

# **THE PROTECTION OF PRESS FREEDOM IN ZAMBIA'S THIRD REPUBLIC: A CRITICAL ASSESSMENT**

***BY***

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An Obligatory Essay submitted to the School of Law of the University of Zambia in partial fulfilment of the requirements for the award of the Degree of Bachelor of Laws (LL.B).

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**THE PROTECTION OF PRESS FREEDOM IN ZAMBIA'S  
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*be accepted for examination. I have checked it carefully and I am satisfied that it  
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Date: 04-05-2006

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## DEDICATION

*To my beloved parents Mr. and Mrs. James Mulenga Chibangula with profound love, affection and gratitude, I remain forever indebted to you. Without your care and support, I would never have learnt that life is pathway of roses that must be traversed with utmost care, lest the thorns prick...*

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## GENERAL INTRODUCTION

The advent of the Third Republic witnessed the ushering of the Movement for Multiparty Democracy (MMD) government into office after it convincingly defeated United National Independent Party (UNIP) in the presidential and general elections held on 31st October, 1991.

The MMD in its campaign manifesto of 1991 claimed that it was determined and fully committed to ensuring that fundamental human rights and freedoms are protected under the Constitution. In particular the MMD manifesto with specific reference to the press (or media) stipulated that: “the MMD believes that freedom of expression and the right to information are basic human rights. As such, journalists will have to play an important role in promoting democracy and development.”

In this regard, it must be emphasised that a free and independent press is the cornerstone or foundation of any emerging democracy, Zambia inclusive. Moreover, the values of democracy, transparency, accountability and good governance can only be upheld where there is a free and independent press. In short, a free and independent press is indispensable in any open and democratic society.

A free and independent press helps create an informed citizenry which is necessary for sustaining a viable democratic society.

It must be noted however, that despite the MMD's seemingly firm commitment to the protection and promotion of press freedom in Zambia, the Third Republic has been and

continues to be characterised by rampant cases of harassment, intimidation, arrests and prosecution of journalists in the independent press for allegedly being opponents working to see the downfall of the MMD government. Furthermore, despite the endorsement of a new democratic order in 1991, Zambia still retains a myriad of archaic pieces of legislation which directly or indirectly hinder press freedom and ultimately the very survival of media institutions.

In view of the foregoing the question which arises is: To what extent (if any) has press freedom been protected and promoted in Zambia's Third Republic? It is in this light that this study is intended to make a modest answer to the question just posed by critically assessing the extent to which press freedom has been protected and promoted in Zambia's Third Republic (1991-2000).

This work comprises five chapters. The first chapter discusses in great detail the historical development of the print media in Zambia from 1906 to 2000. The second chapter, on the other hand, discusses the nature, meaning and constitutional protection of press freedom in Zambia's Third Republic. The third chapter focuses on the need for media law reforms in Zambia's Third Republic while the fourth chapter critically examines the law granting state monopoly in broadcasting and the need for the establishment of an Independent Broadcasting Authority (IBA).

The fifth and final chapter concludes the study by making some recommendations on the ways in which press freedom can be more effectively protected and promoted in Zambia's Third Republic.

# **CHAPTER ONE**

## **HISTORICAL DEVELOPMENT OF THE PRESS IN ZAMBIA**

### **1.1.0 PRE-INDEPENDENCE NEWSPAPERS:1906-1964**

Any modest attempt to provide a meaningful and concise discussion of the protection of press freedom in Zambia's Third Republic, undoubtedly deserves a clear and detailed account of the historical development of the press in Zambia. It should be pointed out from the onset that our discussion of the historical development of the press in Zambia will be confined to the print media only. In other words, the discussion will focus on the historical development of newspapers in Zambia from 1906 to 2000.

The history of the press in Zambia dates as far back as 1906, when the first local newspaper ever, Livingstone Pioneer, was launched in Livingstone by its owner and publisher, Mr. W. Trantor.<sup>1</sup> The paper was published only for a few months in the newly founded town of Livingstone which became the Capital of the then Northwestern Rhodesia in 1907.

### **1.1.1 THE LIVINGSTONE MAIL**

Trantor's newspaper enterprise inspired Mr. Leopold Frank Moore, a politically ambitious chemist, to start a rival newspaper in the same year called The Livingstone Mail. The Mail was ideally a paper for the White Settlers in that

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<sup>1</sup> F. P. Kasoma, The Press in Zambia, (Lusaka, Multimedia Publications, 1986), p. 19.

it never carried any stories about Africans unless they were of direct concern to the Whites. The paper favoured racial segregation and once declared that Blacks were dirty people whom whites were to keep away from.<sup>2</sup> For the Mail, Blacks were loafers and criminals whom the government was supposed to clear off the streets of Livingstone for the safety of the white settlers.

In fact, the paper even warned the white settlers to beware of the dangers of leaving their children in the care of dirty natives and also called on the public health department not to permit dirty Africans to sell dirty milk.<sup>3</sup>

It was, however, in 1944 that a large-scale national newspaper enterprise started, with the launching of Bantu Mirror, published by Bantu Press, a subsidiary of Southern Rhodesia's (now Zimbabwe) African Newspapers, and the launching of The Northern News by Sir Roy Welensky (who was to be the future Prime Minister of the Federation of Rhodesia and Nyasaland) in Ndola on the Copperbelt.<sup>4</sup>

### **1.1.2 THE NORTHERN NEWS**

Northern Rhodesia's first truly national newspaper, The Northern News (later superseded by the Times of Zambia), had a more complicated birth in that many hands were involved including those of government. It should be noted that on 1<sup>st</sup> May, 1942 the Northern Rhodesia government proclaimed the

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<sup>2</sup> Ibid., p. 21.

<sup>3</sup> The Livingstone Mail, 8<sup>th</sup> July, 1949 and 1<sup>st</sup> August, 1949.

<sup>4</sup> R. Ainslie, The Press in Africa, (London, Victor Gollancz Ltd, 1966), p.93.

Emergency powers (Control of Paper) Regulations No. 110 of 1942 which, inter alia, prohibited publication of any new newspaper, unless exempted by the Director of Civil Supplies.<sup>5</sup>

Later in the year Messrs Wykerd and Hovelmeier wrote a letter to the government wherein they proposed to start The Northern News as an independent newspaper whose policy was to be "the furtherance of war effort and, maintenance of amicable relations between all sections of the community."<sup>6</sup> It is interesting to note that Welensky, who was not named in the letter as one of the would-be proprietors of the proposed newspaper, was actually the one who delivered the letter to the Financial Secretary, Mr. Keith Turker.

Some time later, Hovelmeier applied to the Post-Master General for registration of The Northern News, alleging that government had given them permission to publish the paper. However, the Postmaster General reminded Hovelmeier and his partners in a telegram that they were first to seek exemption from the provisions of Regulation 3 of the Emergency Powers (Control of Paper) Regulations, 1942 which prohibited the publication of any new newspapers. This prompted Hovelmeier, in the name of Copperbelt Printers and Publishers, the company that was to publish the paper, to officially apply to the Director of Civil Supplies for exemption from the said Regulations.

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<sup>5</sup> See Regulations 3 and 11(1) of the Emergency Powers (Control of Paper) Regulations, 1942, made pursuant to the Emergency Powers (Colonial Defence) Order in Council; see also F. P. Kasoma, *Supra* note 1, p. 34.

<sup>6</sup> F. P. Kasoma, *Supra* note 1, p. 34.

By a letter dated 31<sup>st</sup> October, 1942, the Director of Civil Supplies granted Copperbelt Printers and Publishers the requisite exemption and The Northern News first appeared on 26<sup>th</sup> May, 1943.<sup>7</sup> It would appear that Welensky had used his influence as leader of both the Labour Party and the Unofficial members in the Legislative Council (Legco) to persuade top government officials to permit him and his partners to start a newspaper at a most awkward time when newsprint was in short supply in the country.

In 1944, Welensky bought out the entire shareholding and became the majority shareholder in the paper until December, 1950 when he sold it to the Southern Rhodesia-based, Rhodesia printing and publishing company (4,000 shares) and the South African-based Argus group of companies (3,500 shares). It must be mentioned here that the latter was the parent company of the former. Upon becoming sole owner of The Northern News, Welensky appointed Stan Hobson (who later became a shareholder) editor and made sure that the paper was his political mouthpiece. As leader of the Labour Party and the Unofficials in the Legislative Council, Welensky was already ambitious, and shrewd enough to appreciate the power of a newspaper as a political instrument.<sup>8</sup> In this regard, he used his newspaper primarily to further his campaign for amalgamation or Federation of Rhodesia and Nyasaland, as a first step towards white independence in Central Africa.<sup>9</sup>

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<sup>7</sup> Ibid, p. 37.

<sup>8</sup> R. Ainslie, Supra note 4, p.93.

<sup>9</sup> Ibid.



Roy Welensky wrote most of the news stories himself in the newspaper especially the "Think pieces." He also wrote many "Letters to the Editor" under pseudo names on controversial topics to which he then replied in subsequent issues, this time using his own name, destroying the arguments he had first propagated in order to convince the readers to agree with his points of view.<sup>10</sup>

It must be emphasised that The Northern News repeatedly declared that it was there to support Welensky and his call for the Federation of Rhodesia and Nyasaland. In fact the paper maintained this policy up to the early 1960s, as we shall see later, when it was obvious that Welensky's Federation was falling apart. This was due mainly to the fact that Welensky was for a long time a shareholder of The Northern News even after he had sold it to the Rhodesia Printing and Publishing Company and the Argus. He, thus, still was in a position to manipulate the paper's policy.

It is in this light that Professor Kasoma, a notable scholar of Mass Communications, argues that The Northern News was not an independent newspaper but the voice of Roy Welensky. It is a classical illustration of how a newspaper owner can manipulate the editorial policy of his/her newspaper to achieve political ends.<sup>11</sup> He further argues that Welensky undoubtedly became the Prime Minister of The Federation of Rhodesia and Nyasaland largely due to the influence of the political propaganda carried in his newspaper.

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<sup>10</sup> A. Gary, The Welensky Story, (Cape Town, Purnel & Sons Ltd, 1952), p. 151; see also F. P. Kasoma, Supra note 1, p.39.

<sup>11</sup> F. P. Kasoma, Supra note 1, p. 40.

However, Welensky was neither the first nor the last to do this in the history of the press in Zambia. Frank Moore had used his Livingstone Mail in the same manner and won himself a seat in the Legislative Council. Dr Scott, as we shall see later, did the same with his Central African Post.

As a general rule, The Northern News never carried any stories about Africans for their own sake, unless such stories had some relevance to the whites. If and when stories about the indigenous people did appear in the paper, they were full of racist epithets like 'black', 'African', 'native', and 'primitive'.

### **1.1.3 CENTRAL AFRICAN POST**

In 1948, Dr. Alexander Scott, a retired medical doctor, started the Central African Post in Lusaka.<sup>12</sup> The idea of starting a newspaper of his own appealed to Dr. Scott as the most exciting way of spending his retirement from medical practice. It is interesting to note, however, that Dr. Scott was an "amateur politician, and an amateur newspaper man, apparently totally ignorant of the technical side of newspaper production"<sup>13</sup> who took to newspaper journalism as more or less a full-time hobby. Moreover, he was very politically minded and thus, he used his newspapers to feather his political nest. He used the paper to campaign for election to the Federal Parliament in Salisbury and won on 4<sup>th</sup> August, 1954.

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<sup>12</sup> S. R. Desai, The Law Governing Press Freedom in Zambia, (An Obligatory Essay submitted to the Law Faculty of the University of Zambia in partial satisfaction of the requirements for the award of LLB Degree, Lusaka, UNZA Library Special Collections, 1988), p. 2.

<sup>13</sup> R. Ainslie, Supra note 4, p. 43.

