Is Freedom of Speech Underrated? The View from a Perspective of Human Rights

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ABSTRACT

This research paper tackles the human right aspect of the freedom of speech. It examines the background context of a human right, and how it evolves through the use in concrete cases. To determine the limits of legal argumentation in regard to the mentioned context of freedom of speech as a human right, we analyzed cases that revolved around freedom of speech. The analysis provided us with the insight into the conceptual understanding of freedom of speech as a human right through the eyes of a judge. The structure of arguments showed how the background context of a human right of freedom of speech can be determined. Freedom of speech is not only a human right that is separatated from the greater legal framework but is, in fact, a human right that needs to be established again and again through the argumentation of judges and through the applicative use in society. The balancing through legal argumentation shows how far protection and restriction can go. Freedom of speech as a human right is no different in this aspect. It is an universal right that can be observed through the arguments of a court and can be put into a context behind it.

Keywords: Human Rights, Freedom of Speech, Restriction, Protection, Universal Right

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Ali je svoboda govora podcenjena? Perspektiva iz vidika človekovih pravic

POVZETEK

Znanstveni prispevek obravnava svobodo govora z vidika človekove pravice. Raziskava je bila usmerjena na osvetlitev ozadja človekove pravice svobode govora in njen razvoj skozi uporabo v konkretnih primerih. Z namenom ugotoviti meje pravne argumentacije v zvezi z omenjenim kontekstom svobode govora kot človekove pravice, smo analizirali primere, katerih skupna rdeča nit je bila svoboda govora. Analiza nam omogoča vpogled v konceptualno razumevanje svobode govora kot človekove pravice skozi oči sodnika. Struktura pravnih argumentov znotraj sodnih odločitev je pokazala, kako je mogoče določiti kontekst v ozadju človekove pravice svobode govora. Svoboda govora ni le človekova pravica, ki bi bila ločena od širšega pravnega okvirja, ampak je v svojem bistvu človekova pravica, ki jo je treba vedno znova interpretirati skozi pravno argumentacijo sodnikov glede na rabo v družbi. Sodniško tehtanje skozi pravno argumentacijo kaže, kako daleč lahko sežeta tako varstvo pravice kot njena omejitev. Pri tem svoboda govora kot človekova pravica ni nič drugačna kot ostale človekove pravice. Gre za univerzalno pravico, ki jo je mogoče opazovati skozi argumente sodišča in postaviti v kontekst, ki stoji za njo.

Ključne besede: Človekove pravice, Svoboda govora, Omejitve, Zaščita, Univerzalna pravica

1. Introduction of the topic

Have you ever felt the need to express something but were discouraged by the thought of backlash that your spoken thoughts would bring? This is not something out of the ordinary, as we come into such dilemmas more often than not. To question oneself what is appropriate to voice out and what is not may prove to be a difficult task; a task that is as meaningless as it is meaningful. If we position ourselves according to the view that every speech is admissible then it is meaningless to burden oneself with the task of sorting the thoughts into those that can be voiced out

loud and those that cannot. A contrasting outcome awaits if we separate valid thoughts worth voicing out from those that would be heedless once spoken out loud. In such an approach it would prove meaningful to choose the thoughts carefully before they are spoken.

Let us put aside the common decency that should be a part of our interactions with others and focus solely on the aspect of speech. Why is this an important factor? When interacting with others, we tend to follow a basic level of politeness; this also varies depending on the individual, as some follow ethical courtesy to a further extent than others. Our communications with the members of society are characterized by a number of factors, but we will not go deeper into this as we are more interested in the legal aspect of the content that such communication contains, rather than the given respectability of the communication itself. Why is this the case? Some communications can come across as harsh and incongruous even though they contain valid information and facts. Same goes for discordant communications which can be perceived as crude while still being completely reasonable in its content. Sayeed points out that we are fierce advocates of unhindered freedom of expression when it comes to literature and works of art, but at the same time, in the cases of ordinary or common speech, we are inclined to be ambivalent (Sayeed, 2017, p. 10).

This is where our research starts. By looking through the prism of legality, we can protect the speech that has purposeful and important ideas behind it. But as we approach the limits of subject matter, we stumble upon another problem: who decides what is an important idea contained in the speech that must be upheld? The easy way out would be to allow all speech no matter the contained idea in it. But at what cost and with what consequences?

To outline the central idea behind the analysis in this research paper, we must first find out how the legal aspects behind speech and communications deal with this breaking point. To find this legal aspect we must focus on freedom of speech. But not only on freedom of speech as an instrument of lawmakers and part of the legal system but freedom of speech as a human right. This research paper is structured in two parts, with each being a research study on its own and not related. Both parts are devoted to the research of case law and finding the relevant patterns in the

argumentation of the decisions made by judges.

The first part analyzes the historical views of freedom of speech and is centered around the caselaw of the United States of America. The second, final part revolves around modern caselaw from the courts in the Caribbean region, more specifically, from the Bahamas and Jamaica. The posed research question tackles the predicament of the background behind freedom of speech as a human right; if it is contingent on the perception or the context.

2. Freedom of speech as a human right

The question of how highly we value freedom of speech as a human right is not as perplexing as it might seem. International law and constitutions of countries all around the world prove that freedom of speech is a fundamental human right that offers protection of the liberties that an individual has. It is an aspect of individual liberty and thus a good unto itself (Stevens, 1993, p. 1312). The aim of this research paper is to enlighten the position of the freedom of speech as a crucial human right for society to function. When we delve deeper into the context of this human right, we can quickly discover that it encompasses all the corners of our waking life. To provide proof of this statement, we can name one clear example: the perpetuation of knowledge and furthering science. If there was a ban on speech or a censorship of sorts that would prohibit sharing knowledge, there would be no advancements in any field or profession. The interest in expressing our thoughts, beliefs and commitments is not solely based on the results that may follow from their articulation as persuading others of our view but also on the very role such expression plays in developing and discovering the content of those thoughts and beliefs (Gilmore, 2011, p. 518). Let us connect this thought with something very important for individuals: the ability to voice concerns, criticism and opinions of issues that cause controversy and doubt. It is a common denominative that doubt was the precursor for some of the most advanced innovations and scientific breakthroughs in human history. Those who doubted the dominant narrative sought answers that would prove their doubts were justified. This is why the right to free speech is seen as essential for the discovery of truth (Dawood, 2013, p. 293).

Even though freedom of speech as a human right can bring positive societal change, it can also bring unrest when it clashes with other human rights. This is even more clear in the digital age where lowering costs of transmitting, distributing, creating and modifying information has important democratising and decentalising effects which have all contributed to the change in social conditions of freedom of speech (Balkin, 2004, p. 3). It is true that freedom of speech is recognized as a human right by several legal documents, but so are other human rights that may come into conflict with it. As was presented beforehand, this research paper tackles the position that freedom of speech has as a human right. This not only means that it is safeguarding the individual's right to speak their mind but also to express oneself and be able to gather new knowledge, new ideas and different points of view from others who also utilize this same human right. This context that we have just provided offers an insight into what this human right really encompasses. It offers one the chance to articulate diverse political, cultural and philosophical views and at the same time be confounded by the same philosophical, cultural and political views that serve the individual as a slightly different reflection of the views they have themselves. This should not be a reason of concern in any democratic society. Even more so, when the legal system encourages such liberties.

We can go back in history to see, that even ancient Athenians boasted how they were unique people as they had freedom of speech (Radin, 1927, p. 215). Furthermore, even children of all ages show high levels of endorsement of freedom of speech, as this greatly refers to societal progress and democratic principles (Helwig, 1998, p. 528). All ideas that might be socially acceptable should be free from any inhibition; same goes for controversial and unpopular ideas, due to the fact that once such ideas are suppressed, they will simmer underground and cause instability (Schlag, 1983, p. 729). For example, political arguments are on the constitutionally protected side of the line (Laycock, 1996, p. 813) and freedom of speech is of great value in the political process (Redish, 1982, p. 592) due to the fact that free speech rights serve an overarching interest in political equality (Sullivan, 2010, p. 144). The remedy for bad speech is said to be more speech and not enforced silence, which also

means that governments are not required to, or more importantly, not permitted to make decisions about what idea may be expressed and what idea may not be expressed (Sedler, 2006, p. 384). Those in society who assert their autonomy through participation, free thought and self-expression are also opposed to the thought of any governmental or community constraint (Powell, 1996, p. 16).

Constitutions and their accompanying national legal systems set out the legal framework for the practise of freedom of speech which means that free speech is directly correlated to the law. This, in term, means that each country decides by law how much autonomy an individual has when it comes to expressing themselves. When governments set up governmental structures, be it a court or an administrative agency, an individual who chooses to become enmeshed must accept the restrictions on autonomy (Baker, 2011, p. 280). Other than that, the regime of autonomy has an agreeable by-product which is the enrichment of public debate (Fiss, 1986, p. 1423). In reality, the autonomous behaviour of an individual is technically bordered by the courts of each country and the judges who determine how the law is applied. Rest assured, this is not solely done how the judges see fit but is built upon many precedent cases that created a foundation upon which every case is adjourned. That is why we should look into the jurisprudence of courts, but not so much for specific doctrinal rules because overarching doctrinal themes are equally as important due to the fact that courts sometimes direct attention to such relevant themes (Coenen, 2017, p. 1605). We can now see that apart from law we need to also know how this law is applied in concrete situations.

The United States Supreme Court was adamant about the fact that freedom of speech was a value so integral to the democratic way of life as to withstand any form of legal balancing. When the law is applied in such a manner the scholarly discourse monitors a number of reccurring observations such as the need for unrestrained speech as a necessary condition of self-development and self-fulfillment, the need for a robust democratic discourse which is essential for achieving political truth and last but not least, that allowing substantive limits on speech even in extreme circumstances would open the door to further restrictions (Mailland, 2001, p. 1183).

