* 197511 OR (2D) 464.

the case but this does not make the judge incompetent to pass a judgement on the case. In the case of *S v Tsvangirai* the court cited the case of *S v Banana*[320] in which it was stated that, in Zimbabwe the High Court Judge is the one who determines any question of fact, unlike other jurisdictions where the jury determines such issues. Hence the court held that it was essential to establish whether there was a realistic potential on the part of the relevant judge of having been unduly influenced by the pre-trial media publicity to which the applicant was the victim.[321]

The impartiality of the judge should not be compromised by media publicity. Counsel for the applicant contended that the powerful impact of the media coupled with the public perception of guilt and expectation of a conviction cannot ever be discounted on the part of the judges.[322] A variety of international cases were mentioned in the *Tsvangirai* case. In the case of *A-G Times Newspapers Ltd*[323] it was held that one should not assume that a judge is impervious to public comments. Additionally, it was stated some comments made with regard to an issue before court can be powerful and would amount to a threat if the judge fails to reach a certain conclusion. In the *Tsvangirai case* the applicants contended that they doubted whether the court was competent to pass a fair judgment on the bail application due to the publication of the cartoon in the Herald and also the suggestive nature of the headline.

In this case bail was granted. It was held that the nature and circumstances of the case had attracted vast media publicity both in Zimbabwe and internationally. Furthermore the court reiterated that despite various comments from the public, the court's function is to consider the facts of the case before it and examine the applicable law and apply the law to the facts before arriving at a decision.[324]

The *subjudice* rule has been applied similarly in South Africa. However it should be noted that the South African Justice system seems to place considerable emphasis on the right to freedom of expression. According to Wardle, the Constitutional Court has established that the public has a right to evaluate and criticise the justice system.[325] In the case of *Midi Television Ltd v Director of Public Prosecutions*[326] it was held that a publication can only be rendered unlawful if its prejudicial effect on the administration of justice is demonstrable and

[320] *Banana v The Attorney General*, 1998 1 ZLR 309 306C.
[321] *Banana v The Attorney General.*
[322] *S v Tsvangirai* HH119-03.
[323] *A-G Times Newspapers Ltd* 1972 3 All ER 11 36 (QBD) 1142C.
[324] *S v Tsvangirai* HH119-03.
[325] Wardle 2014 *De Rebus* 27.
[326] *Midi Television (Pty) Ltd v Director of Public Prosecutions*(WC) 2007 3 All SA 318 (SCA) para 19.

substantial and there is a real risk that such prejudice will occur if the relevant matter is published. Hence a remote likelihood of harm is not enough to prohibit publication. This could be interpreted to mean that the mere publication or mentioning of issues before court is not necessarily unlawful unless there is substantial risk of prejudice to the accused or alternatively to the state's case.

In *Pistorius* it came to the court's attention that certain channels wanted to dedicate all their time to the Oscar Pistorius trial. Panels of legal experts and retired judges were also required to comment on the case and analyse the proceedings as they unfolded. The court held that there was only one court which was allowed to pass a judgment on the matter. It was also held that the inclinations of trial by the media were not in the interests of justice. Interestingly the *Tsvangirai* and *Banana* cases were tried before the new Constitution was drafted. Currently Zimbabwe has a new Constitution whose provisions in relation to freedom of expression[327] are strikingly similar to those contained in the South African Constitution. In the *Tsvangirai* case it was easy for the court to reach the decision it did because the right to freedom of expression was not as extensive as it is currently. Hence the *subjudice* rule was applied strictly.

One is bound to wonder whether the *subjudice* rule has been overridden by the freedom of the public to comment on any issue regarding the administration of justice thereby giving effect to the right to free expression. It is also not clear whether or not the *subjudice* rule has been unjustly impinged on by the open justice principle.

3 5 Fair Trial Rights of the Accused and other Related Policies in a Pre-Constitutional Zimbabwe

In any democratic state, it is essential to have a transformative Constitution that guarantees individual rights and liberties. Zimbabwe is no exception. In as much as the previous Zimbabwean Constitution[328] contained certain rights and liberties, these rights were undermined by substantial derogations and limitations[329]. These derogations and limitations

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[327] Section 61 of the Constitution 2013 contains the right to freedom of expression, the freedom to artistic expression as well as freedom of the media to receive and impart information. See also Constitution, s16 of the Constitution of South Africa contains substantially similar provisions.

[328] Constitution 1980.

[329] Matyszak "Human Rights and Zimbabwe's draft Constitution." archive.kubatana.net/.../rau-human-rights-draft-constitution-1303-pdf. (accessed 01-09-2015). This article makes reference to sections 16 and 16 A of the 1980 Zimbabwean Constitution in which the right to protection from compulsory deprivation of property was undermined by derogations which consisted of six pages of the Constitution.

made it particularly difficult for the public to exercise their Constitutional rights without encountering a 'stumbling block'. Hence the 1980 Constitution was ineffective in the sense that the limitations and derogations permitted by it were not reasonable and not justifiable in an open and democratic society. However the 2013 Constitution has made substantial improvements in this regard. In this regard this study aims to outline and explain the way in which the open justice principle was applied in Zimbabwe both before and after the coming into operation of the 2013 Constitutions. The differences in the application of the open justice principle before 2013 and afterwards will assist in determining the extent to which the open justice principle can be limited in an open and just democracy.

3 5 1 Zimbabwe's Constitutional History in Light of the Fair Trial Rights of the Accused

Zimbabwe proclaimed its Independence from Britain in 1965 through the Unilateral Declaration of Independence. During this period Zimbabwe (formerly known as Rhodesia) was under severe sanctions from Britain due to its brutal and discriminative apartheid policies.[330] The 15 year long civil war that was a direct consequence of the brutal and discriminative policies of the Smith regime which had instituted a Constitution which made it practically impossible for the black majority to decolonise themselves.[331] The black majority rebelled against the Constitution and other racist laws which had been enacted at the time and towards the late 70's they won in the long war against Ian Smith and the Rhodesian government. The 1965 Constitution was discriminative and the fair trial rights of the black majority were not taken into serious consideration during that period. The court system was shrouded by secrecy and the interpretations of unjust laws enacted by the sovereign parliament were meant to repress the rights of the black majority. Unlawful detentions, secret trials and convictions without trial were very common. Thus the Constitution which was in operation during that period of war and instability will not be discussed in detail in this chapter because the justice system was neither fair nor impartial.

[330]Constitutionnet "Constitutional History of Zimbabwe." www.constitutionalnet.org/country/zimbabwe-country-constitutional-profile(accessed 02-09-2015).
[331]Constitutionnet "Constitutional History of Zimbabwe."

3 5 2 The Principle of Open justice and the Rights of the Media to Report under the Lancaster House Constitution

The open justice principle was subject to severe limitations imposed by the Lancaster House Constitution.[332] In as much as this chapter seeks to analyse the potentially adverse effect of the open justice principle on the accused fair trial rights it does not in any way undermine the importance of open justice. This is due to the fact that the right to open justice is inextricably linked to the right to freedom of expression the right to open justice also gives effect to the values of openness, accountability and justice.[333] However, Zimbabwe has a long Constitutional history whereby the right to open justice and the rights of the media to report where not always adequately protected by the Constitution.

This chapter will analyse the 1980 Constitution of Zimbabwe and its adverse impact on the rights of the media to report by inter alia, undermining the right of the media to access information as well as adversely limiting the accused's right to a fair and public hearing. The open justice principle was limited widely thereby leaving room for ruthless government officials to abuse these limitations and cover human rights abuses perpetrated on Zimbabwean citizens and also other illegitimate and illegal activities. Hence the chapter will highlight the importance of free expression by the media with regard to the protection of rights in general.

Open justice is derived from other fundamental rights such as the right to freedom of expression which includes the right of the media and individuals to receive and impart information and ideas.[334] In the case of *Holomisa v Argus Independent Newspapers*[335] it was held that the right of the media to impart information is vital to a democracy. Moreover the role of the media as a watchdog over the actions of the government was also highlighted. Hence justice must be dispensed in the open to avoid instances where there is maladministration, corruption and the imposition of arbitrary sentences. Despite the importance of open justice in this modern era, the right to open justice was undermined substantially under the Lancaster House Constitution and media publicity was also limited.

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[332] Constitution 2013, s18(12).

[333] S 46 (1) (b) of the Zimbabwean Constitution also Declares that in interpreting the Declaration of Rights the court must promote the values and principles that underlie a democratic society based on openness, justice, human dignity, equality and freedom.

[334] Constitution 2013 s61, see also Constitution, s16.

[335] *Holomisa v Argus Independent Newspapers* 1996 SA 588 (W).

Hence one would be compelled to question whether the limitation on the open justice principle gave effect to the accused to a fair trial.

In August 1978 as the Ian Smith regime was on the verge of demise, the British Government and Zimbabwean Nationalist leaders gathered at the Lancaster House to negotiate new terms for the establishment of a new Constitution for Zimbabwe.[336] In December 1979 a document known as the Lancaster House Agreement was signed thereby putting an end to fifteen years of civil war and providing political instability.[337] Section 18 of the Constitution of Zimbabwe 1980 provided for the right to a fair hearing.[338] Moreover section 18 (4) also contained the rights of the accused to have access to a copy of the record of the criminal proceedings instituted against him after the trial whilst section 18(10) contained the right to a public trial in both civil and criminal cases respectively. This gives effect to the open justice principle and one would be inclined to assume that the open justice principle has been effectively enunciated in this Constitution. However, contrary to this assumption the open justice principle in this case was limited by unwarranted and unnecessary derogations just like most of the rights that are contained in the Lancaster house Constitution.

After conferring the right to a public hearing on its citizens, the 1980 Constitution went on to arbitrarily limit such right. The Constitution contained a provision whereby a Minister can produce a certificate in court which prohibits the public disclosure of any matter. The clause goes on to state that the court or other unspecified authority may take action as may be necessary to ensure that the matter is not disclosed.[339] The words "any matter" conferred an unfettered discretion on the Minister concerned to order the prohibition of the release of any information that the Minister regards as privileged. Hence the justice system was shrouded in

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[336] See Vollan "The Constitutional History and the 2013 Referendum of Zimbabwe."https://www.jus.uio.no/.../zimbabwe-constitution-201.(accessed 09-08-2015). The Lancaster House Constitution provided for a parliamentary sovereignty in which the executive position was held by the Prime Minister. In 1987 this was changed and a presidential system was put in place. This system provided for an executive president. (Henceforth "The Constitutional History and the 2013 Referendum of Zimbabwe").

[337] Vollan "The Constitutional History and the 2013 Referendum of Zimbabwe."

[338] Section 18 of the 2013 Constitution of Zimbabwe provides that, If any person is charged with a criminal offence, then, unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law.

[339] Section 18 (12) of the 2013 Constitution of Zimbabwe states that, Notwithstanding anything contained in ss (4), (10) and (11), if any civil proceedings before such court or other adjudicating authority as is referred to in s (2) or (9) including any proceedings by virtue of s (24), a certificate in writing is produced to the court signed by a Minister that it would not be in the public interest for any matter to be publicly disclosed, the court or other authority shall make arrangements for evidence relating to that matter to be heard in camera and shall take such other action as may be necessary or expedient to prevent the disclosure of that matter.

secrecy. Moreover matters relating to the violations of human rights by the officials could also be prohibited from being discovered or published in accordance with section 18(12).

The effect of section 18 (12) is that human rights violations by government officials may be prevented from being published to the public. Rights such as the right to a fair trial and the right not to be unlawfully detained among other crucial human rights violations would be successfully kept away from the media. Thus the 1980 Constitution left room for the violation of the accused fair trial rights by limiting the accused's fair trial rights immensely, especially the right to open justice. It also infringed upon the rights of the media to report information.

3 5 3 The Right to Remain Silent and the Presumption of Innocence Under the 1980 Constitution

Central to the issue of accused fair trial rights is the notion that an accused person should be presumed innocent until proven guilty. However the approach adopted by the South African and Zimbabwean authorities in dealing with an accused that has elected to exercise his right to remain silent differs significantly. The 1980 Constitution did not offer adequate protection to the accused's right to remain silent. It should be noted that the presumption of innocence is inextricably linked to the right to remain silent. The presumption of innocence confers the burden on the prosecution to prove the accused's guilt beyond reasonable doubt.[340]

The presumption of innocence gives effect to the right to remain silent. Hence ordinarily an accused should not be penalised for exercising his right to remain silent. However in Zimbabwe, adverse inferences could be properly drawn from the accused's silence, if the accused elected to exercise that right. In the case of *Makungatu* it was held that section 199 (1) of the Criminal Procedure and Evidence Act was in line with section 18 (8) of the 1980 Constitution which did not prohibit the court from drawing adverse inferences from the accused silence during the course of the trial.[341]

It was stated that a *prima facie* case against the accused could lead to conviction if the accused continuously refused to answer questions which were being asked by the prosecution without just cause. In the case of *McFarlane v Segweni No,*[342] Gubbay CJ remarked that the

[340]Geldenhuys *et alCriminal Procedure Handbook* (2011) 19. See also De Waal, Currie, Erasmus *The Bill of Rights Handbook* (2001) 599.
[341]*S v Makungatu* 1998 2 ZLR 244 (SC).
[342]1995 (1) ZLR 384 (SC).

right to silence carries less weight in Zimbabwe than it does in South Africa and England. He went on to allude this to the fact that the right to silence in Zimbabwe had been "eroded to a significant extent."

Due to the inadequacies of the 1980 Constitution, the people of Zimbabwe demanded a new Constitution. In 1999 an attempt by the government to adopt a new Constitution failed dismally. In February 2000, the public voted overwhelmingly against a Constitutional Bill that had been proposed by the government.[343] The new Constitution was a result of the Global Political Agreement or the so called "unity government." The Global Political Agreement stipulated that a new Constitution should be drafted by the parties to the Global Political Agreement namely Zanu Pf, Mdc M and Mdc T by August 2010.[344] There was also one representative of the traditional chiefs.

The Mdc advocated for a transformative approach in the sense that they wanted a fresh start while the Zanu Pf advocated for a preservative approach in which the parties would have a Constitution modelled on the Kariba draft.[345] A compromise was reached and the new Constitution was adopted. This new Constitution is the one which will be discussed in order to establish whether the newly acquired freedom of expression and the right to open justice is not equally infringing on the fair trial rights of the accused.

3 6 A Primer on the South African Constitution in Light of the Accused Fair Trial Rights

South Africa also has a past in which unjust laws were created by the legislature thereby violating fundamental rights and freedoms of the citizens. Before the coming into operation of the 1996 Constitution, it was very difficult to protect and enforce human rights due to the system of parliamentary sovereignty that had been put in place.[346] The system of Parliamentary sovereignty justified the making of laws by parliament, some of which were

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[343] Vollan "The Constitutional History and the 2013 Referendum of Zimbabwe" https://www.jus.uio.no/.../zimbabwe-conxtitution-201...(accessed 15-08-2015).

[344] The Constitution which was drafted as a result of the Global Political Agreement was finalised as a result of a highly contentious process in which the parties had to compromise with each other. For instance they reached a settlement in which the death penalty could only be imposed on an accussed who was found guilty of aggravated murder with certain limitations on gender and age. Moreover treason is no longer a ground for the imposition of the death penalty. See also Ndhlovu "The role of the courts in the enforcement of socio-economic rights under the 2013 Constitution of Zimbabwe" 2015 *Africa's Public Service Delivery and Performance Review* 29.

[345] Ndhlovu "The role of the courts in the enforcement of socio-economic rights under the 2013 Constitution of Zimbabwe" 2015 *Africa's Public Service Delivery and Performance Review*29.

[346] De Waal, Currie and Erasmus *The Bill of Rights Handbook* (2002) 3.

unjust and arbitrary. However the end of the apartheid era marked the end of discrimination and the CODESA negotiations began. These negotiations were meant to create a new transformative Constitution. According to Devenish, the Constitution of 1996 has certain themes, which include the healing of the divisions of the past and the establishment of a democratic society based on democratic values, social justice and fundamental rights and the creation of a new system based on democracy in an open society.[347]

Public participation and involvement was encouraged and the majority of the South Africans voted overwhelmingly in favour of the new Constitution. The final Constitution of South Africa was drafted by the Constitutional Assembly in accordance with chapter five of the interim constitution. The Constitution had to comply with the 34 principles which were set out in the interim Constitution. In order to ensure the accuracy of the final text, the Constitutional Court was required to certify the final draft of the Constitution.[348] The Constitutional Court has noted that the entrenchment of the right to a fair trial in the 1996 Constitution represents a major change from the previous position in South African Law.[349] It should be noted that while discussing the right to a fair trial in the South African context, references will be made to Zimbabwe.

Hence criminal courts are imposed with a constitutional duty of ensuring that the trial is not only procedurally fair but also substantially fair.[350] In the case of *S v Zuma* it was held that the rights contained in section 25(3)[351] of the Interim Constitution were not exhaustive.[352] Moreover it was stated that criminal courts are now obliged to embrace the notion of substantive fairness which was undermined by the previous Constitution. In the case of *Zuma* the accused fair trial rights were interpreted broadly thereby ensuring that the accused enjoyed considerable Constitutional protection. This chapter seeks to prove that the Zimbabwean Constitution will lead to the Constitutional protection of the accused fair trial rights, since it contains the same provisions as the South African Constitution.

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[347] De Waal *et al* 3.
[348] De Waal *et al* 5.
[349] Synckers *Criminal Procedure Handbook* in Chaskalson et al *Constitutional Law of South Africa* (1999) 27. Section 35 of the Constitution guarantees an accused's right to a fair trial. Section 69 of the Zimbabwean Constitution 2013 contains substantially the same provision.
[350] *S v Ntuli* 1997 3 SA 772 (CC) para 1. The right to protection from double jeopardy s 35 (3) (m) and retroactive punishment s 35 (3) (l).
[351] Interim Constitution 1993.
[352] *S v Zuma* 1995 2 SA 842 (CC).

The right to a public trial is enshrined in the Constitution of South Africa. This right is similarly contained in the Criminal Procedure Act of South Africa.[353] The right to a public trial in South Africa is limited by specific limitations contained in the Criminal Procedure Act.[354] In the case of *Nel v Le Roux*[355] it was held that these exceptions are valid exceptions to the general rule that the trial of an accused person has to be conducted in public. In the case of *S v Pennington* it was held that applications for leave to appeal do not necessarily have to be heard in public. The court stated that section 35(3)(c) only guarantees the right to a public trial, it does not expressly require that the appeal should also be heard in public.[356] This has been accepted as the general interpretation of the section.[357]

Thus the 1996 Constitution of South Africa has brought positive transformation in relation to the fair trial rights of the accused. It is essential to note that the right to open justice is not absolute. It can be limited, but the limitation should conform with acceptable standards that are expected from a society based on democracy and the protection of fundamental human rights. The limitation on the right to open justice should not be targeted at depriving citizens from obtaining information relating to human rights abuses by the state, maladministration and corruption. The limitation should be targeted at protecting the fundamental rights of citizens. For instance the limitation imposed on the public from accessing trials which relate to children is justifiable to ensure the protection of children.[358] Therefore South Africa has transformed its justice system in a positive manner in which justice is dispensed in the open. The 2013 Constitution of Zimbabwe is directed towards the same goal of transformative justice and the protection of human rights. It is in this light that this chapter seeks to investigate on the meaning of the term fair trial and the implications of the right to open justice on the right to a fair trial.

3 7 The *Gumbura* Case

Hardly after the adoption of the 2013 Basic Law, had Zimbabwe had to come face to face with the contemporary problem of pre-trial publicity as result of the *Gumbura* rape trial. Like the controversial 2006 *Zuma* rape trial, *Gumbura* fascinated the public with disclosure of

[353] S 152 of the CPA of South Africa enunciate the right of the accused to a fair hearing. Section 35 of the South African Constitution also contains the right to a fair and public hearing. See also section 69 of the Zimbabwean Constitution 2013.
[354] Section 153 of the CPA.
[355] *Nel v Le Roux NO* 1996 2 SA 562 (CC).
[356] *S v Pennington* 1997 4 SA 1076 (CC) PARA 51.
[357] De Waal *et al* 623.
[358] The Children's Act of 2005.

lurid details. The accused was a prominent Zimbabwean pastor who was accused and convicted of rape in 2014. Robert Martin Gumbura was accused of raping numerous female congregants by threatening them with religious sanction if they did not submit to his demands which were basically of a sexual nature. He was also found in possession of pornographic material contrary to Section 26 of the Censorship and Entertainment Control Act.[359] The *Gumbura* trial received a lion share of media coverage. It was published in both print media and electronic media (news). Gumbura was convicted of four counts of rape and one count of contravening the Censorship and Entertainment Control Act.[360] He was thereafter sentenced to a term of 50 years imprisonment with ten years suspended on condition of good behaviour.

The purpose of this chapter is to establish whether an appeal based on the condition that there was too much publicity surrounding a case is likely to succeed. For instance in the case of Gumbura, when the police discovered pornographic material in Gumbura's household during the course of investigations, the public was immediately alerted of this new development by the media. Journalists and other independent observers went on to assume that he had committed rape due to this incriminating factor. Consequently he was labelled guilty before the trial even started.

Gumbura's application for bail pending appeal was also dismissed. The court made reference to the case of *Manyange*[361] in which it was held that, there is a clear distinction between the application for bail pending trial and an application for bail pending appeal. It was held that the accused who applies for bail pending trial is presumed innocent. Hence the presumption of innocence operates in his favour and his constitutionally guaranteed right to liberty deserves protection. On the other hand the one who applies for bail pending appeal is considered as a convicted criminal and the presumption of innocence does not operate in his favour. Hence the accused must show that he has prospects of success in the appeal.