At first the Central African Post bitterly opposed the Federation and Welensky was repeatedly castigated for championing the same. The paper's main argument was that the federation would (and in fact did) impoverish Northern Rhodesia. This same argument was later effectively used by the African nationalists. However, after the Order in Council proclaiming the Federation had been signed in London, the Central African Post threw in the towel and started supporting the Federation and, reluctantly, Welensky.<sup>14</sup>

Like the Livingstone Mail and The Northern News, the Central African Post was very much an anti-Black newspaper. In its anti-Black editorials, the Central African Post, among other things, consistently maintained that Blacks were not equal with whites, not fit to have university education, and not intelligent enough to run a government. Furthermore, the paper condemned multi-racial marriages as well as the idea of equal pay between Blacks and Whites.<sup>15</sup>

On rare occasions however, the newspaper did speak on behalf of Blacks. At one time, for example, the Central African Post appealed to white butchery owners to sell Blacks better meat than the dog meat which was usually reserved for them and also supported the notion of Africans forming Unions.<sup>16</sup>

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<sup>14</sup> F. P. Kasoma, Supra note 1, p. 43.

<sup>15</sup> The Central African Post, 16<sup>th</sup> February, 1954 and 26<sup>th</sup> May, 1949; see also F. P. Kasoma, Supra note 1, p.44.

<sup>16</sup> The Central African Post, 19<sup>th</sup> January 1954 and June, 1954; also F. P. Kasoma, Supra note 1, p.44.

It would be recalled that in December 1950, the Argus group bought The Northern News from Welensky, and within two years turned it into a daily. However, as already noted, Roy Welensky still remained a shareholder in the newspaper and still exerted his influence on the editorial policy of the paper. The Argus group also bought the Central African Post from Dr. Scott in 1957.<sup>17</sup>

#### **1.1.4 AFRICAN TIMES: 1957-1958**

On 6<sup>th</sup> December, 1957, barely months after selling the Central African Post, Dr. Scott started yet another newspaper of his own which unfortunately closed down four months later. The paper was known as the African Times. The paper like all Scott's previous newspapers was a Lusaka weekly. This time Scott intended to reach an African readership as well as those liberal whites already disenchanted with the Federation which had placed them at the mercy of the reactionary South.<sup>18</sup> The paper strongly opposed the Federation and supported the more dynamic members of the African National Congress (A.N.C), of whom Kenneth Kaunda was emerging as leader. In this connection, news columns of The African Times followed the same pattern of carrying negative news about the Federation and mostly positive news about African nationalists.<sup>19</sup> It should be noted that the newspaper was edited by an experienced African journalist, Elias Mtepula, who had been hired for the post from the Daily Mirror in London. On

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<sup>17</sup> R. Ansilie, Supra note 4, p.95.

<sup>18</sup> Ibid.

<sup>19</sup> F. P. Kasoma, Supra note 1, p. 66.

13<sup>th</sup> February, 1958, Mtepula died suddenly, following a short illness and a month later the paper closed down.<sup>20</sup>

#### **1.1.5 AFRICAN LIFE: 1958-1961**

In December 1958, nine months after The African Times had closed down, another newspaper with the adjective “African” emerged. It was called African Life, published and initially edited by Mr. Sikota Wina (who is believed to be the first African to publish a newspaper in Zambia) in Ndola on the Copperbelt. Mr. Wina later moved to Lusaka’s Matero Compound but the newspaper was still printed in Ndola by Times Printing House.<sup>21</sup>

African Life did not in fact begin as a newspaper but as a magazine. It became a newspaper on 1<sup>st</sup> November, 1959 when Wina turned it into a fortnightly journal and reduced its price from 6d to 3d. The move was in response to demands by readers all over the country who had been asking him to bring out African Life more frequently.

As a newspaper, African Life was virtually a United National Independence Party (UNIP) mouth piece-obviously because of the Publisher’s connections with the top party leadership, which he soon joined as publicity chief. The paper published many inside stories about UNIP which were beyond the reach of contemporary newspapers. For instance, when Kaunda was released

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<sup>20</sup> Ibid.

<sup>21</sup> Ibid.

from detention on 9<sup>th</sup> January, 1960 it was African Life alone that published his message calling on Africans in the country to unite.<sup>22</sup>

Later in his message congratulating the newspaper for being the first all-African newspaper in Central Africa, Kaunda said that there was much about African Life that other people who came to make a home in the country did not understand. He emphasised the need for a vehicle to convey and interpret the way of life of the African-politically, economically, socially and culturally.<sup>23</sup>

The newspaper was so overwhelmingly pro-UNIP that by reading it one got the impression that the other major African Party, A.N.C., did not exist. Indeed, A.N.C. often complained of lack of publicity due to the fact that the African Press was no longer asking the party for interviews and permission to attend meetings.<sup>24</sup>

In September, 1961 African Life suddenly ceased publication seemingly due to hard economic realities.

#### **1.1.6 CENTRAL AFRICAN MAIL: 1960-1965**

In February 1960, Dr. Scott together with David Astor and Richard Hall started the Central African Mail which was published by a company belonging to the three and known as African Mail Ltd. Richard Hall became the paper's first

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<sup>22</sup> African Life, January, 1960, p.1.

<sup>23</sup> Ibid, 30<sup>th</sup> September, 1960, p.1. "Letter to the Editor."

<sup>24</sup> One such complaint was voiced by the party's then Secretary General, Jacob Michelo, who swore never to co-operate with the African Press which was biased in its reporting of news.

editor. In terms of appearance, the Central African Mail was a brighter and better edited newspaper than Wina's African Life, a quality that made it a conspicuous rival of the well-established white press.

In its news Columns, the Central African Mail did something that no other African newspaper had done before: it gave wide publicity to African nationalists both at home and elsewhere in Africa.<sup>25</sup> The paper had started at a time when the spirit of independence was sweeping through Africa for the first time. The paper devoted much space to telling Africans in Northern Rhodesia in particular and in the Federation as a whole what their brothers and sisters in Nigeria and Ghana, for example, had achieved by way of political emancipation. The Central African Mail had renowned columnists in the persons of Titus Mukupo and, later, Kelvin Mlenga whose columns, "Titus Talking" and "Kelvin Calling" respectively were very critical and outspoken.<sup>26</sup>

In this regard, it must be emphasised that the Central African Mail strongly opposed Welensky and the Federation. Just as the white newspapers labelled African nationalists thugs, the Central African Mail called Welensky all sorts of names. A growing number of leading civil servants in the territory, including Governor Evelyn Hone, resented the Federation. They were, therefore, happy to have the newspaper saying things they wanted to but could not easily say about the Federation and Welensky.

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<sup>25</sup> F. P. Kasoma, *Supra* note 1, p.71.

<sup>26</sup> *Ibid.*, p.72.

However, because of the newspaper's editorial policy of opposing Welensky and the Federation and supporting the African nationalists many white businessmen did not advertise in the Central African Mail. For this and other reasons, in spite of its editorial success, the Central African Mail was not economically viable. The paper's editorial policy was generally to support UNIP, the principal African political party in Northern Rhodesia at the time. But this support was not "all the way", as was the case with African Life. The support was qualified in the sense that when some UNIP leaders made what the newspaper's editors thought were outrageous statements, they were sharply criticised. It was clear that the newspaper wanted only to support positive aspects of African nationalism.

The conflict that existed between the Central African Mail and The Northern News deserves mention because it typifies, to a great extent, the relationship between the independent newspapers which supported blacks and the white press. The conflict between the two newspapers, though real, was an undeclared war. Each consciously tried to counteract the other's position by highlighting its own. Thus, on one hand the Central African Mail called on UNIP and A.N.C to unite so that independence would come quickly, while on the other, The Northern News declared that Africans were not ready for independence because they were not yet civilised.<sup>27</sup>

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<sup>27</sup> Central African Mail and The Northern News editorials of 13<sup>th</sup> February 1962 respectively; see also F. P. Kasoma, *Supra* note 1, p. 76.



Rosalynde Ainslie, a notable scholar on the press in Africa, ably summed up the position thus: "As a weekly, though, the Central African Mail remained but a punny rival for the daily Northern News, the champion of Welensky and the Federation, and of white rule in Southern Africa."<sup>28</sup> It is manifestly clear that the Central African Mail was the most professional and the most militant of Scott's three newspapers, campaigning courageously against the Federation and Welensky while vigorously supporting the African nationalists and their call for the independence of Northern Rhodesia. The newspaper had in fact become a frankly African-oriented paper under the editorship of an African named Titus Mukupo, who later became Minister of Information in independent Zambia.

It would be remembered that The Northern News under the ownership of the Argus group, continued to support Welensky and the Federation thereby promoting white rule in Northern Rhodesia. However, by continuing to promote white rule, The Northern News, by and large, played the role of "an oppressor in that it continued to champion political and colonial powers of that time, rather than be able to pursue its own views and opinions independent of its investors."<sup>29</sup>

By 1963, however, there was a noticeable change in the paper's editorial policy towards Welensky and the Federation. Realising that the independence of Northern Rhodesia was inevitable and that their attitude towards the African

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<sup>28</sup> R. Ainslie, *Supra* note 4, p. 96.

<sup>29</sup> S. R. Desai, *Supra* note 12, p. 4.

nationalists in the past would not escape repercussions from the new Black Government, the South African-based Argus group together with its Southern Rhodesian-based subsidiary, the Rhodesia printing and publishing company, withdrew from the new nation-to-be as newspaper publishers in 1964.<sup>30</sup> They also wanted to avoid embarrassment since they were based in countries which Zambia's new leaders considered unfriendly.

The first newspaper the Argus group gave up was the Central African Post, on 28<sup>th</sup> February 1964. According to the company's General Manager, John Hennessy, this move was taken as the "first step in rationalising the company's newspaper activities in the country to allow The Northern News to play its full role as the country's national daily newspaper."<sup>31</sup>

However, before the Central African Post ceased publication it provided, in 1963, an occasion for the leaders to affirm freedom of the press when John Roberts, leader of the opposition, brought a motion before the Legislative Council for the Black Coalition Government to affirm freedom of the press. Roberts' motion came in the wake of threats by Kenneth Kaunda, UNIP leader and Minister of Local Government and Social Welfare, to suppress Northern Rhodesia newspapers if they did not change their pro-Welensky attitude.

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<sup>30</sup> F. P. Kasoma, *Supra* note 1, p.82.

<sup>31</sup> *Ibid*, see also Central African Post, 31<sup>st</sup> January 1964, p.1.

The debate on Roberts' motion, however, unexpectedly ended with both sides easily agreeing and strongly affirming press freedom. Kaunda made one important reservation. He told the House:

All the same I also hold the view that freedom of the press does not mean that the press has a right to publish whatever it desires without taking into consideration its own responsibilities to a society it purports to serve.<sup>32</sup>

Kaunda's remark underscores the cardinal principle that freedom of the press is not absolute, it is subject to certain limitations. The preceding discussion has revealed that the majority, if not all, of the newspapers in the pre-independence era were owned and controlled by the white settlers who used their papers to perpetuate white rule in Northern Rhodesia.

## **POST-INDEPENDENCE NEWSPAPERS: 1964-2000**

### **1.2.1 NEWSPAPERS IN THE FIRST AND SECOND REPUBLICS**

When Zambia attained her independence in October 1964, it would appear that no amount of assurance by the new Black Government could allay Argus and its subsidiary's fears of the unknown future of their newspaper enterprises. As a result, in December 1964 the Argus group sold The Northern News itself to the London Rhodesia Mining and Land Company (Lonrho), a British concern based in Salisbury and having mining, ranching and other interests in the Federation.

It must be noted that shortly before acquiring The Northern News, Lonrho also bought Northern Rhodesia's only other daily newspaper, the Zambia Times and its Sunday version, Zambia News, which was also the country's first and only Sunday newspaper. Mr. Max Heinrich, an enterprising white businessman and owner of Heinrich syndicate Limited, had started the two newspapers in Kitwe on the Copperbelt in August 1965. Heinrich heavily subsidised his newspapers with profits from his prosperous brewing enterprise. He was the maker of the opaque beer popularly known as 'chibuku'.

By buying Heinrich's business enterprises, Lonrho thus found itself also owner of a pair of money – losing newspapers (i.e. Zambia Times and Zambia News) which nevertheless had built up much goodwill among Africans in the country as a result of having identified themselves with the African cause right from their inception. In doing this, the two newspapers were more believable than the other white Newspapers, such as The Northern News, which, although they were trying to change with the times, had an anti-African record behind them.

