Compulsory Accreditation of Journalists in Zimbabwe: An Opinion[1]

By T. Hondora

June 17, 2002

Zimbabwean journalists are now required, before practicing, to apply for and obtain a certificate of accreditation from the Media and Information Commission [hereafter referred to as the Commission]. This article examines the constitutionality of compulsory accreditation, first introduced by the Access to Information and Protection of Privacy Act [Chapter 10:27], [hereafter referred to as AIPPA, or simply as the Act].

It is clear from the provisions of AIPPA, that the legislation is the government's answer to the perceived evils of the print media in Zimbabwe. It absolutely controls the activities and operations of journalists and mass media service providers.

AIPPA was promulgated into law on the 15th March 2002. In terms of section 93, all journalists not "accredited" by the Ministry of Information previously, i.e. prior to the commencement of AIPPA, are obliged to register with the Commission within three months of promulgation of AIPPA.

Ordinarily reckoned, three months calculated from the date of promulgation of AIPPA elapses on the 13 June 2002. However section 33(6) of the Interpretation Act, [Chapter 1:01] states that: "*In an enactment…reference to a month shall be construed as a reference to a calendar month.*" Three months reckoned from the 15 March 2002, the date of commencement of AIPPA, ends therefore, on the 30th June 2002.

Two issues are considered in this opinion, whether:

1.1. journalists should in principle, register with the Commission; and whether;

1.2. section 79 of AIPPA, which provides for the compulsory registration of journalists, is constitutional.

2. Brief History

2.1. Since attaining independence from minority rule in 1980, the government enjoyed a virtual monopoly in the mass media industry. Pre-independence legislation prohibited private ownership and operation of electronic media,[2] but permitted the proliferation of privately owned newspapers. And in order to exercise absolute control of the print media, the socialist government of Robert Mugabe bought the main newspaper company in Zimbabwe. There was no legislation that specifically regulated the operation of newspapers, and other mass media in Zimbabwe.

2.2. The successful constitutional challenge of the monopoly of the Zimbabwe Broadcasting Corporation by Capital Radio in 1999, and the advent of an increasingly vocal civil society, that called for the overhaul of the constitutional framework of the country and general governance, resulted in the birth of the Broadcasting Services

[1] By T. Hondora, 17th June 2002. This opinion is intended for journalists, mass media service providers and any of those interested in challenging the retrogressive legislation.

Act[3]. The Broadcasting Services Act [hereafter the BSA], ostensibly liberalized the airways, yet roping in, under the absolute control of the Minister of Information and Publicity in the President's Office, the operations of any person, lucky to be licensed.

2.3. The emergence of more non-government newspapers, critical of its policies and the political misfortunes of the ruling party, after 2000, contributed to the promulgation of AIPPA. AIPPA is the government's panacea to the ills and evils of the print media.

2.4. Central to AIPPA's regulatory system, is the licensing mechanism for both journalists and media houses, through the Commission. As a corollary, the Commission is granted disciplinary power over Journalists. AIPPA also sets out a litany of offences, the commission of which potentially leads to a journalist losing accreditation. *Refer to section 14, 80, 85 and other related sections of AIPPA*.

3. WHAT IS A JOURNALIST?

3.1. A journalist is defined in section 62 as "*a person who gathers, collects, edits or prepares news, stories and materials for the office of a mass media and is connected with it by reason of his employment and includes freelance journalist*." [Emphasis added]

3.2. This definition is far from being accurate or helpful. It is clear, however, that in order to be classified as a journalist, an individual must be connected to a mass media service provider by reason of "*employment*." The relationship with the mass media service provider must therefore be one between "employee and employer." There must be in existence a contract of employment. By extension of logic, "a person who gathers, collects, edits or prepares news, stories and materials for the office of a mass media service and is connected to it by reason of *a consultancy contract* cannot be classified as a journalist, for purposes of the Act. In addition, any person that provides any of the services stated in section 62 free of charge to a mass media service provider cannot be classified as a journalist, for purposes of AIPPA.