3. Democracy and freedom of speech

Through the years, we have become accustomed to the belief that freedom of speech, like many other human rights, is essential for a democratic state. Freedom of speech is one of the cornerstones of democracy (Vance, 1918, p. 239). Not only because it gives a theoretical layout for the ability to ensure political participation but also to cater to the needs and requirements of informed public debate. If one is not informed, they may not provide constructive feedback in a debate. The same goes for misinformation and censorship of targeted minority views. The quote about censorship being paternalistic and counterspeech being empowering finds itself based on the idea that laws that punish hate speech also undermine the equality rights of minority group members by treating them paternalistically as helpless victims who need the intervention of higher authorities on their behalf (Strossen, 2016, p. 218).

3.1 The obstacles

Free speech is beneficial for each individual as their ideas and opinions can be debated openly and without any limitation, offering concise feedback to the individual regarding their ideas, which are tested in such a way. People have the right to accept or reject points of view and only informed people are ultimately best equipped to make decisions concerning their interests (Haskins, 1996, p. 88). In addition to that, people will not be able to develop intellectually and spiritually, unless they are free to formulate their beliefs and political attitudes through public discussion and in response to criticisms that others may express (Yong, 2011, p. 7). We want to protect speech not because it causes no harm, but despite the harm it may cause (Schauer, 1983, p. 1295).

This brings us to the next problem that we can observe through the lens of human rights when we discuss freedom of speech: the discovery of truth. It is difficult to logically argue about the existence of multiple truths as it is commonly accepted that the truth based on available facts is only one. We might add that there can always be more than one perception of truth but that does not impact truth as an observed fact. If a voice is given to a wide variety of views over the long run, true views are more likely to emerge than if the government suppresses what it deems false

(Greenawalt, 1989, p. 131). Factual truth can be, in all senses of logic, only one, and the view that truth means nothing more than consensus is a very inadequate view, which is why it cannot serve as the basis for a coherent theory of free speech (Solum, 1989, p. 72).

This is one of numerous challenges that eat away at the shield that the status of a human right offers to free speech. But is this an imminent threat to the status of a human right? Later on in this research paper, we will see how the court tackles such an obstacle. To further explain this, not only hate speech, but also government-bound restrictions and misinformation all contribute to this erosion. If banning hate speech is morally misguided, counter-speech is the only morally permissible remedy (Howard, 2019, p. 105). Any restriction of access to information or censorship of it can give rise to authoritarian tendencies of a government which should be a red flag on its own. The same goes for suppressing dissenting opinions. The dilemma arises when it comes to misinformation. Through the years, this phenomenon has been colloquially dubbed fake news and it frequently spikes feverous public debates and outrage, which provides a reason for concern. The tedious fact of it all is that it can often lead to tainted social interactions and cohesion as well as provide serious questions in regard to public safety. However, this does not mean that the purpose of the speaker affects the value of the speech to listeners or public debate (Volokh, 2016, p. 1370). For now, the enigma remains unsolved: how far can unrestricted speech go and how much harm does restricted freedom of speech cause? We will look into this later on.

3.2 The solutions

The aforementioned question has, as implied, two reasonable sides to discuss. The first one is to gauge the unrestricted free speech and the consequences that such a lack of control brings. Second is the culpability that follows restrictions bestowed upon freedom of speech. The latter carries with it the implications for society which coincide with the risk of influencing political discourse and wreak havoc on the individuals when it comes to their freedom of expression. Should such a scenario unfold, there is no doubt that it would have a significant effect on society, espe-

cially for the openness of society to diversity. This is actually a logical aftermath as freedom of speech more or less enables the coexistence of diversity in society. Speech constructs social reality (Volokh, 1996, p. 2433) and if one particular group in society is denied the human right of free speech, this means it will not have a voice and will not be heard which eliminates a certain aspect of cultural diversity amongst the members of society. It is easy to speculate whether such a condition would lead to increased intolerance of society to such a group, especially when this group would try to make their voices heard. And this is one of many reasons why freedom of speech is needed. All the individuals in society should at least feel free to express themselves and state their opinions without the threat of backlash. This backlash need not be associated only with coming from other members of society but also from the state, in particular government agencies for example. Expression deserves extensive governmental immunity, which is strongly tied to the relationship between expression and individual autonomy (Wellington, 1979, p. 1106). The suppression of ideas is illegitimate because it is inconsistent with the presupposition that a democratic society bases its decisions on full and open discussion of all points of view and on top of that it is also illegitimate because of the possibility that the government may wrongly decide that something poses an unacceptable danger to the expression of valuable ideas and that is why suppression of ideas is not a legitimate government function (Bogen, 1983, p. 464).

Should we follow this argument, we find ourselves head on with the threat of governmental influence on society through limitations of free speech. This is not something unknown, as there have been multiple historical cases where it was not in the best interest of the government if the individuals revealed certain information that held the government responsible for wrongdoings. To put it in simpler terms, free speech is decisive in keeping the government accountable for its actions. The detrimental limitation of free speech can lead to a loss of the option to hold a government accountable. For example, the constitutional crisis eventuating in the resignation of President Richard Nixon in the United States of America had a profound effect on the degree of valuation of a free communication market as first hand experience shows that attempts by officials to suppress information

only strengthens belief in freedom of speech and press among those who already subscribe to these beliefs and also converts some to a new belief in the value of freedom of speech (Wilson, 1975, p. 75).

4. The limits of free speech

After describing all of this, it is a difficult endeavour to imagine when does limiting free speech causes more good than it does harm. If we try to solicit a clear reply to such an inquiry, we can start by asking ourselves if a human right can be abused. If the answer is yes, then it is the responsibility of the law to prevent abusing freedom of speech in order to protect other human rights. But if the answer is no, it becomes comprehensible that a human right cannot be abused since it can be bordered solely by the rights and dignity of others. If we follow the idea that we have constructed here, it is self-explanatory that freedom of speech provides meaningful standards of communication which can only birth dialogue in a constructive and nonillicit manner circumscribed by candour. Let us give a plain example of this. The lack of mutual understanding cannot be a reason to label something as hate speech but should be treated as a way to express differentiating opinions. Allegedly harmful speech is commonly labeled as hate speech (Strossen, 1996, p. 449). As friends agree to disagree, the freedom of speech provides those who participate in a dialogue a discerning way to be heard. As soon as something is labeled as hate speech and excluded from public debate, the elegance of the dialogue diminishes and gives place to the brute force of dejecting one from the dialogue based on a label. For example, the government cannot prohibit hate speech on the grounds that it expresses a bad idea and is inconsistent with democratic values (Sedler, 2006, p. 383). Of course, it can be said that there needs to be a recourse to act accordingly, for example against those who instigate or opress. But even in this case, a more well-developed test is needed to better distinguish between speech that implies a true threat and speech that, no matter how inflammatory it may be, is not a threat at all (Rothman, 2001, p. 367).

The same goes for decisions made by courts. If the courts are allowed to treat otherwise protected speech as being less valuable than other speech, the more calls there will be for creating new

zones of diminished protection (Volokh, 2004, p. 924). The main point here is not to allow individualistic arbitrariness to enter into the realm of limiting freedom of speech. It is always better to harbour a chance of dialogue than to prevent this dialogue from happening.

The aforementioned perception of hate speech can allow for a non-uniform approach to it. The first approach is to allow hate speech in order to maximize opportunities for individual expression and cultural regeneration while the second approach is highly controversial due to the fact that it represses hate speech through sanctions ranging from official and private reprimands to criminal prosecution (Massaro, 1991, p. 213). A third approach combines the first two. It is also important to note, that people can understand the gravity of hate speech while still supporting freedom of speech because those who defend free speech may recognize the harm of hate speech, but firmly believe that freedom of speech is more essential than censoring speech content (Downs, Cowan, 2012, p. 20). This is why speech is sufficiently distinctive enough to form a basis for a special right of freedom of speech which in turn means that skeptics are incorrect to say that speech cannot be the basis of a special right just because it cannot be distinguished from other phenomena in the world (Kendrick, 2018, p. 703).

5. The values behind a human right

The complexity of this human right far exceeds the speculative objections of the need to diminish its reach. This is confirmed by many constitutions of the countries around the world and by the case law of their courts. The duty of the courts is to weigh the circumstances and appraise the substantiality of the reasons advanced in support of the regulation of the free enjoyment of the right to speech (Bogen, 1979, p. 387). Perpetuating an environment in which individuals feel free to speak their minds and protecting their right to express themselves opens the gates of democracy and keeps authoritarianism out at the same time. Upholding the values of freedom strengthens democracy as well since free speech should always be seen through the lens of democracy (Sunstein, 1992, p. 316). Speech that matters is less free if a person must pick their words with exquisite care, not to men-

tion the fact that if communications had to meet strict standards of correct formulation, people would be far more hesitant to speak their minds and what they did say would be less an expression of their personality (Greenawalt, 1989, p. 155).

There have been many works where there was an attempt to explain freedom of speech through the legal documents that frame it. There is no shame in such a venture, but to try and elicit the meaning of the human right part in the freedom of speech it is best to turn to the application of law and not only the documents that frame it. We could go on about the legislation which defines freedom of speech as a human right, but it would be far more pragmatic to look at it from the perspective of the judge who uses such law in an actual court case. This is the reason why the methodology behind this research paper focuses on analyzing the court verdicts that give us a glimpse of how the freedom of speech fragments itself into a human right as we know it today. By doing so we will aspire to crystalize freedom of speech as a human right with a particular background that characterizes it as a fundamental human right in a democratic society.

Getting to know the deliberation of the court before coming to a definitive conclusion, we set out to firstly analyze the legal argumentation on top of which the judge reached a decision. By knowing how the argument is structured we get an insight into how the freedom of speech is properly exercized in accordance with the human right principles. Each human right has a background context into which it is set. Freedom of speech is no different. This is the main research question of this paper.