However, Salisbury-based Lonrho Managing Director, Roland Rowland, stopped publishing the Zambia Times and cleverly renamed The Northern News the Times of Zambia, to inherit the goodwill of the Zambia Times, it would

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<sup>32</sup> F. P. Kasoma, Supra note 1, p. 83.

seem.<sup>33</sup> He also renamed the Sunday Zambia News the Sunday Times of Zambia. The Times of Zambia first appeared on 30<sup>th</sup> June 1965. Apparently as part of the strategy to revamp the poor image of the former Northern News, Lonrho also appointed as editor-in-chief none other than Richard Hall, the founding editor of the Pro-African and pro-UNIP Central African Mail.

Hall, whose appointment was publicly welcomed by President Kaunda, immediately set out to improve the newspaper's image by "Zambianizing" it both in staff and content. He hired some Black Zambian reporters, weeded out the "colonial minded" white staff members and recruited only sub-editors with politically progressive views.

In his message of congratulation to Hall, President Kaunda said:

As editor and editorial director of the Central African Mail, you have played a very important part in the creation of our new Republic of Zambia. Now as editor of the country's only daily newspaper you have yet another role to play in the development of our country. I have no doubt... that you will accomplish your new duties with vision, wisdom and insight.<sup>34</sup>

Because of this encouragement, Hall tried his best to change the paper to make it a paper of Zambian readers (both white and Black) and not a paper of white settlers.

Early in 1965, the new Government expressed concern at the prospect of Lonrho owning all the national newspapers in the country. By then Lonrho

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<sup>33</sup> Ibid., p. 85.

owned The Northern News (later Times of Zambia), *Zambian Times* and *Zambian News*. The only other national newspaper outside its orbit was the *Central African Mail* jointly owned by Dr. Scott, David Astor and Richard Hall. In fact, Lonrho had tried to buy this newspaper as well but the then Minister of Information, Peter Matoka issued a statement in parliament to the effect that "Government would not sit back and let one company monopolize Zambia's press and television media."<sup>35</sup>

Less than a month later, President Kaunda announced that the Government was planning to publish a newspaper that was to provide a forum for expression of free thought. He said:

It will not be simply a Government trumpet. I will not allow it to report my every cough..... we want to establish a paper that will be informative – that will be able to say that I should do a little more at the moment. It will be something with dignity, not designed to mislead the people, something to serve Zambia.<sup>36</sup>

In May 1965, the Government officially disclosed its intention to buy the *Central African Mail*. When the deal was completed two months later, the Government, surprisingly, paid Astor only £40,000, £60,000 less than he had initially invested in the newspaper. In his handover message, Astor said he had discussed the future of the paper with President Kaunda a few months previously in London and they had agreed about the need for the *Central African Mail* to

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<sup>34</sup> The Northern News 20<sup>th</sup> May 1965, p. 1 see also S. R. Desai, *Supra* note 12, p. 5.

<sup>35</sup> The Northern News 22 January 1965, p. 1; see also F. P. Kasoma, *Supra* note 1, p. 108.

<sup>36</sup> The Northern News, 19<sup>th</sup> February 1965, p.1; see also F. P. Kasoma, *Supra* note 1, p. 111.

contribute as a responsible and courageous newspaper, dedicated to the fair reporting of news and free exchange of ideas "without fear or favour."<sup>37</sup>

Astor wrote: "Now that Zambia has acquired its independence, I am entrusting the future of the Mail to the care of the Government and I look forward to the paper playing a valuable role in the future of the country."<sup>38</sup>

The Central African Mail under its new ownership first came out as a government weekly on 6<sup>th</sup> August 1965 with a circulation of 20,000. In his official statement welcoming the new government newspaper, the then Minister of Information, Lewis Changufu, said:

The intention of Government is to make the newspaper a lively, stimulating and readable newspaper. The newspaper should reflect public opinion of all shades in Zambia, suppressing no comment or criticism or viewpoint which is sincere and constructive since conflict and controversy are the life blood of a newspaper and the main thrust of its influence on its reading public.<sup>39</sup>

The Central African Mail was renamed Zambia Daily Mail and, surprisingly, its editor, Kelvin Mlenga resigned in February 1966 because he failed to adjust to the idea of editing a Government newspaper. In his own words he said: "I left the Zambia Daily Mail because I strongly believe in freedom of the press. I had been used to hard-hitting writing which is my style but when

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<sup>37</sup> "Without fear or Favour" was the motto of the Central African Mail.

<sup>38</sup> Central African Mail, 30<sup>th</sup> July 1965; see also F. P. Kasoma, Supra note 1, p. 111.

<sup>39</sup> F. P. Kasoma, Supra note 1, p.112; see also S. R. Ainslie, Supra note 4, p. 98; also Central African Mail, 30<sup>th</sup> July, 1965, p. 1.

Government took over, I found myself in a void. I found myself a rebel without a cause.”<sup>40</sup>

The Zambia Daily Mail was run by a board of directors appointed by the Government. The first board included the paper’s former editor Titus Mukupo, Director of Information Services, as chairman; Unia Mwila, Parliamentary Secretary Ministry of Mines and Cooperatives; D.J. Lewis, senior officer, Ministry of Information and Postal Services; and M. Yeta, Director of Zambia Cultural Services.

It is important to note that in its first year of circulation, the Zambia Daily Mail was hardly critical of Government in its editorials, thereby earning itself the nickname “Government Gazette.” Beginning in 1967, however, the Zambia Daily Mail became more and more critical of Government and continued to be increasingly so up to and beyond 1975. Generally, the Zambia Daily Mail was unusually critical for a Government newspaper. The Zambia Daily Mail became a daily newspaper on 15<sup>th</sup> July 1969. The paper explained its editorial policy thus:

... As a Government newspaper, owned ultimately by the Zambian people, the Mail is completely committed to the development and progress of the nation and to improving the lot of the common man. In fulfilling this role, it will aim at giving full and accurate coverage to the Government plans and policies.

It will try to explain these policies to the people and win support for them. It will defend the Government when necessary, but will not white wash Government departments, when mistakes are made. For the Mail has another role to play: to reflect public opinion and to voice the feelings of the people.

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<sup>40</sup> Ibid.



In doing this, it will not censor, or suppress criticism which is sincere and constructive....

It hopes to reflect both the problems and the aspirations of its readers and will not shun controversy.<sup>41</sup>

It is interesting to note that between 1965 and 1969 the Zambia Daily Mail, although published by Government, was not officially recognised as the Government mouth piece. The recognition came only at the beginning of 1970. However, the newspaper's editorial policy remained somewhat critical and independent of Government even after it was officially recognised as a Government mouth piece in 1970.<sup>42</sup>

The Times of Zambia, on the other hand, supported the Zambian Government when necessary, for instance, reporting on the Rhodesia UDI crisis which earned them compliments from the president. The paper, however, criticised Government where and when it was necessary.<sup>43</sup> By the end of 1966, Hall's criticism of Government cost him intimidation from even the lowest level of the party structure. For instance, in March 1967, UNIP youths even demonstrated outside the main offices of the Times of Zambia. This gives an impression that the Times of Zambia seemed to be an anti-government newspaper. Hall resigned in mid-1967 and he was succeeded by a Black Zambian, Dustan Kamana, who seemed to be even more critical of government

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<sup>41</sup> Zambia Daily Mail, 15<sup>th</sup> July 1969; see also F. P. Kasoma, Supra note 1, p. 114.

<sup>42</sup> F. P. Kasoma, Supra note 1, p.116.

<sup>43</sup> S.R. Desai, Supra note 12, p. 9.

than Hall was. Because of his critical and anti-government attitude, Kamana was best described as *"a ruthless and often sarcastic editorial writer."*<sup>44</sup>

*Although Government had repeatedly warned that "stern measures" would* be taken against the newspaper, Kamana was not deterred but continued with his critical reporting which in the end cost him his job. Thus in late 1971, he was replaced by Vernon Mwaanga, who was less critical in his editorials than Kamana had been. Mwaanga's editorial policy was later greatly compromised by the dictates of the new political arrangement when Zambia became a One Party State in 1972. This was mainly due to the provisions of Article 6(1)(h) of the Party Constitution which obliged every member of the Party to refrain from publicly criticising the Party or its Government.

Vernon Mwaanga was replaced by Milimo Punabantu in 1974, and the paper continued in this compromised position until 1975, when it was taken over by the Party and its Government.<sup>45</sup>

### 1.2.2 THE NATIONAL MIRROR

Although it is acknowledged that in general both the Times of Zambia and the Zambia Daily Mail editors were professional and extremely critical of Government at times, the only truly independent newspaper that existed and challenged the policies of the government during the one party state era was the

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<sup>44</sup> F. P. Kasoma, Supra note 1, p. 94; also S. R. Desai, Supra note 12, p.11.

<sup>45</sup> S. R. Desai, Supra note 12, p. 12.

National Mirror. This newspaper, which started off as a monthly paper, was launched in 1972 by multimedia Zambia, an Ecumenical organisation formed jointly by the Christian Council of Zambia (CCZ) and the Zambia Episcopal Conference (ZZEC).<sup>46</sup> The newspaper's policies were centred on propagating Christian principles, keeping the public informed of the work being done by the church, co-ordinating the political news of all the parties, scrutinising public affairs at all levels and encouraging readers to become interested in both social and political affairs of the country.<sup>47</sup>

It is interesting to note that as the paper grew bigger, it became more and more critical of Government on issues of corruption, bad leadership and scientific socialism, among other issues. In 1980, the government proposed to introduce the Press Council Bill aimed at licensing journalists. The National Mirror strongly opposed the said Bill, calling it a "package of threats." The paper stated its disapproval in its editorial thus:

When the Bill becomes law, journalists will be expected to shower praise on the leadership and sing glory songs for its policies. The journalists will have to avoid religious, tribal, or any 'biased Influence.' For the subservient and uncritical media we already have, this is really the last straw that will break the camel's back.

Indeed, when a few people arbitrarily take it upon themselves to formulate uncompromising and contradictory rules for everyone in society, they make a mockery of the concept of participatory democracy. When dissenting views are stifled, then a nation deprives itself of the beams which help in the process of social transformation.<sup>48</sup>

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<sup>46</sup> C. H. Chirwa, Press Freedom in Zambia, (Lusaka, ZIMA, 1997), p. 7.

<sup>47</sup> National Mirror, March 13-26, 1981 editorial; see also S. R. Desai, Supra note 12, p. 15.

<sup>48</sup> Ibid, August 29- September 11, 1980 editorial.

The paper maintained a critical stand against the government and because of this its relations with the state really soured. It was in fact due to its critical stand that the paper became increasingly popular and became a fortnightly paper in January 1980. Unlike the Times of Zambia whose critical stance faltered after the introduction of one-party state, the National Mirror remained very bold and aired its views critically, especially against the government.<sup>49</sup> Up to date, the National Mirror has maintained its critical eye over state actions.

### 1.2.3 NATIONALISATION

In 1975, an unexpected takeover of the Times of Zambia by the Party and its Government was announced. In its opinion column, the paper expressed surprise in the following words: ".... The only reform we have so far not foreseen agitated for is the taking of 60% of the Party in the ownership of the commercial side of the Times and the Sunday Times."<sup>50</sup>

In announcing the takeover President Kaunda said: "we must understand that newsmen write things as they happen, though they may not always express themselves correctly. Let us help them to do their work properly in the interest of the revolution."<sup>51</sup> The President's statement seems to suggest that the Party and its Government were not impressed with the reporting of the Times of Zambia.

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<sup>49</sup> Ibid, August 29 – September 11, 1980 editorial.

<sup>50</sup> Times of Zambia, 1<sup>st</sup> July 1975, p. 1; see also S. R. Desai, Supra note 12, p. 17.

<sup>51</sup> Ibid.

As earlier noted, the Times of Zambia (and its predecessor The Northern News) was critical of the state, up to and beyond, the establishment of the One Party State.

It is argued that Government seems to have realized that if this negative trend of reporting went on unchecked, it could no longer be in the good books of the people at large. In this respect, the President called on all journalists on the Government-owned Zambia Daily Mail, the Times of Zambia and other media to clearly reflect the official thinking of the Party and its Government, that is to say, to reflect the aspirations of the masses under the leadership of the Party and its Government.