3.3. What constitutes a "freelance journalist" is not defined, yet this phrase is not a legal term. Read in context it must refer to persons, "employed" by several organizations to undertake journalism work as defined in section 62. Ordinarily, a freelance journalist is not employed by an organization but is paid per job. Invariably freelance journalists do not have contracts of employment or consultancy, but instead sale news to various media organizations. In the case of freelance journalists, their contracts are usually those of sale of news and other matter, as opposed to contracts of employment or consultancy.

---

[2] Refer to the Radiocommunication Services Act [Chapter 12:04]

[3] Broadcasting Services Act [Chapter 2:06]. In effect, the BSA is meant to ensure that the government retains the monopoly over electronic broadcasting, and to ensure that only those persons that broadcast materials in favour of the government are granted licences. The regulatory regime created under BSA, renders it virtually impossible for any persons other than those connected to the government to invest in broadcasting.

3.4. A consultant contractually bound to provide consultancy services to one organization for a specific period cannot be classified as a journalist under the definition provided, in section 62 of AIPPA.

3.5. The above means that there is a category of persons, that may actually provide literary contributions to mass media service providers and not stand the danger of being classified as journalists, and will not be susceptible to disciplining under AIPPA. It is arguable that this category of persons does not need to register with the Commission, it is insulated from the threat of deregistration.

4. Should Journalists Register?

4.1. Section 79(1) obliges all journalists to register as a prerequisite to practicing. Should journalists seek registration with the Commission? This is a matter of personal preference, which is influenced, potentially by a myriad of considerations that range from personal convictions, to editorial pressure.

4.2. Journalists that do not wish to register may simply change, in consultation with their current employers their contracts of employment to that of consultants. Once there has been a change of status the "journalists" cease being considered as a journalist under AIPPA, but this does not in any way alter or impact on the right of the person to continue with the operations previously undertaken. It simply means that the individual is no longer an employee, and will not be disciplined under AIPPA.

5. IMPACT OF SECTION 93

5.1. Journalists that were accredited with the Ministry of Information prior to the 15 March 2002, which is the date of commencement of AIPPA, are deemed registered until the end of the year. *Refer to section 93 of AIPPA*. Journalists that were not registered with the Ministry of Information are obliged to register with the Commission by the end of June 2002, in order to retain their right to practice.

5.2.1. There currently exists two categories of journalists in Zimbabwe; those that will have to seek accreditation at the end of the year, and those that must apply now, if they are to remain both in employment and practice.

5.2.2. This distinction is critical, particularly because the issue of accreditation of journalists must be urgently resolved. It is easier to justify the filing of an *urgent* constitutional application on behalf of journalists that are obliged to register as of the end of June 2002, as opposed to those that are deemed registered for another six months, i.e. until the end of 2002.

6.1. The distinction is also important as it provides a basis for a constitutional attack, to the category of journalists that was not registered with the Ministry of Information, prior to the promulgation of AIPPA.

6.2. If there exists journalists that did not register with the Ministry of Information on the basis of a "belief" that accreditation/registration of journalists is contrary to the dictates of media freedom, then they may challenge the provision that requires them

to seek accreditation by 30 June 2002, through an urgent application. Their complaint being that section 93 unfairly distinguishes them from those journalists who volunteered to accredit with the Ministry during a period when accreditation was not legally compellable. The petitioners will seek protection from discrimination, which is a right protected under section 23 of AIPPA. It is also possible to simultaneously allege violation of the constitutionally entrenched freedom of conscience, which is protected under section 19 of the Constitution.

7. Prior to the commencement of AIPPA, registration was a voluntary exercise. Except for some privileges, very limited, if any rights, flowed from the registration exercise. Non-accredited journalists enjoyed the same rights as those that opted to register, except in the accessing of certain places. Accredited journalists were given press cards as proof of accreditation. Section 93 of AIPPA, retrospectively extends legal status to the previously non-compulsory, accreditation/registration of journalists. It is arguable that this retrospective extension of legal status to registration under the Ministry of Information is unfair and discriminatory.