6. Historical analysis from the perspective of the United States

Let's start with the cradle of freedoms, the United States of America. The Supreme Court of the United States has a rich history when it comes to defining the freedom of speech as a human right and we will begin right at the start, in 1919. On March 3rd of that year the Supreme Court of the United States reached a verdict in Schenk v. United States in a case of a conspiracy to circulate among men who were called and accepted for military service a circular which intended to influence them to obstruct the draft. The Court decided that words that would be ordinarily

and in many places within the freedom of speech protected by the First Amendment, may become subject to prohibition when of such nature and used in such circumstances as to create a clear and present danger that they will bring about the substantive evils which Congress has a right to prevent and the character of every act should depend on the circumstances in which it is done (Schenk v. United States, 249 U.S. 47, 1919, p. 48.). In this legal argumentation, we can see that the Court emphasized the condition of clear and present danger. This means that it needs to be proven beforehand that the act registers a danger that is both clear and present. Acts that are not set forth to become such danger cannot be subject to the limitations of free speech. Such materialized danger can then serve as a prerequisite that free speech can be limited. This limitation that we found and presented here brings us to another standard which was created by the Supreme Court of the United States in the case Abrams v. United States.

The Abrams v. United States case was decided on November 10th, 1919, by the Court, explaining the standard set forth in the Schenk v. United States even further. It stated that only present danger of immediate evil or intent to bring it about warrants Congress to set a limit to the expression of opinion where private rights are not concerned and that Congress cannot forbid all efforts to change the mind of the country (Abrams v. United States, 250 U.S. 616, 1919, p. 628.). Here we can see that the Court gave to the Congress the option to set a limit to free speech if this limit prevents present danger of immediate evil. We emphasize the wording of immediate evil as this shows how serious the danger needs to be to have free speech limited as a fundamental freedom and human right. To understand this, we need to look deeper into the case and what it was about. The facts of the case which were undisputed were of a conspiracy to violate the Espionage Act by uttering the circulars that were intended to provoke and encourage resistance to the United States in the war with Germany, especially by inciting and advocating through such circulars a resort to a general strike of workers in ammunition factories for the purpose of curtailing production of ammunition essential for the war (Abrams v. United States, 250 U.S. 616, 1919, p. 616.). One might ask what was in these circulars or pamphlets that was so dangerous as to cause immediate evil. It contained war propaganda aimed at destabilizing the efforts of the United States. A lot of

five thousand pamphlets were distributed in one day, on the 22nd of August 1918. Let's explain that further; the pamphlets which circulated in the New York City stated: »The Russian Revolution cries: Workers of the World! Awake! Rise! Put down your enemy and mine! Yes! Friends, there is only one enemy of the workers of the world and that is Capitalism. Workers, Russian emigrants, you who had the least belief in the honesty of our Government must throw away all confidence, must spit in the face the false, hypocritic, military propaganda which has fooled you so relentlessly, calling forth your sympathy, your help to the prosecution of the war.« (Abrams v. United States, 250 U.S. 616, 1919, p. 620.). One might see how this would provoke a hasty response from society, not the least from those who were not at ease with the Government. This is more so true when we realize that the conclusion of the pamphlet included a direct call to action: »With the money which you have loaned, or are going to loan them, they will make bullets not only for the Germans, but also for the Workers Soviets of Russia. Workers in the ammunition factories, you are producing bullets, bayonets, cannon, to murder not only the Germans, but also your dearest, best, who are in Russia, and are fighting for freedom.« (Abrams v. United States, 250 U.S. 616, 1919, p. 621.). The Court decided that the spirit becomes even more bitter as the pamphlet declares that America and her Allies have betrayed the workers and that the reply of all workers to the barbaric intervention has to be a general strike.

Judge Oliver Wendell Holmes Jr. Dissented. His argument was that when words are used exactly, a deed is not done with the intent to produce a consequence unless that consequence is the aim of the deed (Abrams v. United States, 250 U.S. 616, 1919, p. 627.). His creative take on free trade ideas is summed up in his explanation of the best truth which is in the power of the thought to get itself accepted in the competition of the market and that truth is according to Judge Oliver Wendell Holmes Jr. the only ground upon which wishes can be safely carried out to which he adds that we have to wager our salvation upon some prophecy based upon imperfect knowledge and for that reason, we should, as Judge Oliver Wendell Holmes Jr. puts it, be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless so imminently threaten immediate interference with the lawful (Abrams v. United States,

250 U.S. 616, 1919, p. 630.). What makes his dissenting opinion so persuasive is not only the grace of his legal writing but also the articulate thought that he expressed in regard to opinions that some consider grisly and frightful to their own. We may speculate that this is the reason why Judge Louis Dembitz Brandeis concurred with this opinion. Judge Louis Dembitz Brandeis also authored the concurrence in the Whitney v. California case which we are going to present next.

The Whitney v. California case was decided on May 16th 1927. This case revolved around the question of whether joining and assisting in the organization of a Communist Labor Party contravened the California Criminal Syndicalism Act. The opinion of the Court was delivered by Judge Edward Terry Sanford. The opinion of the Court was that freedom of speech does not confer an absolute right to speak, without responsibility whatever one may choose, neither does it give an unrestricted and unbridled license of immunity for every possible language, neither does it prevent the punishment of those who abuse this freedom, which coincides with the fact that State can in the exercise of its police power punish those who abuse this freedom by utterances inimical to the public welfare, which incite to crime, disturb the public peace or endanger the foundations of organized government if it is threatened of being overthrown by unlawful means (Whitney v. California, 274 U.S. 357, 1927, p. 357.). Judge Louis Dembitz Brandeis stated in his concurrence that the »Court has not yet fixed the standard by which to determine when a danger shall be deemed clear, how remote the danger may be and yet be deemed present and what degree of evil shall be deemed sufficiently substantial to justify resort to abridgment of free speech and assembly as the means of protection (Whitney v. California, 274 U.S. 357, 1927, p. 374.).

Nonetheless, the background of this case remains clear; Miss Anita Whitney was convicted of the felony of assisting in organizing the Communist Labor Party of California, by being a member of it and assembling with it. The mentioned acts were enough to constitute a crime, which was based on a prerequisite that the Communist Labor Party of California was formed to teach criminal syndicalism. The statute that made these acts a crime restricted the right of free speech and of assembly theretofore existing (Whitney v. California, 274 U.S. 357, 1927, p. 374.). Should this be

a reasonable ground for concern? While the majority of justices on the Supreme Court of the United States upheld the verdict against Anita Whitney, this also had a fairly negative impact on the freedom of speech. Let us now explain this effect which was a residual aftermath of the verdict. Anita Whitney was arrested in November of 1919 after giving a speech in Oakland, which was part of a fundraiser for the Communist Labor Party of California. Although she denied that the speech she gave was meant to incite violence, she was found guilty of criminal syndicalism and sentenced accordingly. When she turned to the Supreme Court of the United States she claimed that her speech was treated differently than the speech of others and that this discrepancy in equality stemmed from the fact that the subject matter was parlous to some. This might as well be the reason that Judge Louis Dembitz Brandeis possibly had in his mind when he wrote that the prohibition which was newly introduced means that the statute no longer solely aims at the practise of criminal syndicalism but now also at associating with those who propose to preach it, although he still sees the right of free speech, the right to teach and the right of assembly as fundamental rights even though they are not absolute and subject to restrictions in order to protect the State (Whitney v. California, 274 U.S. 357, 1927, p. 373).

What constitutes a serious threat to the State and where does free speech wander into the territory from which it can cause irreparable damage to the State? Judge Louis Dembitz Brandeis gave us an insight into how to answer this question when he wrote that fear of serious injury cannot alone justify suppression of free speech and assembly by using the historical anecdote of men who feared witches and burnt women, to which he added the description of the function of free speech to free men from the bondage of irrational fears. In addition to this, he pointed out how there must be reasonable ground to fear that serious evil will result if free speech is practiced in order for it to be justifiably suppressed. In his opinion, there must also be reasonable ground to believe that the evil which needs to be prevented is a serious one. It can be logically believed that this point of view garnered his opinion of the fact that even advocacy of violation, however morally reprehensible, is not automatically a justification for denying free speech where the advocacy falls short of incitement and there is nothing to indicate that the advocacy would be

immediately acted on, to which he added the dilemma of wide differences between advocacy and incitement, analog to preparation and attempt, similarly to the difference of assembling and conspiracy (Whitney v. California, 274 U.S. 357, 1927, p. 373.).

How to act upon clear and present danger depends on the notion of finding it in the first place. Surely one can quote the famous Judge Potter Stewart and say that they will know it when they see it but this approach seems to fall short of the gravitas that comes with immediate serious violence that is expected upon being advocated for. Should there be any prior reason extending out to past behaviour which would lead us to believe things would stir up, we might think things through or maybe not. According to the position that Judge Louis Dembitz Brandeis took in this case only an emergency can justify repression. He grandiosely wrote that those who won the independence by revolution were not cowards and did not fear political change, which meant that no danger from flowing speech could be deemed clear and present unless the incidence of evil apprehended was so imminent that, according to his opinion, may befall before there is an opportunity for full discussion, leading to the fact that evil can be averted by the process of education (Whitney v. California, 274 U.S. 357, 1927, p. 377.) and this means more speech, which is a remedy needed to be applied in accordance to the fact that enforced silence cannot do as much as education and speech.