The President emphasised that pressmen, in their collective and personal capacities must be entirely committed to the philosophy of the revolution; the promotion of Humanism and cultural values, and warned that any journalist who did not see the role of the media in the context of the official thinking of the Party and its Government should resign voluntarily or risk being sacked by the Central Committee.<sup>52</sup>

The Times of Zambia took the hint and reflected it in its opinion column: The masses of the peasants, workers, the many people as yet without jobs have started to move into a new revolutionary direction under the leadership of the

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<sup>52</sup> S. R. Desai, Supra note 12, p. 19.

Party and its Government. It is both a privilege and a vote of confidence that we have been singled out to accompany the vanguard of the intensified revolution.<sup>53</sup>

At the same time, the paper vowed that it would not be intimidated either.

The paper stated thus:

...As the people of Zambia's leading national newspaper, we are neither afraid of the change nor frightened of the awesome task before us.

... The truth we write we will not change, if anything we must become sharper and more penetrating...

We shall continue with our alertness and the proven ability to probe and investigate and must come out with fuller story than before. Nothing will be sacred.<sup>54</sup>

The Times of Zambia made a desperate effort to maintain its critical style of reporting even after the nationalisation but was met with constant intimidation from the Party and its Government.

It is clear from the foregoing discussion that the Second Republic (1973-1990) was characterised by firmer control of the media by the Party and its Government in so far as both the electronic and print media were owned and controlled by the government. Moreover, all heads of public media institutions were appointed by the president and any erring head of a government media institution or individual journalist who wrote any article critical of either the Party or its Government was either reprimanded (or disciplined) by suspension or

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<sup>53</sup> Ibid.

<sup>54</sup> Times of Zambia, 1<sup>st</sup> July, 1975, p. 1.

dismissed by the party machinery.<sup>55</sup> During this era it was very common for president Kaunda to call journalists “stupid fools” or “stupid idiots.”

### **1.3.0 NEWSPAPERS IN THE THIRD REPUBLIC: 1991 – 2000**

The advent of the Third Republic witnessed a remarkable proliferation of privately-owned newspapers. This development came in the wake of the Movement for Multi-party Democracy (MMD)’s policy of liberalisation of both the print and electronic media. With specific reference to the mass media the MMD’s Manifesto states, *inter alia*, that “individuals and organisations shall have a right to own and operate their own press and electronic media facilities.”<sup>56</sup>

In particular the Third Republic has witnessed the birth of such independent newspapers as The Post (successor of The weekly Post); The Weekly Express (successor of The Daily Express); The Confidential (successor of Zambia Crime News); The Sun; Financial Gnome; The National Herald; The Weekly Standard; The Eagle Express; The Chronicle; The Citizen, The Monitor and The People, etc. It should be noted however, that most of these private newspapers have since collapsed largely due to financial difficulties.<sup>57</sup> Independent newspapers which are still in regular production include The Post, The National Mirror, The Monitor and The People.

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<sup>55</sup> C. H. Chirwa Supra note 46, p. 7.

<sup>56</sup> MMD Manifesto, Lusaka, 1991, see also C. H. Chirwa, Supra note 46, P. 11.

<sup>57</sup> See Report of the Task Force on Media Law Reform, January 2000.

On the other hand, there are presently two government newspapers publishing Companies: the Times Printpak Limited which publishes the Times of Zambia and its Sunday edition, the Sunday Times of Zambia; and the Zambia Daily Mail Limited which publishes the Zambia Daily Mail and two other weeklies, the Financial Mail and the Sunday Mail. The two weeklies were launched by the Company in 1992. In this regard, it should be noted that the Board members for these two companies are appointed by the Minister of Information and Broadcasting Services on behalf of the government which is the principal shareholder. The Boards of these two companies as well as that of Zambia National Broadcasting Corporation (ZNBC) are usually packed with MMD cadres.<sup>58</sup> Moreover, the Minister of Information has power to dissolve the Board of ZNBC at any time. In late 1993, for example, the government dismissed the Director-General of ZNBC, Dr Manasseh Phiri ostensibly for irregularities in his hiring, but in reality for exercising independence in programming.<sup>59</sup>

It has been observed that "the existence in Zambia today of many independent and government owned newspapers essentially means that the public is in the Third Republic accorded a wider choice of newspapers and consequently higher quality formats and a greater diversity of information than was the case in both the First and Second Republics."<sup>60</sup> It is equally true that there is now greater freedom of expression and of the press as independent

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<sup>58</sup> A. W. Chanda, "Human Rights in Zambia's Third Republic: An Overview", *Legality Journal*, (Lusaka, Litovia Ltd, 1998), p. 60.

<sup>59</sup> *Weekly Post*, February 18, 1994 at p.1.

<sup>60</sup> C. H. Chirwa, *Supra* note 46, p. 9.



newspapers are now allowed to exist and many people feel much freer to express their opinions on public issues. Besides, the fear of reprisals from the secret police has significantly dissipated.

There is however, the problem of polarisation between government owned and independent media institutions. The government owned media is perceived as being too pro-government while the independent media is viewed as being too anti-government. This division has in effect led to the establishment of two media organisations, the Zambia Independent Media Association (ZIMA) and the Press Association of Zambia (PAZA), representing employees in private and government media institutions respectively.

The government has completely reneged on its pre-1991 promise to privatise the state-owned media. Its new definition of liberalisation of the media is that anyone who wishes to venture into newspaper publishing or broadcasting is free to do so and to compete with the subsidised government-owned newspapers, the Zambia Daily Mail and the Times of Zambia, as well as the country's only national broadcaster, the Zambia National Broadcasting Corporation (ZNBC).<sup>61</sup>

In addition, the government continues to deny independent newspapers revenue by directing all its advertisements to the government owned media.

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<sup>61</sup> D. Nthengwe and B. Mwape, So This is Democracy? Report on the State of the Media in Southern Africa, (Namibia, MISA, 1997), p. 138.

Government has also denied private newspapers companies critical revenue by discontinuing the purchase of newspapers printed by private media institutions.

It remains to be pointed out however, that the Third Republic has been characterised by incessant arrests, intimidation, detention and prosecution of journalists in the private media for allegedly “being opponents working to see the downfall of the MMD government.”<sup>62</sup> For instance, in March 1999, there was an unprecedented crack down on the Post by state functionaries in response to an article headlined “Angola Worries Zambia Army/ZAF” which appeared in The Post newspaper on 9<sup>th</sup> March 1999. The article that sparked the crackdown had questioned the military capacity of Zambia to withstand an incursion from neighbouring Angola. Angola had accused Zambia of supplying arms to UNITA movement, which is fighting the Angolan government. About nine post newspaper journalists were arrested and subsequently charged with espionage under the State Security Act. The arrest and charging of these journalists by the state attracted resounding criticism from media and human rights groups from around the world. In a letter to President Chiluba, the Executive Director of ARTICLE 19, Andrew Puddephatt, expressed concern about the use of espionage charges to suppress legitimate debate on a matter of public interest. He pointed out that the government's action was a serious violation of The Johannesburg Principles on National Security, Freedom of Expression and

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<sup>62</sup> Ibid.

Access to Information as well as Article 19 of the International Covenant on Civil and Political Rights, 1966, to which Zambia is a party.<sup>63</sup>

Finally, it must be stressed that even after 36 years of political independence, Zambia still retains a myriad of archaic pieces of legislation in the statute books which directly or indirectly impinge on Press Freedom. Classical examples of such colonial pieces of legislation include the Penal Code and the State Security Act, etc. Moreover, the Constitution of Zambia Act No. 1 of 1991 does not expressly entrench press freedom as a basic and inalienable right distinct and separate from freedom of expression. This is in contrast with the position obtaining in South Africa and Malawi where press freedom is expressly provided for in their respective Constitutions. Thus, the next chapter focuses on the nature, meaning and constitutional protection of Press Freedom in Zambia's Third Republic.

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<sup>63</sup> Southern Africa Media Law Briefing, Volume 4, Number 1, February 1999, p. 12, "Outrage as Zambia Journalists are charged with Espionage."

## **CHAPTER TWO**

### **THE NATURE, MEANING AND CONSTITUTIONAL PROTECTION OF PRESS FREEDOM IN ZAMBIA'S THIRD REPUBLIC**

#### **2.1 THE NATURE OF PRESS FREEDOM**

It is undisputed that freedom of expression and of press constitute the cornerstone or foundation of any democratic society. In fact, it has been observed that "the role played by a free and independent press in any emerging democracy cannot be overstated. Government is aware that freedom of the press is a facilitator of the democratic process. A country needs an informed public in order to make informed choices. In this regard, the government, appreciating that wide access to information is healthy for democracy, decided in 1991 to liberalise both the print and electronic media, through legislative reforms, resulting in the establishment of private radio stations and private or independent newspapers."<sup>64</sup>

Furthermore, the preamble to the Zambian constitution declares that Zambia will "uphold values of democracy, transparency, accountability and good governance."<sup>65</sup> Indeed, transparency, accountability and good governance are only possible where there is a free and independent press, and the right of the public to know is assured. Dr. Alfred Chanda, a renowned scholar, rightly states:

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<sup>64</sup> National Capacity Building Programme for Good Governance in Zambia, 26<sup>th</sup> April, 1999, p. 13.

<sup>65</sup> Constitution of Zambia, CAP 1 Laws of Zambia (1995 edition).

Freedom of expression is the life-blood of democracy. It serves four broad purposes: (1) it helps an individual to attain self-fulfillment; (2) it assists in the discovery of truth; (3) it strengthens the capacity of an individual to participate in a democratic society; and (4) it provides a mechanism by which to establish a reasonable balance between stability and social change.<sup>66</sup>

The distinguished writer goes on to say:

It is incontrovertible that the public essentially obtains information about matters of public interest from the press. It follows, therefore, that the press should have freedom to gather information and communicate such information and ideas to the public. A free [and independent] press helps create an informed citizenry, which is necessary for sustaining a viable democratic society.<sup>67</sup>

The above statement underscores the fundamental principle that press freedom is inseparable from a democratic society. This link between press freedom and the democratic process was emphasised by Professor Abernathy when he said:

Freedom of the press occupies a peculiar position relative to the democratic process and to restrict substantially the right of the press is to cut the arteries that feed the heart of the democratic model.<sup>68</sup>

Moreover, in the landmark case of Castells-v-Spain,<sup>69</sup> the European Court of Human Rights stated that the press not only has the task of imparting information and ideas on matters of public interest but the public also has a right to receive them. The public's right to know is an aspect of informed political debate crucial to genuine democracy. The court stated that:

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<sup>66</sup> A. W. Chanda, "The State Security Act vs Open Society: Does A Democracy Need Secrets?" in *Zambia Law Journal*, volume 29, (Lusaka, UNZA Press, 1997), p. 34.

<sup>67</sup> Ibid.

<sup>68</sup> A. Abernathy, Civil Liberties Under the Constitution, (New York, Dodd Mead & Co., 1970), p.330.

Freedom of the press affords the public one of the best means of discovery and forming an opinion of the ideas and attitudes of their political leaders. In particular, it gives politicians the opportunity to reflect and comment on the preoccupations of public opinion; it thus enables everyone to participate in the free political debate which is at the very core of the concept of a democratic society.<sup>70</sup>

Professor Francis Kasoma, a scholar of Mass Communications, takes the point further by asserting that “freedom of the press is a basic human right, so basic that it is almost synonymous with democracy .... In a democracy the press has a duty to promote transparency, accountability and good governance by revealing to the citizenry what government is doing or not doing that deserves public attention. Government owes it to the people to explain its actions or the lack of them and does this mainly through the media of public communication. Secondly, in a democracy the press should play a watchdog role by alerting the citizenry against misuse of power and bad governance.”<sup>71</sup>

In this connection, one of the authors of the U.S. Constitution, James Madison, in stressing the importance of an informed citizenry to democratic governance, states:

A popular government, without popular information, or the means of acquiring it, is but a prologue to a Farce or Tragedy; or perhaps both. Knowledge will forever govern ignorance. And a people who mean to be their own governors

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<sup>69</sup> Judgement of 23rd April 1992, Series A, No. 236-B.