8. Accreditation versus Registration

8.1. Both mass media organizations and journalists are controlled through a licensing system. For some reason the licensing of journalists is referred to as accreditation and that of mass media organizations is referred to as registration. There is however virtually no distinction, between the registration of mass media houses and the accreditation of journalists. The distinction is one without a difference:

8.1.1. Official registration/accreditation of both mass media organizations and journalists is a mandatory precondition to operating. *Refer to section 79(1) as read with sections 80 and 83, as regards journalists, and section 66 in relation to the registration of mass media service providers*;

8.1.2. Criminal sanctions are imposed for operating without registration/accreditation. *Refer to section 80 and 72 for journalists and mass media service providers respectively*;

8.1.3. There are mandatory prescribed qualifications for registration and accreditation;

8.1.4. In addition, the possession of the requisite and prescribed qualifications does not guarantee provision of a certificate of registration/accreditation. *Refer to section 79(5) in relation to journalists and section 69(1)(a) in relation to media houses*.

8.2. Called by whatever name, journalists and mass media houses are required to obtain a licence from the Commission prior to operating.

9. Constitutionality of Accreditation Requirement

9.1. In the opinion of the writer section 79 breaches section 20 of the Constitution; i.e. the section that guarantees freedom of expression.

9.1.1 In particular, the requirement that journalists accredit/register with the Commission as a prerequisite to operating, is *ultra-vires* section 20(2) of the Constitution.

9.1.2 The Commission, which is the accrediting body, is not independent or immune from political control or influence. The Commission is appointed by the Minister, enjoys tenure of office at his discretion, and is obliged to comply with directives and orders issued by the Minister. *Refer to section 40, 91, and the Fourth Schedule to the Act, amoung other sections of AIPPA*. Compulsory accreditation through the medium of a politically compromised licensing and disciplinary authority is therefore, not reasonably justifiable in a democratic society.

9.1.3 In addition, the discrimination between journalists that were accredited before by the Ministry of Information and others may, in relation to some specific journalists, be declared unconstitutional, on the basis that the discriminatory requirement violates section 23(1)(a) of the Constitution.

10. Is Section 79 of AIPPA *Ultra-Vires* section 20(2) of the Constitution?

10.1. It is contended section 79 of AIPPA that provides for the compulsory accreditation of journalists, is *ultra-vires* section 20(2) of the Constitution. Section 20(1) of the Constitution states that:

"*…no person shall be hindered in the enjoyment of his freedom of expression, that is to say, freedom to hold opinions, and to receive and impart ideas and information without interference, and freedom from interference with his correspondence.*"

10.2. The freedom is not however absolute; it is made subject to limitations, which it is now accepted, must be restrictively interpreted. It has been held that "*Derogations from rights and freedoms which have been conferred should be given a strict and narrow, rather than a wide construction. Rights and freedoms are not to be diluted or diminished unless necessity or intractability of language dictates otherwise*."[4]

10.3. Section 79 of AIPPA constitutes a hindrance on freedom of expression, since it prohibits journalists from practicing unless if they obtain accreditation from the Commission. On this point, there cannot be serious dispute! In terms of section 80 of AIPPA it is an offence to contravene any section of the Act. And the Commission if given authority to levy a fine of up to $100 000.00. Practicing without a certificate of accreditation is therefore an offence. The exercise of freedom of expression through the print media is an offence unless if sanctioned by the Minister of Information appointed Commission. No doubt then, the compulsory accreditation requirement in the circumstances constitutes a restriction on the exercise of freedom of expression.

11.1. Section 20(2) of the Constitution states the *only* legitimate restrictions/limitations/exceptions on freedom of exception. In other words section 20(2) of the Constitution is the enabling section for legitimate exceptions to freedom of expression. It has been held that *"It is clear that limitations on freedom of*

[4] In re Munhumeso and others 1994 (1) ZLR 49 (S) Gubbay CJ, @ page 59G

expression which do not serve one of the legitimate six aims or exceptions listed in s 20(2) of the Constitution are not valid."[5]

11.2. Does section 20(2) of the Constitution provide, anticipate or envisage the limitation of freedom of expression through an accreditation/registration system? The restriction is not enabled by *any* of the provisions of section 20(2) of the Constitution. The requirement is therefore invalid, illegitimate and unconstitutional.