From this analysis which we made, the reader can further understand why imminent danger does not automatically justify a legislator's ban or prohibition just to cater to the functions of an effective democracy. Unless, of course, the apprehended evil causes serious problems. We saw that Judge Louis Dembitz Brandeis feels how stringent the measure of prohibiting free speech is. He even structured his argument on the Founding Fathers and their courage to act freely. This position can be attributed to the fact that he held a view on how it is not enough to justify suppression of free speech if it is likely to result in some violence or in the destruction of property, but there needs to be a probability of serious injury to the State instead (Whitney v. California, 274 U.S. 357, 1927, p. 378.). His remarks were observed in the next case that we are going to analyze and that is the Terminiello v. Chicago case.

The aforementioned case of Terminiello v. Chicago was decided on the 16th of May 1949. To give a time perspective to the

reader, more than two decades later the doctrine of clear and present danger was again further elaborated. The undisputed facts of the case and its background are as follows: »In a meeting which attracted considerable public attention, petitioner addressed a large audience in an auditorium outside of which was an angry and turbulent crowd protesting against the meeting. The petitioner condemned the conduct of the crowd outside but also at the same time started to vigourously criticize various political and racial groups. Notwithstanding efforts of a cordon of police to maintain the order, there were several disturbances in the crowd. Petitioner was charged with violation of an ordinance forbidding any breach of peace and the trial court instructed the jury that any misbehaviour which stirs the public to anger, invites dispute, brings a condition of unrest or creates a disturbance, violates the ordinance (Terminiello v. Chicago, 337 U.S. 1, 1949, p. 1).

Reverend Father Arthur Terminiello delivered a crude and harsh speech that fired up the crowd of protestors who were held at bay by the police. There was an estimate of 800 people at the event. The number of people at the spot later on was 1500 (Terminiello v. Chicago, 337 U.S. 1, 1949, p. 16). It was clear to all that the speech would invite dispute and stir the emotions of all who were involved. People were not at ease and many became angry. But does unrest and dissatisfaction with what someone says cause the suppression of free speech? Do such circumstances allow for the prohibition of freedom of speech? We will present to the reader whether this situation constituted a clear and present danger or was it just a seldom invective occasion which brought slight public annoyance and inconvenience for the individuals involved.

With no intention of spoiling the final outcome to the reader we must explain that Father Arthur Terminiello was convicted, the Illinois Appellate Court and the Supreme Court of Illinois affirmed but the Supreme Court of the United States granted certiorari and reversed. Continuing on we will explain why through the analysis of the argumentation that was delivered by Judge William Orville Douglas, a successor of Judge Louis Dembitz Brandeis.

The Court decided that the vitality of civil and political institutions in society depends on free discussion and accordingly the function of free speech is to invite dispute as it may only serve

its high purpose when it induces a condition of unrest, creates dissatisfaction with present conditions and also stirs people to anger, because speech is often provocative and challenging, so it may strike at prejudices and preconceptions with profound unsettling effects as it presses for an acceptance of an idea (Terminiello v. Chicago, 337 U.S. 1, 1949, p. 4.). This is why the trial court failed as it permitted the conviction of Father Arthur Terminiello on the grounds of his speech inviting public dispute, making people angry and at unrest. That is why free speech is protected as a human right in the first place. It should not be decreased just so we can achieve the absence of anger and public dispute. If we lessen the reach of free speech due to the fact it may unsettle people we at the same time deny the ability to discuss any issue freely without the angst of making someone angry with your personal views. We need not bind free speech with subjective emotions which can be stirred by opposing views. Such an approach is flawed. Let's explain in detail the reasons for this by analyzing the case at hand. The Court had tremendous candor when delivering this decision as is shown in the fact that it noticed how Illinois courts convicted Rev. Fr. Arthur Terminiello based on the fact of inviting dispute and bringing about a condition of unrest. The Court explained that those courts merely measured Rev. Fr. Arthur W. Terminiello´s conduct and not the ordinance against the Constitution, which is worrisome as the petitioner raised both points, that his speech was protected by the Constitution and that the inclusion of his speech within the ordinance was a violation of the Constitution (Terminiello v. Chicago, 337 U.S. 1, 1949, p. 6.). This should not be a nuisance to any court as they are the ones applying the law so they should be able to check the aforementioned points.

A similar case to the one we presented before was the Cantwell et al v. Connecticut which was decided on May 20th 1940. In that case, the Court stated that when a clear and present danger of riot, disorder, interference with traffic upon the public street or other immediate threat to public safety, peace, or order appears, the power of the State to prevent or punish is obvious, as is equally obvious that the State may not unduly suppress free communication of views, religious or others, under the guise of conserving desirable conditions (Cantwell v. Connecticut, 310 U.S. 296, 1940, p. 308.).

The question bestowed upon us is how to draw the line between a speech that is meant to provoke certain feelings and force the individuals to peruse thought-provoking facts and on the other hand speech that is only meant to incite violence and cause unrest amongst the public.

We can find the answer in the Feiner v. New York case. The facts of the case are rather concerning but also extremely straightforward. The Supreme Court of the United States stated the following facts of the case: »Petitioner made an inflammatory speech to a mixed crowd of 75 or 80 Negroes and white people on a city street. He made derogatory remarks about President Truman, the American Legion, and local political officials; endeavoured to arouse the Negroes against the whites and urged that Negroes rise up in arms and fight for equal rights. The crowd, which blocked the sidewalk and overflowed into the street, became restless, its feelings for and against the speaker were rising and there was at least one threat of violence. After observing the situation for some time without interference, police officers, in order to prevent a fight, thrice requested the petitioner to get off the box and stop speaking. After his third refusal, and after he had been speaking for over 30 minutes, they arrested him and he was convicted of violating section 722 of the Penal Code of New York, which in effect, forbids incitement of a breach of peace« (Feiner v. New York, 340 U.S. 315, 1951, p. 315.).

The Court reached a decision on the 15th of January 1951. The opinion was delivered by Judge Frederick Moore Vinson. Petitioner was convicted of the offense of disorderly conduct and the conviction was affirmed by the Onondaga County Court and the New York Court of Appeals. The Court held the conviction, while petitioner Irving Feiner claimed that the conviction was in violation of his right of free speech. Let's explain the reason behind it. The court noticed that the exercise of the discretionary power that police officers had was used to prevent the breach of the peace and that the same notion was approved by the trial court and two courts on review. Those same courts also recognized the right of the petitioner to hold a street meeting, to make use of loud speakers and to make derogatory remarks concerning public officials. This was not contested as it was within the realm of legality. When making the arrest, the police officers were solely motivated by a concern for the preservation of order and protec-

tion of the general welfare and not by the suppression of political views that Irving Feiner had (Feiner v. New York , 340 U.S. 315, 1951, p. 319).

In reaching the decision, the Court stated that it was mindful of the possible danger of giving overzealous police officials complete discretion to break up otherwise lawful public meetings and that it is aware that the ordinary objections of a hostile audience cannot be allowed to silence a speaker (Feiner v. New York, 340 U.S. 315, 1951, p. 320). It, therefore, decided that police officials are not powerless to prevent a breach of peace when the speaker passes the bounds of argumentative persuasion and starts to incite a riot. In the case we presented, this was exactly what happened and, as such, could not be protected as free speech.

Judge Hugo Lafayette Black dissented and wrote that such a conviction is a mockery of the free speech guarantees as it subjects all similar speeches to the supervision and censorship of the local police and views it as a long step toward totalitarian authority (Feiner v. New York, 340 U.S. 315, 1951, p. 323). Due to this legal argument that he presented he made clear in his dissent that he does not want to take part in such a thing. His staunch approach to free speech would definitely go more in line with what we have presented so far. He concluded with a remark that he understands that people in authoritarian countries must obey arbitrary orders but hoped that there was no such duty in the United States because due to this minority speakers in every city can be silenced (Feiner v. New York, 340 U.S. 315, 1951, p. 328). We can see the reasoning in the background of all of this. The erosion of free speech as a human right can happen slowly but when these incremental steps surmount to a large enough chunk the entire intent of the human right erodes. The gradual slide that can happen to human rights of this type need not happen through years it can happen in decades before it becomes perspicuous that the right is almost gone. We have shown to the reader how free speech functions in the light of the intent that this human right has. Free speech is one of those human rights that can potentially be in danger by the perilous erosion that takes place through many years before one even becomes moderately aware of it.

The analyzed case can raise some worries especially due to the fact that judge William Orville Douglas wrote in his dissenting opinion, with whom judge Sherman Minton concurred, that

there were no fights and no disorder even by the standards of the police, no one was even heckling the speaker, there was only the testimony of the police that there was some pushing and shoving in the crowd (Feiner v. New York, 340 U.S. 315, 1951, p. 330). Sure enough, the topic was ill-mannered and in bad taste, especially due to the fact that unpopular opinions often gather heckling from the crowd if not just cause unrest to the individuals present there. But the police should, according to judge William Orville Douglas, protect these lawful gatherings so that speakers may exercise their constitutional rights as long as there is no incitement of riots.

In the same year, there was another similar case in front of the Supreme Court of the United States. The Dennis et al vs. United States case was about petitioners who were leaders of the Communist Party in the United States. They were indicted in a federal district court for willfuly and knowingly conspiring to organize as the Communist Party a group of people to teach and advocate the overthrow and destruction of the government by force and violence. They were convicted.