<sup>70</sup> Ibid., Para 43.

<sup>71</sup> F. P. Kasoma, “Press Freedom in Multiparty Democratic Zambia”, (Paper presented at a follow-up seminar on “The Zambia We want” jointly organised by the Mindolo Ecumenical Foundation and the President’s Citizenship College, Kabwe, 11-14 January 1995), pp. 1&4.

must arm themselves with the power which knowledge gives.<sup>72</sup>

It is manifestly clear from the above statement that democracy thrives well in an environment where there is a free and informed citizenry. It is in this light that in the American case of Whitney-v-California <sup>73</sup>Louis Brandeis, J remarked that citizens have an obligation to take part in the governing process and that they can only fulfil this obligation if they can discuss and criticise government policy fully and without favour. If the government can punish unpopular views, then it cramps freedom, and in the long run, will strangle the democratic process.

The judge outlined the importance of free expression in the following words:

Those who won [the] independence [of the United States] ... believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that, with them, discussion affords ordinarily adequate protection against the dissemination of the noxious doctrine; [and] that the greatest menace to freedom is an inert people ... only an emergency justifies repression.<sup>74</sup>

In view of the foregoing it is plausible to conclude that press freedom is both a pre-requisite and co-requisite of any democratic society, that is to say, a free press cannot be divorced from a democratic society because the two are inseparable from each other.

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<sup>72</sup> ARTICLE 19, Freedom of Expression Handbook: International and Comparative Law, Standards and Procedures, 1993, p. 91

<sup>73</sup> 274 US 357 (1927).

## 2.2 THE MEANING OF THE CONCEPT OF 'PRESS FREEDOM'

In common Law England, the persistent attempts by the crown to muzzle the press by way of licensing, led to the eventual birth of the concept of 'press freedom'. A question may be posed: What then is the meaning of the concept of 'press freedom'? To begin with, the term 'press' generally covers printed matter of all kinds, and not merely newspapers and periodicals. As the court stated in Lovel-v-Griffin,<sup>75</sup> the press in its historic connotation comprehends every sort of publication which affords the vehicle of information and opinion.<sup>76</sup>

It must be borne in mind that 'press freedom' means different things to different people. Thus, writing in 1765, England's most acclaimed jurist, Sir William Blackstone, defined press freedom thus:

... The liberty of the press is indeed essential to the nature of a free state, but this consists in laying no previous restraints upon publications, and not in freedom from censure for criminal matter when published. Every freeman has an undoubted right to lay what sentiments he pleases before the public; to forbid this, is to destroy the freedom of the press; but if he publishes what is improper, mischievous or illegal, he must take the consequences of his own temerity ... thus the will of the individuals is still left free; the abuse only of that free-will is the object of legal punishment ...<sup>77</sup>

One distinguished lawyer and writer has interpreted Blackstone's definition in the following words:

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<sup>74</sup> Ibid.

<sup>75</sup> 303 U.S. 444 (1939).

<sup>76</sup> Ibid.

<sup>77</sup> T. B. Carter et al., The First Amendment and the Fourth Estate, (New York, The Foundation Press, Inc., 1988), p. 26.



[Blackstone's] idea was that freedom of the press and freedom of speech existed to protect an individual from prior restraint upon what he said. His notion was that the government had no right to prevent any man from writing, publishing and distributing a pamphlet or book however distasteful the contents were to any other person. He believed that the government could not restrain a man from communicating his ideas to other people. However, Blackstone thought the government could punish a man for what he said after he had said it.<sup>78</sup>

It is submitted, with due respect, that Blackstone's definition of 'press freedom' as absence of "previous restraint upon publications" has inherent shortcomings and has in fact been widely criticised by a number of modern scholars. On the other hand, the late Prime Minister of India, Pandit Neru, attempted to define 'press freedom' in the following words:

The freedom of the press is not just a slogan ... It is an essential attribute of the democratic process. I have no doubt that even if the government dislikes the liberties taken by the press and considers them dangerous, it is wrong to interfere with the freedom of the press. By imposing restrictions you do not change anything. You merely suppress thoughts underpinning them to spread further. Therefore, I would rather have a completely free press with all the dangers that arise from wrong use of that freedom than have a suppressed or regulated press.<sup>79</sup>

Similarly, barely four months after taking up the office of Republican President, Mr. Fredrick Chiluba while addressing the National Press Club in Washington D.C., United States on 19<sup>th</sup> February, 1992 made a profound statement regarding the notion of press freedom.

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<sup>78</sup> J. M. Mwanakatwe, End of Kaunda Era, (Lusaka, Multimedia Publications, 1994), p.271.

<sup>79</sup> Quoted in P. H. R. Chalwa, The Law of Defamation and Freedom of the Press, (An Obligatory Essay submitted to the Law Faculty of the University of Zambia in partial satisfaction of the requirements for the award of the LLB Degree, Lusaka, UNZA Library Special Collections, 1989), p.8.

He said:

... We decided that press freedom must not only be observed, press freedom must be promoted so that whatever we are trying to bury under the carpet, and whatever may be passed in that House by our (MMD) majority will not escape the notice of society, and society must call us to account for it if the press remains free.<sup>80</sup>

However, a notable scholar of Mass Communications has defined 'press freedom' as having four meanings: (1) the right of journalists to report news and information without outside interference; (2) the right of journalists to comment on issues and events as they see fit without any outside interference; (3) the right of the people to express themselves in the media without being curtailed by those wielding political, religious, economic and other power; and (4) according to the people unimpeded access to news and information from the media if and when they need them.<sup>81</sup> In addition, Chris Chirwa has defined 'press freedom' in the following broad terms:

Freedom of the press means something different to different people. It is however accepted that freedom of the press confers the right to a publisher to start a newspaper, to publish news and views and to sell the newspaper; the right to gather and select information; to reject material for publication; to attend and report on public meetings; the right of the public to hear alternative views and of the public to receive fair, full and objective information. It is within the purview of press freedom that the publisher is accorded protection from excessive or prohibitive licensing requirements, or discriminatory taxation and from censorship save as provided by specific legislation. It is expected of the press to give chance to the public to express their views, serve the public common good, present alternative points of view, including unpopular or disagreeable matter and to act as a trustee on behalf

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<sup>80</sup> C. H. Chirwa, *Supra* note 46, p.13.

<sup>81</sup> F. P. Kasoma, "Press Freedom in Multi-party Democratic Zambia", *Supra* note 71, p.3.

of the public. On the other hand, freedom for owners means property rights over the means of communication production; for editors and journalists freedom means professional autonomy and liberty to select, write and publish (or refuse to publish) articles; and for the readers or public, freedom means to have its information needs met, the right to be informed.<sup>82</sup>

It seems apparent that a journalist has to seek out information without interference on the basis of the freedom of access to information and to impart such information, because the public has the right to be informed and to hear diverse views. In this regard, Dr. Chanda ably sums up by saying that freedom of the press means “the right to receive and impart ideas and information without interference. The expression ‘interference’ primarily refers to legislative constraint and executive control.”<sup>83</sup>

### **2.3.0 THE CONSTITUTIONAL PROTECTION OF PRESS FREEDOM IN ZAMBIA’S THIRD REPUBLIC**

It must be noted that the Bill of Rights was incorporated for the first time in the Northern Rhodesian history in the self government constitution of 1963.<sup>84</sup> It was reproduced, with minor amendments, in the independence constitution of 1964,<sup>85</sup> the one-party constitution of 1973 and the 1991 constitution. The Bill of Rights incorporated in the independence constitution was modelled on the Nigerian constitution of 1963, which in turn was based on the European

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<sup>82</sup> C. H. Chirwa, Supra note 46, pp. 25-26.

<sup>83</sup> A. W. Chanda, and M. Liswaniso, Handbook of Media Laws in Zambia, (Lusaka, ZIMA, 1999), p. 1.

<sup>84</sup> Northern Rhodesia (Constitution) Order –in- Council, 1963, Government Notice No. 25 of 1964.

<sup>85</sup> A. W. Chanda, Zambia: A case study in Human Rights in Commonwealth Africa (A Thesis submitted to Yale Law Faculty in conforming with the requirements for the J.S.D. Degree, New Haven, Connecticut, USA., July, 1992), p.110.

Convention for the protection of Human Rights and fundamental Freedoms of 1950.<sup>86</sup>

One of the notable features in all the four constitutions that have graced the Zambian legal order, is the implied, and eventual express recognition of freedom of the press. Under the 1963 constitution, freedom of the press was declared by implication in section 10(1). This section read in part: "except with his own consent no person shall be hindered in the enjoyment of his freedom of expression, that is to say ... freedom to communicate ideas and information without interference (whether the communication be to the public generally or to any person or class or persons)...."<sup>87</sup>

This provision reappeared in the successive constitutions of 1964 and 1973 without any alteration, thereby continuing the constitutional recognition of press freedom.

However, the notable change in the provision respecting press freedom came in the 1991 constitution which provides for freedom of the press in Article 20 as constituent part of freedom of expression. Article 20(1) provides that:

Except with his own consent, a person shall not be hindered in the enjoyment of his freedom of expression, that is to say, freedom to hold opinions without interference, freedom to receive ideas and information without interference, freedom to impart and communicate ideas and information without interference, whether the communication be to the

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<sup>86</sup> Ibid.

<sup>87</sup> Ibid.

public generally or to any person or class of persons, and freedom from interference with his correspondence.

On the other hand, Article 20(2) provides that: "Subject to the provisions of this constitution a law shall not make any provision that derogates from freedom of the press." On the face of it, the guarantee afforded by Article 20(1) seems very broad. Freedom of expression thus includes the right to hold opinions without interference, the right to receive ideas and information without interference, freedom to impart and communicate ideas and information without interference and freedom from interference with one's correspondence.

In this respect Dr. Chanda observes thus:

In providing for freedom of expression so broadly, the constitution has recognised the important role freedom of expression plays in the democratic process. Similarly, by prohibiting the legislature from passing laws that may derogate from the freedom of the press, the constitution underscores the indispensable role the press plays in the realisation of freedom of expression. Without a free press, freedom of expression will just be an illusion<sup>88</sup>

It is worthy of note, however, that Article 20(2) only brought about "a terminological change in so far as it departed from the style and manner of the previous constitutions. It expressly declared freedom of the press, while previous constitutions had declared the same by implication."<sup>89</sup>

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<sup>88</sup> A. W. Chanda, "Freedom of Expression and the Law in Zambia", *Zambia Law Journal*, volume 30, (Lusaka, Unza Press, 1998), p.124.

<sup>89</sup> K. Hang'andu, The Legal Constraints to Press Freedom in the Third Republic (Zambia), (An Obligatory Essay submitted to the Law Faculty of the University of Zambia in partial satisfaction of the requirements for the award of the LLB Degree, Lusaka, UNZA Library Special Collections, 1995), P. 20.

It remains to be pointed out however, that government has conceded that the constitution does not expressly provide for freedom of the press as a fundamental human right distinct and separate from freedom of expression despite numerous representations for such express provision from a number of people, including some donors, journalists and human rights Non-governmental organisations.<sup>90</sup>

In this connection, it should be mentioned that many petitioners to the Mwanakatwe Constitutional Review Commission made specific proposals for the express entrenchment of press freedom in the Republican constitution. For example, the Press Association of Zambia (PAZA) specifically submitted:

1. That the recognition of freedom of the press as an inalienable democratic human right distinct from freedom of expression should be guaranteed through the country's highest law, the constitution of Zambia through the insertion of the following clause:

'Parliament shall abrogate all laws and shall not pass new laws which directly or indirectly contravene freedom of the press which is a basic and inalienable human democratic right distinct from the general right of freedom of expression'.

2. That the constitution should still contain a separate clause affirming freedom of expression as a human right which should ensure free expression at the interpersonal level.
3. That the constitution should not list any exceptions under which freedom of the press (and expression) should not be enjoyed as the present constitution does.<sup>91</sup>

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<sup>90</sup> National Capacity Building Programme for Good Governance in Zambia, Supra note 64, P. 13.