12. Alternative Argument

12.1. The government has always pretended that the requirement of accreditation/registration is simply technical[6]; that most countries require journalists to register with some authority anyway, and that the requirement is therefore not unconstitutional. The government has criticized the print media on the unsubstantiated basis that it is foreign funded and therefore represents foreign interests, but surprisingly there has been no argument that the print media must be controlled on the basis that it threatens the country's defence interests, public safety or order. This argument is however likely to be raised by the government in support of the accreditation requirement. Support will be sought from section 20(2)(1)(a) of the Constitution.

12.2. In the event that it is found that the restriction of freedom of expression is "law", that it finds birth from one or other provisions of section 20(2) of the Constitution, it is contended that the requirement is not reasonably justifiable in a democratic society.

13. Is the Limitation of Registration Reasonably justifiable in a Democratic Society?

13.1. The Zimbabwean Supreme Court following Canadian jurisprudence set a three-tier test in the determination of whether or not limitations on rights or freedoms are reasonably justifiable in a democratic state. These are whether:

13.1.1. the legislative objective which the limitation is designed to promote is sufficiently important to warrant overriding a fundamental right;

13.1.2. the measures designed to meet the legislative objective are rationally connected to it and ate not arbitrary, unfair or based on irrational considerations;

13.1.3. the means used to impair the right or freedom are no more than is necessary to accomplish the objective.

Refer to Chavunduka (Supra, @page 565 B-C)

14. Is the Legislative Objective Important to Justify Limiting Freedom of Expression?

---

[5] Chavunduka and another versus Minister of Home Affairs and another 2000 (1) ZLR 552 (S)

14.1. At the heart of AIPPA is the desire to control the print media. And control is exercised through the licensing of both mass media organizations and journalists. Licensing allows the government through the Commission to discipline, keep under leash, and prevent targeted persons from operating or practicing. The Commission is both the licensing and disciplinary authority. The Commission however is not independent, has no security of tenure of office, is appointed by the Minister, and is obliged to obey the Minister's commands and orders. *Refer to section 40, 91, and the whole of the Fourth Schedule*.

14.2. Control for the mere sake of control is not permissible under section 20(2) of the Constitution. If the media is to be controlled, this must be in advance of one or other of the legitimate six exceptions listed under section 20(2). *It is contended, without conceding that if accreditation is required in the interests of defence, public safety or order, then the reasons for canceling or suspending accreditation certificates must be strictly limited to instances where these principles have been violated*. Simply put, if the government justifies AIPPA and accreditation on the basis of public order, then it should be able to prove that one of the grounds for cancellation of a certificate of accreditation is on the basis of breach or threat to public order. Under AIPPA journalists are subject to cancellation of their accreditation on grounds unrelated to any of the six legitimate grounds stated in section 20(2).

14.3. This observation shows that there is no real and relevant legislative objective intended to be protected by the promulgation of AIPPA.

15. Are Measures Connected to Objective?

15.1. Since there is no legitimate objective apparent from AIPPA, for its promulgation, this should really dispose of the issue of the constitutionality of the enactment. But it is also contended that even if there was in existence some legitimate reason apparent, the measures designed to meet the objective are irrational, arbitrary, and are unfair. Accreditation is done through the medium of the Commission, a politically compromised institution, which is inherently incapable of impartiality and independent judgment.