The Court, through the delivered opinion by Judge Fred Moore Vinson, stated that it has adopted as a rule the statement made by Judge Billings Learned Hand who phrased that courts must in each case ask whether the gravity of the evil, discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger (Feiner v. New York, 341 U.S. 494, 1951, p. 510). Here, we can see why the petitioners were denied the right to exercise free speech, as such exercise would mean the creation of a plot to overthrow the government. The gravity of evil in this case is an overthrown government and the suppression of free speech would prevent this from happening. This is the reason why the right to exercise free speech was denied. Later on, as time passed, both Schenk v. United States and Abrams v. United States were overturned and also Dennis et al v. United States was overturned as well, while Whitney v. California was overruled as later decisions set up a newer standard to guarantee free speech. By the end of the sixties the clear and present danger doctrine was replaced by the imminent lawless action test brought by the Brandenburg v. Ohio case (Brandenburg v. Ohio, 395 U.S. 444, 1969, p. 447). To this day the caselaw in the United States seems to use the imminence of a targeted threat as one of the most impor-

tant thresholds to decide whether a restriction must be imposed on a given statement or act, although more recently the Court has moved away from this doctrine, if you threaten violence against a specific target, you might find your right to speech restricted, but in the same light, religious practices and speech that has hateful content may not be regulated, however, if the victim can prove targeted intent to intimidate, the Court will not intervene in a restriction (Lamson, de Souza Lehfeld, Martinez Perez Filho, 2022, p. 50).

7. Synthesis of the results for the historical analysis

We chose the historical caselaw of the United States for a reason; the United States of America has always been a cornerstone for liberties and human rights. It was clear that in order to find applicable elucidation it was unavoidable to include such a stronghold. Especially from the historical view point of how it all began. The main point was to show the changing dynamics of the freedom of speech as a human right. We feel that a time period of 50 years from 1919 up to 1969 was enough to showcase the relevant approaches and how they change with time. The background of each human right can be traced in the same manner that we presented so it would not be pivotal for this research to extend it to a broader timeframe. Free speech and the interpretation of what constitutes it can sometimes heavily depend on the circumstances that are taken into account by the court before issuing a verdict. It was shown that no case is really identical to other cases, yet we can undoubtedly find similarities in precedent that help. It was demonstrated that a human right such as free speech can be as fragile as it can be strong. The constant development around it means that it can go from overwhelmingly perceptible to almost non-existent. It was also apparent that free speech as a right on its own is always subject to judicial evaluation.

Most importantly, it was evident that even from a historical point of view, there was a sense of context put into this evaluation, rather than just the sheer perception of judges when it comes to each case. The context of free speech was always put into consideration, rather than just considering the perception of such speech. Be it in regards to communism or religion, or even

espionage and racial topics, the speech was assessed from the context in which the ideas were shared or promoted. The judges were conscientious of the implications that a judgment based on perceived implication would have; that is why they put the whole situation in perspective. They looked at the bigger picture.

Why was this important? The importance of evaluating the context in matters of limiting free speech gives an additional safeguard to help uphold this human right. To put it plainly, would the situation be different if Rev. Fr. Arthur W. Terminiello gave the heated speech in a church rather than at the meeting in an auditorium or if Irving Feiner tried to commove a non-hostile and non-mixed crowd? The answer is simple, the context in which the speech is given and the context in which the idea is conveyed matters. The same goes for Anita Whitney and her speech she gave at the fundraiser for the Communist Labor Party of California in Oakland. The context in which the judges would ponder the case is without a doubt different if it was not given at a fundraiser for a communist party. This shows the importance of context behind free speech.

8. Modern developments from a Caribbean legal perspective

To further elaborate the research question of this research paper regarding the background context into which freedom of speech as a human right is set, we need to provide additional balance to this research, since it is needed to provide us with the insight into how courts structure the arguments around the common human rights and principles surrounding them. In our case, we are researching the context of free speech.

Additional balance to this research comes in the form of judicial decisions from two of the highest courts in the Caribbean region. We chose the Supreme Court of the Bahamas and the Supreme Court of Jamaica. The standards of legal argumentation in the verdicts of the mentioned courts are on the same level of quality as any other court in the world and often exceed it. Oftentimes this fact is wrongfully overlooked as it can provide valuable insight into the perception of free speech as a human right.

Let's start in the Bahamas. The first case we are going to analyze is between Coalition to protect Clifton Bay as the first appli-

cant and the second applicant Zachary Hampton Bacon III versus the Hon. Frederick A. Mitchell as the first respondent and Minister of Foreign Affairs and immigration and second respondent the Hon. Jerome Fitzgerald as the Minister of Education, Science and Technology. Before we go into details, let's present the relevant context of the case. The first applicant is a non-profit environmental group popularly called Save the Bays and the second applicant is affiliated with them. They brought a constitutional motion challenging the disclosure of private and confidential emails said to belong to them. They sued the first and second respondent but also sued the third respondent which was the Attorney General in her capacity. The emails were disclosed in Parliamentary Proceedings by the second respondent and refered to the financial information of the Coalition to Protect Clifton Bay. The source of emails was never disclosed or fully explained. The Applicants claimed that the disclosure of the emails violated their Constitutional rights, including Article 23 which is Freedom of Expression (Coalition to protect Clifton Bay, Zachary Hampton Bacon III v. The Hon. Frederick A. Mitchell MP, The Hon. Jerome Fitzgerald MP, The Attorney General of the Commonwealth of the Bahamas, 2016/PUB/con/00016, p. 3).

The Respondents on the other hand challenged the constitutional motion on number of grounds. For our research paper the most relevant claim seems to be the fact that they stated that Court does not have jurisdiction to adjudicate on matters within the sacred walls of Parliament or to make orders purporting to impinge on the conduct or speech of Members of Parliament. (Coalition to protect Clifton Bay, Zachary Hampton Bacon III v. The Hon. Frederick A. Mitchell MP, The Hon. Jerome Fitzgerald MP, The Attorney General of the Commonwealth of the Bahamas, 2016/PUB/con/00016, p. 7). The Court decided that it will decide in the issue whether or not this is a case in which the Court will adjudicate on matters occurring within Parliament or make orders affecting the conduct of Members of Parliament or controlling the speech of Members of Parliament inside the Parliament and on top of that the Court decided to resolve the issue of the question should the Court make any order which places further restrictions on the constitutional rights and the freedom of speech (Coalition to protect Clifton Bay, Zachary Hampton Bacon III v. The Hon. Frederick A. Mitchell MP, The Hon. Jerome Fitzgerald MP, The

Attorney General of the Commonwealth of the Bahamas, 2016/PUB/con/00016, p. 19).

There was a restriction that the Court addressed immediately. We shall explain it in detail; there exists a statutory basis of parliamentary privilege which states that the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place outside of parliament. The privileges enjoyed included freedom of speech in parliament. The Court presented a limitation to this doctrine which included the Buchanan v. Jennings case which held that the need to protect freedom of speech in parliament and the right of parliament to govern its own proceedings did not preclude a claimant from relying on such a record as evidence in support of an action against a Member of the Parliament based on what was said outside the House (Coalition to protect Clifton Bay, Zachary Hampton Bacon III v. The Hon. Frederick A. Mitchell MP, The Hon. Jerome Fitzgerald MP, The Attorney General of the Commonwealth of the Bahamas, 2016/PUB/con/00016, p. 32). Regarding this, the Court decided that it is well established that parliamentary privilege even in its absolute form cannot apply to what a Member of Parliament says outside of Parliament.

The Court found that the Government, through one of its Cabinet Ministers, breached the Constitution and the Applicants were therefore entitled to vindicatory damages (Coalition to protect Clifton Bay, Zachary Hampton Bacon III v. The Hon. Frederick A. Mitchell MP, The Hon. Jerome Fitzgerald MP, The Attorney General of the Commonwealth of the Bahamas, 2016/PUB/con/00016, p. 88). What persuaded the Court? The answer lies in the argumentation that the Court used. It said that it is axiomatic that a man's private and confidential correspondence, precious to his heart, should not be the subject of public discussion and scrutiny. The second respondent made unsubstantiated allegations about the first applicant which he portrayed as a money-laundering organization. According to the Court these statements are regrettable since it had nothing to do with the Mid-term Budget debates (Coalition to protect Clifton Bay, Zachary Hampton Bacon III v. The Hon. Frederick A. Mitchell MP, The Hon. Jerome Fitzgerald MP, The Attorney General of the Commonwealth of the Bahamas, 2016/PUB/con/00016, p. 90). This ruling showed us that there are limits to free speech even when it comes to parliamentary privi-

lege. Freedom of speech as the constraint on the Government in this case constitutes an exception to parliamentary privilege. The verdict was presented by the honourable Madam Senior Justice Indra H. Charles on 2nd of August in 2016.

The second and final case we are going to analyze from the Supreme Court of the Bahamas is monumental in its own right. The case of Omar Archer, Senior as the plaintiff versus Commissioner of Police and the Attorney-General of the Commonwealth of the Bahamas as the defendants brings us another interesting take on the freedom of speech. Before we dig into the fundamentals of freedom of speech let's present to the reader some facts of the case first; over the course of several days in April of 2015 the plaintiff became embroiled in an acrimonious exchange on Facebook with a female, who is referred to as the virtual complainant. She first called the plaintiff amongst other things, a »pathetic turd«, said that a »cockroach could beat you in an election«, and that his mother may have tried to induce abortion which made him »retarded instead«. The plaintiff responded back personal and offensive allegations, the most stinging of which were that she had »had a baby in a bucket in a Rasta camp and left it to die« and that she had HIV/AIDS and was spreading it. She complained to the police and the plaintiff was subsequently arrested, charged with intentional libel and summarily tried before a magistrate. Midstream that trial, he asserted that the law under which he was charged was unconstitutional and that is how the whole thing ended up in the Supreme Court (Omar Archer Sr. v. Commissioner of Police, The Attorney General of the Commonwealth of the Bahamas, 2017/PUB/con/0024, p. 2). Justice Loren Klein made sure to point out the fact that this was the first time that the constitutionality of criminal libel is being questioned in this jurisdiction as this offence is considered anachronistic in many Western democracies and in a handful of Caribbean countries. To this he added, that any opportunity for reform through courts comes up firmly against the savings clause which paradoxically preserves laws that pre-date the Constitution even if repugnant to constitutional guarantees.