<sup>91</sup> Quoted in C. H. Chirwa, Supra note 46, pp. 16-17.

The Mwanakatwe Commission, bearing in mind that a free press is necessary for democracy as a medium of exchange of ideas and the realisation of transparency, recommended that:

- (a) Every person should have the right to freedom of the press and other media, and the freedom of artistic creativity;
- (b) all press material or other communication intended for publication should not be subjected to any form of censorship or official interference and all public media should enjoy institutional independence and protection from outside influence to enable it accommodate different opinions and ensure free flow of information and ideas necessary in a democratic and open society;
- (c) all media financed by or under the control of the government should be organised and regulated in a manner which should ensure impartiality and the expression of a diversity of opinions;
- (d) journalists should not be compelled to divulge their sources of information;
- (e) the registration or licensing of any media should not be unreasonably withheld, withdrawn or refused;
- (f) there should be no censorship in Zambia and no person should be hindered in the [enjoyment of] freedom of expression which includes the right to hold opinions without interference and to seek, receive and impart information and ideas through any media; and
- (g) the National Assembly should pass no law abrogating the freedom of the press.<sup>92</sup>

The above provisions were the least that the Zambian media personnel would have wished to see reflected in the Constitution of Zambia (Amendment) Act of 1996 as a way of providing an adequate constitutional guarantee of press freedom in Zambia's Third Republic. Unfortunately, however, the MMD

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<sup>92</sup> Report of the Mwanakatwe Constitutional Review Commission, (Lusaka, Government Printers, 1995), paragraph 7.2.15, pp. 61-63.

Government blatantly rejected the Commission's progressive recommendations regarding freedom of the press and other media on the purported ground that this right is adequately covered by Article 20 of the 1991 Constitution. Had the commission's recommendations been accepted and embodied in the Republican Constitution, Zambia would have no doubt joined countries like South Africa and Malawi in expressly providing for press freedom in the Constitution. The Constitution of the Republic of Malawi in Article 36 guarantees freedom of the press in the following terms:

The press shall have the right to report and publish freely, within Malawi and abroad, and to be accorded the fullest possible facilities for access to public information.

The Constitution of Malawi even goes further to guarantee the right of access to Government-held information in Article 37 which provides that: "...Every person shall have the right of access to all information held by the State or any of its organs at any level of Government insofar as such information is required for the exercise of his rights."

It is, therefore, the present author's considered view that the commission's recommendations on press freedom, if accepted, would have led to a full and meaningful protection and promotion of press freedom in Zambia's Third Republic. Furthermore, the commission's recommendations on the subject will always be remembered in Zambia's media history as a lost golden opportunity on



the part of the MMD government to demonstrate their purported firm commitment to the protection and promotion of press freedom.

### **2.3.1 RESTRICTIONS ON PRESS FREEDOM UNDER THE ZAMBIAN CONSTITUTION**

It is undisputed that freedom of the press anywhere in the world is relative and not absolute. As such, society is entitled to place some legitimate restrictions on the exercise of freedom of expression and of the press to prevent their abuse. In this respect, Professor Nwabueze writes:

It is obvious that rights cannot be guaranteed in absolute terms if for no other reason than to protect the rights of other persons. To guarantee rights without qualification is to guarantee license and anarchy.

It follows that even if one were to guarantee rights in absolute terms, as does the American Bill of Rights, they cannot in fact be enjoyed without qualification.<sup>93</sup>

It is worthy of note, that even international human rights instruments recognise the need to place legitimate restrictions on freedom of expression and of the press. At national level, Article 20(3) of the Constitution, which contains a host of qualifications to press freedom, stipulates that:

Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this Article to the extent that it is shown that the law in question makes provision:-

- (a) that is reasonably required in the interests of defence, public safety, public order, public morality or public health; or
- (b) that is reasonably required for the purpose of protecting the reputations, rights and freedoms of other persons or the

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<sup>93</sup> B. O. Nwabueze, Constitutionalism in the Emergent States, (London, C. Hurst & Co. and Nwanife Publsihers, 1973), p. 39.

private lives of persons concerned in legal proceedings, preventing the disclosure of information received in confidence, maintaining the authority and independence of the courts, regulating educational institutions in the interests of persons receiving instructions therein, or the registration of, or operation of, newspapers and other publications, telephony, telegraphy, posts, wireless broadcasting or television; or

- (c) that imposes restrictions upon officers; and except so far as that provision or, the thing done under the authority thereof as the case may be, is shown not to be reasonably justifiable in a democratic society.

This provision is undoubtedly, a sweeping and very broad derogation clause, which, if widely construed, completely waters down the protection of freedom of expression and of the press contained in clauses 1 and 2, respectively. According to Article 20(3), in order for a restriction on freedom of expression and of the press to be valid, it must meet the following criteria. First, it must be provided for by law. Second, it must be reasonably required in any of the interests enumerated in clauses (a) to (c) which interests are admittedly expressed in very broad and ambiguous terms. Moreover, there is no precise definition of 'public safety', 'public order', 'public morality', or 'defence' given in the Constitution. To this effect, almost any restriction can be justified on any of these grounds by the state and is likely to be upheld by a timid judge.<sup>94</sup>

Thirdly, the restriction must be reasonably justifiable in a democratic society. Unfortunately, what constitutes a democratic society is not defined by

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<sup>94</sup> A. W. Chanda, "Freedom of Expression and the Law in Zambia," Supra note 88, p. 127.

the constitution. Thus, this will depend on the social philosophy of the judge hearing the case and the scale of value s/he places on public interest.<sup>95</sup>

In this connection, it should be noted that in the case of Cheranci-v-Cheranci,<sup>96</sup> the High Court of Northern Nigeria laid down a rule that for a restriction upon a fundamental human right to be 'reasonably justifiable' "it must (a) be necessary; and (b) not be excessive or out of proportion to the object which it is sought to achieve." It should be mentioned here that the current Bill of Rights in the Zambian Constitution has been widely criticised on the ground that almost all the enumerated rights are substantially watered down by long lists of exceptions or derogation clauses to the guarantee rights and freedoms.

Dr. Chanda highlights the defects in the current Bill of Rights in the following words:

The Bill of Rights contains wide derogation clauses which have the effect of negating the essential content of the rights protected. Most of the rights [guaranteed] can be restricted on the grounds of public interest, public order, public morality, public health, and defence, etc.

... Given the timidity of the courts, the effect of the wide derogation clauses has been to render the Bill of Rights almost meaningless.<sup>97</sup>

Furthermore, it should be emphasised that the Mwanakatwe Constitutional Review Commission had recommended a complete overhaul of the Bill of Rights in terms of the manner and style of its formulation. In particular, the Commission

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<sup>95</sup> Ibid.

<sup>96</sup> [1960] N.R.L.R. 24 at 29 per Bate, J.

<sup>97</sup> A. W. Chanda, "Human Rights in Zambia's Third Republic: An Overview," Supra note 58, p. 69.

recommended a complete removal of derogation clauses to the guaranteed rights and freedoms, which have the overall effect of completely emasculating the same rights and freedoms. It is, therefore, plausible to argue that the long lists of derogation clauses or exceptions contained in the current Bill of Rights have completely taken away almost all the rights and freedoms purportedly guaranteed under it thereby rendering the entire Bill of Rights completely meaningless.

As earlier indicated, the American Bill of Rights guarantees rights in absolute terms. To this effect, the First Amendment to the U.S. Constitution declares that: “congress shall make no law ... abridging the freedom of speech, or of the press ...” In fact, the United States of America has many times been cited as one of the countries in the world that offers an ideal environment for the protection of press freedom. Moreover, in America, the press is regarded as the “Fourth Estate” – meaning that the press is a fourth arm of government to the constitutionally recognised Executive, Legislature and judicial pillars of democracy. Press freedom in the U.S, as shown above, is provided for in a positive manner without unnecessary derogation clauses or list of exceptions which render the protected rights and freedoms completely watered or fettered.<sup>98</sup>

It is the present author's considered view that Zambia should strive to emulate the United States of America especially with regard to the protection of

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press freedom by doing away with the chain of exceptions or derogation clauses contained in Article 20(3) of the Constitution of Zambia Act No. 1 of 1991.

### **2.3.2 RESTRICTIONS ON PRESS FREEDOM UNDER INTERNATIONAL HUMAN RIGHTS INSTRUMENTS**

It may be noted that Zambia is a signatory to the International Covenant on Civil and Political Rights, 1966. In fact, Article 20(1) of the Zambian Constitution reflects in large measure, Article 19 of the ICCPR and the Universal Declaration of Human Rights, 1948, as well as Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950. In particular Article 19 of the ICCPR provides:

1. Everyone shall have the right to hold opinions without interference.
2. Everyone shall have the right to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
3. The exercise of the rights provided for in Paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subjected to certain restrictions, but these shall be such as provided by law and are necessary:
  - (a) For the respect of the rights or reputations of others;
  - (b) For the protection of national security, or of public order.

As earlier stated, even international human rights instruments recognise the need for legitimate restrictions on the exercise of freedom of expression and of the press. However, such restrictions must meet a three-part test in order to

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<sup>98</sup> For a detailed discussion on the protection of press freedom under the U.S Constitution see K.Hang'andu, Supra note 89, pp.50-63.

be valid: (1) any restriction must be provided by law; (2) any restriction must serve one of the legitimate purposes expressly numerated in the text; and (3) any restriction must be shown to be necessary.<sup>99</sup>

In the hallmark case of The Sunday Times-v-United Kingdom,<sup>100</sup> the European Court of Human Rights laid it down that for a restriction to be “prescribed by law”, it must be adequately accessible and foreseeable, that is to say, “formulated with sufficient precision to enable the citizen to regulate his conduct.”<sup>101</sup> In addition, for a restriction to have a legitimate aim it must be in furtherance of, and genuinely aimed at, protecting one of the permissible interests listed in the text. Dr. Chanda sums up the subject in the following terms:

... To be ‘necessary; a restriction does not have to be indispensable’ but it must be more than merely ‘reasonable’ or ‘desirable’. A ‘pressing social need’ must be demonstrated, the restriction must be proportionate to the legitimate aim pursued, and the reasons given to justify the restriction must be relevant and sufficient. In order to assess whether an interference is justified by ‘sufficient’ reasons, the court must consider any public interest aspect of the case.

Where the information subject to restriction involves a matter of ‘indisputed public concern’, the information may be restricted only if it appears ‘absolutely certain’ that its dissemination would have the adverse consequences legitimately feared by the state. Also relevant is the breadth of a restriction. An absolute restriction (such as the prohibition of disclosure of all information concerning pending cases) is clearly not acceptable; a court may sanction an interference with expression only when it is

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<sup>99</sup> A. W. Chanda and M. Liswaniso, *Supra* note 83, p. 4.

<sup>100</sup> Judgement of 26 April 1979, series A, No.30, Para. 49.

<sup>101</sup> *Ibid.*

satisfied that the interference was necessary having regard to the facts and circumstances prevailing in the specific case before it.<sup>102</sup>

It is manifestly clear that the Zambian standards on restrictions on press freedom are less stringent than the international standards just discussed. Under the Zambian Constitution the listed interests need only be 'required' as opposed to being 'necessary' as under Article 19 of the ICCPR. Furthermore, under the Zambian Constitution all that has to be shown is that the restriction in question is 'reasonable' or 'desirable'. It is not necessary to demonstrate a 'pressing social need' or to advance any relevant and sufficient reasons for the restriction.<sup>103</sup>

The next chapter discusses some of the colonial pieces of legislation still in the statute books which directly or indirectly impinge on press freedom, in particular the Penal Code and the State Security Act.

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<sup>102</sup> A.W. Chanda, "Freedom of Expression and the Law in Zambia," *Supra* note 88, pp. 125-126.

<sup>103</sup> *Ibid.*, p.127.