The court also considered the possibility of public outrage as a factor which must be taken into account before granting bail.[362] It was held that in instances where the granting of bail would cause a public outcry the courts may be slow to grant bail in order to guard the integrity of the justice system.[363] One is bound to wonder whether this is a valid criterion for the denial of bail, unless the denial of bail is targeted at protecting the security of the

[359]Section 26 of the Censorship and Entertainment Control Act Chapter 10:04.
[360] Censorship and Entertainment Control Act Chapter 10:04.
[361]*Manyange v The State* HH 60-2008.
[362] The Court referred to the case of *Gardener v The State* In this regard 2011 (1) SACR 570 (SCA).
[363]*Gumbura.*

applicant. Thus it is essential to establish whether there is likelihood that the magistrate may have been influenced by the views of the public to reach the decision he did in the case of *Gumbura.*

3 8 The *Pistorius* Case

The predicament brought by the right to open justice and the accused's fair trial rights burst upon South African public consciousness most forcefully during companion cases of *Shaik*,[364] the *Zuma* rape trial and *Zuma/Thint*[365] corruption trial. More than companion cases of impression, the *Pistorius* trial encapsulated the complex interplay presented by accused right to a fair trial and the right to open justice. This case also involved a prominent figure. Pistorius is an internationally acclaimed athlete who was charged with the murder of his girlfriend. Like the *OJ Simpson* trial the case attracted extensive media publicity and various television stations were willing to broadcast the whole trial. This resulted in the *Multichoice* case where the electronic, broadcast and print media approached the court so that they could be granted permission to broadcast the case of *Pistorius*.

Pistorius on the other hand contended that such publication was likely to infringe on his right to a fair trial. He contended that the mere knowledge that there was audio visual equipment, especially cameras would restrict him and his witnesses while giving evidence. It was also stated that the broadcasting of the trial had the potential to undermine the authenticity of the facts to be brought before the court. For instance witnesses who would have watched the trial on tv could tailor their evidence and ensure that it would conform to what other witnesses would have said.[366] The possibility that witnesses could bring fabricated testimonies before court is detrimental to the justice system. This is due to the fact that a criminal trial is about the search for truth. Hence if evidence has been tailored to suit certain ideals, it could prove difficult to establish what the truth really is. Thus the evidence must not have been tempered with. It has also been stated that in the Pistorius case certain witnesses could not testify due to the publicity. Therefore if other witnesses could not come forward to testify on his behalf, it becomes difficult to establish whether or not Pistorius had a fair trial.

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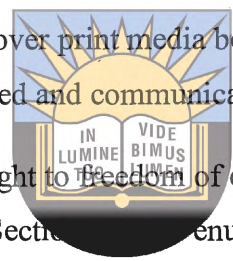
[364]*S vShaik* 2006 (1) SACR 468 (D). See also *S v Shaik* 2007 (1) SA 240 (SCA); 2007 (1) SACR 247 (SCA); *S v Shaik* 2008 (2) SA 208 (CC).

[365]*Zuma v National Director of Public Prosecutions* 2009 (2) SA 277 (SCA);*Zuma v National Director of Public Prosecutions* 2009 (1) SA 1 (CC); *Zuma v National Director of Public Prosecutions* 2009 (1) SA 11 (CC).

[366]Wardle 2014 *De Rebus* 138.

However the media contended that Pistorius is an international icon, and so was the deceased Reeva. Hence the media stated that it was in the public interest that the proceedings should be made available to the public. Moreover it was held that at his bail hearing there was not enough space in the court room to accommodate everyone who had attended. Thus it was more convenient to broadcast the trial

In as much as the accused has the right to a fair trial, it should be noted that the media has the right to freedom of expression.[367] This includes the right to receive and impart information and ideas. In the case of *South African Defence Union v Minister of Defence*[368] in which it was held that the right to freedom of expression lies at the heart of democracy. The case enunciated the idea that the general public should be able to receive information and express their views on various matters. In the case of *Dotcom Trading*[369] it was stated that the use of radio transmission has its advantages over print media because the tone of the speaker and the hesitations *etcetera* can also be recorded and communicated.



However it should be noted that the right to freedom of expression has limitations. Section 16 (2) contains some of the limitations. Section [illegible] enunciates on how an essential right can be justifiably limited. Section 61 of the Zimbabwean Constitution contains substantially similar provisions. In the Pistorius case publicity was allowed, albeit with certain exceptions. It was held that the cameras had to be controlled by a remote. No member of the media would be allowed to operate the camera while the court was in session. Moreover only audio recordings were broadcasted. There are only certain portions of the trial which would be broadcasted for instance opening arguments of the state and the accused, any interlocutory applications during the trial and closing arguments of the state and the accused. This shows that the right to open justice is not absolute. The trial courts are aware of the potential of the open justice principle to impinge on other essential rights such as the right to a fair trial and the right to privacy and dignity.

3 8 1 Remarks on *Gumbura* and *Pistorius*

There are certain similarities between the case of *Gumbura* and *Pistorius*. Both were prominent figures who exert a certain degree of influence and wealth. Consequently their cases attracted vast media publicity. There are a couple of issues involved in these cases

[367] S 6 of the 2013 Constitution. See also s 16 of the 1996 Constitution.
[368] 1999 4 SA 469 (CC) at para 7.
[369] 2000 4 SA 973 (C).

including the application of the rule of law and the right to equality. The rule of law demands that no one should be above the law. Thus one may be tempted to argue that the public had a legitimate interest in attending these proceedings and inspecting how justice would be dispensed.

In as much as these cases seem similar there are also some striking differences. The outcome in *Pistorius* proved to be bitterly disappointing for both legal experts as well as laymen. He was charged with culpable homicide but afterwards this conviction was turned to one of murder. However the public was generally enraged at the sentence that he got for the murder conviction. Nevertheless the purpose of this chapter is to deal with issues of open justice and accused fair trial rights so this matter will not be discussed further. In contrast *Gumbura* was handed a hefty sentence of fifty years imprisonment and ten were suspended on condition of good behaviour. The general public in Zimbabwe were basically satisfied with this decision because they argued that justice had been done. Seemingly, the rule of law had been upheld.

The nature of publicity in these cases also differed. In the *Pistorius* case there was more extensive media coverage including live broadcasts, print media, twitter, facebook and all other forms of social media. In the *Gumbura* case the media coverage was also relatively extensive and forms of media included print media, electronic broadcasts mainly during news time and also facebook, twitter and other forms of media. Burd and Horan acknowledged that the Internet has transformed the way information is disseminated.[370] It has also affected the regulation of media publicity because it was easier to regulate the traditional forms of media rather than the new ones. This may be partly due to the fact that information posted on the internet is permanent and unreliable and unprofessional sources can also post their ideologies, findings and other information pertaining to any case on the internet.

This can have an adverse impact on the accused's fair trial rights. Brandwood argues that media publicity can have an influence on factors such as the accused's likability, whether the decision maker will be sympathetic towards the defendant, whether or not the decision maker will regard the accused as a common criminal, pre-trial assessment of the accused's guilt and final verdicts as well.[371] If the media publicity affects the impartiality of the decision maker then it is unlikely that the accused would have a fair trial.

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[370] Burd and Horan 2012 *Crim LJ* 105.

[371] Brandwood "You say 'Fair Trial' and I say 'Free Press': British and American Approaches to Protecting Defendants Rights in High Profile Trials" 2000 *New York University LR* 1417 1417.

3 8 2 Pre-trial Publicity and the Courts

One may wonder whether an appeal based on the argument that there was too much publicity surrounding a case would be likely to succeed. With reference to Zimbabwe and South Africa it is arguably apparent that an appeal based on the issue of excessive pre-trial publicity would be likely to succeed. Currently there is no case which has dealt with this situation directly in both South Africa and Zimbabwe. However there are cases from the Australian jurisdiction that have dealt with this matter.

In the Australian case of *R v Glennon* Mason CJ and Toohey J argued that the fact that a juror will be exposed to pre-trial publicity is inevitable in a criminal trial.[372] Thus in order to determine whether the pre-trial publicity compromised the fairness of the proceedings, there should be an intolerable risk to a fair trial.[373] Thus the test is whether the pre-trial publicity poses an unacceptable risk to the fairness of the proceedings. Brandwood suggests that when evaluating the effect of pre-trial publicity it imperative to take into account the nature of the publicity as well. The publication of recanted confessions, previous criminal records, failed lie detector tests or other forms of inadmissible evidence have the potential to undermine the accused's right to a fair trial more than other forms of publicity.[374] Thus it is not the amount of media publicity only that should be taken into account but the nature of publicity as well.

Burd and Horan highlighted that in small Australian communities where everyone knows the prior convictions of the other as well as other unpleasant details regarding their neighbours an infamous defendant could apply to have his trial held in another place where he was not known.[375] This shows that the potentially adverse impact of media publicity was always in issue.

In the Australian case of *R v Liddy* the court ordered a stay of proceedings due to the media publicity as well as a number of other factors such as the four year delay between the sexual assault and the trial.[376] However the judge emphasised that if media publicity had been the only factor relied on by the applicant, the judge would not have granted the stay of proceedings.[377]

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[372]*R v Glennon* (1992) 173 CLR 592 at 603; 60.
[373]*R v Glennon.*
[374]Brandwood 2000 *New York University LR* 1419-1420.
[375]Burd and Horan *Crim LJ* 105.
[376]*R v Liddy* 2010 SADC 80.
[377]*R v Liddy.*

However in the case of *Attorney General for New South Wales v X*, Mason P stated that, "A verdict of guilt and ensuing punishment must be the product of a fair trial. The rule of law can settle for nothing less. Trial by media cannot be tolerated in a civilised society."[378] This shows that the fair trial rights of an accused are a priority in any democracy. Thus it is apparent that unrestricted media publicity has the potential to prejudice the accused in his trial. It is also generally accepted that a free press is essential in a democracy. Therefore this study seeks to establish whether a balance can be drawn between the seemingly divergent interests of open justice and the accused right to a fair hearing.

Part A of this chapter explored the impact of open justice on accused fair trial rights, the presumption of innocence and the *subjudice* rule in this era of technological advancement where pre-trial publicity is not easy to regulate. Part B of this chapter discussed the impact of pre-trial publicity on fair trial rights of the asylum seeker, the need for confidentiality is asylum proceedings as well as national security concerns in asylum proceedings.

Part B: The Tension between the Right to Open Justice and the Confidentiality of asylum proceedings.

3 9 Introduction

The question whether and to what extent there can be exception to the requirement of confidentiality in asylum applications and appeals to the Refugee Appeal Board in the interests of the right to open justice is a problematic issue. The *Chipu* court had to grapple with how to strike a delicate balance between the competing interests of confidentiality in asylum proceedings and open justice. The weighing and balancing processes entail, on the one side of the scale, the right to open justice derived from a cluster of related rights, including the rights to freedom of expression, access to courts and to a public trial. The constitutional imperative for dispensing justice in the open is to protect the integrity of the judicial system as well as give effect to accountability, responsiveness and openness as founding values of a South African based constitutional democracy. On the other side of the scale is the sensitive nature of asylum claims that is based on among others, the nature of persecution to which asylum seekers have been subjected in their countries of origin. Information relating to an asylum seeker's application for asylum should not be divulged carelessly, without careful consideration for the safety of the relevant asylum seeker and his

[378] *Attorney-General (NSW) v X* (2000) 49 NSWLZ 653 [184.

family. The importance of confidentiality in asylum proceedings for the preservation of the safety of the asylum applicant cannot be doubted. Part B of this chapter is therefore structured around *Chipu* case which is discussed against the backdrop of the study between South Africa and Zimbabwe on the right to open justice.

3 9 1 The Tension between Open Justice and the need for Confidentiality in Asylum Proceedings

The tension between the countervailing values of confidentiality and open justice is a contentious issue in this Constitutional era. This is due to the fact that these interests, though divergent are of equal importance to our democracy. *Chipu* specifically deals with the confidentiality of asylum applications, thereby highlighting the contentious issues that inevitably arise where the need for confidentiality exists in tension with open justice. This is a particularly remarkable area of study because of the delicate nature of the relevant applications. It is vital for refugee law to regulate the dissemination of information relating to asylum seeker's applications.

However, this task involves the reconciliation of two equally important but also divergent principles namely the need for confidentiality on one hand and openness on the other hand. Information relating to an asylum seeker's application for asylum should not be divulged carelessly, without careful consideration for the safety of the relevant asylum seeker and his family. Failure to regulate the dissemination of asylum applications and other relevant information, poses possible grievous consequences. The asylum seeker and his family could suffer persecution which includes assault, unlawful detention, death threats or even death. Thus, it is essential to ensure that asylum applications remain confidential. On the other hand, the right to freedom of expression also demands allegiance. Free expression entails the right to receive and impart information and ideas and also the rights of the media. Therefore, when confronted with a situation whereby the media needs access to an asylum application one would be inclined to wonder whether they should uphold the value of confidentiality or freedom of expression.

A thorough analysis of *Chipu* would inevitably invoke debate among legal scholars. This is due to the fact that there is a myriad of issues surrounding the case of *Chipu.* For instance the tension between various countervailing interests is exposed. There is also dissention about the ideal approach that should be adopted in balancing these countervailing interests. Hence a

detailed analysis of the *Chipu* case is necessary in order to fully comprehend the methods that the courts used in order to balance these countervailing interests.

This case note seeks to highlight the controversies surrounding the implementation of the right to open justice in light of its potential to impinge on the need for confidentiality when handling of asylum seekers applications. Further, this part of the chapter will expose the uncertainties that are inherent in attempting to implement the right to open justice where it poses a threat to other equally fundamental values. The study also seeks to highlight the methods of implementations that were highlighted in the case of *Chipu.*

3 9 2 Facts of the *Chipu* Case

The applicants in the case of *Chipu* sought leave to appeal against a decision of the North Gauteng High Court which was handed down by Fabricius J. The facts which led to the dispute are as follows. Mr Krejcir a Czech National sought asylum in South Africa.[379] His request for temporary asylum was granted in terms of section 22(1) of the Refugees Act 130 of 1998.[380] Subsequently his application for asylum was rejected. Mr Krejcir appealed to the Appeal Board against this decision.

The applicants who are mainly media companies such as the Mail and Guardian Limited, Independent Newspapers (Pty) Ltd and Media 24 Limited went on to issue a request to attend the proceedings relating to the appeal. The North Gauteng High Court denied the applicants access to the relevant proceedings on the basis that asylum applications were confidential in terms of section 21 (5) of the Refugees Act.[381] Therefore the applicants had no right of access to the proceedings. Thus it is against this order that that the applicants sought leave to appeal.

The applicants argued that there was no requirement for strict confidentiality in this particular case because the issues pertaining to Mr Krejcir were already in the public domain. There were various allegations of unlawful and immoral conduct which had been published by the media.[382] Such illegal conduct includes murder, fraud, bribery and smuggling of cash among

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[379] *Chipu* para 34 However in the case it was pointed out that he seemed to have come to South Africa from Seychelles.

[380] *Chipu* para 36 Mr Krejcir's application for temporary asylum is believed to have been granted under suspicious circumstances. He allegedly obtained his temporary asylum seekers permit fraudulently.

[381] 130 of 1998.

[382] *Chipu* para 36 It was alleged that Mr Krejcir had obtained his asylum seekers permit fraudulently, was involved in a "cash swap" deal with one deceased Lolly Jackson, was involved in a scheme in which imported cars were used to smuggle cash into the country, was involved in various murders including the

others. Thus most of the information relating to the asylum application was already in the public domain and there seemed to be no need for absolute confidentiality with regard to this particular application.

3 9 3 Issues before the Court

In this case the applicant and the respondent both conceded that asylum applications and appeals to the Appeal Board require confidentiality.[383] However they have different views regarding whether the degree of confidentiality required should be absolute or invariable. Hence in as much as the applicant and respondent were in mutual agreement on the requirement for confidentiality in asylum cases. They differed materially on the degree or measure of confidentiality required. Thus the issue before the court was whether section 21(5) which provided for absolute confidentiality in asylum applications was reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.

Secondly it was not clear whether section 21(5) constitutes a reasonable and justifiable limitation on the right to freedom of expression.

3 9 4 Application of the Law

In attempting to dispense with the requirement of strict confidentiality the applicants contended that issues relating to Mr Krejcir were already in the public domain thus there is no justification for strict confidentiality. This is due to the fact that confidentiality serves no purpose when the matters are already known to the public.[384]

In addressing the question whether section 21(5) constitutes a reasonable and justifiable limitation on the right to freedom of expression the court took into account the factors listed in section 36 of the Constitution. Section 36 takes several factors into account before limiting a right, these are

1. The nature and importance of the right.
2. The importance and purpose of the limitation.
3. Nature and extent of the limitation.
4. The relationship between the limitation and its purpose.
5. Less restrictive means to achieve its purpose.

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murder of one Frantisek Mrazek, is involved in organised crime in his home country, has bribed police officers to interfere with the investigation of the Hawks, admitted in his bail hearing that he had been convicted of fraud and sentenced to six years imprisonment in his home country, obtained a false passport and was arrested on charges of insurance fraud.

[383] *Chipu* para 12.

[384] *Chipu* para 43.

However it should be noted these factors do not constitute an exhaustive list but they are supplied mainly as guidelines.[385] In the case of *National Coalition for Gay and Lesbian Equality v Minister of Justice* it was highlighted that in cases where the court seeks to establish whether a limitation is reasonable and justifiable, the balancing of different interests must still take place. On the one hand there is the right infringed, its nature and its importance in an open and democratic society based on human dignity, equality and freedom. On the other hand there is the nature and extent of the limitation. In the balancing process and on the evaluation of proportionality one is enjoined to consider the relation between the limitation and its purpose as well as the existence of less restrictive means to achieve this purpose.[386]

3 9 5 Nature and Importance of the Right

Section 21(5) limits the right to freedom of expression specifically freedom of the press and the other media to receive and impart information or ideas.[387] This section also limits the right that members of the public have to receive and impart information and ideas.

Freedom of expression is essential to facilitate the achievement and sustenance of democracy. In the case of *Philips v Director of Public Prosecutions* the court highlighted the inextricable link between freedom of expression and democracy. It also suggested that free expression should be, "zealously guarded" due to the fact that the suppression of free speech enhanced the power of the apartheid system.[388] The case of *SABC Ltd v National Director of Public Prosecutions* concurred with the above view. It reiterated the idea that freedom of expression lies at the heart of a democracy and added that it facilitates the search for truth by both society and individuals.[389]

The applicants in *Chipu* also mentioned the importance of the media in guaranteeing human rights. They contended that media freedom is not only protected by the right to freedom of

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[385] *S v Manamela (Director-General of Justice Intervening)* 2000 3 SA 1 (CC); It was stated that these five factors are mainly key factors which must be considered in order to assess whether the limitation is reasonable and justifiable in an open and democratic society.

[386] *National Coalition for Gay and Lesbian Equality v Minister of Justice*; 1999 1 SA 6 (CC).
It is essential to note that the media has a particularly important role in the achievement of democracy. The media ensures that the branches of government are accountable to the general public by disclosing matters of public interest, including corruption of public officials. See *Khumalo v Holomisa* 2002 5 SA 401 (CC).

[388] *Philips v Director of Public Prosecutions,* WLD 2003 3 SA 345 (CC).

[389] *SABC Ltd v National Director of Public Prosecutions* 2007 1 SA 523 (CC); The role of freedom of expression in the search for truth is enunciated by the marketplace of ideas theory which states that it is through the collusion of dissenting opinions that the truth finally emerges. The idea that freedom of expression lies at the heart of a democracy was also reiterated in the case of *South African Defence Union v Minister of Defence* 1999 (4) 469 (CC).)

expression but it is also recognised due to its role in promoting and guaranteeing the protection of human rights.[390] In the case of *Khumalo v Holomisa* it was stated that, "the media are important agents in ensuring that the government is open, responsive and accountable to the people as the values of the Constitution require."[391]

The importance of the right to freedom of expression is to enable the public to form and express opinions on a wide range of matters.

3 9 6 Importance of Purpose of the Limitation

The importance of the purpose of the limitation was to protect the integrity of asylum seekers. It was also stated that confidentiality would encourage asylum seekers to disclose all the relevant information which was needed to reach a decision. Moreover confidentiality was required in order to protect asylum seekers and their families from persecution. There is an inherent danger to their lives and the lives of their families and friends if the information became known.[392]

3 9 7 Nature and Extent of the Limita

The limitation contained in section 21(5) is confidential in nature. The confidentiality required in this instance was found to be absolute. This implies that even in instances whereby the asylum seeker has committed grievous crimes or other relevant crimes against humanity the information still maintains its confidentiality. Even in the event that the application is rejected the matters related to that asylum application remain confidential. In this respect the court must enquire on whether there are less severe means to achieve the desired result without arbitrarily curtailing the other right. In this case this would entail that the courts should enquire whether there is a less restrictive way of protecting the security and safety of these asylum seekers without arbitrarily limiting the right to freedom of expression

3 10 The Right to Open Justice and the Confidentiality of Asylum Applications.

Extreme caution should be exercised when handling asylum seekers applications. This is due to the fact that fundamental rights and liberties are at stake in most instances. Asylum applications present an opportunity for a state to protect fundamental human rights such as

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[390] *Chipu* para 52.
[391] 2002 5 SA 401 (CC).
[392] *Chipu* para32.

the right to personal security[393] and in some instances the right to life.[394] One of the ways in which the state can safeguard the fundamental rights of asylum seekers is through protecting their privacy by ensuring that asylum seekers remain confidential. Secondly it is essential to balance confidentiality rights with the right to access to information. Therefore it is necessary to ensure that there are adequate measures available to regulate the dissemination of information relating to asylum applications.

In order to safeguard the interests of asylum seekers and human rights in general, South Africa ratified various International Instruments. It incorporated such International Instruments into South African law by implementing legislation that works more effectively at a national level as well. One of the International Instruments that South Africa is a party to is the Geneva Conventions.[395] Subsequently the Geneva Convections Act[396] was enacted in order to implement the objectives of the Geneva Convections more effectively at national level. Most asylum seekers flee their countries of origin due to fear of persecution, which includes violence and also the arbitrary curtailment of their rights. Where the asylum seekers application is genuine there exists a real possibility of danger to the asylum seeker as well as his family and friends.[397] This danger is made more probable where his application is rejected and he has to return to his country of origin.