The plaintiff in his affidavit from 20.2.2018 states that he is a political activist and an advocate for freedom of expression and his lead counsel described him as a well-known publicly outspoken figure with a big political profile. The plaintiff alleged in the

aforementioned affidavit that his prosecution was politically motivated. The woman with whom he had a virtual altercation is a newspaper reporter and according to the plaintiff a ghost writer for a tabloid; she and the plaintiff were Facebook friends until the unfortunate exchange when he unfriended her but are otherwise not socially acquainted. She inboxed the plaintiff on 16.4.2015 (Omar Archer Sr. v. Commissioner of Police, The Attorney General of the Commonwealth of the Bahamas, 2017/PUB/con/0024, p. 5). She became aware of his public post which said she had Human Immunodeficiency Virus on the 16.4.2015 and made the screenshots on 19.4.2015 and made the complaint to police on that same day (Omar Archer Sr. v. Commissioner of Police, The Attorney General of the Commonwealth of the Bahamas, 2017/PUB/con/0024, p. 7).

The main issue that arose later was the alleged violation of Article 23 of the Constitution which protects the rights to freedom of expression. Not only that but the plaintiff argued that criminal libel law was unconstitutional, and even if it is saved by the clause of existing law it is not reasonably required to protect private reputation for any public policy interests (Omar Archer Sr. v. Commissioner of Police, The Attorney General of the Commonwealth of the Bahamas, 2017/PUB/con/0024, p. 17). When deciding whether criminal libel is an interference with freedom of expression Justice Loren Klein pointed out that the right to freedom of expression is interfered with by the offence of intentional libel but the law equally pursues a legitimate aim in protecting the rights, reputations and freedoms of others (Omar Archer Sr. v. Commissioner of Police, The Attorney General of the Commonwealth of the Bahamas, 2017/PUB/con/0024, p. 24). So this means that the question actually comes down to whether the interference is proportionate. Is it necessary and proportionate to have the means to criminally punish people for publishing intentionally libelous material? Justice Loren Klein hinted that he would be prepared to hold that criminal libel was a *prima facie* interference with the right of free speech. He based this thought on the fact that there has been universal acceptance that freedom of speech is a *sine qua non* in a democratic society. In doing so he reminded of the Guyanese case Jagan v. Burham where it was said that the facets of freedom of expression were cherished rights and that the article of the Guyanese constitu-

tion protecting freedom of expression seeks to preserve what is vital in a free society wherein the right to speak, to propagate and to circulate ideas belong to everyone and will be protected for everyone. This means that the chief commodity of freedom of expression lies in its role in fostering free political discussion (Omar Archer Sr. v. Commissioner of Police, The Attorney General of the Commonwealth of the Bahamas, 2017/PUB/con/0024, p. 25).

In this aspect Justice Loren Klein built his argumentation on European jurisprudence where the courts developed the concept that defamation laws, civil and especially criminal, can have a chilling effect on freedom of expression and the free flow of ideas. His perception was that civil remedy ought to be the first port of call to redress defamation, but this does not necessarily mean that the criminal law has no role in defamation as there are cases where a civil claim may not be feasible and may not punish, which is in the case where the defendant is a person of straw and unable to pay damages, or the defamer might be very wealthy and takes the calculated risk of paying damages. That is why they coexist (Omar Archer Sr. v. Commissioner of Police, The Attorney General of the Commonwealth of the Bahamas, 2017/PUB/con/0024, p. 28).

On the question whether the legislative objective is sufficiently important to justify limiting freedom of speech the Court decided after performing the first element of the proportionality test, that the provision which penalizes defamation and limits the right to free speech with the objective of protecting reputation is a sufficiently laudable goal in a democratic society to warrant a limitation of freedom of expression. The Court ruled that this condition is not only satisfied because of the inherent value and dignity attached to personal reputation but also because the core substance of the right to freedom of expression is not necessarily impaired by such restrictions (Omar Archer Sr. v. Commissioner of Police, The Attorney General of the Commonwealth of the Bahamas, 2017/PUB/con/0024, p. 34). Counsel for the plaintiff argued that the comment in the context in which it was made was not really likely to have caused significant or serious harm which is why it was unnecessary and disproportionate for the state to intervene. The Court did not follow this. The words of the plaintiff were public, while she on the other hand messaged

him privately. His statement had the potential to cause significant harm as it was posted on Facebook where it can reach millions of people. The seriousness of his action is confirmed by the fact that the plaintiff committed several serious crimes against her, from concealing the body of a child and infanticide to knowingly spreading HIV. Challenged provisions were not unconstitutional on the grounds of proportionality (Omar Archer Sr. v. Commissioner of Police, The Attorney General of the Commonwealth of the Bahamas, 2017/PUB/con/0024, p. 41). The Court did not find the act of prosecuting the plaintiff unconstitutional (Omar Archer Sr. v. Commissioner of Police, The Attorney General of the Commonwealth of the Bahamas, 2017/PUB/con/0024, p. 49). The verdict is dated to 29.6.2020.

The main point we can observe from the analyzed decisions from the Court is how the limitations of free speech are argued by the judges. There is an implied border where free speech cannot overflow and as we saw the two examples given, free speech as a human right is contested by other human rights. Parliamentary privilege for one does not provide full grounds for unlimited upkeep of the freedom of speech, same goes for the aspects of serious defamation. The second case showed that free speech can be potentially limited by another person´s reputation and protection of it. We saw how there is an intricate line of balancing the decision, which is usually tightly linked with the facts of the case.

Final case analysis comes from the decisions made by The Supreme Court of Jamaica. The cases were chosen according to the subject matter of free speech.

The first case is between Roy K. Anderson as the claimant and Dwight Clacken as the defendant. Before digging into the legal arguments behind the case we must provide the background of it: Dwight Clacken authored the book titled »No Justice in Jamaica – How the Jamaican Judicial System Destroyed My Life and My Business and How It Can Happen to You«, Roy K. Anderson alleged that certain statements in the book were defamatory in reference to him as a judicial officer and his actions in the capacity as a judicial officer. Roy K. Anderson is an Arbitrator and and Associate tutor in the Faculty of law, University of West Indies as well as a retired judge of the Supreme Court of Jamaica (Roy K. Anderson v. Dwight Clacken, 2016 HCV 05224, 2023 JMSC Civ 42, p. 3).

The statutory framework for this case was The Defamation Act of 2013 whose one of the principles is to ensure that the law relating to the tort of defamation does not place unreasonable limits on freedom of expression (Roy K. Anderson v. Dwight Clacken, 2016 HCV 05224, 2023 JMSC Civ 42, p. 17). The Court in this decision looked into case-law and cited The Jamaican Observer Ltd v. Orville Mattis where the Court of Appeal stated the position that it takes years to build a good name and reputation but it takes only a few reckless lines in a newspaper to destroy or seriously damage that name or reputation; Section 22 of the Constitution gives a right to free speech but it does not permit defamation of one´s good character (Roy K. Anderson v. Dwight Clacken, 2016 HCV 05224, 2023 JMSC Civ 42, p. 38). The Court found that the claimant successfully proved malice on the part of the defendant for the reasons that the defamatory statements were published with an indirect motive, which is other than a duty to publish material of public interest regarding the administration of justice and that the evidence of intrinsic malice can be detected in the words and statements themselves as according to the Court, the language used by the defendant was disproportionate to the facts (Roy K. Anderson v. Dwight Clacken, 2016 HCV 05224, 2023 JMSC Civ 42, p. 36). The Court also found that the defendant did not establish his defence of fair comment because the statements in the book were not honestly made and were not based on true representation of the facts but were actuated by malice (Roy K. Anderson v. Dwight Clacken, 2016 HCV 05224, 2023 JMSC Civ 42, p. 37).

The problem of such viewing of free speech lies in the context of applying this human right. We saw that the Court structured a position in which it decided firstly that statements were published with an indirect motive. Malice intent was a presupposition to build an argument around it. Without this, it would be impossible to hold a limitation to free speech. To understand the words in a certain way, especially in intrinsic malice, it depends on how the Court views each case by the claims made by both parties. This means that, regrettably, even if the defendant did not have such an outcome in mind, but the affected claimant perceived it as such, it constitutes a limit of freedom of speech with the goal of protecting the good name and reputation. This approach can be problematic if left unmonitored.

We can see the same issue in the next case that we are going to analyse. The case of Michael Troupe as the claimant versus Leon Clunis as the first defendant, Owen Wellington as the second defendant, Television Jamaica Ltd as the third defendant, CVM Television Ltd as the fourth defendant and Attorney General for Jamaica as the fifth defendant is an interesting one when it comes to assessing the protection of good name and reputation in the relation to freedom of expression and free speech in particular.

To understand the case more thoroughly we need to present the facts of it: On July 18th of 2012 at 5:30 in the morning a search and seizure operation was carried out by the Jamaica Constabulary Force and its Anti-Lottery Scam Task Force of the Major Organised Crime and Anti-Corruption Agency and the Jamaica Defence Force under the command of Superintendant Leon Clunis. It took place in the parish of Saint James at the residence of Michael Troupe, a businessman, Justice of Peace, Parish Councillor and Deputy Mayor for Montego Bay who resided at Pitfour, Granville in the parish. Troupe and his son were arrested. An illegal pistol was found at the residence. His son pleaded guilty to the offences of illegal possession of firearm and illegal possession of ammunition. The charges against Michael Troupe were dropped (Michael Troupe v. Leon Clunis, Owen Ellington, Television Jamaica LTD, CVM Television LTD, Attorney General for Jamaica, 2012 HCV 06037, 2019 JMSC Civ 240, p. 3).