15.2. In any event it is now generally accepted that compulsory licensing of journalists violates freedom of expression. The Inter-American Court of Human Rights stated that:

"*The compulsory licensing of journalists does not comply with the requirements of Article 13(2) of the Convention because the establishment of law that protects the freedom and independence of anyone who practices journalism is perfectly*

[6] This assertion is inaccurate as evidenced by the fact that AIPPA seeks to control the content of matter that is published as well as determine the mass media organizations and journalists that may practice or operate.

conceivable without the necessity of restricting the practice to a limited group of the community."[7]

15.3. It is contended therefore that no rational justification has been provided and none is self evident for the accreditation requirement. If accreditation was a mere technicality which granted limited rights of access to certain public places ordinarily inaccessible to other members of the public, and was a means through which press cards would be issued to journalists, as opposed to being a prerequisite to practicing, then the section would have been arguably constitutional. In its present form, the section is unconstitutional.

16. Preliminary Application: Section 93 is Unconstitutional

16.1. It has been stated above that if there exists a category of journalists proclaiming that they did not register with the Ministry of Information, under the previous non-compulsory accreditation process, because they belong to a school of thought that believes that licensing of journalists, by whatever means, violates freedom of expression; there exists the possibility of an urgent application on the basis that section 93 of AIPPA, in so far as it discriminates against this group, violates section 20 of the Constitution.

16.2. Section 93 states that all journalists that were not accredited by the Ministry of Information at the commencement of AIPPA, must register with the Commission within three months. Three months expire on the 30 June 2002. Those that were accredited are deemed accredited until the end of the year. Since the pre-AIPPA accreditation process was not compulsory, the retrospective change of status, to accreditation unfairly discriminates against those that did not believe that accreditation was necessary. Put differently, the law before 15 March 2002 did not compel journalists to accredit with an authority as a prerequisite to practicing. Those that were accredited must have been motivated by some other philosophical or personal reason and not due to operation of law.

16.3. Section 23 of the Constitution outlaws the use of legislation that is discriminatory either of itself or in its effect.

16.4. Subsection 2 reads:

"…a law shall be regarded as making a provision that is discriminatory and a person shall be regarded as having been treated in a discriminatory manner, if as a result of that law or treatment, persons of a particular description by …creed are prejudiced-

(a) by being subjected to a condition, restriction or disability to which other persons of another such description are not made subject; or

(b) by the according to persons of another such description of a privilege or advantage which is not accorded to persons of the first mentioned description;

[7] ……

and the imposition of that condition, restriction or disability or the according of that privilege is wholly or mainly attributable to the description by race….creed ...of the persons concerned."

17.1. The Collins dictionary defines creed as referring to, "a religion" or "any set of beliefs" such as for instance, "the free enterprise creed." Therefore while "accreditation" in the non-legal and non-technical sense was available to journalists prior to the promulgation of AIPPA, those that did not opt to register, notwithstanding the few but positive benefits of accreditation, must have done so on some motivation, related to their belief in the evils of such a system or requirement.

18.1. Journalists constitute a distinct group of professionals. In this group, journalists that are of the belief that compulsory accreditation/registration of mass media practitioners violates media freedom, constitute a distinct group within the profession of journalists. Therefore a law that singles out the group that did not register/accredit with the Ministry, at a time when this was not legally compulsory, rewarding those who purely for some personal reasons, opted to accredit, violates section 23 of the Constitution; in that:

"Non-accredited" journalists are subjected to a restriction on their trade and means to earn a livelihood, through the requirement that they must apply for registration/accreditation under AIPPA, but those that chose to simply send their names to the Minister of Information are not obliged to undergo the rigorous process of accreditation.

19. Freedom of Conscience

19.1. If accepted that there are some journalists that did not "accredit" with the Ministry for ideological reason that registration in whatever form is a violation of freedom of expression, then it can be further contended that the applicants' in question's freedom of conscience, protected under section 19 of the Constitution is violated by the requirement that their group must seek accreditation from the Commission, in terms of section 79 of AIPPA.