On the other hand there are various other opportunists, including criminals who seek to abuse the protection which is afforded to prospective refugees in order to flee after having committed various crimes, including crimes against humanity. Consequently, it becomes essential to note that although South Africa affords protection to asylum seekers, the legislature is not oblivious to the fact that there is a possibility that individuals involved in crime would wish to abuse the asylum system.

In order to regulate issues relating to International crime more effectively, South Africa ratified the Rome Statute of the International Criminal Court, which is also known as the Rome Statute in 2000. In order to implement the provisions of this statute more effectively, the legislature enacted The Implementation of the Rome Statute of the International Criminal

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[393] S 12 of the 1996 Constitution. The Right to freedom and security of the person also encompasses the protection of persons from arbitrary detention and detention without trial. It also includes protection against violence, freedom from torture and freedom from cruel inhuman and degrading treatment.
[394] S 11 of the 1996 Constitution.
[395] Geneva Conventions 1949.
[396] Act 8 of 2012.
[397] See the arguments of the Lawyers for Human Rights in *Chipu* para 6.

Court Act 27 of 2007.[398] The preamble states inter alia that the state has an obligation to exercise its Criminal Jurisdiction over perpetrators of International Crime.[399] Nevertheless South Africa has recently shown an intention to rescind from the Rome Statute. This implies that it will no longer be under the jurisdiction of the International Criminal Court. Moreover such withdrawal is highly likely to render the provisions of the Implementation of the Rome Statute of the International Criminal Court invalid. This means that South Africa's obligation to deal with perpetrators of International Crime will fall away and be replaced with the need to exercise its discretion in that respect. The withdrawal of South Africa from the Rome Statute could make it particularly difficult for it to be held accountable for possible human rights violations. In that respect one may submit that the withdrawal of South Africa from the Rome Statute poses possible problems with regard to the fulfilment of asylum seeker's rights. However South Africa is also a party to the Refugee Convention which excludes people who are reasonably suspected of having committed a crime against peace, a war crime or a crime against humanity from protection.[400]

Moreover the 1984 Torture Convention incorporates the *aut dedere aut judicare* principle of extradite or prosecute. This requires signatories of the Convention to either extradite perpetrators of torture and cruel, inhuman or degrading treatment or prosecute them. Section 4(1)(a) of the Act has been interpreted to mean that perpetrators of these offences should either be extradited or prosecuted.[401] They cannot be given refugee status. This shows that refugee law takes cognisance of the fact that the asylum/ refugee system is not immune to abuse by criminals. Thus it is essential to note that although the asylum seekers are usually victims of crime; this is not always the case. One may find penetrators of crime also seeking protection from the law.

One may argue that due to the prevalence of crime, asylum applications should be accessible and open to the media as well as the public in certain circumstances. In the case of *Chipu* the debate between the need for confidentiality and openness in the context of crime is made more apparent. Mr Krejcir was reasonably suspected of having obtained his temporary asylum seekers permit fraudulently. He was also suspected of having committed various grievous crimes. Thus the media felt entitled to attend his hearing in order to view how justice would be dispensed. However the stumbling block was section 21(5) of the Refugees

[398] Act 27 of 2007.
[399] See Preamble of the Implementation of the Rome Statute of the International Criminal Court 27 of 2007.
[400] Article 1 (F) of the 1951 Refugee Convention.
[401] S4 (1) (a) of the 1984 Torture Convention. See also *Chipu* para23.

Act which afforded absolute confidentiality for all asylum applications. Where justice is dispensed in the open, judicial accountability is enhanced. Thus the applicants namely media companies rightly contended that the Refugee Appeal Board should be conferred with discretion to determine whether a matter should be heard in camera or not. In the case of *Chipu* the court compared the approach of various countries in reconciling the competing interests of privacy and openness with regard to asylum applications. The court referred to the Refugee laws of particular countries in order to determine whether there is a rule of absolute confidentiality with regards to their asylum applications.

3 11 The Application of the Confidentiality Requirement in Other Jurisdictions

In trying to establish whether or not absolute confidentiality is the International norm the court analysed the Refugee Act of its neighbouring state Lesotho.[402] The Refugees (Control) Act of Zambia was also taken into account for comparative purposes.[403] It was discovered that the Refugees Acts of both Lesotho and Zambia do not have specific provisions which deal with the issue of confidentiality with regards to asylum applications. Thus there is no requirement for confidentiality of asylum applications in both countries.

Peculiarly, in Botswana the Refugees (Recognition and Control) Act provides that applications from persons seeking refugee status shall be held in private.[404] However the Act only addresses the issue of proceedings and does not deal with the accessibility of the written application itself. Thus there is absolute confidentiality in terms of attending the enquiry in terms of the Refugee Act of Botswana. However in Kenya the Refugees Act[405] regulates the dissemination of information relating to asylum seekers by prohibiting a member of the Refugee Affairs Committee or employee or agent of the Department of Refugees from disclosing information obtained in terms of the Act except in the course of his or her duties or alternatively with the consent of the Commissioner. Thus there is relative confidentiality and the Commissioner is conferred with powers of granting or prohibiting disclosure. Thus, notably in Africa it is apparent that the degree of confidentiality conferred on asylum applications and inquiries varies from absolute confidentiality in one country, for instance Botswana, to lack of confidentiality in other countries. Other countries such as Kenya opted

[402] Refugee Act of 1983.
[403] Refugees (Control) Act of 1970.
[404] S 5 (2) of the Refugees (Recognition and Control) Act.
[405] S 24 (1) of the Refugees Act of 2006.

to confer discretionary powers on the Commissioner to determine whether or not to consent to disclosure.

It is undoubtedly essential for asylum applications to be confidential. Apart from protecting the privacy interests of the asylum seeker, confidentiality protects his security as well, thereby protecting the integrity of the justice system. One can argue that absolute confidentiality is the only way to protect the rights of asylum seekers. However the case of Chipu sheds light on some of the circumstances whereby the absolute confidentiality requirement would not be in the interests of justice, for instance where the asylum seeker is a dangerous criminal and where matters relating to the person are already in the public domain.

This chapter also dealt with the confidentiality of asylum seekers applications in Canada, New Zealand, Ireland and United States of America. In Canada, asylum applications are governed by the Immigration and Refugee Protection Act.[406] The Immigration Department in Canada consists of the Refugee Protection Division, Refugee Appeal Division, Immigration Division and Immigration Appeal Division in accordance with the Immigration and Refugee Protection Act. Section 166 (b) of that Act gives the Division the discretion to conduct proceedings in the absence of the public. Alternatively, the public may be excluded where there is an application for the proceedings to be held in private. Moreover such a Division should implement necessary measures to ensure that the proceedings are confidential, however certain requirements have to be met. The Division must be satisfied that there is,

i. a serious possibility that the life, liberty or security of a person will be endangered if the proceeding is held in public;
ii. a real and substantial risk to the fairness of the proceedings such that the need to prevent disclosure outweighs the societal interest that the proceedings be conducted in public, or
iii. a real and substantial risk that matters involving public security will be disclosed.[407]

This shows that the security of the asylum seeker and his right to a fair hearing are one of the factors that should be taken into account when dealing with the confidentiality of asylum applications in Canada. In New Zealand the safety of the asylum seeker is also taken into account in accordance with Section 18(3) of Schedule 2 of the New Zealand Immigration Act[408] read with section 151 of the same Act. Although asylum applications in New Zealand are not open to the public,[409] the requirement of confidentiality may be dispensed with where

[406] Immigration and Refugee Protection Act S.C.2001.27.
[407] S 166 (b) of the Immigration and Refugee Protection Act S.C.2001.27.
[408] New Zealand Immigration Act 51 of 2009.
[409] S18 (3) of the New Zealand Immigration Act.

there is no serious possibility that anyone's safety or security may be endangered as a consequence of such disclosure.[410]

The Ireland's Refugee Act requires *inter alia*, the consent of the asylum seeker before consent to public disclosure can be granted.[411] The general rule is that the hearings of the Refugee Appeal Board ought to be conducted in private. Thus one may argue that the confidentiality requirement should not be applied rigidly. It should be applied in a flexible manner to allow the law to do justice to various unique circumstances that inevitably present themselves before Refugee Boards worldwide.

3 12 A Commentary on *Chipu*

The principle of open justice requires that justice should be dispensed in an open court.[412] This is done to ensure public access to the methods and ideologies that are normally implemented by the court in administering justice. Lord Scarman concurs with this view. He enunciated that justice must be dispensed in the open so that the public may be given an opportunity to evaluate the quality of justice administered by the courts.[413] This is essential to our democracy because it enhances accountability and transparency. The values of accountability are essential principles that should be inherent in any legal system. Thus it is essential to uphold open justice because it enhances openness and transparency in the justice system thereby minimizing corruption and arbitrariness in the justice system. The asylum process requires openness to ensure that the Refugee Board as well as the Refugee Appeal Board are held accountable for their actions. Therefore it is essential to ensure that a balance is struck between the asylum seeker's need for confidentiality on one hand as well as the right to open justice on the other hand. The right to open justice is inextricably linked to the right to freedom of expression which includes freedom of the press and the media.[414] Hence the media has the right to access information and impart it to the public. Matters of public interest are also of particular interest to the media.

The facts of *Chipu* are of such a nature that media interest in the matter was inevitable. This is due to the fact that there was a reasonable belief to suspect Mr Krejcir of having committed

[410] S 151 of the New Zealand Immigration Act.
[411] S 16 (14) and 19 (2) of the Ireland's Refugee Act 17 of 1996.
[412] Stepniak *"The Therapeutic Vaue of Open Justice"* www.aiija.org.au/TherapJurisp06/Papers/Stepniak.pdf. (accessed 15-05-2016).
[413] *Home Office v Harman* 1982 1 All ER 532, 547.
[414] S 16 of the 1996 Constitution.

grievous crimes. Moreover, his country of origin sought to extradite him on account of various crimes including fraud. Accordingly one could justifiably submit that the alleged offences are such that they could lead a reasonable person to believe that he is more of an International Criminal than a hopeless asylum seeker. Hence this was a matter of public interest.

Moreover Mr Krejcir is alleged to have obtained his temporary asylum seekers permit fraudulently. This shows that the justice system is susceptible to abuse. Where secrecy is allowed, it becomes even more probable for corruption and maladministration to thrive under the veil of secrecy. Open justice thus serves the function of ensuring that the justice system is open and accessible to the public. In the instances where such accessibility would not be in the interests of justice, the limitation on the right to open justice should be justifiable.[415] Thus the question which arose in Chipu was whether the limitation on the right to open justice, including media freedom was justifiable and reasonable in a democratic society.

3 13 Lawyers for Human Rights Arguments

Although the Lawyers for Human Rights application to be admitted as *amicus curiae* was not accepted, this chapter will explore its arguments. The Lawyers for Human Rights arguments exposed the vulnerability of asylum seekers.[416] They also showed that asylum seekers are dependent on the Refugee Board which has the ultimate power to decide whether or not their application for asylum should be granted or rejected. This can be interpreted to mean that strict rules should be applied in order to govern Refugee Law and ensure the accuracy of decisions given by the Refugee Board. This is due to the fact that asylum seekers depend on the Refugee Board to discharge its functions effectively. Thus one may wonder if unfettered access to asylum applications by the media is bound to interfere with the interests of justice.

The Lawyers for Human Rights also mentioned that asylum applications are sensitive due to the nature of persecution that the asylum seekers and their families would have suffered in their countries of origin.[417] Human Rights violations such as torture, unlawful detention and other forms of persecution which threaten the security of the asylum seeker and his family would have been committed in most genuine cases. If the asylum seekers application is rejected summarily the consequences could be grievous. However one may explore the

[415] S 36 of the 1996 Constitution.
[416] *Chipu* para 6.
[417] *Chipu* para 6.

possibility that open justice can increase the intensity of such persecution in cases where the media is allowed to publish details of the facts that led to the application for asylum without adequate supervision. This is due to the fact that if the original countries from where the asylum seeker originated gains access to the information the asylum seeker may face further persecution.

The respondents in the case of *Chipu* concurred with this above view. They contended that absolute confidentiality was essential in order to ensure the security of the asylum seeker and his family. However if one where to analyse their argument in light of the fact that open justice enhances accountability one may be tempted to tilt the balance in favour of open justice. The case of Chipu deals with the issue of Mr Krejcir, an alleged criminal who is alleged to have obtained his temporary seekers permit fraudulently. Thus it would probably be in the best interests of justice to ensure that the need for open justice outweighs his need for confidentiality in order to enhance the accountability of the Refugee Board thereby protecting the integrity of the justice system.

Therefore section 21(5) of the Refugee [illegible]t allow the Refugee Board to make a decision on whether or not to allow publicity based on the unique facts of each case. Each case is different and the circumstances that lead individuals to apply for asylum are different as well. In the case of Chipu, the applicant was alleged to be a criminal and thus this inevitably makes it a matter of public interest. Especially if one were to consider the grievous nature of the crimes, which includes murder. Hence discretion on the part of the Refugee Board as requested by the media companies was essential.

3 14 The Decision of the Court

It was held that the legitimate purpose of section 21(5) could be achieved by less restrictive means. This would entail conferring the Refugee Appeal Board with the discretion to determine what issues can be made accessible by the media and the public and which ones are not. Zondo J ruled that absolute confidentiality was not essential. Thus section 21(5) was deemed not to be a reasonable and justifiable limitation on the right to freedom of expression to the extent that it does not confer discretion on the Refugee Appeal Board to determine instances whereby the public and the media can have access to proceedings and those that they cannot.

3 15 Remarks on *Chipu*

This chapter contends that media publicity has a potentially adverse impact on the administration of justice with regard to asylum proceedings. Notably media publicity could subject the asylum seeker and his family to further persecution. Alternatively there is a danger that matters pertaining to the national security could be exposed during asylum proceedings and lastly media publicity could impact negatively on the asylum seekers right to fair trial. Thus it is clear that unregulated media publicity has negative consequences.

However regulating media publicity is also a complex task due to the fundamental nature of rights which are attached to the press. Freedom of expression is a fundamental tenet in any democracy. Open justice is inextricably linked to freedom of expression and it is essential to facilitate an efficient justice system because it gives the public an opportunity to see how justice will be dispensed. In the case of *Chipu* it was particularly important for justice to be dispensed in the public, firstly because the matter was a matter of public interest since Krejcir was allegedly a criminal and secondly because there were allegations that he had obtained his temporary asylum seekers permit fraudu[illegible]e the tension between open justice and the confidentiality of asylum proceedings is a complex issue which requires adequate legislative measures and careful consideration on the part of the decision makers in order to deal with it more effectively. Thus this thesis suggests legislative reform in order to incorporate the remedies applied by other states in to the system.

3 16 Conclusion

This Chapter identified the tension between the right to open justice and the accused right to a fair trial. The chapter observed further that the courts are battling to deal with the tension between these competing interests effectively due to the fact that these interests, though divergent, are of equal importance to our democracy. In hearings before an ordinary court of law, the open justice principle has the potential to impinge on an accused fair trial rights thereby unfairly prejudicing the accused by disturbing the impartiality of the courts. Alternatively in hearings before the Refugee Board the right to open justice also has the potential to impinge on the asylum seeker's need for confidentiality thereby exposing him to persecution. However this study also observed that much depends on the nature of publicity in addition to the degree of publicity.

The study has also identified the impact of technology as a factor which has escalated the harmful nature of pre-trial publicity. This is due to the fact that the traditional methods of journalism have been supplemented by the internet whereby bloggers and other social network users are free to publish their id[illegible] actually assessing their correctness first. Thus it has become difficult to regulate media publicity. This study also observed that the new Constitution which was adopted in Zimbabwe recently will be more effective in protecting the accused's fair trial rights in Zimbabwe.

The study detected that issues relating to criminal activity can impact on national security as well. Thus the study highlighted that careful consideration should be applied when dealing with asylum seekers who have committed crimes. Moreover the study also observed that the Refugees Act of South Africa is not effective in supplying the Refugee Board with enough mechanism to deal with the tension between the right to open justice and the need for confidentiality in asylum applications effectively.

The next chapter will deal with the tension between the right to open justice and the question of national security in a nascent democracy. Open justice involves access to information; however information relating to national security is usually the subject of much confidentiality. Thus chapter four seeks to explore the nature of the tension between these fundamental values.

CHAPTER FOUR

The Right to Open Justice and the Question of National Security in a Nascent Democracy

4 1 Introduction

The extent to which the right to open justice can be limited to protect national security interests has been, and is still, a problematic issue in public law in South Africa, Zimbabwe and the Commonwealth. South African and Zimbabwean courts have had to confront the notoriously difficult question of whether disclosure of sensitive information in an open court would be injurious to national security. At stake here are two competing rights and interests which seem fundamentally opposed. In the determination of whether national security information should be disclosed, it has been asserted that a court in forming an opinion on the likelihood of damage to national security which could result from disclosure of the information at issue has to take into account the "mosaic effect." Put differently and in general terms, this concept when invoked by the government posits that the release of even innocuous information can jeopardize national security if it can be pierced together by a knowledgeable reader. The right to open court justice, comprising cluster of rights to freedom of expression, access to courts and fair trial, on the other hand, provides that information which is before court ought to be public information to the extent possible. In this regard, the Constitutional Court decision in *Independent Newspapers v Minister of Intelligence: In re Masetlha v President of RSA* in which the media sought access to court proceedings, remains relevant and current. This Chapter will expose the inherent tension between the values of open justice and national security in the context of South African and Zimbabwean jurisprudence since the advent of 1993/6 and 2013 Constitutions.

Firstly the chapter will highlight the nature of the tension between open justice and national security. Secondly the chapter will illustrate the importance of ascertaining the scope and extent of national security as well as defining the term national security. South African case law will be discussed. The study will examine Zimbabwean legislation which deals with access to information and national security. The study will also examine whether the legislation is compatible with the 2013 Constitution of Zimbabwe. Lastly this study will inquire into the issues of open justice, privacy and national security in the American jurisdiction.

4 2 Outlining the Scope of National security

In February 2015 there were reports of a cell phone jammer which was used to restrict the free flow of information in the South African parliament.[418] The cell phone jammer effectively intercepted the available networks thereby hindering journalists from publishing the events that were taking place in parliament that day through twitter, facebook and other forms of media.[419] Subsequently, the jamming device became the subject of much outrage and dissention.

This incident is highly relevant in assessing the tension between freedom of expression which includes the freedom to receive and impart information and ideas on one hand and national security on the other hand. Firstly the government argued that the cell phone jammer had been put in place in order to safeguard national security. Arguably the unrestricted flow of information has the potential to impinge on the national security or alternatively the stability of a state. However in order to safeguard national security one should have a definition of national security so that he or she is familiar with the interest that he or she is bound to protect. A general idea of what national security entails would also suffice in certain circumstances. Secondly one should be aware of the conduct or possibly situations that pose a threat to national security. The knowledge of these factors would assist in ensuring that the liberties and free expression rights of individuals and the press are not unnecessary curtailed in the name of national security even when it is not necessary.

Regrettably there is currently no concrete definition of national security that is universally accepted. This could be attributed to the fact that different states face different forms of threats, therefore different states have different ideas of what they conceive to be national security. However in South Africa the Promotion of Access to information Act provides a guideline of matters that may be defined as national security.[420] Moreover the Johannesburg principles if implemented effectively, could give a general guideline of what constitutes national security thereby narrowing the scope of national security in both South Africa and Zimbabwe.[421]

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[418] News 24 "Reports of a cellphone Jammer in Parliament." www.news24.com (accessed 19-07-2015). ("Reports of a cellphone Jammer in Parliament.")

[419] News 24 "Reports of a cellphone Jammer in Parliament."

[420] S41 of the PAIA.

[421] Mendel "National Security and Open Government". maxwell.syr.edu/uploadedFiles/Campbell/events/NSOG.pdf. (accessed 15-07-2015). This article elaborates on the need to define national security. (Henceforth "National Security and Open Government").

Defining national security is essential in order to enhance open justice and access to information. This is due to the fact that national security considerations tend to limit the application and scope of the right to access information held by the state. Information is at the heart of any legal system. Police investigate crimes and act on the information they acquire; lawyers and witnesses present information to courts; and judges make decisions based on that information; and those decisions, reported by the popular and legal press, make up the basis of the law in future cases. In South Africa, as in any truly democratic society, the courts are expected to be open; information is expected to be available to the public. However, from time to time, national security considerations can limit the extent of disclosure of information in legal proceedings. Thus an accurate definition of national security would surely eradicate the blanket of secrecy that currently exists in most African countries with regard to national security information. If the scope of national security is overly broad this could unduly influence intelligence services to withhold various categories of information on the basis of national security. Thus information should only be withheld where there is a possibility that the national security of a state would be endangered by public disclosure.

Mendel identifies the presence of a "legitimate national security interest" as a factor that should be taken into consideration before limiting the right of access to information in accordance with the Johannesburg Principles.[422] The Johannesburg principles define a "legitimate national security interest" as "an interest the genuine purpose and primary impact of which is to protect national security, consistent with international and national law."[423] Moreover the Johannesburg principles stipulated that a national security interest will not be considered as legitimate if its aim is not to safeguard national security but to avoid embarrassment, or protect government officials from evidence of wrongdoing such as corruption or maladministration and covering human rights violations.[424] Hutton also captured the essence of this view by stating that,

> [t]he justifiable need for secrecy has ...in many African states become a blanket of secrecy the norm rather than the exception providing cover for ethically questionable operations, corruption, abuses of power, inadequacy and inefficiency. A system of accountability needs to be created that ...can on the one hand respect the justifiable use of secrecy, but can [on the other hand] also ensure that intelligence agencies serve the broader justice and security needs of the people.[425]

[422] Mendel "Defining the Scope of National Security." .
[423] Mendel "Defining the Scope of National Security."
[424] Mendel "Defining the Scope of National Security."
[425] Hutton "Intelligence and Accountability in Africa" http://www.issafrica.org/publications/policy-brief/intelligence-and-accountability-inafrica (accessed 15-07-2015).