The operation conducted at the residence was video recorded by Television Jamaica and CVM television and broadcast on the day the operation took place. Statements relating to the operation were made by Superintendant Clunis and Commissioner of Police Owen Ellington during the course of police operations which were broadcast by the same television stations during Midday news (Michael Troupe v. Leon Clunis, Owen Ellington, Television Jamaica LTD, CVM Television LTD, Attorney General for Jamaica, 2012 HCV 06037, 2019 JMSC Civ 240, p. 4). Michael Troupe claimed that he suffered severe embarrasment and sustained damage by defamatory words of the defendants. The first two defendants stated that the publication of the statements was not defamatory as the published words were true and substantially true or in the alternative they were fair comments on matters of public interest and the circumstances of publication were protected by qualified privilege while the fourth defendant admitted that

its videographer was alerted to the raid, attended it and learned of the operation at Pitfour where the recording of the arrest was made (Michael Troupe v. Leon Clunis, Owen Ellington, Television Jamaica LTD, CVM Television LTD, Attorney General for Jamaica, 2012 HCV 06037, 2019 JMSC Civ 240,p. 6). The Court stated that if it decides that words are capable of defamatory meaning, it must determine whether an ordinary intelligent and unbiased person would understand them as words of disparagement and as an allegation of dishonest and dishonourable conduct (Michael Troupe v. Leon Clunis, Owen Ellington, Television Jamaica LTD, CVM Television LTD, Attorney General for Jamaica, 2012 HCV 06037, 2019 JMSC Civ 240, p. 18). The Court found the words given their plain and ordinary meaning, are imputing criminal action on the part of the claimant (Michael Troupe v. Leon Clunis, Owen Ellington, Television Jamaica LTD, CVM Television LTD, Attorney General for Jamaica, 2012 HCV 06037, 2019 JMSC Civ 240, p. 20). The words »key actors« and »top-tier actors within the scamming operations« connote involvement in criminality, when considered in the ordinary sense according to the Court, which means that the average Jamaican would infer guilt upon the claimant (Michael Troupe v. Leon Clunis, Owen Ellington, Television Jamaica LTD, CVM Television LTD, Attorney General for Jamaica, 2012 HCV 06037, 2019 JMSC Civ 240, p. 22).

Comments made by the reporters would show, to a reasonable person viewing the newscasts, that the claimant is involved in lottery scamming and was arrested because there was a strong case against him. That is why the Court found the words in their natural and ordinary meaning to be defamatory of the claimant as it had an effect of lowering the esteem that the claimant had in public due to the fact that the statements ascribe to the claimant criminal conduct (Michael Troupe v. Leon Clunis, Owen Ellington, Television Jamaica LTD, CVM Television LTD, Attorney General for Jamaica, 2012 HCV 06037, 2019 JMSC Civ 240, p. 25).

For the argument of fair comment that the defendants used, the Court stated that such words must be stated as a comment on some fact, which means that there must beforehand be a statement with foundation of fact which is a basis for the comment given on this fact. If the facts on which the comments purport to be made are not proven to be true or published on an occasion of privilege, the defence of fair comment is not available (Michael

Troupe v. Leon Clunis, Owen Ellington, Television Jamaica LTD, CVM Television LTD, Attorney General for Jamaica, 2012 HCV 06037, 2019 JMSC Civ 240, p. 27). The Court made it clear that fair comment does not extend to misstatements of facts however bona fide they may be. In regard to the argument of qualified privilege, the Court stated that a proper balance must be struck between freedom of expression and the right of an individual to protect his reputation, which is relevant for freedom of speech (Michael Troupe v. Leon Clunis, Owen Ellington, Television Jamaica LTD, CVM Television LTD, Attorney General for Jamaica, 2012 HCV 06037, 2019 JMSC Civ 240, p. 31). The reasonable television viewer would understand the serious allegations when the reporter stated that the claimant was caught in the lotto scam dragnet. The Court concluded that the tone of publications was not investigative and thus fell below the threshold of responsible journalism as the reasonable man would be convinced from the reports that the claimant was involved in lottery scamming activities (Michael Troupe v. Leon Clunis, Owen Ellington, Television Jamaica LTD, CVM Television LTD, Attorney General for Jamaica, 2012 HCV 06037, 2019 JMSC Civ 240, p. 32).

It was the opinion of the Court that no public interest is served by publishing misinformation as the public was clearly misinformed as the claimant was not charged for any offences related to lottery scamming. The claimant was an elected representative which means that any allegation of criminal conduct on the part of such person is serious (Michael Troupe v. Leon Clunis, Owen Ellington, Television Jamaica LTD, CVM Television LTD, Attorney General for Jamaica, 2012 HCV 06037, 2019 JMSC Civ 240, p. 34). The Court concluded that although the subject matter was of public interest, there was no need to hastily broadcast it without first verifying the accuracy (Michael Troupe v. Leon Clunis, Owen Ellington, Television Jamaica LTD, CVM Television LTD, Attorney General for Jamaica, 2012 HCV 06037, 2019 JMSC Civ 240, p. 36). On top of that, the excuse that the claimant was in custody is not sufficient but only shows, according to the Court, that there was no real effort made to get his side of the story. The Defendants failed to show any justification for the words spoken or broadcast (Michael Troupe v. Leon Clunis, Owen Ellington, Television Jamaica LTD, CVM Television LTD, Attorney General for Jamaica, 2012 HCV 06037, 2019 JMSC Civ 240, p. 54).

This case that we have analyzed showed how the relation between publishing information in public interest and the right of a person to protect their reputation and good name can have an impact on free speech. The argument of responsible journalism when it comes to investigating matters in public interest still holds a high threshold for eliminating any misinformation before a certain broadcast reaches the audience. In this case the free speech aspect of journalism only comes to play when the information does not base on something that is not true. It is debatable what can be proven to be true as investigative journalism often relies on information that is only the tip of the iceberg. In the case mentioned above this was not such an occasion as the broadcast was made of statements by officials who took part in the operation. The reporters added their own connotation to the story which breached the human right aspect of free speech. We must distinguish between hard facts and embellished facts that can sometimes not even resemble the facts that they were based on.

The final case we are going to analyze from Jamaica also touches the subject of free speech in the media. The case between Maurice Arnold Tomlinson as the claimant and Television Jamaica Ltd as the first defendant, CVM Television Ltd as the second defendant and The Public Broadcasting Corporation of Jamaica as the third defendant is an interesting legal issue. Let us start, as we do, with the facts of the case: the claimant Maurice Arnold Tomlinson, sought to have his message aired at a time and in a manner of his choosing. His inability to achieve this has led him to allege that there has been a breach of his rights (Maurice Arnold Tomlinson v. Television Jamaica LTD, CVM Television, The Public Broadcasting Corporation of Jamaica, 2012 HCV 05676, 2013 JMCF Full 5, p. 3). The claimant is an attorney-at-law and a homosexual man. He is a citizen of Jamaica but became a landed immigrant of Canada in 2012, he was at the time of commencing the quest to have his message aired, employed as legal advisor for the international NGO Aids-Free World. He describes himself as an activist and as such he has organized several public events in an attempt to bring about changes in the attitude towards homosexuals in Jamaica and further to draw attention to the need for tolerance of minority groups as an effective tool to counter the spread of HIV and AIDS. The message he had sought to be aired was presented in what he describes as the »Love and Respect PA« video,

a 30 second video which was produced as a part of his advocacy campaign. He acts in it, portraying a homosexual man whose aunt reassures him when he complains of trying to get Jamaicans to respect his human rights as a gay man, that she respects and loves him (Maurice Arnold Tomlinson v. Television Jamaica LTD, CVM Television, The Public Broadcasting Corporation of Jamaica, 2012 HCV 05676, 2013 JMCF Full 5, p. 5). The refusal to air occurred in Jamaica (Maurice Arnold Tomlinson v. Television Jamaica LTD, CVM Television, The Public Broadcasting Corporation of Jamaica, 2012 HCV 05676, 2013 JMCF Full 5, p. 12).

The Court, when structuring the arguments, used the reasoning from a 1989 case of Trieger versus Canadian Broadcasting Corp: As to free speech, the right to speak does not necessarily carry with it the right to make someone listen or the right to make someone else carry that message to the public (Maurice Arnold Tomlinson v. Television Jamaica LTD, CVM Television, The Public Broadcasting Corporation of Jamaica, 2012 HCV 05676, 2013 JMCF Full 5, p. 18) and the reasoning from a 1985 case of Re New Brunswick Broadcasting Co. Ltd. versus Canadian Radio Television and Telecommunications Commission: The freedom guaranteed by the Charter is a freedom to express and communicate ideas without restraint, whether orally or in print or by other means of communication. It is not a freedom to use someone else's property to do so. It gives no right to anyone to use someone's land or platform to make a speech, or someone else's printing press to publish his ideas. It gives no right to anyone to enter or use a public building for such purposes. And it gives no right to anyone to use the radio frequencies (Maurice Arnold Tomlinson v. Television Jamaica LTD, CVM Television, The Public Broadcasting Corporation of Jamaica, 2012 HCV 05676, 2013 JMCF Full 5, p. 19). The Court added the reasoning from a 1983 case of Haider versus Austria that in Europe under the Article 10 of the European Convention on Human Rights the freedom of expression guarantee does not confer an unfettered right on any citizen to have access to radio or television to air his views except under exceptional circumstances (Maurice Arnold Tomlinson v. Television Jamaica LTD, CVM Television, The Public Broadcasting Corporation of Jamaica, 2012 HCV 05676, 2013 JMCF Full 5, p. 98). The Court also addressed editorial discretion, which it described in the context of licensed broadcasters, which does