## **CHAPTER THREE**

### **THE NEED FOR MEDIA LAW REFORMS IN ZAMBIA'S THIRD REPUBLIC**

#### **3.1 BACKGROUND TO THE NEED FOR URGENT MEDIA LAW REFORMS IN ZAMBIA'S THIRD REPUBLIC**

It would be recalled that the Mwanakatwe Constitutional Review Commission recommended that Parliament should abrogate all laws and should not pass new laws which directly or indirectly contravene freedom of the press which is a basic and inalienable human right distinct from the general right of freedom of expression. It may equally be noted that during the launching of the Sun Newspaper on 7<sup>th</sup> September 1993, the then Minister of Information and Broadcasting Services, the late Dr. Remmy Mushota, promised the Zambian media that: "My Ministry will ensure that good laws to govern the media are passed by parliament and I shall dedicate my effort towards this objective."<sup>104</sup>

The above promise has to-date not yet been honoured. Moreover, even after thirty-six (36) years of political independence Zambia still retains a myriad of archaic pieces of legislation in the statute books which directly or indirectly hinder press freedom and ultimately the very survival of media institutions. Furthermore, most of these repressive laws were enacted by the British colonial

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<sup>104</sup> Quoted in C.H. Chirwa, Supra note 46, p. 12.



masters and their main purpose was to suppress the African struggle for independence.<sup>105</sup>

It is sad to note that the draconian laws have remained in place even after 1991 when a new democratic order was endorsed. It was in light of the foregoing that the Media Reform Committee of September 1993 made recommendations to the Government that certain pieces of legislation, inter alia, the Penal Code (sections 53,57, 67 and 69), the State Security Act (sections 4 and 5), Zambia National Broadcasting Act and the Defamation Act, etc, should be repealed in order to guarantee adequate and meaningful protection of press freedom in Zambia's Third Republic.

Similarly, in June 1999 a Task Force on Media Law Reform was constituted and mandated to review afresh laws which impede freedom of the press and other media. The Task Force, which was chaired by Mr. John Sangwa of the Legal Resources Foundation, presented its report to the Ministry of Information and Broadcasting Services on 7<sup>th</sup> February 2000. The Task Force reiterated the recommendations of the Media Reform Committee of 1993 and further recommended the enactment of a Freedom of Information Act and the establishment of an Independent Broadcasting Authority (IBA). The said report was at the time of writing this work still awaiting government's attention.

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<sup>105</sup> A.W. Chanda, "Freedom of Expression and the Law in Zambia", Supra note 88, p. 128.

It is patent that the repressive pieces of legislation are incompatible with the present democratic order. There is, therefore, urgent need to reform media laws in order to make them more relevant to the demands of democracy, transparency and accountability. The author proposes to discuss some of the repressive pieces of legislation with a view to highlighting their impact on freedom of the press and other media and suggesting provisions which need immediate reform.

### **3.2.0 THE PENAL CODE, CAP 87.**

The Penal Code was introduced for the first time in Northern Rhodesia in 1930, six years after the British Government took direct administration of Northern Rhodesia (now Zambia). The code was uplifted from Nigeria, where a code of English Criminal Law had been in operation by 1930, for fourteen years. The Penal Code in its current state creates a number of offences which have a direct or indirect bearing on the operations of the media in Zambia. The most notorious offences in this regard include banning of publications, sedition, publication of false news with intent to cause fear and alarm to the public, defamation of the president, defamation of foreign princes, prohibition of taking photographs in court and criminal defamation, etc. For the purpose of this work, the author will endeavour to discuss only a few of these offences and their impact on press freedom.

### 3.2.1 THE PRESIDENT'S POWER TO BAN PUBLICATIONS: SECTION 53

The President's power to ban publications clearly makes him a censor. Section 53(1) of the Penal Code confers powers upon the President, to declare a publication or series of publications to be prohibited publication(s), if in his opinion such publication or series of publications published either within or outside the country are contrary to public interest. What constitutes public interest is within his sole direction. However, section 62 defines 'public interest' as the interest of defence, public safety, public order, public morality or public health, phrases, which are incapable of definite meaning.

Moreover, any person who imports, publishes, sells, distributes, offers for sale or reproduces any prohibited publication is liable to imprisonment for up to three years. It is manifestly clear that this section vests enormous power in the President. In this regard, Dr. Alfred Chanda argues that the existence and operation of a free and independent press could be said to entirely depend on the president's goodwill. He further argues that section 53 has no place in an open and democratic society as even the courts are reluctant to question the president's discretion.<sup>106</sup>

Dr. Chanda's proposition is best illustrated by the case of Shamwana-v-Attorney General,<sup>107</sup> where an attempt to challenge the President's power failed.

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<sup>106</sup> A.W. Chanda, "Human Rights and Public Order", Legality Journal, (Lusaka, Classical Arts and Crafts Ent., 1993), pp. 9-10.

<sup>107</sup> Ibid., p.10; see also Times of Zambia, 5<sup>th</sup> march 1986, at p. 1.

In this case, two political detainees, Edward Shamwana and Valentine Musakanya, sent a petition to Parliament. The petition requested parliament to review the semi-state of emergency which had been in existence since independence. In March 1981, President Kaunda banned the petition. Shamwana sought an order from the High Court declaring that the President's decision to prohibit the petition was wrongful, unlawful and unconstitutional. He contended that a petition to the National Assembly could not be prejudicial to the public interest and that by proscribing the document the President was negating his oath of office to uphold the constitution. Justice Florence Mumba held that the President had acted within the powers conferred on him by Section 53 of the Penal Code and that the president's opinion was not open to question and that his decision following upon such an opinion could not be impugned.

This decision has been criticised by some scholars on the ground that there is no such a thing as unchallengeable discretionary power. It has been argued that the courts have power to check abuse of discretionary power where it is exercised unreasonably or in bad faith, or where the person concerned takes into account irrelevant considerations or fails to take into account relevant considerations, or acts under dictation.<sup>108</sup>

It is beyond doubt that the President's power to ban publications accorded to him by section 53 of the Penal Code seriously imperils the liberty of the press. In this connection, Mr. Kelvin Hang'andu argues that the ruling of the late Justice

Dr. Chitoshi in William Banda-v-Attorney General<sup>109</sup> - where his lordship stated that the Bill of Rights does not confer power on the government to exercise 'prior restraints' on the expression of views- should be preferred to the incorrect view in Shamwana case which permitted them.<sup>110</sup> It has in fact been argued that the latter case clearly demonstrates the fragility of press freedom and other media in the absence of judicial review of the President's discretion. It is regrettable to note however, that very few judges in Zambia have the courage to review decisions of the president.

It may be noted that in America and other jurisdictions the courts have held that censorship of whatever form is a violation of freedom of expression and of the press and, therefore, unconstitutional. In Near-v-Minnesota<sup>111</sup>, a statute prohibited the publication of "malicious, scandalous and defamatory" newspapers and magazines. A newspaper called 'The Saturday Press' was condemned under the statute and its owners and publishers were restrained from publishing it by way of an injunction. The U.S. Supreme Court set the injunction aside, as being an unconstitutional prior restraint on publications.

Similarly, in Kenneth Matiba-v-The Attorney General,<sup>112</sup> the Kenyan Court of Appeal lifted the ban imposed on a book authored by one of Kenya's leading politicians and a vociferous critic of the government, Kenneth Matiba. The facts

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<sup>108</sup> A.W. Chanda, "Freedom of Expression and the Law in Zambia", Supra note 88, pp. 132-133.

<sup>109</sup> 1992/HP/1005 (Unreported).

<sup>110</sup> K. Hang'andu, Supra note 89, p. 100.

<sup>111</sup> 283 US 697, 1 Med LR Ptr 100 (1931).

of the case were that in early 1993, the appellant authored and published a book, *Kenya: Return to Reason*, which critiqued the recent performance of the Kenyan government. It contained a concise record of Kenya's political and economic history as well as human rights violations by the government of Daniel Arap Moi.

On 14<sup>th</sup> January, 1994, in exercise of powers conferred by section 52 of the Penal Code (Chapter 63 of the Laws of Kenya) the Minister of State in the President's office, through a Gazette notice, declared the book a prohibited publication. Counsel for the Appellant submitted that the prohibition of the book was not reasonably justifiable in a democratic society. He further argued that the prohibition order was made in violation of his client's right to freedom of expression as guaranteed by section 79 of the Kenyan Constitution. The court concurred with counsel's submission and lifted the ban imposed on the book on the ground that it violated the author's freedom of expression guaranteed in the Kenyan Constitution.

It should be stressed that the President's power to ban publications has continued to be abused even in the Third Republic. A classical illustration of abuse of this power in Zambia's Third Republic is the incident of February 5, 1996 when President F.T.J. Chiluba banned edition 401 of *The Post Newspaper* under the same section and declared it a prohibited publication. The newspaper had prematurely disclosed a plan by the MMD Government to conduct a

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<sup>112</sup> Civil Appeal No. 42 of 1994, Kenya Court of Appeal at Nairobi 13<sup>th</sup> November 1998; discussed in Southern Africa Media Law briefing, volume 4, No. 1, February 1999, p. 4.

referendum over the controversial 1996 constitution.<sup>113</sup> Moreover, long before this ban, President Chiluba had warned the independent press “not to complain if his government was forced to take punitive measures including banning publications.”<sup>114</sup>

In view of the foregoing discussion, the author is compelled to concur with Dr. Chanda that the existence and operation of a free and independent press in Zambia entirely depends on the president’s goodwill. To this end, the present author endorses the submission that section 53 is unconstitutional in that the powers given to the president are so overbroad and cannot be reasonably justified in an open and democratic society. This provision is incompatible with the new democratic order prevailing in the country and should accordingly be repealed as soon as possible.

### **3.2.2 SEDITION: SECTION 57**

That the law relating to sedition seriously undermines the free operation of the media in Zambia’s Third Republic is a matter that is too obvious to deserve discussion.

Seditious libel, which is an offence against the state, may be committed by publishing or disseminating material that advocates or calls for reform or political

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<sup>113</sup> The People-v-Fred Mmembe, Masautso Phiri and Bright Mwape HP/38/1996; see also D. Nthengwe, So this is Democracy? State of the Media in Southern Africa 1996, (Namibia, MISA, 1997), p.54.

<sup>114</sup> The Post Newspaper, Tuesday, 20<sup>th</sup> June, 1995, No. 22.

change, etc, by unconstitutional or illegitimate means such as violence, insurrection or rebellion against the government or head of state, leading to a breach of peace.<sup>115</sup> The offence may equally be committed through other communications or activities such as distributing subversive literature by political activists, members of opposition political parties or a religious sect to cause anarchy or disorder in the country as a means of bringing the desired change of government.<sup>116</sup>

However, under section 57(1) a person commits the offence of sedition if he:-

- (a) does or attempts to do, or makes any preparation to do or conspires with any person to do, any act with a seditious intention;
- (b) utters any seditious words;
- (c) prints, publishes, sells, offers for sale, distributes, or reproduces any seditious publication;
- (d) imports any seditious publication unless he has no reason to believe that it is seditious.

In this regard, section 60(1) defines a seditious intention as an intention:-

- (a) to advocate the desirability of overthrowing the government by unlawful means; or
- (b) to bring into hatred or contempt or to excite disaffection against the government; or
- (c) to excite the people of Zambia to attempt to procure the alteration, otherwise than by lawful means, of any other matter in Zambia; or
- (d) to bring into hatred or contempt or to excite disaffection against the administration of Justice in Zambia; or
- (e) to raise discontent or disaffection among the people of Zambia; or

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<sup>115</sup> A.W. Chanda and M. Liswaniso, *Supra* note 83, p. 95.

<sup>116</sup> *Ibid.*



- (f) to promote feelings of ill-will or hostility between different classes of the population in Zambia; or
- (g) to advocate the desirability of any part of Zambia becoming an independent state or otherwise seceding from the Republic; or
- (h) to incite resistance, either active or passive, or disobedience to any law or the administration thereof.

However, the proviso to this section goes further to provide that an intention shall not be taken to be seditious if it is an intention:-

- (i) to show that the government have been misled or mistaken in any of their measures; or
- (j) to point out errors or defects in the government or constitution or in legislation or in the administration of justice, with a view to the reformation of such errors or defects; or
- (k) to persuade the people of Zambia to attempt to procure by lawful means the alteration of any matter in Zambia; or
- (i) to point out, with a view to their removal, any matters which are producing or have a tendency to produce feelings of ill-will or hostility between different classes of the population of Zambia.