This elaborates on the potential that a system based on secrecy has to undermine the rule of law while depriving citizens of information which is of public interest and importance. National security considerations can be used to cover various illicit activities of state officials. On the other hand open justice is a value that has the potential to enhance accountability and ensure the efficient dispatch of public interest information to the media as well as the public. Hence justice should be dispensed in the open unless there are legitimate or genuine reasons why the right to open justice should be limited in order to accommodate national security considerations.

Open justice is essential in preserving accountability, openness and transparency as basic values of a Constitutional democracy. Klaaren asserts that in South Africa there has been an increasing emphasis on accountability recently.[426] Nathan attributes this sudden emphasis on openness and accountability to the provisions of the South African Constitution which addresses the issues related to security.[427] These Constitutional provisions proliferated the impact of the rule of law thereby deterring acts of misconduct from the intelligence community.[428] The Constitution demands that national security must be preserved in accordance with the rule of law.[429] This is a welcome shift away from the oppressive and secretive methods that were employed by the apartheid regime. According to Allan, "Secrecy was the hallmark of the apartheid regime."[430] As stated before excessive and unjustifiable secrecy is detrimental to open justice and the other essential values that open justice seeks to uphold. Thus if the scope of national security is clearly defined it becomes easier to determine whether or not there is a legitimate national security interest against the disclosure of such information.

4 2 1 Towards a Definitive approach: Defining National Security

Various attempts have been made to define national security more precisely. Mendel argues that before trying to define the term national security one should be aware of the purpose that

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[426] Klaaren "Defining National Security".

[427] Nathan, "Intelligence Bound: The South African Constitution and Intelligence Services" doi:10.1111/j.1468-2346.2010.00875.x. (accessed 15-07-2015).

[428] Members of the security intelligence are not permitted to obey an illegal instruction or order. Members of the security intelligence are also required to act in accordance with the law. The Constitution also requires the establishment of a body to carry out civilian oversight of the intelligence services thereby providing the opportunity for civilian monitoring of the activities of the intelligence services through an inspector appointed by the President. This also enhances the accountability of intelligence operatives.

[429] Nathan, "Intelligence Bound: The South African Constitution and Intelligence Services"

[430] Allan "Paper Wars: Access to Information in South Africa" http://works.bepress.com/kate_allan/2. (accessed 15-07-2016).

such a definition will serve.[431] He advanced two reasons for the requirement of a definition with regards to national security. First, he submitted that a definition of national security clarifies the scope of information to which access may be denied on the grounds of national security.[432] Secondly a definition of national security serves as a key element in outlining the circumstances in which members of the public will be penalised for disclosing or publishing the information.[433] Thus the need for a definitive approach with regards to national interest has led experts to attempt to define national security.

In 1995 a group of legal and other academic experts adopted a document entitled, "The Johannesburg Principles: National Security, Freedom of Expression and Access to Information."[434] Their purpose was to endorse model standards outlining the legitimate scope of justifiable limitations on freedom of expression on grounds of national security.[435] These principles gained acceptance among judges, lawyers, academics and the media.[436] Although the definitive section of the Johannesburg Principles elaborates that the Principles will not be offering a concrete definition of national security, Principle 2 of the same principles goes on to encourage states to define national security at national level.[437] Meanwhile Principle 9 offers categories of Information that falls under national security.[438] Klaaren acknowledged the efforts of judicial and other legal institutions in contributing towards defining national security while placing emphasis on the need to access national security information.[439] He also argues that since the "secrecy side" has not attempted to define national security, the definition of national security has to emanate from the "disclosure side." This could possibly refer to the courts. It is the courts who are burdened with the task of classifying information which falls under national security while balancing open justice and national security at the same time.

The disclosure of potentially sensitive information is a problematic issue. Nevertheless democracy tends to favour disclosure and openness while secrecy is permitted on exceptional

[431] Mendel "Defining the Scope of National Security."
[432] Mendel "Defining the Scope of National Security."
[433] Mendel "Defining the Scope of National Security."
[434] Mendel "Defining the Scope of National Security." See also Coliver "Commentary on the Johannesburg Principles on National Security, Freedom of Expression and Access to information. Right2infor.org/exceptions-to-access/resources/publications/Commentary on the Johannesburg Principles.pdf. (accessed 25-11-2016).
[435] Mendel "Defining the Scope of National Security."
[436] Mendel "Defining the Scope of National Security."
[437] Mendel "Defining the Scope of National Security." See also Principle 2 of the Johannesburg Principles 1995.
[438] Mendel "Defining the Scope of National Security." See also Principle 9 of the Johannesburg Principles 1995.
[439] Klaaren "Defining National Security".

grounds. The Constitution of South Africa provides the right of access to information. Section 32 of the Constitution states that,

> (1) Everyone has the right of access to
> (a) Any information held by the state: and
> (b) Any information that is held by another person and that is required for the exercise or protection of any rights.
> (2) National legislation must be enacted to give effect to this right, and may provide for reasonable measures to alleviate the administration of financial burden on the state.[440]

Subsequently the Promotion of Access to Information Act (hereinafter referred to as PAIA) was enacted to give effect to the right of access to Information.[441]

PAIA is essential because it provides for the right of access to information and educates one on the procedure which should be followed to obtain such information. More importantly it enables interested parties to obtain information which relates to national security. PAIA also identifies information which falls under national security thereby narrowing the scope of national security in South Africa. In section 41 PAIA confers the Information Officer with a discretion to refuse access to a record if the disclosure of such record would be reasonably be expected to cause prejudice to,

i. The defence of the Republic
ii. The security of the Republic
iii. Subject to subsection (5) the Internal Relations of the Republic or reveal Information supplied in confidence in terms of International agreements (as specified in s41(1) (b)[442]

After stating these factors the drafters of PAIA went on to issue particularizations of information which they considered as national security information. Thus PAIA provides an idea of the types of information that may fall under the exemption clause which is section 41(1) of PAIA. This includes information,

> a. relating to military tactics, strategy, exercises or operations undertaken in preparation for hostilities or in connection with detection or curtailment of subversive or hostile activities;
>
> b. relating to quantity, characteristics, capabilities, vulnerabilities or deployment of weapons or equipment used to detect, prevent, suppress, or curtail subversive or hostilities—or anything being designed, considered or developed for such use;
>
> c. relating to characteristics, vulnerabilities, and deployment etc. of any military force or unit or person responsible for detection, prevention, suppression or curtailment of subversive or hostile activities;
>
> d. held for the purpose of intelligence relating to defence; the detection, prevention, suppression or curtailment of subversive or hostile activities; or of another state or international organization used by the Republic in the process of deliberation;

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[440] S 32 of the 1996 Constitution.
[441] For a more detailed discussion on the essence of The Promotion of Access to Information Act see Chapter 2. Chapter 4 will be restricted to a discussion of PAIA in relation to national security only.
[442] S 41 of the PAIA.

e. on methods or equipment used for intelligence as referred to in (d);

f. on the identity of a confidential or intelligence source; g. on the positions adopted or to be adopted by the Republic (or another international organization) for the purpose of international negotiations; and

h. that constitutes diplomatic correspondence.[443]

PAIA's efforts to define the scope of national security cannot be disputed. However it is disturbing to note that section 41(2) goes on to state that such examples should not necessarily limit the generality of the subsection.[444] Klaaren compared the provisions of PAIA with those of the Draft Model for AU member states which was commissioned by the African Commission on Human and Peoples Rights.[445] (Hereinafter referred to as the model law). Like PAIA, this document places the definition of national security in the context of military or armed conflict thereby narrowing it considerably.[446]

There are also striking differences between the two because while PAIA identifies national security information as "including" certain kinds of information. The Model law on the other hand specifies that "this is what national security means."[447] Thus the Model law attempts to restrict the scope of national security.

Moreover, the Model Law varies considerably from the similar provision in PAIA: it lacks the equivalent of PAIA section 41(d) (iii), 41(c) and varies the equivalent provision to PAIA section 41(b) so that the exemption in the African law will not include nuclear weapons.[448] At first it seems as if PAIA sections 41(g) and (h) have also been omitted, however it must be noted that the Model law considers international relations under a separate section.[449] The separation of the two concepts also discloses the South African requirement for clarity in

[443]S 41 (1) of the PAIA.
[444]S 41 (2) of the PAIA.
[445]Klaaren "Defining National Security". See the definition of national security as contained in the Model draft. It includes information related to a. military tactics or strategy or military exercises or operations undertaken in preparation of hostilities or in connection with the detection, prevention, suppression, or curtailment of subversive or hostile activities;
b. intelligence relating to—
c. the defence of the State;
d. the detection, prevention, suppression, or curtailment of subversive or hostile activities; i. methods of, and scientific or technical equipment for, collecting, assessing, or handling information referred to in paragraph (b); ii. the identity of a confidential source and any other source of information referred to in paragraph (b); or iii. The quantity, characteristics, capabilities, vulnerabilities, or deployment of anything being designed, developed, produced or considered for use as weapons or such other equipment, excluding nuclear weapons.
[446]Klaaren "Defining National Security". A national security interest is a considerably wider concept. PAIA limited this effect.
[447]Klaaren "Defining National Security."
[448]Klaaren "Defining National Security."
[449]Klaaren "Defining National Security."

order to ensure a thorough understanding of national security.[450] Thus national security is a value which is being defined as precisely as possible through the efforts of drafters both nationally and abroad. However PAIA is one of the instruments that is being utilised by the judiciary when determining issues related to national security. In the course of this chapter such judicial decisions will be discussed.

4 3 Evaluating the Role of National Security and the Value of Freedom of Expression in a Nascent Democracy

As stated in Chapter 2 freedom of expression is an important foundational value which is protected both under International law as well as the national laws of South Africa and Zimbabwe. The right of access to information is indeed a component of the right to freedom of expression because free expression includes the right to receive and impart information.

However the correct approach that should be used to restrict freedom of expression is still not clear. There is dissention among scholars on the test that should be utilized to restrict freedom of expression as well as the exact purpose that such restrictions would ultimately serve. Article 19(3) of the ICCPR provides guidelines on the scope of restriction. Thus under International law freedom of expression can justifiably be restricted or limited,

1. For respect of the rights or reputation of others; and
2. For the protection of national security or of public order or of public health or morals.[451]

Nevertheless, in imposing restrictions this provision also seeks to ensure that states should balance the legitimate aim they seek to protect against the fundamental right to freedom of expression.[452] This difficult task usually falls into the hands of the courts as this Chapter will reveal. There is also the vague concept of necessity which tends to be considered when dealing with the tension between national security and open justice. It is vital for laws to restrict freedom of expression only when it is necessary.

Freedom of expression has been the focus of historic abuse since time immemorial. Mendel advances two ways in which freedom of expression can be arbitrarily limited in the name of national security.[453] Firstly, the imposition of heavy criminal sanctions against the publishing of statements which allegedly endanger national security is a common occurrence especially

[450]Klaaren "Defining National Security."
[451] Art 19(3) of the ICCPR.
[452]Mendel "National Security and Open Government."
[453]Mendel "National Security and Open Government."

in dictatorship states.[454] Secondly, in states where the law safeguards the right of access to information, these laws limit the right excessively on the grounds of national security.[455] Thus access to national security information is a fundamental right which states are still battling to provide for their citizens.

Various arguments have traditionally been advanced in favour of openness. These identify the central role of the intelligence services in society and go further to state that they must be held accountable just like other public bodies.[456] Mendel took an example of the Defence as an industry that absorbs large amounts of public funds and in most countries they spend undisclosed amounts of money for undisclosed purposes.[457] This inevitably enhances corrupt activities which tend to thrive in such situations. Therefore open justice also plays an essential role in upholding the rule of law.

The next section of this chapter will assess the approach of the South African courts in dealing with the tension between the right to open justice and the need to preserve national security in a nascent democracy.

4 4 South Africa's Judiciary Approach in Resolving the Conflict between Open Justice and National Security

Independent Newspapers

4 4 1 The Facts of the Case

The *Independent Newspapers case* emanates from another matter which was also tried before the Constitutional Court. The court labelled this case as the "underlying matter." This case is the popular case of *Masethla v President of the Republic of South Africa,*[458] which was heard on the 10th of May 2007 while judgment was passed on the 3rd of October 2007.

In the underlying matter, Mr Masethla who had been dismissed from his position as the Head of the National Intelligence Agency (Hereafter referred to as the NIA), submitted two applications which were subsequently dismissed by the High Court. Masethla sought leave to appeal to the Constitutional Court against the decision of the High Court which leave was granted. The facts relating to the *Independent Newspapers case* later ensued from this

[454] The following pages will discuss the situation in Zimbabwe.
[455] See the Canadian case of *R v Oakes* [1986] 1 SCR 103. This case illustrates the prominence of the problem of excessive secrecy even in so called democracies.
[456] Mendel "National Security and Open Government."
[457] Mendel "National Security and Open Government."
[458] 2008 1 SA 566 (CC).

situation. Before hearing the appeal, the court of its own volition, ordered the removal of the underlying record from the court website. The Registrar was also instructed not dispatch the hard copy of the underlying record to the public. This direction was issued to protect certain documents that were marked as "in camera" or "confidential or "secret" from public disclosure since the documents possessed information which related to the activities of the NIA. These Markings are likely to have been made under existing Minimum Information Standards Security Regulation which is an unpopular cabinet policy which promotes secrecy and is highly regarded as being unconstitutional.

Independent Newspapers was following the *Masethla* case and it sought access to the underlying record. An application was made by Independent Newspapers for conditional access to the materials in order to pursue its application for access to the record. The interlocutory application was denied for three reasons. Firstly it was stated that the applicant had not established a substantive basis for its case. Thus its request for access was seemingly based on mere curiosity. Secondly the claim for an open court proved to be overwhelming since national security interests could be defeated by mere public assertion of a court case. Thirdly it was stated that the Minister had furnished the applicant with some of the required information.[459] However, the court after hearing the main and interlocutory aspects of the case granted access to some but not all of the documents. The court made no order as to costs noting that each party had gained substantial success to a certain extent. The decision reached in the Independent Newspapers case is not immune to critism. It can be criticised on the basis that it places much significance and deference to the government's claims for secrecy rather than on the need for access to information.

Therefore this part of the chapter will delve into the views of the majority opinion as submitted by Moseneke DCJ in the *Independent Newspapers* case. This case is relevant to the issue of open justice and it explores the tension between open justice and national security. The court was therefore faced with the task of balancing or reconciling these competing interests. In order to determine whether to grant Independent Newspapers access to the documents or not, Moseneke DCJ began by making reference to the Constitution which enjoys supremacy in South Africa. He submitted that it is evident that section 32 creates a right to the discovery of information held by the state or another person subject to certain

[459] 2008 5 SA (CC) para 30.

procedural requirements.[460] However Moseneke DCJ was under no obligation to deal with this aspect in detail because Independent Newspapers did not rely on this right at all in their application.

After establishing that the right of access to information does exist in South African law, Moseneke went on to deal with the concept of open justice. Moseneke DCJ acknowledged the "cluster of rights" which establishes and constitutes open justice namely the right to a fair trial, the right to freedom of expression as well as the right of access to information. [461] Accordingly it may seem that Moseneke DCJ sees the need for a regular requirement of openness in South Africa.[462] Moreover he identified the purposive value of open justice in enhancing transparency, accountability and responsiveness.[463]

Moseneke DCJ captures the essence that the general rule should be in favour of openness. However open justice should not be restricted by the presence of exceptional circumstances alone but by the powers of the courts as well.[464] Since this case dealt with the accessibility of classified documents, the courts had to establish its position as a watchdog which checks and balances the powers of the executive.[465] The court rejected the argument that judicial authority over the executive is derived from and limited to declaring invalid any conduct which is inconsistent with the Constitution.[466] Moseneke DCJ also asserted that the judiciary has the inherent power of access to a classified record which may be the subject of dispute in a court case.[467] Yacoob J also agreed with this assertion,

> "A mere classification of a document within a court record as 'confidential' or 'secret' or even 'top secret' under the operative intelligence legislation or the mere ipse dixit of the minister concerned does not place such documents beyond the reach of the courts. Once the documents are placed before a court, they are susceptible to its scrutiny and direction as to whether the public should be granted or denied access."[468]

This invalidated assertions made by the Minister who argued that a court was not supposed to release a classified document if there was no challenge to such classification.

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[460] 2008 5 SA 31 (CC) para 23.
[461] *Independent Newspapers* para 39.
[462] *Independent Newspapers* para 40.
[463] *Independent Newspapers* para 40-42.
[464] *Independent Newspapers* paras 43-45.
[465] Klaaren 2009 *SALJ* 24 27.
[466] *Independent Newspapers* para 52-54.
[467] *Independent Newspapers* para 52-54.
[468] *Independent Newspapers*para 89.

4 4 2 The Test for Limiting Open Justice- Interests of Justice

The courts named the interests of justice as a significant factor in limiting open justice. Klaaren viewed this as, "an assertion of judicial authority and a correlative rejection of executive power."[469] Thus in Moseneke DCJ's view the interests of justice is a concept which is based on the court's power to regulate its own processes in accordance with the Constitution.[470] Conversely it is apparent from this argument that the courts can justifiably limit rights using a standard apart from section 36 of the Constitution. This limitation test which is based on the interests of justice will be dealt with in more detail in chapter 5. Therefore in circumstances where the court is dealing with the disclosure of a document that was classified on the basis of national security the court is supposed to consider all the relevant circumstances and then establish whether the disclosure of such a document to the parties, media as well as the public would be in the interests of justice.[471]

In order to reach a decision Moseneke DCJ used four methods. Firstly he inspected the fundamental contents of the material in issue. Secondly, he determined whether the information contained in the material constituted national security information or not. Thirdly he considered whether the material was already in the public domain or not. Lastly he measured redaction of the material. This shows that the courts must have access to the document first before they can ascertain whether the material can be legitimately withheld from the public. The balancing of different interests will also take place as the court considers whether the disclosure of the information would be in the interests of justice.

4 4 3 The Dissenting Opinion in the *Independent Newspapers* case

This part of the chapter will briefly capture the arguments of the dissenting minority in the *Independent Newspapers* case. The judges who dissented from the majority opinion are Yacoob, Sachs and Van Westhuizen. However Yacoob J and Van Westhuizen J also differ on certain slight aspects. Firstly Van Westhuizen submits that he would not have granted the interlocutory application while Yacoob J specifies that he would indeed have granted the interlocutory application.[472] This shows that there is a difference in their assessment of the risks that the disclosure of the underlying record would have posed.[473] Specifically, Van der

[469]Klaaren 2009 *SALJ* 24 27.
[470] S 173 of the 1996 Constitution.
[471]Klaaren 2009 *SALJ* 27.
[472]Klaaren2009 *SALJ* 29.
[473]Klaaren2009 *SALJ* 29.

Westhuizen asserts that revealing the name of an operative could put that particular operative at risk and consequently he would not reveal the name of the operative, while Yacoob J argues that he would have disclosed the name of the operative. Sachs J seems to concur with Van Westhuizen on this specific point, thus it seems that Yacoob J is the only one who would have revealed the name of the operative.[474] Yacoob J shared the majority's view that this is a matter which implicates the right to open justice. He differs with the majority opinion that the court's authority to regulate its own process is a justifiable mechanism to limit the right to open justice.[475] However he places particular emphasis on the application of the limitations clause contained in the Constitution.

Yacoob J noted that the Independent Newspapers case reflected the tension between a right and a state interest. This is different from the approach taken by Sachs J in paragraph 151 who views it as a conflict between open justice which is central to our democracy and secrecy on the other hand. Sachs J is of the view that the interests which require balancing in this case are not merely two. There is openness and democracy on one hand while the other hand contains the need for a shared sense of security.[476] Sachs J however reached a conclusion which favours a higher degree of openness as provided for by Yacoob J.

Yacoob J commented on the balancing approach adopted by the majority which is in favour of harmony while arguing that there is in fact no harmony between these competing interests.[477] Yacoob J also reflected that there should be a presumption towards openness rather than secrecy. He also stated that most of the claims for secrecy were aimed at the avoidance of embarrassment rather than legitimate reasons. Sachs J concurred with Yacoob J on this issue.

4 4 4 Remarks on the *Independent Newspapers* case

The Independent Newspapers case exposes the tension between open justice and national security. Both interests are essential but the tension between them is inevitable since one requires openness while the other requires secrecy. However Sachs J notes that these opposing interests are not merely two since open justice promotes democracy while classification promotes a shared sense of security which is craved by all humans. Yacoob J and Sachs J show that the presumption should be in favour of openness while secrecy is

[474] *Independent Newspapers* para 182.
[475] *Independent Newspapers* para 83.
[476] Klaaren 2009 *SALJ* 31.
[477] *Independent Newspapers* para 86.

promoted in exceptional circumstances. They also show that the mere avoidance of embarrassment is not a legitimate factor in promoting secrecy.

A requirement which is apparent from an evaluation of the facts is the need for a balancing mechanism with regards to these rights. Moseneke DCJ uses section 173 as a method of establishing the authority of the court to regulate its own processes. This supports the idea that a court after accessing the relevant classified document has the authority to determine whether the contents of that document are classified or not. Secondly the court has to establish whether it would be in the interests of justice to disclose the information to the relevant parties, the media and the public. Yacoob J seems to have reservations about this particular view as he puts emphasis on the need to use the limitations test contained in Section 36 of the Constitution. Thus this case shows that the balancing of divergent interests is a complicated process.

President of the RSA v Mail and Guardian Ltd

In the *Mail and Guardian* case the definition of national security was interpreted in the context of PAIA. In this case the Mail and Guardian which is a valued newspaper, sought access to a report which had been compiled by two South African judges on the instruction of former President Mbeki. This reports contained information on the controversial Zimbabwean elections held in 2002. The report has basically been described as a document which contained the Constitutional and legal issues relating to the relevant elections.

Access to the relevant document was denied on the basis of section 41 of PAIA. Specifically section 41(1)(b)(i).[478] This subsection regulates the disclosure of information supplied in confidence to other states. The respondents argued that the record contained information which had been supplied in confidence by another state.