not mean the editor can exclude views he does not like or does not agree with as the grant of licenses is not about the privatization of censorship but rather about regulating a public resource such as airwaves so that citizens derive the greatest benefit in order for them to play an effective role in democracy due to the fact that access to reliable and accurate information is vital to the functioning of a democratic state (Maurice Arnold Tomlinson v. Television Jamaica LTD, CVM Television, The Public Broadcasting Corporation of Jamaica, 2012 HCV 05676, 2013 JMCF Full 5, p. 109). Through such argumentation the Court found that licensed broadcasters are under an obligation to use the public domain in the public interest which is stated in their licence, furthermore this coincides with the duty of the broadcaster to provide information on important public issues for the benefit of the public having accurate and reliable information about the matter. This argumentation leads the Court to accept the approach that no person can dictate to a private broadcaster that he should accept a particular advertisement advocating any particular position because the issue is not whether or not to accept the advertisement but rather whether the private broadcaster has carried out his obligation in the public interest, which is to inform the public on the particular issue (Maurice Arnold Tomlinson v. Television Jamaica LTD, CVM Television, The Public Broadcasting Corporation of Jamaica, 2012 HCV 05676, 2013 JMCF Full 5, p. 112). In the light of the mentioned legal position, the Court decided that were it to accept the proposition of the claimant, it would mean the Court would now be getting into the business of telling editors what advertisements or events to broadcast but the regulation of broadcasters has not been given to the courts and it is not a job that any court would even contemplate accepting as that job is in Jamaica given to the Broadcasting Commission (Maurice Arnold Tomlinson v. Television Jamaica LTD, CVM Television, The Public Broadcasting Corporation of Jamaica, 2012 HCV 05676, 2013 JMCF Full 5, p. 113). On the contrary, it was not even suggested that the defendants would fail to give a full, fair and adequate coverage of the issue of Homosexuality in Jamaica. The Court decided that the defendants have the editorial rights to decide how an issue is to be covered, which logically means that such an approach constitutes that it cannot be said that all who wish to speak on the issue must be allowed to do so by the defend-

ants (Maurice Arnold Tomlinson v. Television Jamaica LTD, CVM Television, The Public Broadcasting Corporation of Jamaica, 2012 HCV 05676, 2013 JMCF Full 5, p. 115).

We can see in this decision that a part of the right to free speech is also the editorial power to decide how they will deal with a specific issue in the society that needs to be informed on the issue of public interest. The Court dismissed in its entirety the claim because the freedom of expression and freedom to receive and disseminate information or ideas includes the right not to speak and not to receive or disseminate information, or as the Court put it, why should Mr Tomlinson's wish to exercise his right be more important than TVJ's or CVM's desire to exercise their right not to broadcast (Maurice Arnold Tomlinson v. Television Jamaica LTD, CVM Television, The Public Broadcasting Corporation of Jamaica, 2012 HCV 05676, 2013 JMCF Full 5, p. 123). This was not the only insightful legal argument that we could find in this verdict as the Court also used a comparison in its legal argumentation: One cannot shift the stumps while the bowler is running in and the batsman has assumed his batting stance in order to give the bowler a greater opportunity at dismissing the batsman (Maurice Arnold Tomlinson v. Television Jamaica LTD, CVM Television, The Public Broadcasting Corporation of Jamaica, 2012 HCV 05676, 2013 JMCF Full 5, p. 121).

9. Findings and key notion

We proposed a reasearch question at the beginning of this paper, regarding the background of freedom of speech as a human right, whether it is contingent on the perception or on the context. The cases analyzed both in the historical part of this paper and the modern part of this paper showed that context is more important than perception of speech, when it comes to the argumentation of a judge. This research paper, according to its findings, advocates the importance of the context in which certain speech was made. We should avoid the use of perception to limit free speech as it may prove to be a wrong thing to do, especially given the nature of this human right. If we were to deem some speech as off limits in advance, based on the perception of it, we would find ourselves denying core democratic values and drifting towards authoritarian ideas.

To put it more bluntly, if someone perceives a certain fact to be offensive to them, their perception cannot be a valid reason to limit free speech as a human right. The fact exists no matter the perception of it in society, this is why our research paper proposes a solution in the way of a safeguard in the form of context. Courts have been proven to resort to context but more in a practical course of action. We believe it is time for a more doctrinal method to theoretically strenghten this practical approach. Advocating for the context behind speech as a human right gives us an additional safeguard that can help determine how far can free speech reach and what can be encapsulated in it.

Furthermore, context is already the reason why the majority of speech is observed as protected in the form of a human right. Facts should remain under the protection of this human right, no matter the perception they cause. For example, public statements made by Superintendant Clunis and Commisioner of Police Owen Ellington to Jamaican news stations during and after a police operation were not a fact, as the charges against Michael Troupe were dropped. But after the broadcast had aired all the viewers perceived Michael Troupe as a part of the scamming operation ring and a person of criminal conduct. Jamaican court put into consideration the context in which the statement was made, it was during and after the police operation in the early hours of the morning. Public has the right to know the facts about political figures but in this case the context was such that no public interest was served by publishing misinformation as the public was clearly misinformed. Suffice to say, it would be ample enough to inform the public that a house was searched at half past five in the morning regarding the lottery scamming operation. The perception differs widely from the background context of the speech. Superintendant and the Commisioner of Police both had their own perception that was different from the fact. The only fact was that the charges were dropped.

This brings us to another important conclusion; if something is a fact, it should be stated as such, but if something is perceived as a sagacity of certain reality, it should be stated as an opinion. Opinions differ, but a fact is a fact. To put it in simpler terms, the prospect of living in a modern democratic society is to hear speech that one might find inappropriate, offensive or disparag-

ing. That does not mean one must isolate oneself to avoid situations which cause unrest upon hearing unsettling opinions. Speech should not be viewed according to its perception and how it is perceived by each individual but instead should be put into context of all relevant circumstances. For what is perceived by some as offensive, can be perceived as complimentary by others. This is a crucial disposition for opinions. Predilection for inclusion of opinions in speech is a completely conventional way of communication.

Opinions are protected by freedom of speech as a human right and should be protected in the same manner as stating the facts. The only difference is the background context, which would in this case be stating whether it is a personal opinion or a fact. The difference between the two opted recognitions was clear in the case of Maurice Arnold Tomlinson as the claimant against Television Jamaica Ltd as the first defendant, CVM Television Ltd as the second defendant and The Public Broadcasting Corporation of Jamaica. Maurice Arnold Tomlinson had a perception that as a homosexual man and a gay rights activist he has a right to air his message with private broadcasters to advocate for the respect of gay rights in Jamaica. Jamaican court looked for the context and found that the background to assessing this practise of the mentioned human right was tied to the fact that there is no such thing as the freedom to use someone else's property to do so and it gives no right to anyone to use someone's land or platform to make a speech, or someone else's printing press to publish their own ideas. In the end it all came down to balancing two interests and it was decided that there is no valid reason why Mr. Tomlinson's wish to exercise his right was more important than TVJ's or CVM's desire to exercise their right not to broadcast it. This case also reflected why relying solely on perception of something is not enough to safeguard a human right.

The whole presented analysis of the verdicts also showed that free speech as a human right is much more nuanced than it strikes at first glance. We were able to go through the insides of the meaning of this human right as it is not straightwforward but it should, as we have proven, be put into a context. It is clear that we only touched the surface on the matter but more importantly we demonstrated that even a human right has its own context in which it strives or thrives.

Each of the analyzed cases showed to the reader that the context in which the human right of free speech is put determines whether it will thrive or strive. Even if the context behind each case shows that free speech is not an absolute human right we should not dissuade ourselves from losing the standards to which free speech is measured and compared. We need this human right for the normal functioning of a democratic society and should look after it accordingly.

10. Conclusion

In conclusion, we observed how the context behind the human right of freedom of speech develops through the argumentation of a judge in a certain case. The main research question of this paper on the background context of the freedom of speech as a human right was answered through the analysis of judicial arguments in an array of different cases that all tackled the same theme; the limits of free speech. The background context was heavily depended on the case and also on the arguments that the judge used to solve the legal question. There was no difference observed whether it was a court in the Caribbean or in the United States. There was always a process of balancing in accordance to the facts of the case. Are these facts the backbone of the background context for a human right? The research paper affirms this. We have shown that a human right such as freedom of speech is conditioned not only by the facts of the case but also by the structure of the arguments that a judge makes.

The distinction whether a human right such as freedom of speech strives or thrives is not only dependant on the way a judge sees the case but also about the context of the human right, the setting it is put into and the factors that influence it. These things are outside the realm of legal provisions and can be found in social structures of the relationships in society. The background context is a framework far more outflanked than we can imagine. This is due to the fact that each case brings something new into contest. Sure enough, some cases share a striking resemblance but none are alike in a way that would enable a judge to mirror their arguments. Arguments can be structured similarly, but not mirrored. We saw this clearly when we analyzed five decades worth of cases brought forth in the United States. Approaches

change but the background context of a human right remains the same. This was affirmed by the cases analyzed which were brought forth in the Bahamas and in Jamaica. The main research purpose was to add the element of context into the doctrinal approach of evaluating freedom of speech as a human right. In this sense, the paper succeeded to show how there is an existant practical framework already in place where courts implement the deliberation of context into which a certain speech was said and put into. Such continued practise prompted this research paper to commend the addition of context into the evaluation of legality of limits to freedom of speech. Freedom of speech should be upheld by all means in a democratic society and there is a firm belief that evaluating the context is a better safeguard than relying on personal perception of speech. There should not be less free speech but more free speech and puting things into context enables us to differentiate between facts and opinions with greater results by not imposing authoritarian approaches at the same time.

The circumstances of the cases around which the argumentation of the court revolved were distinctive but the background context of a human right was unchanged throughout. Be it through the use of case law approach or through the use of specific legal argumentation approach it was observed that a common theme can be established. Freedom of speech is contextual and not perceived. We have shown in this research paper that speech cannot have its freedom depend on perception but rather on the context of it. The perception of speech and how the judge sees it in each case is not bound by the apprehension of the idea or the notion of it but by the context in which this idea is set down.

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