19.2. The Zimbabwean Supreme Court accepted that: "*…the reference in s 19(1) to freedom of conscience is intended to encompass and protect systems of belief which are not centered on a deity or religiously motivated, but founded on personal morality*."[8]

19.3. Citing with approval Canadian Supreme Court jurisprudence on the issue of conscience, the Zimbabwean Supreme Court accepted that: *"…in a free and democratic society 'freedom of conscience and religion' should be broadly construed to extend to conscientiously-held beliefs, whether grounded in religion or secular morality."*[9]

[8] In re Chikweche 1995 (1) ZLR 235 (S) @ 242H-243A

[9] Morgentaler and others versus R (1988) 31 CRR 1 @ 91 cited with approval by Gubbay CJ in the In re Chikweche case (Supra) @ page 243B

19.4. While all the other Honourable Justices of Appeal in the In re Chikweche judgment were of the view that Rastafarianism was a religion whose practice was protected under section 19 of the Constitution, McNally JA added that: "*I have reservations about the classification of Rastafarianism as a religion. But I have no doubt that it is a genuine philosophical and cultural belief, and as such fall under the protection of s 19(1) of the Constitution*."[10][Emphasis added]

19.5. Extrapolating the principle behind the judicial pronouncement, it is contended that by whatever name the motivation is referred to, a belief in a free press, and its pursuit by media practitioners, is a philosophical principle worthy of protection under section 19(1) of the Constitution.

19.6. Exceptions to the freedom are found in section 19, subsection (2), and (5). None of the exceptions stated justify limiting the freedom to media practitioners who do believe in a free press.

20. Justification for Application

20.1 An application based on a breach of either section 19 or 23 of the Constitution, will by its very nature be an urgent application. It has to be made by journalists who were not "accredited by the Minister of Information. It will constitute a protest against immediate registration/accreditation. By the application, the journalists would be stating that they do not wish to seek accreditation, and that they seek to be deemed "accredited" in the same manner as those that opted to accredit with the Minister of Information prior to the promulgation of AIPPA.

20.2 Apparently an urgent application to the Supreme Court made by Andrew Meldrum and some other foreign correspondent journalists contesting the registration requirement was struck out on the basis that it was not urgent[11]. Since the Supreme Court has already pronounced on the issue of urgency, the application will seek to ensure, that all journalists deemed unaccredited should not be required to apply for accreditation until the end of the year. In the meanwhile the journalism fraternity would have to proceed with much haste to finalize the constitutional case of accreditation before the end of the year.

21. Conclusion

21.1. There are several courses of action available to the fraternity of journalists.

21.1.1. Notwithstanding, the dismissed Andrew Meldrum urgent court application, another application, exclusively restricted to the issue of accreditation, may be filed. And the

[10] In re Chikweche (Supra) @ page 245D, per McNally JA

[11] There is no doubt that insufficient attention was paid to the meaning of the law by the court in this case. The case was urgent, because it was filed less than three works before the effluxion of the three months grace period granted to all non-accredited journalists to apply for registration. Further it can be safely argued in this case that the Supreme Court was responsible for part of the urgency. But it should be noted that the application was deemed not urgent by the Chief Justice acting alone and without the benefit of opposing argument from the State. On whom does the fault lie?

application will have to be distinguished from the Andrew Meldrum application. This means that the pleadings have to be comprehensive, and convincing. The urgent application will seek a declaration that section 79 of AIPPA is unconstitutional, on any of the grounds raised above. In the mean time however, in order to avoid arrest and persecution from the government, the affected journalists will have to register. But to avoid the effects of section 79, those journalists that feel strongly about the issue may hazard and change their employment status to that of consultants, or write under pseudonyms.

21.1.2. The other option relates to a point of law, which is yet to be decided by the court: and that is the issue of the discriminatory nature of section 93 of AIPPA. This option allows journalists to approach the Supreme Court seeking urgent relief. It may contain a prayer that pending the court challenge the State should be stopped from arresting or persecuting them.

22. Other Concluding Remarks

22.1. It is clear that the opinion contained in this application is based on the belief and statement that compulsory registration/accreditation of journalists adversely impacts on media freedom, plurality of information and the development of democracy itself. The licensing system has no other purpose other than the control of information and the instruments of information dissemination. This explains why the Commission is appointed and enjoys tenure of office at the discretion of the Minister of Information, and why the Commission is the licensing and disciplinary authority.