The first court ruled in favour of the applicants. The High court stated that there was no evidence to show that the information had been obtained in confidence. Secondly the nature of the information consisting merely of legal and constitutional issues would not naturally infer confidentiality.[479] The use of the word "may" in section 41 was also interpreted to mean that it confers discretion on the decision maker to exercise his discretion and such discretion must be exercised in favour of openness unless there are specified grounds for refusal.

[478] *M & G Ltd v President of the Republic of South Africa* (1242/09)2010.
[479] *Mail and Guardian* case para 9.

Moreover the High Court noted that when deciding a case such as the one provided in section 41 the information officer is usually not in possession of the disputed document thus an affidavit is necessary if the respondent desires to justify refusal. It was also stated that the affidavit should be specific enough to justify refusal considering the authority that the information officer possesses to strike off the offending aspects of the record. It was discovered that the respondents had not furnished adequate grounds for refusal. Thus the court ruled in favour of disclosure.

The Johannesburg principles also reiterate the need for a legitimate national interest as a crucial factor in dealing with access to information and national security. According to Klaaren they emphasise, "the establishment of that legitimacy (rather than the interest itself) that ought to be advanced." Thus section 2 (a) of the Johannesburg Principles necessitates the protection of a national interest as a prerequisite before limiting access to information. Principle 2 (b) also emphasizes the degree of justification needed for legitimacy to be established.

The respondents appealed to the Supreme Court of Appeal.[480] The SCA ruled against them once more. The SCA noted that the three people who had intimate knowledge about the contents of the report did not submit any affidavits.[481] Therefore there was an apparent lack of particularity in asserting section 41 as a justification for non-disclosure. The appeal was set aside due to the fact the state had failed to establish an evidential foundation for failing to disclose the document.

The state appealed to the Constitutional Court but the court dealt with issues of procedure. It specified that the High Court had erred in failing to access the document and evaluating its contents in terms of section 80 of PAIA. The case was therefore remitted back to the High Court so that the court could take a judicial peek at the report. This established the power of courts to access a classified document and evaluate whether it contains national security information. A similar view is found in the *Independent Newspapers* case which was dealt with above. The state attempted to bring affidavits written by President Mbeki and Jacob Zuma but the court rejected the offer. The High Court took a look at the report.[482] After the judicial peak a judgment was issued against the state once again. They appealed to the SCA

[480] *President of the Republic of South Africa v M & G Media Ltd.* 2011 2 SA 1 (SCA).
[481] *Mail and Guardian* case para 20.
[482] *Independent Newspapers* para 75.

and lost once again. Subsequently, the Constitutional Court denied their application for leave to appeal thereby putting an end to the dispute.

4 5 Remarks on the *Mail and Guardian* Case

The decision in this case shows that open justice is the general rule while secrecy needs to be justified by sufficient reasons. This is due to the fact that the interests of justice dictate the need for access to information and freedom of expression.

National security is a vague concept. Arguably because it is difficult to determine the risk that disclosure of such sensitive information would pose. In the *Mail and Guardian* case the state had to show that the information that they intended to withhold indeed fell within the categories of information protected by national security. They also had to establish reasons why secrecy was necessary as well. Thus in this Post-apartheid era state accountability has been enhanced.

CC (II) Systems Proprietary Limited v Fa

A company was initially denied access to information regarding an Audit General Review of the Strategic Defence Package, despite the allegations of corruption regarding the awarding of the tender.[483] This information was refused on the basis of section 41 (a) of PAIA. The case dealt with the degree of justification which is required in order for a rejection to qualify under the exemption section. It was stated that mere generalities will not suffice when refusing access to information.[484]

The court ordered the Auditor General to disclose some of the records. It was stated that the respondents have a duty to specify the record which is exempted from disclosure as well as specify accurately why confidentiality is a requirement.

4 6 Remarks on the *Fakie* Case

This case deals with the standard that must be complied with in order for a court to rule in favour of secrecy. Such a standard is high considering that the presumption works in favour of disclosure as stipulated in the *Independent Newspapers* case. The respondent must have valid reasons why the document should maintain its confidentiality. He must specify the

[483] *Fakie NO v. CCII Systems (Pty) Ltd* 2006 4SA 326 (SCA).
[484] *Fakie*para 17.

reasons clearly and concisely to the court. If the reasons are justifiable in a democratic society then the exemption clause will be applied.

4 7 The Minimum Information Security Standards and Related Laws

PAIA and the Protection of Access to Information Act are two pieces of legislation which currently exist in tension due to the divergent nature of the interests that they promote. While PAIA promotes openness, the Protection of Information Act promotes secrecy. PAIA promotes and gives effect to the right of access to information including information that is held by private bodies. This piece of legislation is evidently governed by the current Constitution of South Africa which is widely regarded as being progressive.

However Klaaren criticised PAIA in part on the basis of what it fails to do rather than what it actually does.[485] He observes that PAIA omitted to repeal the remaining policies and governmental laws which operate in favour of secrecy. Thus when one seeks to obtain information which is not contained in a record and without following the procedures stipulated in PAIA the Protection of Information Act and MISS would still apply.[486] Regrettably PAIA does not restrain the application of these laws. However it should be noted that PAIA remains the only legislation which regulates formal access to records. Nevertheless, this chapter will briefly highlight these oppressive laws since they are relevant to Constitutionalism.

The Protection of Information Act 84 of 1982 replaced the Official Secrets Act 16 of 1956.
The Protection of Information Act has been criticised as being broad in terms of promoting government secrecy.[487] Apart from prohibiting the disclosure of information from another person, this Act also penalises the failure to adequately care for such information or safeguard it. Heavy Criminal sanctions are imposed on offenders such as ten years imprisonment as well as the payment of a fine in accordance with section 4(1) of the Act.[488]
Moreover the Act does not differentiate between national security on one hand and other information held by the public service thereby creating a blanket of secrecy.
The MISS which can be defined as a potentially unconstitutional cabinet policy also continues to operate. It is intended to be applied by public institutions and also private

[485]Klaaren "Access to Information and National Security in South Africa" Maxwell.syr.edu/uploadedFiles/Campbell/events/NSOG.pdf. (accessed 10-07-2-16).
[486]Klaaren "Access to Information and National Security in South Africa"
[487] S 4(1) (b) of the Protection of Information Act.
[488]S4 (1) of the Protection of Information Act.

institutions which have a working relationship with private institutions. It recommends the relevant institutions to draft rules of procedure which comply with the Minimum Security Standards contained in MISS. Klaaren drew some similarities and differences between MISS and the South African Defence Orders (SANDF/INT DIV/2/97) which is a separate policy governing information security within the South African Defence forces. (Hereafter referred to as SANDF). Both MISS and SANDF tend to view national security in the context of military or national security schemes rather than the broader national interest.

However MISS tends to have a seemingly broader definition of the term "classified" than its counterpart SANDF. Moreover MISS shows a clear intention to favour confidentiality due to the use of the phrase "must be exempted from disclosure" in its preface. This shows a lack of particularity on its part for failing to issue a discretion to the relevant authority who will be determining the issue. Moreover the clearance procedure which is a prerequisite for access to information in terms of MISS is cumbersome and onerous. The clearance process is also highly regulated by the NIA who seem to have been furnished with the task of assessing the demeanour of the person requesting access. There is also a Declaration form attached on appendix B of MISS which requires the signatory to *inter alia* confirm that he/ she is familiar with section 4 of the Protection of Information Act. Klaaren asserted that the MISS interferes with the right of access to information.[489] This assertion is possibly based on fact that the presumption in MISS seems to lie in favour of secrecy. Moreover access to information is highly regulated by members of the NIA subject to difficult clearance processes.

The TRC reports saga is another matter which showed the difficulty in obtaining information in South Africa. The Truth Reconciliation Commission is believed to have compiled 34 reports which contained sensitive information about the apartheid. However access to the documents proved to be increasingly difficult.[490] At first the reports were reported to having been moved to the Department of Justice. Thereafter the Department of Justice failed to make the documents accessible to the requesters on the basis that they were with the South African History Archives.[491] The South African History Archives department later informed the requesters that the reports were in the possession of the NIA. The NIA admitted this fact and

[489]Klaaren "Access to Information and National Security in South Africa" Maxwell.syr.edu/uploadedFiles/Campbell/events/NSOG.pdf. (accessed 15-08-2016).
[490]Klaaren "Access to Information and National Security in South Africa"
[491]Klaaren "Access to Information and National Security in South Africa"

stated its intention to move the documents back to the Department of Justice.[492] This shows the difficulties of accessing information which is regarded as sensitive.

4 8 The Mosaic Theory or Compilation Theory

The "Mosaic theory" encapsulates a basic principle of intelligence gathering. In this case, seemingly unrelated items of information which are of limited importance can have a significant meaning when combined with other pieces of information.[493] Thus innocuous information can be pierced together by a knowledgeable reader and possibly pose a grave danger to the national security of a nation.

In cases related to national security the mosaic effect illustrates the potential for an enemy of the state to infer from independently innocuous facts, an exploitable vulnerability in the system of national security.[494] In the United States Navy Department, their Freedom of Information Act defines the theory as "[t]he concept that apparently harmless pieces of information when assembled together could reveal a damaging picture." In the case of *Halkin v Helms* it was stated that,

> It requires little reflection to understand that the business of foreign intelligence gathering in this age of computer technology is more akin to the construction of a mosaic than it is to the management of a cloak and dagger affair. Thousands of bits and pieces of seemingly innocuous information can be analysed and fitted into place to reveal with startling clarity how the unseen whole must operate.[495]

This shows that national security requires more protection as a result of technology which also makes it easier to connect separate information. The case of *North Jersey Media Group, Inc. v. Ashcroft* stated that judges possess relative expertise in national security matters thus their inability to foresee the mosaic.[496] This case also stated that judges should not be entrusted with decisions concerning the sensitivity of isolated facts. However this decision may be a bit controversial. This decision is arguably contrary to the decision in *Independent Newspapers*. It should also be noted that judges sometimes depend on expert evidence to determine matters which fall out of their areas of expertise. However it still remains the duty of the judge to determine any issue before court.

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[492]Klaaren "Access to Information and National Security in South Africa"
[493]Pozen *"The Mosaic Theory, National Security and the Freedom of Information Act."* 2005 *Yale LJ* 628 630.
[494]Pozen 2005 *Yale LJ* 630.
[495]*Halkin v Helms*, 598 F.zd 1, 8 (D.C. Cir.1978).
[496]*North Jersey Media Group, Inc. v. Ashcroft*, 2002 308, F3d. 198,219 3d Cir.

The tension between national security and open justice is a contentious issue worldwide. Various states are grappling to find a balance between the right to open justice and the preservation of national security. This is due to the fact that national security is a value which requires secrecy due to its sensitive nature while open justice is also a fundamental principle which is central to democracy and the rule of law. Zimbabwe is one of the countries that is battling to ensure the liberty of its citizens while preserving national security at the same time. The emphasis placed on the need for Zimbabwe to protect itself from the West may be one of the causes for the paranoia that currently exists in most Zimbabwean public bodies. The next part of this chapter will deal with Zimbabwean national security laws.

4 9 · National Security in Zimbabwe

In Chapter 2 it was specified that Zimbabwe has a relatively new Constitution which provides for the right of access to Information.[497] This Constitution is more suitable for this era where there is an increased emphasis on democracy, the rule of law and open justice.[498] The 2013 Constitution of Zimbabwe also has a broader perspective on freedom of expression and it now includes media freedom. Moreover, this Constitution has the potential to improve access to information in two ways. Firstly it ensures that access to information which is held by both private and public bodies is enhanced. Secondly it has the effect of liberating the media so that they can report on various issues of public interest to Zimbabweans without restrictions thereby increasing access to information.

The Constitution of Zimbabwe however is not oblivious to the importance of state security. The Act states that legislation must be enacted to give effect to the right to access information but may restrict access to information based on *inter alia*, the interests of defence and public security to the extent that the restriction is fair, reasonable, necessary and justifiable in a democratic society based on openness, justice, human dignity, equality and freedom. It is interesting to note that the element of necessity is expressly stated in the Constitution. This aspect will be discussed in the course of this chapter.

There are four pieces of legislation that are pertinent to national security in Zimbabwe. These will be discussed in this chapter to the extent that they are relevant to national security.

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[497] S 62 of the 2013 Constitution.
[498] The previous Constitution of 1980 did not contain the right of access to Information. See Chapter 2.

I. Access to Information and Protection of Privacy Act (AIPPA) Chapter [10:27][499]
II. Public Order and Security Act (POSA) [Chapter 11:17][500]
III. Official Secrets Act (OSA) [Chapter 11:09]
IV. The Broadcasting Services Act [Chapter 2:06][501]

Like South Africa, Zimbabwe has a history of secrecy. Draconian legislation was enacted in order to ensure that the Smith Regime stayed in power. The press was highly regulated to ensure that the information which was disseminated to the public was supportive of the government. Access to Information was not an express right guaranteed by the Constitution. The Law and Order Maintenance Act [Chapter 11:07] of 1960 was in place to ensure the safety and security of the state as well as restrict freedom of speech. However this Act has since been repealed by the Public Order and Security Act. (Hereafter referred to as POSA).

Due to the emergence of a new Constitution in Zimbabwe there is the potential for the establishment of an open, transparent government which is accountable to its people. However access to information can be impended by the existence of the four pieces of legislation stated above. These pieces of legislation were working alongside the 1980 Constitution of Zimbabwe which was conservative especially with regard to granting fundamental liberties such as free expression and access to information to citizens. This chapter will discuss this legislation in as far as it relates to national security.

4 10 Access to Information and Protection of Information Act. (AIPPA)

The Access to Information and Protection of Information Act (hereafter referred to as AIPPA) was enacted in 2002. It was enacted as the presidential candidates were preparing for elections. The Act was passed as a result of what one might term "sensationalist journalism." In the case of *Chavhunduka v Minister of Home Affairs,*[502] the Standard, a Zimbabwean newspaper published a story alleging that members of the army had attempted to execute a *coup* and failed.[503] It highlighted that there was a great deal of dissention in the army due to the fact that they were being sent to wage war in DRC as well as the fact that state funds were being mismanaged by the government. The standard also alleged that twenty three members of the national army had been arrested as a result of the failed *coup.* At that moment the Law and Order Maintenance Act was still in force thus the Editor of the newspaper and his Chief

[499] 5 of 2002.
[500] 1 of 2002.
[501] 3 of 2001.
[502] 2000 (1) ZLR 55 2 (SC).
[503] Media Monitoring Project in Zimbabwe "The Campaign to Silence Private Media in Zimbabwe." www.mmpz.org.zw/freedom&law/aippa.htm. (accessed 20-07-2016).

Reporter were subsequently arrested in terms of section 50(2) of that Act.[504] After the publication of the story some government officials went on to criticise the media on the basis that they wanted to subvert the government. After this incident AIPPA was enacted in order to among others regulate the media.

In the years preceding the 2002 elections the private media had gained momentum in Zimbabwe. They analysed and criticised governmental policies as well as exposed illegal activities by members of the government. Around the year 2000 the private media launched an attack on the way in which land was being redistributed via the third *Chimurenga.*[505] The Daily news became increasingly unfortunate during that time as they were subjected to mysterious attacks. In April the head office of the Independent Newspapers was bombed and its printing press was subsequently bombed in January 2001 as well.[506] Hours before the attack the Minister for information at that time, Jonathan Moyo had told the Zimbabwe Broadcasting Corporation that the state would silence the Daily news because it posed a "security risk to the nation."[507]

It should be noted that in 2002 the situation in Zimbabwe was unstable and the tension between the private media and the state was increasing. The private media continued to publish matters relating to corruption and other unpalatable government actions. Consequently, the environment gradually became hostile an unworkable for the private media as they were subjected to more and more oppressive legislation, court cases and some of them were shut down as well.

Access to significant information is one of the imperatives of an open justice system. There are various ways of accessing information but this Chapter has identified two crucial ways of accessing information. Firstly by exercising the right of access to information and requesting for the relevant records from the state bodies as well as the relevant private bodies. Secondly,

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[504] Section 50 (2) of the Law and Order Maintenance Act which has since been repealed stated that,
Any person who makes, publishes or reproduces any false statement, rumour or
report which-
(a) Is likely to cause fear, alarm or despondency among the public or any section
of the public, or
(b) Is likely to disturb the public peace;
Shall be guilt of an offence and liable to imprisonment for a period not exceeding seven years, unless he satisfies the court that before making, publishing or reproducing, as the case may be, the statement, rumour or report he took reasonable measures to verify the accuracy thereof.

[505] Chimurenga means uprising.

[506] Media Monitoring Project in Zimbabwe "The Campaign to Silence Private Media in Zimbabwe."

[507] Media Monitoring Project in Zimbabwe "The Campaign to Silence Private Media in Zimbabwe."

information can be accessed through the media. The media can acquire information and impart it to the general public thereby enhancing the right of access to information.

A free press is a precondition for the achievement of democracy. One may also argue that access to information is one of the prerequisites for an open justice system. Thus media freedom should be protected at all times in so far as it does not interfere with the national security. However there are a lot of obscurities surrounding this notion of national security. For instance the exact point at which free expression may be deemed reasonably likely to interfere with national security is not clear. A mere remote possibility that freedom of expression will interfere with national security will not suffice. This study will look at some selected provisions of AIPPA and evaluate them in the context of this debate.

4 10 1 AIPPA

AIPPA aims to provide members of the public with a right of access to records and information held by public bodies according to its preamble. It also purposes to make public bodies accountable by giving the public a right to request correction of misrepresented personal information. AIPPA also regulates the unauthorised collection, use or disclosure of personal information by public bodies.[508]

AIPPA also establishes its areas of interest which are the regulation of access to information, protection of privacy as well as the mass media. However the Act seems to be targeted at the mass media because most of its provisions are related to the media. The Act confers on members of the public, the right to access any record held by a public body.[509] It also obligates public officials to assist a person to obtain the required record.[510] However information contained in Schedule 1 of the Act is not subject to dispatch.[511] However members of the public who intend to access information contained in schedule 1 can

[508] AIPPA, see preamble.
[509] S5 (1) of the AIPPA.
[510] S 8 of the AIPPA.
[511] S 4 of the AIPPA. Schedule 1 contains the following.(a) A personal note, communication or draft decision of a person who is acting in a judicial or quasi-judicial capacity; (b) any record that is protected in terms of the Privileges, Immunities and Powers of Parliament Act [Chapter2:08]; (c) a record that is created by or for, or is in the custody or control of a person in terms of the Children's Act [Chapter 5:06] and relates to the exercise of that person's functions under that Act; (d) a record of a question that is to be used in an examination or test; (e) a record containing teaching materials or research information of employees of a post-secondary educational body; (f) material placed in the National Archives or the archives of a public body by or for a person or agency other than a public body; (g) any record or information relating to any matter or issue referred to in section 31K of the Constitution, and any matter or issue relating to the exercise of the functions and powers of the President.

approach the courts to access such information. The restrictive Acts can also be subjected to Constitutional scrutiny by the courts.

Section 8 provides that a request for access should be responded to within thirty days.[512] However if one were to read section and in-cooperate sections 11 and 12 together the request of access may take as much as seventy days to be processed. There is also no assurance that the relevant information will be granted after this period. AIIPA does not accommodate individuals who may be in urgent need of certain information. For information to be useful in most instances, it must be current and accurate.[513] However seventy days may be too long in some instances to ensure that the information is current.

4 10 2 Exemption clauses in AIPPA

Cabinet deliberations are exempt from disclosure until twenty five years have lapsed.[514] Section 17 protects information relating to law enforcement and national security. The list of information exempted under this heading is relatively long and relates to a mixture of both criminal intelligence information as well as national security. The identity of a police informer is not subject to disclosure in order to protect his security.[515] Section 17 (1) (b) also protects numerous categories of information including

> (b) Prejudice the defence and national security of the country and the safety or interests of the country; or [Paragraph amended by section 25 of Act 5 of 2003]
>
> (c) Prejudice the defence and national security of a foreign country with which Zimbabwe has entered into a defence pact;
>
> (d) Prevent the detection, prevention or suppression of espionage, sabotage or terrorism; or
>
> (h) Prejudice the operations of the defence and security forces within or outside Zimbabwe;[516]

Section 18 also relates to the protection of information relating to inter- governmental relations or negotiations. The Minister is given a discretion to limit information whose disclosure would negatively impact on the relationship between government and municipal or rural districts as well as a foreign state or an Intergovernmental Organisation of states. Section 19 protects information which relates to the financial and economic interests of Zimbabwe. The exemption clauses relating to national security in Zimbabwe refer to the security of the military as well as the prevention of crime. The protection of economic

[512] S 8 of the AIPPA.
[513] S 31 and 32 of the AIPPA however provides a right to accurate information.
[514] S 14 of the AIPPA.
[515] S 17 (1) (a) (i) of the AIPPA.
[516] S 17of the AIPPA.

interests also shows that Zimbabwe has a broader view of what constitutes national security. The definition of national security in Zimbabwe seems to boarder on the protection of national interests which is a broader perspective.

Section 28 of AIPPA provides for the disclosure of public interest information whether or not a request has been made. This information includes any matter that threatens national security, any matter that is in the interest of public security or public order, including any threat to public security or public order.[517] However information concerning any threat to public security or public order shall only be disclosed to the relevant law enforcement authorities.[518] Nevertheless cabinet deliberations and other pertinent disclosures are not subject to disclosure even on the grounds of public interest. If one were to read section 14 and 30 along with section 28, it would seem as if the public is a danger to itself while the government could not possibly pose a danger to the public. To rectify this error public interest should be a factor that infiltrates all the relevant exemptions.

AIPPA also contains a clause entitled abuse of freedom of expression.[519] This clause is targeted at regulating the media and contr[illegible]ontent of their distributions. This section criminalises the publication of "false" information which affects the national security of the country among other things.[520] The intention of the relevant journalist in publishing the information is immaterial. Thus even if the information was dispatched negligently, it is likely to attract imprisonment. However, in the case of *S v Modus Publications (Pty) Ltd* it was held that defamation has to be serious before it can amount to a crime.[521] In *Chavhunduka v Minister of Home Affairs* the courts held that the most appropriate remedy for

[517] S 28 of the AIPPA.
[518] S 28 of the AIPPA.
[519] S 64 of the AIPPA.
[520] Section 64 states that , A person registered in terms of this Part who makes use, by any means, of a mass media service for the purposes of publishing— (a) information which he or she intentionally or recklessly falsified in a manner which— (i) threatens the interests of defence, public safety, public order, the economic interests of the State, public morality or public health; or (ii) is injurious to the reputation, rights and freedoms of other persons; or (b) information which he or she maliciously or fraudulently fabricated; or (c) any statement— (i) threatening the interests of defence, public safety, public order, the economic interests of the State, public morality or public health; or (ii) injurious to the reputation, rights and freedoms of other persons; in the following circumstances— A. knowing the statement to be false or without having reasonable grounds for believing it to be true; and B. recklessly, or with malicious or fraudulent intent, representing the statement as a true statement; shall be guilty of an offence and liable to a fine not exceeding level fourteen or to imprisonment for a period not exceeding three years.
[521] 1996 (2) ZLR 553 (s).

failure to prove truth are civil damages and not the rigorous sanction of criminal conviction and imprisonment.[522] This section tends to impact negatively on media freedom.

AIIPA is the piece of legislation that Zimbabweans are currently relying on in order to access information. However the Act is furnished with so many exemptions which make the enjoyment of the right difficult. This Act not only impedes access to national security information but it also stifles the media who are supposed to be imparting matters on public interest to the public. The requirement for registration of the media has been subjected to abuse. In the case of *Associated Newspapers of Zimbabwe (Pvt) Ltd v Media Commission of Zimbabwe* the administrative court ruled that the decision to refuse to register the Daily News should be set aside on the basis that the Chairperson had demonstrated clear bias and animosity towards the newspaper.

AIPPA provides that the head of a public body shall not disclose to information which will be prejudicial to the defence or national security of the republic to any applicant. However the public needs to have access to information held by public bodies and this includes national security information. This facilitates the [illegible] monitoring of governmental departments including the defence thereby enhancing accountability.[523] Public scrutiny of governmental officials guards against abuse by public officials thereby deterring acts of misconduct, upholding the rule of law and ensuring effective participation in governmental polies by the public. However it should be noted that national security is also essential to safeguard the military and territorial integrity of a nation as well as safeguarding the safety of its citizens.

This study will discuss the Public Order and Security Act in so far as it relates to the maintenance of peace within the Republic as well as the national security of the nation. Its impact on journalist activities in Zimbabwe will also be briefly evaluated.

4 11 The Public Order and Security Act 1 of 2002

The Public Order and Security Act (POSA) repealed and replaced the Law and Order Maintenance Act of 1960. The Law and Order Maintenance Act was a tool used by the Smith regime to suppress the media and minimise the publication of controversial issues. This Act

[522] 2000 (1) ZLR 552 (S) see also the case of *Association of Independent Journalists v Minister of State for Information and Publicity in the President's Office* Judgment NO S.C.36/02 where the criminalisation of "false statements" was also repudiated.
[523] *Association of Independent Journalists.*

was used to prosecute journalists and the public who would have made statements which had the potential to cause "fear", "alarm" or "despondency" in the country.

POSA is believed to have come into operation following the publication of "falsehoods" by the private media in Zimbabwe thereby inciting civic groups, opposition political parties as well as other Human Rights activists to engage in violent demonstrations against the government.[524] Another issue which seems to justify the existence of the Act is the publication of a story in the 90's about a Zimbabwean member of the military who was alleged to have been beheaded in DRC. This story was later proved to be false. This story was deemed a threat to national security because it could have incited violent protests by the public demanding the return of troops who had been deployed to DRC by the Zimbabwean Government.[525] Thus the Zimbabwean government replaced the Law and Order Maintenance Act with POSA in order to regulate the media as well as the public more effectively. POSA came into effect in 2002. The Act aims to regulate internal security and public order in Zimbabwe. The Act also purposes to restrict activities that pose a threat to national security such as terrorism and the subversion of the state. The Act also tends to regulate public gatherings.

The Act affects journalists as well as members of the public. Arguably, the Act tends to restrict freedom of expression to a greater extent such that it may not pass Constitutional scrutiny. Section 5 of POSA restricts journalists from setting up, urging or suggesting the organization or setting up of any group or body with a view to,

I. Coercing or attempting to coerce the government.
II. Overthrowing and taking over the government through unconstitutional means.
III. Supporting or assisting any group or body that attempts to engage in any of the above.[526]

Moreover both the media and individuals alike are expressly prohibited from performing Acts that subvert Constitutional Government. It is also an offence for persons who are inside or outside Zimbabwe to make utterances or suggest or do anything that suggests the overthrow of government. This is an arbitrary limitation on media freedom especially when one takes into account the role of the media as a watchdog of the judiciary, legislative and executive

[524] African Network of Constitutional Lawyers "National Study on Access to Information in Zimbabwe" righ2info.org/resources/publications/publications/national-study-on-access-to-information-in-Zimbabwe (accessed 20-07-2016).
[525] African Network of Constitutional Lawyers "National Study on Access to Information in Zimbabwe."
[526] S 5. Coercing is given a wide definition as it is interpreted to mean "constraining, compelling or restraining by among others physical force or civil disobedience."

branches of government. Mere critism of the governmental policies may be interpreted to mean that one is advocating for change.

Section 12 is targeted at the protection of members of the military and the police so that they remain aligned to the government. This section makes it an offence to attempt to cause any disaffection amongst members of both the police and the military which may result in them withholding their services, loyalty or allegiance. This Act makes it an offence for example to expose the poor wages of the military and comparing them to the lavish life style that is led by top government officials. Or appeal to the conscience of the military in cases where they may receive an order which violates human rights. In this case the intention of the person making the statement is irrelevant. Culpability is determined by the result of the author's statement or actions. It should be noted that section 20(2) of the 1980 constitution had the effect of making this section permissible. However it is doubtful whether this section would pass Constitutional scrutiny in light of the new Constitution.

Section 15 of POSA is relatively controversial. Firstly a similar provision of the Law and Order Maintenance Act was repealed and [illegible] because it limits freedom of expression arbitrarily.[527] Section 15 of POSA prohibits the publication and communication of false statements which are prejudicial to the state. Thus the making of a statement which is materially false where the person foresees a risk or possibility of *inter alia* inciting or promoting public disorder, violence or endangering public safety is prohibited. However the meaning of a false statement is not clear. In the Canadian case of *Zundel* the court exposed the absurdity of such legislation where it was said, "Should an activist be prevented from saying "the rainforest of British Columbia is being destroyed" because she fears prosecution for spreading "false news" in the event that scientists conclude and a jury accepts that the statement is false and that it is likely to cause mischief to the British Columbia forest industry."[528] This shows that the criminalisation of so called false statements by the media infringes on their right to freedom of expression. One does not suggest that they should not go unpunished but civil damages would suffice.

In the Zimbabwean case of *Chavhunduka* Gubbay CJ addressed the issue of criminal liability based on false statements when he stated that,

[527] S 50 (2) of POSA.
[528] *R v Zundel* 1992 10 CRR (2d) (CanSc) 219.

> "Plainly, embraced and underscoring the essential nature of freedom of expression, are statements, opinions and beliefs regarded by the majority as being wrong or false…[t]he fact that the particular content of a person's speech might 'excite popular prejudice' is no reason to deny it protection for 'if there is any principle of the Constitution that more imperatively calls for attachment than any other, is the principle of free thought-not free thought for those that agree with us but freedom for thought of that we hate."[529]

This shows that freedom of expression should be a priority in a democracy. The marketplace of ideas theory[530] provides for a variety of ideas on an open market with the conviction that the correct ideas always get more recognition than false ones. The International Instruments that guarantee freedom of expression also identify the aspect of national security as a valid limitation on freedom of expression.

However Article 19 identified national security and defamation as the tools used by repressive governments to limit the unimpeded flow of information and ideas.[531] One of the tests used by the International courts to evaluate whether there is a real security risk is the necessity test.[532] The necessity requirement requires that the statements under scrutiny must have been made with the intent to cause harm to national security. Secondly there must be a clear nexus between the statement and the likelihood of harm occurring.[533] Thus POSA needs to reflect this element of intent and the judiciary must ensure the existence of a clear causal nexus between the conduct of statements and the risk to national security.

The Intent requirement is a test that is used to determine whether a statement poses a risk to national security.[534] The requirement seeks to distinguish between genuine political debate and incitement to cause harm on the other hand. The right to freedom of expression encompasses various kinds of ideas including revolutionary ideas as well as nationalist ideas. All the ideas should be put on the marketplace of ideas for acceptance. However in cases where the statements are made with the intention to encourage others on violent acts against national security a limitation can be placed on the relevant expression.[535]

The nexus requirement requires a clear link between the statement and the likelihood of harm.[536] This emphasises the requirement that states should not restrict freedom of expression due to mere paranoia on the part of the relevant authorities. A mere remote possibility that

[529] 2000 (1) ZLR 552 (S) 588 E-F.
[530] See Chapter 2.
[531] Article 19 "National Security" https://www.article19.org/pages/en/national-security-more.html.s (accessed 26-07-2016),
[532] Article 19 "National Security."
[533] Article 19 "National Security."
[534] Article 19 "National Security."
[535] Article 19 "National Security."
[536] Article 19 "National Security."

harm might occur is not sufficient.[537] Principles 15 and 16 of the Johannesburg Principles require that the expression must have been made with the intention to cause harm. The statement should be likely to cause harm. Lastly there must be a direct and immediate connection between the expression and the occurrence of the harm. This shows that the mere publication of a statement contrary to government perceptions will not suffice.

4 12 The Official Secrets Act [Chapter 2:06]

The Preamble of the Official Secrets Act (hereafter referred to as OSA) clearly states out the aims of the Act. These include imposing a prohibition on the disclosure of information prejudicial to the safety or interests of Zimbabwe. Secondly it prohibits the disclosure of information which might be useful to an enemy. The Act also makes provision for the purpose of preventing persons from obtaining or disclosing official secrets in Zimbabwe. OSA also seeks to prevent unauthorized persons from making sketches, plans or models of and to prevent trespass upon defence works, fortifications, military reserves and other prohibited places; and to provide for matters incidental to the foregoing. However the main goal of this Act is to prevent the disclosure by a state employee of any information that he or she may have acquired while working in the government.[538] The Act is strikingly similar to the United Kingdom Official Secrets Act of 1911 which has since been repealed.

OSA prohibits the disclosure of any information which is prejudicial to the interests of Zimbabwe and "might" be useful to the enemy. Section 3 (c) also prohibits the publication or communication to a third party of information that might be useful to the enemy. An enemy is defined in section 2 to include a hostile organization. A hostile organization is also defined as any organization which is an unlawful organization in terms of the Unlawful Organizations Act or any organization operating in Zimbabwe which is declared by the President, by notice in a statutory instrument, to be a hostile organization on the ground that it is furthering or encouraging persons to commit acts prejudicial to the safety or interests of Zimbabwe.

The Act also prohibits unauthorised persons from making sketches, plans or models of and to prevent trespassing upon defence works and other prohibited places. This is a justifiable limitation of artistic expression on the grounds of national security. Section 3 also prohibits a person from entering such prohibited areas. These prohibitions are all targeted at protecting

[537] Article 19 "National Security."
[538] S4 (1) (c) of OSA. In this instance it is irrelevant whether the disclosure by a government employee will be harmful to public interest or not.

national security. Section 4 also restricts freedom of expression on the grounds of national security by prohibiting the disclosure of codes, passwords, models or documents that are used in prohibited places. This also seems to be a justifiable limitation on the grounds of national security.

However the definition of an enemy is not specific. More categories of enemies should be provided for clarity. Secondly intent requirement is missing from this legislation. A mere possibility that the information supplied will be of use to an enemy is all that is required in order for one to be held liable. The intention of the maker of the statement is not taken into account. In Zimbabwe two individuals namely Philip Chiyangwa and Ambassador Dzvairo are believed to have been tried and convicted for violating this Act.

OSA also prohibits the disclosure of information by a person who is in the employ of the state. This information should have been obtained by the employee during the course of his duties. This provision may have been enacted to protect the security interests of Zimbabwe. However the provision has the effect of limiting the right to open justice arbitrarily. It hinders the operation of the principles of openness, transparency and accountability. Moreover it has the effect of covering maladministration, corruption and the incompetence of government officials. If one were to contrast OSA with the Protected Disclosure Act of South Africa it will become apparent that the Protected Disclosures Act is more befitting of a democratic government. This Act protects employees who are employed by the government as well as those employed in the private sector when they divulge information relating to unlawful conduct by both their employers as well as fellow employees who are employed by their employers.

Thus the Protected Disclosures Act fosters a culture which promotes the disclosure of information by employees regarding criminal activities and other forms of serious misconduct in the workplace. This is undoubtedly a positive advancement towards democracy and transparency. Unfortunately, Zimbabwe does not have a similar legislation in place. OSA is contrary to the provisions of the new Constitution. The absence of legislation which protects whistle-blowers is likely a result of the high levels of corruption that currently exist in Zimbabwe. Thus new provisions which are compatible with the 2013 Constitution are needed.

Access to Information in Zimbabwe is still a challenge. This is due to the nature of the legislation that accompanies the 2013 Constitution. However if the provisions of the new

Constitution can be utilised to clear or repeal Unconstitutional legislation, this would create a way forward for Zimbabwe. New legislation can also be enacted which meets the requirements of a Constitutional democracy. In Zimbabwe the relationship between open justice and national security is still unbearably complex. On the other hand South Africa is considerably more developed than Zimbabwe because access to Information is relatively easy. Zimbabwe has to create a balance between openness and secrecy which is acceptable in a democracy.

4 13 Miscellaneous Matters: Freedom of Expression and the Internet.

This chapter has demonstrated the magnificence of an open justice system. It has also illustrated the importance of access to information and highlighted the positive impact that access to information has on democracy. In this technological era it has become easier to acquire information due to the advent of the internet and technology. This gives effect to the right to freedom of expression which encapsulates the freedom to impart information and ideas as well as to receive such information. The advent of the internet also allows humans to express themselves freely and comment on current issues, uninhibited by distance and time.

This study demonstrates that the internet has increased the efficiency of the media whose primary role is to impart matters of public interests to the public. One may argue that this is inevitably an exceptional benefit to the open justice system as it evidently promotes freedom of expression including media freedom. However this study shall reveal that the internet and other forms of technology makes it particularly difficult to control the dissemination of sensitive information relating to national security. The advent of the internet also allows humans to express themselves freely and comment on current issues, uninhibited by distance and time.

As previously shown in this chapter, the advent of the internet makes it particularly difficult to monitor the press or to hinder publication of material which may be injurious to national security. The internet has made it easier to publish information for worldwide consumption without necessarily waiting for the rigorous and crucial process called editing whereby a qualified editor has to verify the authenticity of such information before publication. The advancement in technology also makes it particularly difficult for a state to control the dissemination of information. This study will make reference to the Wiki Leaks saga as well as the Edward Snowden saga which facilitated the exposure of some of the most sensitive

secrets of the United States government. One could also liken this undesirable situation to the issue of *baba Jukwa* a Zimbabwean National who exposed some of the Zimbabwean government's national security details on facebook including the names of the members of the Central Intelligence Organisation. Thus one would be inclined to question the role of technology in the equation of open justice and national security.

4 14 Privacy and the Internet

In the United States the September 11 terrorist attacks on the World Trade Centre marked the return of draconian secrecy laws in the name of national security.[539] Most states decided to limit their degrees of openness in order to avoid a recurrence of this tragic event. However a few years later the debate relating to open justice and national security was reignited by the events of 2013. In 2013, Edward Snowden a 29 year old American national sparked a worldwide debate when he exposed sensitive state secrets after he left his employment at the National Security Organisation of the United States. There were a plethora of issues involved in this matter. One of the major ones rela[illegible] extent to which government interference in the lives of its subjects is acceptable when attempting to detect terrorist activity. However this study will focus on the issues relating to national security.[540]

Edward Snowden, a young American citizen who was employed by the (NSA) wilfully left the service and proceeded to Hong Kong. Afterwards diligently he sought the help of two journalists Laura Poitras and Glenn Greenwald so that they could publish the classified information that he had obtained while working for the NSA.[541] This information was had the potential to unnerve most United States citizens as well as damage the relationship between the United States Government and other countries.[542]

In June 2013, Glenn Greenwald and the Guardian newspapers commenced the publication of numerous classified documents which exposed the fact that the United States Government had employed the use of mass surveillance programmes targeted at spying on its citizens and

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[539] Blanton "National Security and Open Government in the United States: Beyond the Balancing Test." Maxwell.syr.edu/uploadedFiles/Campbell/events/NSOG.pdf. (accessed 15-07-2015). See also Curtin "Freedom of Information Trumped by 'internal security'." Maxwell.syr.edu/uploadedFiles/Campbell/events/NSOG.pdf. (accessed 15-07-2015).

[540] See Chapter 1, for a detailed discussion on privacy.

[541] Greenwald "No Place to Hide" http://glenngreenwald.net/pdf/NoPlaceToHide-Documents-Compressed.pdf (accessed 07-09-2016). (Henceforth "No Place to Hide").

[542] Greenwald "No Place to Hide."

accessing immeasurable data on their activities.[543] It was also alleged that the United States government was spying on other countries. The documents furnished the public with information relating to *inter alia* the existence of an operation or data programme known as PRISM where an electronic device was effectively utilised provide surveillance on United States citizens. It also exposed the conduct of some states who were sharing surveillance data with the United States.[544] This sparked a myriad of questions on the issue of privacy. One may argue that while unwarranted government interference in the private affairs of its subjects seems unquestionably unpalatable it is also essential to look at the existence of other factors such as fear of terror attacks. According to Victor Yao Lida this case involved the balancing on interests namely the rights of the individual and the government's interest in safeguarding national security.[545]

In Chapter 2, it was shown that freedom of expression is essential for the self-fulfilment of the individual. There are two major disadvantages of mass surveillance which have been identified. One of the ways that people express themselves in this era is through the internet. Through the internet people express ideas. people make choices on what they wish to read, watch and type. Thus it is essential that the intellectual development of citizens should be uninhibited due to fear of being under surveillance. There are two major disadvantages of mass surveillance which have been identified. Firstly, the unregulated and unlimited power of a state to spy on its members is not a feature of a democracy. It hinders the development and self-fulfillment of the individual through the freedom to express themselves. This study suggests that the consciousness that one is being monitored results in the withdrawal of the individual. Secondly if the government is allowed to collect various categories of information concerning individuals from yahoo, facebook, gmail and other companies as well as phone records, it will gain considerable insight into individual habits and patterns. There is a great risk that such information will be abused. Julian Assange commented on this issue when he stated that,

> The state would leech into the veins and arteries of our new societies, gobbling up every relationship expressed or communicated, every web page read every message sent and every thought googled and then store this knowledge, billions of interceptions a day, undreamed of power, in vast top secret warehouses

[543]Greenwald "No Place to Hide."
[544]The disclosure of information of this nature had the potential to damage the relationship between the United States and other countries.
[545]Yao Lida "Open Justice and Secret Courts" http://www.singaporelawreview.com/juris-illuminae-entries/2015/open-justice-and-secret-courts (accessed 07-09-2016). Henceforth "Open Justice and Secret Courts").

forever…and then the state would reflect what it had learned back into the physical world, to start wars, to target drones, to manipulate UN Committees and to trade deals…[546]

This quote shows how the government can utilise the information acquire unscrupulously to the detriment of both the individual and other nations. Thus the NSA and other intelligence agencies worldwide should only be given the mandate to use state surveillance mechanism where there is reasonable suspicion of criminal or other terrorist activity.[547] Thus in order to preserve freedom of expression and the liberty of the individual it, is essential to maintain the privacy of the individual. The state should inarguably refrain from monitoring its subjects without lawful excuse in the name of national security.

The Edward Snowden disclosures apart from encouraging debate on freedom of expression and privacy also caused tension between the United States and other countries. This is evidenced by the fact that the President of Brazil subsequently cancelled a state visit while Ecuador renounced United States trade benefits.[548] The Germany government on the other hand wanted to ascertain the extent to which Germany citizens has been affected by the surveillance. However the information disclosures also facilitated change. On 17 January 2014, President Obama presented an NSA reform plan which sought to end the storage on cellphone data relating to the masses. Suggested surveillance reforms were presented on NSA intelligence gathering methods. However other critics saw these changes as no more than a false attempt to placate the public outrage which the disclosures had caused.[549]

4 15 Censorship of the Press: Wiki Leaks Saga

One of the major features of a totalitarian government is the censorship and intimidation of the press as well as the creation of draconian pieces of legislation targeted at restricting press freedom. This study will highlight that the arbitrary restriction of press freedom is not unique to nascent democracies such as Zimbabwe alone. Wiki leaks, a well-known media organisation which is popular for exposing corruption, misconduct and other maladministration practices by member states was subjected to various attacks in an attempt to shut it down. The internet providers are believed to have been forced or coerced to

[546] Assange *Freedom and The Future of the Internet* (2012) 4.
[547] Yao Lida "Open Justice and Secret Courts."
[548] Von Solms and Von Heerden "The Consequences of Edward Snowden NSA Related Information Disclosures" researchgate.net/publication/275019555-The-Consequences-of-Edward-Snowden-NSA-Related-Information-Disclosures. (accessed 07-09-2016).
[549] Greenwald "Obama's NSA 'reforms' are little more than a PR attempt to mollify the Public" theguardian.com/commentisfree/2014/jan/17/Obama-nsa-reforms-bulk-surveillance-remains. (accessed 08-09-2016).

withdraw their services from wiki leaks in order to shut down its website.[550] In 2010, amazon withdrew its services from wikileaks and subsequently the DNS service pointing to wikileaks.org domain was interrupted. This shows that most democracies are still battling with striking the right balance between open justice and national security. This evokes the question of what constitutes a national security threat. It is not possible to ascertain the matters that are not subject to publication because seemingly each case should be judged in relation to the uniqueness of its facts. This is what makes this issue particularly interesting in relation to both mature and nascent democracies. Generally in the US, it is a requirement for the media to alert the intelligence agency before publishing national security information. The agency will be alerted with regard to the nature of the information that the media company wishes to publish.[551] This gives the intelligence agency an opportunity to demonstrate how the publication of the material will be injurious to national security.[552] This procedure is likely to be effective in nascent democracies such as Zimbabwe if properly utilised.

Moreover the Espionage Act of America has been the subject of much critism. It restricts press freedom and impedes on the ability to become a whistle blower. The Espionage Act is a potential tool for the repression of media freedom because it makes it an offence for a journalist to publish leaked information possibly information which is detrimental to national security.[553]Thus states are battling with the need to supply the general public with the information that they need to make informed choices and exercise their right to freedom of expression due to fear of national security breaches and in some circumstances fear of embarrassment. Whether or not the national security factor is a valid tool for denying access to information depends on the circumstances. Thus it is essential for legislators, the media and executive members of the state to acquaint themselves with the meaning of national security as well as the issues that are likely to pose a threat to national security when published.

[550]Assange 15.
[551]Greenwald "No Place to Hide."
[552]Greenwald "No Place to Hide."
[553]Greenwald "No Place to Hide."

4 16 The FISA Secret Court and the Principle of Open Justice

After the Snowden disclosures another debate ensued on the viability of the FISA court in a state based on open justice and the rule of law.[554] Open justice requires the courts and other public administrative bodies to conduct proceedings of a judicial nature in public.[555] This is one of the indispensable pillars of the rule of law and it applies to criminal and civil trials.[556]Additionally the right to open justice enables the public to monitor the courts and observe how justice is being dispensed.[557] The idea of a secret trial is foreign to the rules of natural justice and has to be justified by certain compelling factors such public morality, national security and the safety of an individual. However in relation to national security there are certain predetermined tests which provide guidance on whether or not secrecy is justified. These include the clear and present danger test.

The FISA court is a secret court which deals with classified matters. It was initially established in order to provide checks and balances on the investigative powers of the executive.[558] However it has been reported that all the data collected without justifiable cause including telephone records and email was collected with the approval of the FISA court under section 702 of the FISA Amendment Act.[559] President Obama and the intelligence administration acknowledged that permission had been granted by the FISA court. The grounds on which the permission to conduct mass surveillance on individuals who were not under investigation was granted are unknown.[560] Yao Lida exposed the unfairness of a system which makes use of secret courts such as the FISA court. According to Yao Lida there is a real likelihood of bias since the court is approached by the executive in secret in order to obtain a surveillance order against a suspect who is both absent and unrepresented.[561] The FISA court clearly violates the right to open justice and the quality of its decisions seems questionable. The United Kingdom is believed to have adopted a similar approach through the enactment of the Justice and Security Act which empowers the government to request a secret session with the result that submissions can only be viewed by the judge and other

[554]Von Lida "Open Justice and Secret Courts" http://www.singaporelawreview.com/juris-illuminae-entries/2015/open-justice-and-secret-courts (accessed 03-09-2016).
[555] Joseph *Open Justice: A Critique of the Public Trial* (2002) 1.
[556].Joseph *Open Justice: A Critique of the Public Trial*
[557]Duff *Trial and Punishments* (1986) 147-148.
[558]Greenwald "No Place to Hide."
[559]Goiten and Patel "What went wrong with the FISA Court." brennancenter.org/site/default/files/analysis/What_Went_Wrong_%Wrong_With_The_FISA_Court.pdf (accessed 07-09-2016). (Henceforth "What went wrong with the FISA Court").
[560]Goiten and Patel "What went wrong with the FISA Court."
[561]Greenwald "No Place to Hide."

intelligence or security personnel.[562] This is contrary to the principle of open justice. Firstly it deprives the public of the right to evaluate the quality of decisions made by their leaders. Secondly this procedure is susceptible to abuse because it can be used to cover corruption and other illicit activities.

Therefore it is clear that the tension between open justice and national security is not only affecting nascent democracies such as South Africa and Zimbabwe. Even old democracies such as the US are still grappling with this issue. Moreover the situation in the US reinforces the idea that the advent of technology could impact negatively on national security. It shows that it has become increasingly difficult to regulate media publicity. In the Edward Snowden case the internet was used as a means to publish state secrets. This method is both effective and more difficult to regulate than other forms of media. Zimbabwe was faced with a similar situation in which a figure known as baba Jukwa was exposing state secrets through facebook. Thus the preservation of national security has become increasingly difficult due to the advent of the internet.

[562]Greenwald "No Place to Hide",

4 17 Conclusion

This Chapter illustrated that the principle of open justice encapsulates a variety of democratic values such as freedom of expression, access to information and access to courts as stated in the *Independent Newspapers* case. The vitality of access to information was also shown in the course of the chapter. The study identified two methods of gaining access to information namely (1) By having access to records held by both public and private bodies and (2) by having a free and independent media which imparts matters of public interest to the public. However this study also observed that the right to open justice is not absolute. Some records may be legitimately withheld on the grounds of national security.

This chapter identified that the area of national security and open justice is particularly difficult to regulate. This is due to the fact that there is no universally acceptable definition of national security. More particularly some countries have not yet ascertained the scope and extent of national security, neither have they bothered to define it precisely. The Johannesburg Principles suggested that each country must come up with a definition of national security.

This study also examined the [illegible] implementation of the open justice principle in Zimbabwe. It was observed that access to information is still a complex issue. The legislation that is in place to regulate access to national security information is incompatible with the new Constitution. AIPPA, POSA and OSA all have wide definitions of what constitutes national security. These Acts are inconsistent with the values of the 2013 Constitution. These include financial statements and economic activities as well. Some of the laws such as OSA may need to be repealed. Thus there is more emphasis on "national interest" rather than national security in Zimbabwe. This is problematic because it puts a wide ambit on inaccessible information thereby limiting the accountability of government officials.

This study also found that media freedoms have been severely curtailed in Zimbabwe. The imposition of criminal sanctions on journalists who publish statements which might be useful to an enemy or which prejudice the interests of national security is incredibly harsh. The case of *Chavhunduka* noted that civil damages would suffice in punishing the so called false statements. However the issue of publishing incorrect information is also a problem thus journalists need to verify the veracity of the information before publication.

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Lastly this chapter has demonstrated the positive impact that technology has on the right to open justice and the right of access to information. This includes the role of the internet in

enhancing the efficiency of the media as well as the ability to broadcast trials containing matters of public interest. Thus the role of the internet and technology in facilitating access to open justice cannot be undermined. However this study also examined the impact of open justice on national security and revealed the potentially adverse effect of open justice on national security. In this respect, this study suggested that technology makes it more difficult to regulate journalism. Particular reference was made to the Edward Snowden leaks in which information which had the potential to harm national security as well as cause public outrage was exposed on the internet. Therefore this study illustrated the tension between open justice and national security.

CHAPTER FIVE

Conclusions and Recommendations

5 1 Introduction

The right to open justice is a fundamental right which is deeply entrenched in both African and Western civilisation. This indispensable right is a mandatory pre-requisite for an open and just society based on openness, transparency and responsiveness as founding values of both South African and Zimbabwean democracies. The open justice principle in this modern era comprises of a cluster of related rights such as freedom of expression, access to information and the right to a public hearing. These rights are essential to the fulfilment of a democracy. The right to open justice imposes sufficient legal obligations on the government to provide information which is crucial for the fulfilment or exercise of human rights in accordance with PAIA. The Zimbabwean Act namely AIIPA also provides for the right of access to information which is crucial for the fulfilment of the right to open justice. The preceding chapters have established the critical role that the right to open justice plays in exposing corruption, maladministration and other illicit activities of public officials at the expense of the general public. The right to open justice is also important because it recognises the right of the press to impart matters of public interest to the public. Moreover the right to open justice enhances the integrity of the justice system because it enables the general public to assess the quality of justice rendered by the courts. The open court principle also has a deterrent effect on criminal activities because the general public will get an opportunity to see how criminals are punished. The right to open justice enjoys protection in various International Instruments such as the UDHR and the ICCPR and other regional human rights instruments named in Chapter 2, as well as in sections 35 and section 69 of the South African and Zimbabwean Constitutions respectively. Thus the right to open justice is essential.

However the right to open justice exists in tension with other fundamental interests such as accused fair trial rights and national security. Thus the correct regulation of the right to open justice is indisputably essential, especially in nascent democracies such as South Africa and Zimbabwe. These two countries are still battling with how to strike an accurate balance between the right to open justice and other competing interests such as fair trial rights as well as national security concerns. The courts have acknowledged that the limitation clauses contained in sections 36 and 86 of the South African and Zimbabwean Constitutions respectively, provide guidelines on how to balance competing interests.

However the factors listed in these sections are provided merely as guidelines and do not necessarily constitute an exhaustive list. Thus discretion is needed on the part of the judge to determine each case individually while ensuring that the balancing of these interests is accurate and acceptable in a democratic society.

The emergence of technology is a factor that has made it particularly difficult to implement the right to open justice without potentially curtailing other competing interests as shown in both chapters 3 and 4. The advent of technology has a potentially adverse effect on both fair trial rights and national security interests. The live broadcasting of trials which is being implemented in most countries on the basis of open justice has raised a series of questions. Most of these questions relate to the potentially adverse impact of open justice on the fair trial rights of the accused. Other questions are also targeted on the impact of open justice on national security. The sensitivity of national security matters demands a certain degree of confidentiality. However it is not clear whether this is still possible.

Technology has made it difficult to regulate media publicity effectively. In the past it was relatively easy to regulate the traditional forms of media because media publicity consisted mainly of print and broadcasting. This means material had to be approved first before publication. However due to the advent of the internet it has become difficult to regulate media publicity. Anyone can post anything on the internet including bona fide journalists as well as bloggers and other individuals. This makes it difficult to regulate the right to open justice. However it should be noted that media freedom is central to democracy. Thus the media should be allowed to impart matters of public interest to the public. However a balance needs to be struck between open justice, accused fair trial rights and national security.

This chapter will discuss the recommendations that can be implemented in order to balance the competing interests of open justice, accused fair trial rights and national security. However it should be noted that Zimbabwe has a relatively new Constitution thus in some instances this study may suggest that Zimbabwe should adopt the South African approach. Lessons will also be drawn from other mature democracies such as Australia and Canada.

5 2 Conclusions

In determining the nature, scope and content of the right to open justice, this study concludes that access to information is an essential component of the right to open justice. This study thus identified the role of access to information in enhancing open justice. Furthermore one cannot mention the right of access to information without also mentioning the role of the media as agents who impart various categories of information to the public. This means that the South African and Zimbabwean governments should provide access to information which is both relevant and current for the exercise and protection of human rights. Moreover the freedom of the media to report should not be curtailed arbitrarily thereby hindering the free flow of information which may be of public interest.

Both South Africa and Zimbabwe have demonstrated a commitment in providing access to information by enacting legislation which gives effect to the enjoyment of this right. South Africa enacted PAIA, a piece of legislation which not only provides the right of access to information but also educates citizens on how such information may be acquired. Zimbabwe also enacted AIIPA which provides the right of access to information. However this piece of legislation is not compatible with the 2013 Constitution as it dwells more on curtailing media freedom than specifying how citizens can obtain information. Moreover AIIPA is furnished with many exclusions and it is doubtful whether it will pass constitutional scrutiny.

Further on the question relating to the impact of open justice on accused fair trial rights, this study concludes that open justice has the potential to impinge on accused fair trial rights if not properly regulated. This study observed that there is an inevitable tension between the right to open justice and accused fair trial rights. It was also noted that it is difficult to determine the extent of this tension because each case is unique with regards to its facts. Thus the judge has to exercise his discretion in order to balance or reconcile these competing interests. Therefore the study has highlighted that the courts are constantly battling with how to strike a delicate balance between the competing interests of open justice and accused fair trial rights.

Chapter 3 dealt with the impact of the open justice principle on the accused right to a fair trial in an ordinary court of law as well in asylum hearings before the Refugee Board. Firstly it was noted that the right to open justice interferes with the proper application of the *subjudice* rule. Secondly it was also noted that the right to open justice has the potential to impinge on the accused's fair trial rights by interfering with the impartiality of the courts thereby

prejudicing the accused. However the problem is that open justice is central to democracy thus it cannot be dispensed with altogether. Hence a solution is needed, whereby the courts can attempt to balance these competing interests.

In hearings before the Refugee Board the right to open justice was identified as a potential threat to the security and safety of the asylum seeker and his family. This is due to the fact that asylum applications require a certain degree of confidentiality depending on the circumstances of the case. However the right to open justice also demands allegiance. Nevertheless it should be noted that the decision maker has to strike a balance between the need for confidentiality in asylum applications as well as the need for open justice which includes a free press and access to information. Moreover the study also observed that the Refugees Act of South Africa is not effective in supplying the Refugee Board with enough mechanism to deal with the tension between the right to open justice and the need for confidentiality in asylum applications effectively.

After taking into account the literature written on open justice and national security as well as various cases dealing with this issue, this study concluded that open justice can be limited on the grounds of national security. Chapter 4 demonstrated that the principle of open justice encapsulates a variety of democratic values such as freedom of expression, access to information and access to courts as stated in the *Independent Newspapers* case. The importance of access to information was also demonstrated in the course of the chapter. The study acknowledged two methods of gaining access to information specifically (1) By having access to records held by both public and private bodies and (2) by having a free and independent media which imparts matters of public interest to the public. However this study also observed that the right to open justice is not absolute. Some records may be legitimately withheld on the grounds of national security. However this study is not oblivious to the fact that national security can be used as an unjust excuse to cover corruption and other illicit practices of government officials.

Chapter 4 identified the difficulties that are inherent in attempting to regulate access to information. These difficulties possibly stem from the fact that there is no universally acceptable definition of national security. More particularly some countries have not yet ascertained the scope and extent of national security, neither have they bothered to define it precisely. The Johannesburg Principles suggested that each country must come up with a definition of national security.

This study concluded that a definition of national security is essential in order to facilitate access to open justice. The notion of national security is susceptible to abuse. This is due to the fact that the preservation of national security can be used as an unjustifiable excuse in order to cover up illicit activities by government officials. This study identified the "legitimate national security interest" as an important factor in limiting the right to open justice on the grounds of national security. Thus a concrete definition of national security would assist in limiting the scope of national security thereby enhancing access to open justice.

Another conclusion reached in this study is that press freedom is being severely curtailed in Zimbabwe thereby hindering the free flow of information. Moreover the right of access to information is rather limited to a larger extent. This study acknowledged that Zimbabwe is different from South Africa in the sense that it has a relatively new Constitution which came into operation in 2013. This new Constitution is currently working alongside incompatible pieces of legislation which tend to limit access to information, suppress the freedom of the press and hinder the operation of the open justice principle.

This study also dealt with the extent question whether disclosure of information in an open court would be injurious to national security or whether the public interest in disclosure is outweighed by public interest in non-disclosure has been and is still vexed issue of public law in SA and the Commonwealth. The question is how are these competing rights are to be reconciled? In dealing with this issue chapter 4 also illustrated the impact of technology on today's notion of open justice. This has accelerated the impact of the mosaic impact which makes it easier for an enemy of the state to piece together different forms of information which seem unrelated. Thus in determining whether or not disclosure would be in the interests of justice, one should take into account the mosaic effect. This makes the analysis of intelligence information more complex. However it is still a factor that needs to be taken into account in balancing the competing interests of national security and open justice

Thus this thesis examined the implementation of the open justice principle in Zimbabwe. It was observed that access to information is still a complex issue in this country. The legislation that is in place to regulate access to national security information is incompatible with the new Constitution. AIPPA, POSA and OSA all have unreasonably wide definitions of what constitutes national security. These Acts are inconsistent with the values of the 2013 Constitution. Financial statements and economic activities of Zimbabwe are all included in

the ambit of national security information. Some of the laws such as OSA may need to be repealed. Hence there is more emphasis on "national interest" rather than national security in Zimbabwe. This is problematic because it puts a wide ambit on inaccessible information thereby limiting the accountability of government officials.

This study also found that media freedoms have been severely curtailed in Zimbabwe. The imposition of criminal sanctions on journalists who publish statements which might be useful to an enemy or which prejudice the interests of national security is incredibly harsh. The case of *Chavhunduka* noted that civil damages would suffice in punishing the so called false statements. However the issue of publishing incorrect information is also a problem thus journalists need to verify the veracity of the information before publication.

This study concluded that some lessons drawn from South Africa may be beneficial to Zimbabwe, with specific reference to issues of access to information and national security.

5 3 Legal and Practical Recommendations

5 3 1 Zimbabwean Courts Should Adopt the Broadcasting of Trials, Especially Ones that Involve Public Figures

Due to the advent of technology, a plethora of cases dealing with the broadcasting of criminal trials has evolved in both South African and foreign jurisprudence. Although these cases are drawn from a variety of countries such as South Africa, Canada and America they contain an essential compendium of judgments which provides an insight on the importance of the enhancement of open justice through the broadcasting of criminal trials. Consequently this part of the discussion intends to demonstrate the importance of televising criminal trials and motivating the Zimbabwean media to adopt this strategy of imparting matters of public interest to the public.

Recently, an unspecified number of people gathered outside the Magistrate Court in Zimbabwe while waiting for the trial of Evan Mawarire popularly known as the "flag pastor." Most of the people had to wait outside the court because the court room was full of people and the space was inadequate to accommodate everyone. Other Zimbabwean nationals in the Diaspora had to rely on online journalists to relay information on what was taking place inside the court room. Other people who constitute the majority of Zimbabweans had to wait for the anonymous whatsapp messages that were circulating in order to be informed about the

case and the verdict. It is important to add that these messages have a danger of being unreliable. This shows the inadequacies that are inherent in the Zimbabwean system with regards to access to information. Similarly in South Africa when the Oscar Pistorious trial first came to the attention of the public, it is reported that the court room was full and the space was not adequate to accommodate everyone including general citizens as well as the media. Thus a remedy was needed to enhance access to information with regard to the trials of public figures.

In South Africa, the broadcasting of criminal trials is permitted and it is also being implemented effectively. In the case of *Multichoice (Pty) Ltd and Others v National Prosecuting Authority and Another; In Re: S v Pistorius*,[563] publicity was allowed with certain restrictions. In the *Multichoice case* the media was allowed to broadcast the entire proceedings relating to the *Pistorious* trial through audio and visual means. However the fair trial rights of the accused had to be taken into account as well so highlighted packages were not allowed. In the case of *South African Broadcasting Corporation Ltd v National Director of Public Prosecutions* it was held that highlights packages might create a risk of misrepresentation and misunderstanding.[564] The court therefore must guard against the possibility of misrepresentation through the unwarranted editing of the court proceedings thereby distorting the events. Thus the broadcasting of criminal trials can be implemented with a view of upholding the principle of open justice. However the court can rely on relevant considerations such as the interests of justice and the risk of misrepresentation to impose certain conditions to the exercise of broadcasting.

The broadcasting of criminal trials is an effective tool in enhancing the enjoyment of the right to freedom of expression especially in countries were free speech is expressly guaranteed in the Constitution. In America the right to free speech is expressly guaranteed in the First Amendment to the American Constitution. This is similar to the position in both Zimbabwe and South Africa. Thus the media in America have a relatively unrestrained ability to report on court proceedings. For instance, according to Burd and Horan during the OJ Simpson trial the Los Angeles Times published three hundred and ninety eight front pages about the matter while more than one thousand five hundred articles were written during the course of the

[563] 2014 2 All SA 446 (GP).
[564] *South African Broadcasting Corporation Ltd v National Director of Public Prosecutions* 2007 1 SA 523 (CC) 2007 2 BCLR 167 (CC) SABC.

trial.[565] The CNN is also believed to have turned into an "all OJ network."[566] The CNN broadcasted the entire proceedings.

Although this study recommends the broadcasting of trials, especially those that contain matters of public interest, it should be noted that the court has the discretion to determine whether the trial should be broadcast or not after taking into account the interests of justice. Section 173 of the South African Constitution confers the court with power to regulate its own processes.

Similarly section 176 of the Zimbabwean Constitution states that,

> The Constitutional Court, the Supreme Court and the High Court have inherent power to protect and regulate their own processes and to develop the common law or the customary law, taking into account the interests of justice and the provisions of the Constitution.[567]

This shows that the courts have the power to determine whether proceedings before a court of law can be broadcast or not. In the *SABC Case* the respondents interpreted this provision to mean that the courts have the power to limit the right of the media to broadcast proceedings.[568]

Thus Zimbabwe should adopt the broadcasting of criminal trials in order to enhance open justice.

5 3 2 Self-Regulation of Journalists should be Used as a Tool to Enhance the Enjoyment of Freedom of Expression in Zimbabwe

In Zimbabwe the media is currently being subjected to cumbersome and onerous registration procedures and accreditation is a pre-requisite for them to practice their profession. The media in Zimbabwe is currently being regulated by the Zimbabwe Media Commission which is arguably aligned to the present government. It should be noted that while the media is currently being regulated by the Zimbabwe Media Commission, (hereafter referred to as ZMC) this was not always the case.[569] The media in Zimbabwe was previously regulated by the Media and Information Commission as was provided for in AIPPA.[570] The Media and

[565] Burd and Horan 2012 *Crim LJ* 108.
[566] Burd and Horan 2012 *Crim LJ* 108.
[567] S 176 of the 2013 Constitution.
[568] [2007] 1 SA 523 (CC) 2007 2 BCLR 167 (CC).
[569] Ss 248-250 of the Constitution.
[570] Part VII. This section has been replaced by one which establishes the Zimbabwe Media Commission which is the new Commission which regulates journalism in Zimbabwe.

Information Commission was responsible for *inter alia* the control of the mass media and the receipt and evaluation of applications for the accreditation of journalists. These are the duties of the ZMC as well. The inadequacies of the MIC as well as the ZMC will be highlighted so as to draw lessons for the future.

However this study recommends the self-regulation of journalists for various reasons. Firstly an independent body of journalists would be more likely to deal with the unprofessional conduct of journalists effectively, for instance when they publish false information.[571] If one were to take the law profession as an example, one would see that lawyers who abuse client's funds or commit other irregularities within the profession of law are dealt with effectively by the Law Society of Zimbabwe. A similar condition applies in South Africa with regard to the practice of the law profession. Thus self-regulation could serve as an instrument of dealing with unscrupulous journalists more effectively. Secondly the self-regulation of the journalist profession would enhance freedom of expression while giving journalists the opportunity to uphold the integrity of their profession. In Tanzania there is a self-regulatory framework for journalists and this is working efficiently and effectively.

This part will briefly highlight the weaknesses of the previous and current systems. Firstly the MIC which was regulating the media was not sufficiently independent from state control. The Commissioners of the MIC were appointed, remunerated and dismissed at the discretion of the Minister of Information. Secondly the Minister had the authority to dismiss the relevant Commissioners on vague grounds such as the ground that the particular Commissioner has engaged in conduct which renders him unsuitable. The Act did not attempt to define such conduct thereby granting the Minister with wide discretionary powers to dismiss the Commissioners. The Minister was thus regarded as the head of the public media and this seems inappropriate considering that he is a political figure.

Thus he had the power to control the dissemination of information either by refusing to accredit a newspaper of his choice or dismissing members of the Commission who no longer serve his interests.[572] The ZMC has similar powers to register and accredit journalists of their choice. This is a violation of Art 9.1 of the African Charter on Human and Peoples Rights which confers the right of access to Information.

[571] See Chapter 4.
[572] S 67 of AIPPA requires that the Minister should be notified about changes in ownership of any newspaper.

The Constitutionality of the requirement for compulsory registration of journalists in Zimbabwe is a debatable issue. Principle VIII of the Declaration of Principles of Freedom of Expression in Africa on the Print and Media states that any registration system for the print media shall not impose substantive restrictions on the right to freedom of expression." For the registration to be lawful it must comply with the following requirements,

I. The authorities should have no discretion to refuse registration once the requisite information has been provided.
II. Registration should not impose substantive burdens and conditions upon the media.
III. The registration system should be administered by bodies which are independent of government.[573]

Taking into account these requirements it is doubtful whether the regulation of the media by a Commission which is intertwined with the state would pass Constitutional scrutiny. In the case of *Independent Newspapers of Zimbabwe (Pvt) Ltd v The Media Commission of Zimbabwe* the court found that the decision to refuse to register the newspaper should be set aside because the chairperson had displayed bias against the newspaper.[574] In the case of *Associated Newspapers of Zimbabwe (Pvt) Ltd v Minister for State Information and Publicity in the President's Office* the *Daily News* challenged the Constitutionality of the requirement for compulsory registration on the basis that it violated the right to freedom of expression.[575] However the disappointing judgment was that the journalists as citizens of Zimbabwe were obliged to follow the law. Thus they had to register first before bringing the issue to court. However the court admitted that the Constitutionality of the section was debatable. However the claim could only be entertained after registration.

Chidyausiku CJ while in the case of *Capital Radio v The Broadcasting Authority of Zimbabwe* held that the laws regulating the licensing and functioning of the press, though permitted had to be in line with the Constitution.[576] However he dismissed the argument that journalism is a special profession and thus special regulations is the only acceptable method of regulation. Chidyausiku also stated that the word may in section 79(5) did not give the MIC the discretion to determine whether to accredit a journalist or not. Once the relevant journalists have furnished all the required information accreditation should be automatic.

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[573] Principle VIII.
[574] *Independent Newspapers of Zimbabwe (Pvt) Ltd v The Media Commission of Zimbabwe.*
[575] *Associated Newspapers of Zimbabwe (Pvt) Ltd v Minister for State Information and Publicity in the President's Office* (ZSC, SC 20/03; 11 September 2003).
[576] Judgment NO SC 128/02 Unreported judgment.

The case of *Re Ontario Film and Video Appreciation Society v Ontario Board of Censors* clarifies the above mentioned point. In this case the court struck down a law granting the Board of censorship the authority to ban any film that it did not like. It was stated that,

> It is accepted that the law cannot be vague, undefined and totally discretionary. It must be ascertainable and understandable. Any limits placed on freedom of expression cannot be left to the whim of an official. Such limits must be articulated with some precision or they cannot be considered to be law.[577]

Thus the Minister cannot be conferred with an overly wide discretion to limit the right of the press and the media. Moreover the registration of the media should be an administrative process which is conducted by an impartial Commission. In Zimbabwe the MIC did not pass the test for impartiality and neither does the ZMC.

The idea of self-regulation is not alien to Zimbabwe. In 2014 the Voluntary Media Council of Zimbabwe which comprises of a number of journalists drafted the "Media Practitioners Bill" in an attempt to pave the way for the self-regulation of journalists in Zimbabwe.[578] This Bill seeks to allow the media to transfer media regulatory powers from the state and the ZMC to the media practitioners themselves. This would mean that a body of media practitioners will be responsible for the registration and accreditation of journalists as well as the disciplining of members who engage in misconduct.[579] This Bill was drafted as a response to the calls of the people for change due to the events that occurred in Zimbabwe in past years were some media organisations were shut down and many journalists were arrested.[580]

AIPPA empowers the ZMC to caution, suspend, delete from the roll or refer journalists for prosecution in instances where there is a breach of the code.[581] Ruhanya noted that AIPPA omits to take into account and reinforce the public interest role of the media.[582] According to Ruhanya there should be a distinction between the regulation of media content which is intolerable in a diverse and democratic society and also media content which is essential for the fulfilment of the value of transparency in a democratic society.[583]

Ruhanya also stated that self-regulation is more effective when it is reinforced by statute. Ruhanya cited a few recommendations with regard to the self-regulation of journalists in

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[577] 1983 31 O.R. 2d 583 (Ont. H.C.) 592.
[578] Matendere "VMCZ drafts Bill on media self-regulation." thezimbabwean.co/2016/07/vmcz-drafts-bill-on-media-self-regulation. (accessed 13-09-2016). (Henceforth "VMCZ drafts Bill on media self-regulation").
[579] Matendere "VMCZ drafts Bill on media self-regulation."
[580] ..Matendere "VMCZ drafts Bill on media self-regulation."
[581] Ruhanya "Zim Media Council out to muzzle press." www.theindependent.co.zw/2012.09/21/zim-media-council-out-to-muzzle-press/ (accessed 13-09-2016). (Henceforth "Zim Media Council out to muzzle press.").
[582] Ruhanya "Zim Media Council out to muzzle press."
[583] Ruhanya "Zim Media Council out to muzzle press."

Zimbabwe. She stated that, "the VMCZ should be statutory but independent where direct government involvement is only necessary and minimal."[584] This statement acknowledges that the media cannot totally dispense with government interference. However it should be kept at minimal levels, for instance when it is necessary.

Thus this part suggests that the self-regulation of the media should be used as a tool to enhance access to information and freedom of expression while controlling unlawful or ethical conduct by the press. In most democratic countries the media is not subjected to compulsory cumbersome registration procedures. In South Africa, Zambia and Malawi the law does not require the licensing or registration of journalists. This study suggests that a similar approach should be taken in Zimbabwe.

5 3 3 Removal of Criminal Sanctions Imposed on Journalists who "abuse journalistic privilege."

This study recommends the removal of criminal sanctions on journalists who would have published false information. These should be replaced by civil sanctions as suggested in the case of *Chavhunduka.*[585] The imposition of criminal sanctions in Zimbabwe usually applies to journalists who publish defamatory matter or false information which may pose a danger to national security in accordance with further. In Section 80 of AIPPA[586] terms this the "abuse of journalistic privilege." Chidyausiku CJ acknowledged that the wording of the section is inconsistent with the aims of a Constitutional democracy. He stated that media freedom is a guaranteed right and not a privilege. Thus calling it a privilege was inappropriate. This provision was declared to be Unconstitutional.

Therefore criminal sanctions should be replaced with civil remedies like in South Africa. In South Africa neither defamation nor the publication of such untrue statements is a crime. Sufficient damages to compensate the injured party would be sufficient.

5 3 4 The Implementation of Suppression Orders or Non Publication Orders

Where publicity would defeat the interests of justice, this study recommends the implementation of suppression orders. In as much as this study reiterates the importance of the open justice principle, one should also acknowledge the potentially adverse effect of unregulated publicity on accused fair trial rights and possibly national security. Thus to guard

[584] .Ruhanya "Zim Media Council out to muzzle press."
[585] See Chapter 4.
[586] S80 (1) (a) and (b) of AIPPA.

against the possibility that the accused fair trial rights and national security may be impinged, this study suggests the implementation of suppression orders.

A Suppression order can be defined as a court order which prohibits a third party from publishing certain information to a third party or the public. The judiciary has the authority to grant suppression orders in accordance with both common law and statute.[587] The purpose of a suppression order could be targeted at preventing the publication of information that may prejudice a trial.[588] A notable characteristic of a suppression order is that it does not necessarily bind the whole world, its application is restricted to the parties named in the order. However those who are not expressly named in the order are also expected to refrain from publishing the information concerned. In the case of *John v Fairfax Publications Pty Ltd v District Court of South Wales* it was stated that a deliberate violation of the order is punishable for contempt of court.[589] Thus suppression orders are generally enforceable.

In Australia, suppression orders are used as efficient tools when dealing with harmful media publicity. For example the Evidence Act of 1929 provides that a suppression order can be made,

a. To prevent prejudice to the proper administration of justice
b. To prevent undue hardship to
   I. To an alleged victim of a crime
   II. To a witness or potential witness in civil or criminal proceedings
   III. To a child.[590]

However the interests of open justice are also taken into account. The Act goes on to state that,

> (2) If a court is considering whether to make a suppression order (Other than an interim suppression order) the court
> (a) must recognise that a primary objective in the administration of justice is to safeguard the public interest in open justice and the consequent right of the news media to publish information relating to court proceedings;[591]

Therefore when implementing suppression orders, special circumstances should exist which justify the granting of the order. In criminal trials for instance if one argues that publicity is likely to affect the fair trial rights of the accused it should be noted that much depends on the nature of publicity rather that the amount of publicity. For instance evidence of previous convictions as well as confessions is generally regarded as being damaging. However the power to restrict publicity should be exercised parsimoniously.

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[587] *Hogan v Hinch* 2011 85 ALJR 398 at 26.
[588] Burd and Horan 2012 Crim LJ 109.
[589] *John v Fairfax Publications Pty Ltd v District Court of South Wales* 2004 61 NSWLR 344 at 83
[590] S69 A of the Evidence Act of Australia.
[591] Evidence Act 1929.

However in Australia the issue of some suppression orders was criticised on the basis that they tend to overlap with legislation which would have been enacted to protect certain interests and individuals for instance, victims of sexual offences.[592] Thus in such cases suppression orders are not necessary since legislation would have prohibited reporting on such matters already. They also have a danger of being issued even in instances where they are not justifiably necessary.

An example of the use of suppression orders is the suppression order that was used in Australia prohibiting the publication of information regarding the infamous Tony Mokbel.[593] The court ordered the removal of media articles concerning him from media websites. The fact that he had been acquitted for the murder of one Lewis Moran was concealed from the public.[594] His alleged involvement in criminal activities, previous convictions as well as other prejudicial information was suppressed. He was acquitted of the crime which he was facing. Burd and Horan attributed his acquittal to the fact that the jury had not been subjected to harmful media publicity and thus remained impartial.[595]

The use of suppression orders should be [illegible]d in both South Africa and Zimbabwe in order to guard against the release of information which may be unfairly prejudicial to the defendant. In Zimbabwe there is a prohibition on the publication of information regarding the name and address of a child involved in court proceedings.[596] South Africa has a similar rule. Victims of sexual offences are also protected. However this study suggests the use of suppression orders because they tend to tailor the needs of each individual case. Such an order can be granted by a judge while exercising his discretion after looking into the facts of the case. Legislation is not effective in this case as it is too general. Moreover the judge can order the removal of information which had already been posted online thereby making suppression orders more effective. However it should be noted that though suppression orders are effective they should not be used to impose a blanket of secrecy over the case.

In Australia the Standing Committee of Attorney Generals released the Court Suppression and Non Publication Bill 2010 (Cth).[597] However this order also acknowledges the

[592] Burd and Horan 2012 *Crim LJ* 109.
[593] Burd and Horan 2012 *Crim LJ* 109.
[594] .Burd and Horan 2012 *Crim LJ* 109.
[595] Burd and Horan 2012 *Crim LJ* 109.
[596] See The Courts and Adjudicating Authorities (Publicity Restriction) Act. See also Chapter 2.
[597] Burd and Horan 2012 *Crim LJ* 117.

importance of open justice in imparting matters of public interest to the public.[598] This paper suggests that suppression orders would act as a necessary tool in security the life, liberty and security of asylum seekers. The adoption of a similar Bill in South Africa would assist with the problem shown in Chapter 3 where publicity is likely to interfere with the life, liberty and security of the asylum seeker. Suppression orders can be used to ensure that the life of the asylum seeker and his family are safeguarded.

5 4 Legislative Reform

5 4 1 Refugees Act of South Africa

This Chapter suggests law reform to adopt the Canadian approach when attempting to balance open justice and the confidentiality of asylum proceedings. The Immigration and Refugee Protection Act of Canada goes beyond merely conferring the Refugee Division with the discretion to determine whether a matter should be held in camera or not.[599] It lists factors that assist in determining whether or not there is a reasonable likelihood of danger to the asylum seeker.[600] Under this Act the life, liberty and security of the person is taken into consideration before allowing publicity. The right of the asylum seeker to a fair trial is also considered as well as the public security of a state.[601]

An addition of such a provision in the Refugees Act of South Africa would assist in reconciling open justice and the right to a fair trial in asylum proceedings whilst ensuring the safety of the asylum seeker in the process. The provision also addresses the issue of national security which is an important factor when dealing with criminal defendants or asylum seekers.

5 4 2 AIPPA

There is a need for legislative reform in Zimbabwe with regards to legislation which provides for access to information. This study argues that legislation such as POSA, OSA and AIPPA is incompatible with the 2013 Constitution and thus must be repealed or amended in order to reflect the values of the new Constitution.

This study recommends that AIPPA must be amended. Firstly AIPPA provides the right to records which are held by public bodies. This is insufficient because the 2013 Constitution

[598] Clause 3.
[599] S 166 (b) of the Immigration and Refugee Protection Act S.C. 2001. 27
[600] S 166 (b) of the Immigration and Refugee Protection Act S.C. 2001. 27
[601] S 166 (b) of the Immigration and Refugee Protection Act S.C. 2001. 27

provides the right to access records which are held by both private and public bodies. Zimbabwe can also draw lessons from South Africa. In South Africa the right to access information is provided for by PAIA. This Act also provides the right to access records held by both private and public bodies. Moreover PAIA is more specific about the purpose for which such information is sought. The required information must be sought for the purposes of the exercise of rights as well as matters that are related to the exercise of rights. Thus AIPPA should provide access to records held by private bodies as well. In addition the Act should specify the purpose for which the information must be sought.

AIPPA should be amended in order to provide the right of access to information substantively and not just in name only. The title of the Act should reflect the contents of the Act as well. Furthermore detailed instructions on how such information can be obtained should be provided. Currently AIPPA dedicates a small portion of its space to the right of access to information while the rest of the Act deals with the regulation of mass media and the conduct of journalists. PAIA on the other hand provides a guide for South African citizens on how to access information. The entire Act is dedicated towards the right of access to information as well as detailed instructions on the procedure that must be followed to obtain such information. This study recommends that AIPPA should be amended in order to give a more detailed insight on the right of access to information, the purpose for which information may be sought, the exclusions as well as the procedure for accessing such information. AIPPA should be devoted in its entirety to the right to access information. It is recommended that the government of Zimbabwe should adopt a similar guide to the one in South Africa which shows how to use PAIA so as to enable the ordinary individual to be equipped with the knowledge of how to use AIPPA.

Furthermore the exclusions currently contained in AIPPA must be revised. AIPPA has a plethora of exclusions which effectively hinder the enjoyment of the right of access to information. AIPPA excludes *inter alia*, advice relating to policy, information relating to inter-governmental relations, information relating to financial and economic interests of a public body or the state and information where disclosure would be harmful to the law enforcement process and national security. These exclusions are unlikely to survive Constitutional scrutiny. On the other hand PAIA excludes records of judicial functions as well as records that are requested for civil and criminal proceedings. Thus it is recommended that Zimbabwe should revise the exclusions and remain with those that are in line with the limitations test provided in the Constitution. However it should be noted that both PAIA and

AIPPA exclude records of cabinet deliberations from disclosure. This is presumably unconstitutional.

AIPPA should be amended in order to remedy the provision that makes defamation a criminal offence. This provision interferes with media freedom thereby limiting the right to freedom of expression. The fact that defamation is a criminal offence inhibits the media from reporting on various matters of public interest. In South Africa defamation is a civil wrong. Thus AIPPA should be amended to remove the criminal sanctions imposed on journalists for defamation.

This chapter also recommends that Zimbabwe should adopt legislation such as the Protected Disclosures Act which combats corruption. The provisions of OSA which makes it an offence for an employee of the government to disclose information which he or she obtained while in the employ of the state should be repealed. Instead legislation which in cooperates the values of the Protected Disclosures Act should be enacted.

In Zimbabwe the there is only one Television station. The Broadcasting Authority of Zimbabwe has not granted a Broadcasting license to a single independent Broadcaster, since its genesis. Therefore this study recommends that there should be a variety of broadcasters in Zimbabwe thereby enhancing the right to media freedom as well as providing citizens with a variety of information as propounded by the marketplace of ideas theory.

5 4 3 PAIA

PAIA gives effect to the right to access information as required by section 32 of the Constitution. However PAIA is currently working alongside other pieces of legislation as well as governmental policies which are not compatible with the 1996 Constitution of South Africa. PAIA did not repeal these Acts. This study recommends that PAIA should be amended so that it can have the effect of repealing legislation such as the Protection of Information Act 1982 as well as MISS which is an unconstitutional cabinet policy. The Protection of Information Act should be repealed. Thus PAIA should repeal all legislation which favours the apartheid method of secrecy.

PAIA is also irreconcilable with urgent matters. It makes no provision of access to persons who are in need urgent need of information.[602] This study suggests that one of the requirements of an open justice system is the provision of information which is both current

[602] SS 11(1) (a) and 50 (1) (b).

and relevant. Hence undue delay in disseminating information could result in a failure on the part of the individual to exercise his rights effectively for instance due to reasons such as prescription. The drafters of PAIA should ensure that urgent matters are given priority. Abuse by the requester can be prevented by requesting the requester of information to prove that the matter is indeed urgent.[603] Therefore PAIA can be amended in order to include an explicit procedure of urgency. AIPPA of Zimbabwe should also be amended in order to contain a similar provision.

5 5 Area for further Research

5 5 1 Impact of Technological Advancement on the Right to Open Justice

This study focused mainly on the impact of open justice on fair trial rights and national security. It has explored the benefits of an open justice system as well as the adverse impact that open justice has on fair trial rights and national security. However the study did not explore in detail the impact that technological advancement has had on journalism and the right to open justice. Technology has [illegible] the way in which the media imparts information. Faster ways of communication between the media agents and the public has minimised the role of censorship of information through editing before publication. There is a plethora of controversial issues surrounding the impact of technology on open justice. Therefore this study recommends further research in this area.

5 6 Concluding Remarks

This thesis has demonstrated the importance of open justice as one of the indispensable pillars which support democracy. It has also shown that the open justice principle is a common law principle which is derived from a cluster of important rights such as freedom of expression, access to courts and access to information. Thus open justice involves the impartation of information to the general public so that they may be able to evaluate the quality of justice rendered by our courts, participate knowledgeably in governmental activities as well as comment critically on issues of public interest. The tension between open justice and other fundamental rights such as fair trial rights and national security has also been exposed.

[603]Roling, Transparency and Access to Information in South Africa (LLM-thesis, UCT, 2007) 62-63.

The study has demonstrated that the courts need to strike a balance between the right to open justice and other competing interests. There are cases whereby the publication of certain information would be prejudicial to the fair trial rights of the accused or alternatively in asylum applications, the publication of certain information might endanger the life of an asylum seeker and his family. This study has shown that in such instances the courts are required to measure the degree of risk that the accused or asylum seeker is likely to be exposed to. Thus the balancing of open justice and accused fair trial rights is well within the discretion of the courts.

This study has also demonstrated that the law plays a pivotal role in enhancing open justice. The legislation that is enacted must be in line with the values of the Constitution that is in place. Both Zimbabwe and South Africa have a history of secrecy laws. Thus it would be more effective for current legislation to repeal those laws first so that all the secrecy laws are repealed.

LIST OF ABBREVIATIONS

ACHPR	African Charter on Human and Peoples' Rights
ACHPR	African Commission on Human and People's Rights
Afr.Hum.Rts.LJ	African Human Rights Journal
AIPPA	Access to Information and Protection of Privacy Act
ANC	African National Congress
CPE	Criminal Procedure and Evidence Act (Zimbabwe)
CPEA	Criminal Procedure and Evidence Act (South Africa)
ICCPR	International Covenant on Civil and Political Rights
IECSCR	International Covenant on Economic, Social and Cultural Rights
LOMA	Law and Order Maintenance Act
MISS	Minimum Information Standards Security Regulation
NIA	National Intelligence Agency
NSA	National Security Agency
OSA	Official Secrets Act
PAIA	Promotion of Access to Information Act
PAJA	Promotion of Administrative Justice Act
PDA	Protective Disclosures Act
POSA	Public Order and Security Act
SABC	South African Broadcasting Corporation
SAJHR	South African Journal on Human Rights
SALJ	South African Law Journal
SANDF	South African Defence Orders
SJ	Speculum Juris
TRC	Truth Reconciliation Commission

UDHR	Universal Declaration of Human Rights
UK	United Kingdom
US	United States

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