Moreover, in determining whether the intention with which any act was done, any words were spoken, or any document was published, was or was not seditious, every person is deemed to intend the consequences which would naturally follow from his conduct at the time and under the circumstances in which he so conducted himself.<sup>117</sup>

It is quite clear that the definitions of what constitutes seditious intentions under section 60(1) are so broad and sweeping that a number of legitimate

actions can, on their face, be said to be seditious. As Dr. Chanda rightly states, “almost any criticism of the government can be termed seditious. Public exposure of scandals in government could also be considered seditious as it has the effect of undermining the people’s confidence in the government.”<sup>118</sup> He further argues that many of the activities prohibited by section 60(1) are normal in a democracy. For instance, it is incumbent upon opposition political parties to create disaffection against the government by exposing the government’s blunders and shortcomings so that they can be elected at the next elections.<sup>119</sup>

Historically, the law of sedition was intended to punish any expression that was critical of the government or government officials. By its very nature, therefore, the law of sedition conflicts with the concept of press freedom as it punishes publications that are critical of the government or government officials.<sup>120</sup> It should be noted that in some commonwealth jurisdictions, the law of sedition has actually been invalidated on the ground that it abridges the constitutionally guaranteed right to freedom of the press. In Nigeria, for a example, the Court of Appeal (Enugu Division), in Chief Arthur Nwanko-v-The State<sup>121</sup> invalidated the provision of the Criminal Code concerning seditious publications. The Appellant had been convicted of publishing and distributing “seditious publications” for having published and distributed a book accusing the Governor and government of Anambra State of attempting to import arms into

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<sup>117</sup> Penal Code, S. 60(2).

<sup>118</sup> A.W. Chanda, “Human Rights and Public Order”, Supra note 106, p. 12.

<sup>119</sup> A.W. Chanda and M. Liswaniso, Supra note 83, p. 97

the state. The Court of Appeal unanimously held that the relevant sections of the Criminal Code were invalid because they violated the right to freedom of expression guaranteed by the Constitution and were not saved by the constitutional provision which permits derogation from the same right in the interests of public order and safety. The court found the sections particularly unsatisfactory because they did not provide for a defence of truth and could lead to conviction even in the absence of any evidence that the publication was likely to lead to a breakdown in public order. Olatawura, J.C.A. stated:

We are no longer the illiterates or the mob society our colonial masters had in mind when the law was promulgated... To retain section 51 of the Criminal code, in the present form, that is even if it is inconsistent with the freedom of expression guaranteed by our constitution, will be a deadly weapon to be used at will by a corrupt government or a tyrant... Let us not diminish from the freedom gained from our colonial masters by resorting to laws enacted by them to suit their purpose.

Similarly, it is submitted that the offence of sedition created by section 57 of the Penal Code is an "unconstitutional fetter on freedom of the press and should be invalidated on the ground that it flagrantly offends and violates the free-press clause under Article 20(2) of the Constitution. It cannot be saved by the derogation clause under Article 20(3) since it is neither required in the interest of public safety and order, nor can it be reasonably justifiable in a democratic society."<sup>122</sup>

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<sup>120</sup> For a detailed discussion on the history of the law of sedition see K. Hang'andu, *Supra* note 89, pp. 73-77.

<sup>121</sup> F.C.A./E/111/83; (1985) 6 NCLR 228.

<sup>122</sup> K. Hang'andu, *Supra* note 89, p. 83.

Furthermore, the law of sedition cannot be saved by the said derogation clause as a legitimate restriction on press freedom considering that for all intents and purposes it was created as a weapon for suppressing government critics.<sup>123</sup> Furthermore, such a law cannot be justified as reasonably required in a democratic society because a law created for suppressing government critics offends the sacred democratic ideal of free criticism of government. In this regard, the observation by Lord Bridge in Hector-v-Attorney General of Antigua and Bermuda<sup>124</sup> is instructive:

In a free and democratic society it is almost too obvious to need stating that those who hold political office in government and who are responsible for public administration must always be open to criticism. Any attempt to stifle or fetter such criticism amounts to political censorship of the most insidious and objectionable kind. At the same time it is no less obvious that the very purpose of criticism levelled at those who conduct public affairs by their political opponents is to undermine public confidence in their stewardship and to persuade the electorate that the opponent would make a better job of it than those presently holding office. In the light of those considerations, their lordships cannot help viewing a statutory provision which criminalises statements likely to undermine confidence in the conduct of public affairs with the utmost suspicion.<sup>125</sup>

It is abundantly clear at this juncture that the provisions relating to sedition in the penal code are outdated and incompatible with the present democratic dispensation and must be repealed accordingly. As was observed by the Sri Lanka Supreme Court in the Case of Joseph Perera-v-Attorney General:<sup>126</sup>

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<sup>123</sup> Ibid.

<sup>124</sup> (1990) 2 AC. 312, (P.C.).

<sup>125</sup> Ibid at p. 315.

<sup>126</sup> SC App. Nos. 107-9/86, decision of 25 May 1987; quoted in A.W. Chanda and M. Liswaniso, Supra note 83, p. 99-100.

One of the basic values of a free society... is founded on the conviction that there must be freedom not only for the thought that we cherish but also for the thought that we hate. Hence criticism of government, however unpalatable it may be, cannot be restricted or penalised unless it is intended or has a tendency to undermine the security of the state or public order or to incite the commission of an offence. Debate on public issues should be uninhibited, robust and wide open and may well include vehement, caustic and sometimes unpleasant sharp attacks on government. Such debate is not calculated and does not bring the government into hatred and contempt.

The above statement underscores the cardinal point that the concept of seditious libel strikes at the very heart of democracy and that any country, Zambia inclusive, which makes seditious libel an offence is "not a free society no matter what its other characteristics are".<sup>127</sup>

### **3.2.2 PUBLICATION OF FALSE NEWS WITH INTENT TO CAUSE FEAR AND ALARM TO THE PUBLIC: SECTION 67**

In assessing the impact of the offence of publication of false news with intent to cause fear and alarm to the public on freedom of the press and other media, it is instructive to look at the brief history of the offence. The offence dates as far back as the statute of Westminster of 1275, which established the offence of scandalum magnatum:

From henceforth none be so hardy to tell or publish any false news or tales, whereby discord or occasion of discord or slander may grow between the king and his people or the great men of his realm.<sup>128</sup>

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<sup>127</sup> K. Hang'andu, Supra note 89, p. 85.

The primary purpose of the offence seems to have been to maintain public order in an era when information was scarce and hard to verify and false rumours could all too easily lead to violence, for example in the form of public duels. In Zambia, the offence was introduced in 1938. It is created under section 67 of the Penal Code. It is significant to note that there is no similar provision in the United Kingdom, the country whose criminal law our Penal Code sought to consolidate.<sup>129</sup>

Under section 67(1) the publication, whether oral or in writing or otherwise, of any statement, rumour or report which is likely to cause fear and alarm to the public or to disturb the public peace is an offence. It should be noted that knowledge of the falsity of the rumour, report or statement is a necessary ingredient of the offence. Although there are people within the media who are capable of fabricating stories, which can cause great harm to the people and the country as a whole, it is submitted that section 67 is unfair and a hindrance to press freedom as there is no legal obligation on the part of those who hold public office to provide information or confirm any information that is sought by a journalist.<sup>130</sup>

Because of the inherent “chilling effect” of false news provisions on press freedom, the courts in some commonwealth jurisdictions, such as Canada and

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<sup>128</sup> Southern Africa Media Law Briefing, volume 4, Number 1, February 1999, p.6, “False News is Bad News.”

<sup>129</sup> Report of the Task Force on Media Law Reform, para. 3.2, p. 28.

<sup>130</sup> Ibid., pp. 28-29.

Antigua and Bermuda, have struck down such provisions as being contrary to the constitutional guarantees of freedom of expression and of the press. The courts have gone further to state that such laws cannot be reasonably justifiable in a democratic society. For example, in R-v-Zundel,<sup>131</sup> the Supreme Court of Canada struck down section 181 of the criminal code which stipulated that:

Everyone who willfully publishes a statement, tale or news that he knows is false and that causes or is likely to cause injury or mischief to a public interest is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years.

The court held that this provision was a flagrant violation of the constitutional guarantees of freedom of expression and of the press and that it could not be justified in a free and democratic society and, therefore, declared it invalid.

Similarly, in Hector-v-Attorney-General of Antigua and Bermuda,<sup>132</sup> the Privy Council unanimously held that section 33B of the Public Order Act, 1972, of Antigua and Bermuda contravened the constitutional guarantees of freedom of expression and of the press. Section 33B provided that:

Notwithstanding the provisions of any other law any person who:-  
(a) in any public place or at any public meeting makes any false statement, or (b) prints or distributes any false statement which is likely to cause fear or alarm in or to the public, or to disturb the public peace, or to undermine public confidence in the conduct of public affairs, shall be guilty of an offence and shall be liable on summary conviction to a fine not exceeding 500 dollars or to a term of imprisonment not exceeding six months.

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<sup>131</sup> (1992) 2SCR 731.

<sup>132</sup> (1990) 2.A.C. 312.

Significantly, the Judicial Committee of the Privy Council held:

It would on any view be a grave impediment to the freedom of the press if those who print or afortiori those who distribute, matter reflecting critically on the conduct of public authorities could only do so with impunity if they could first verify the accuracy of all statements of fact on which criticism was based.<sup>133</sup>

It is clear from the two authorities cited above that section 67 of our Penal Code unduly restricts the exercise of the constitutional guarantees of freedom of expression and of the press and should, therefore, be repealed immediately. The abuse of this provision strikes at the very heart of freedom of the press by inhibiting public debate about matters of public concern. The abuse of section 67 in Zambia's third Republic is illustrated by the incident of 16<sup>th</sup> February 1999, when Chronicle newspaper editor Lweendo Hamusankwa and reporter Boyd Phiri were arrested and jointly charged with "publishing false news with intent to cause fear and alarm to the public" contrary to section 67 of the Penal Code. They published a story alleging that arms and ammunition were stolen from Mikango Barracks on the outskirts of Lusaka. The journalists appeared for mention in the Lusaka magistrate court but fortunate enough, the case never proceeded to trial.<sup>134</sup>

The glaring "chilling effect" of section 67 on press freedom under the circumstances cannot be overstated. To this effect, it is strongly submitted that

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<sup>133</sup> Ibid., at p. 318.

<sup>134</sup> D. Nthengwe, So this is Democracy? Report on the State of the Media in Southern Africa 1997, (Namibia, Misa, 1998), P.139.



section 67 should be repealed immediately as it is clearly incompatible with the constitutional guarantees of press freedom and can not be reasonably justified in a free and democratic society.

**3.2.4 DEFAMATION OF THE PRESIDENT: SECTION 69**

It is significant to note that in the past few years since the advent of the Third Republic in 1991, a remarkable number of journalists from the independent media have been persistently arrested, charged and prosecuted for allegedly violating the provisions of section 69 of the Penal Code.<sup>135</sup> This section seeks to protect the president's reputation and dignity of his office by providing that any person who, with intent to bring the president into hatred, ridicule or contempt, publishes any defamatory or insulting matter, whether by writing, print, word of mouth or in any other manner or form is guilty of an offence and is liable on conviction to imprisonment for up to three years.

However, there is a distinction between the institution of office of President and the person occupying the office. This law undoubtedly seeks to protect the person occupying the office of president as opposed to the institution.<sup>136</sup> The current constitutional order allows for competition to the office of President. Invariably this will require and inevitably entails criticism of the incumbent president, which may extend to an examination of his personal character. Thus,

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<sup>135</sup> Report of the Task Force on Media Law Reform, para. 3.2. at P. 29.

<sup>136</sup> Ibid., p. 30.

it is more likely that the person occupying the office of president may be brought into hatred, contempt or ridicule.

It becomes manifestly clear, therefore, that section 69 is a very serious threat to freedom of expression and of the press in that it exposes critics of the President to possible prosecution.<sup>137</sup> In Zambia, for instance, the nature of the political process invariably requires the person occupying the office of president to convince the electorate that he is a better candidate than his opponents. That may mean them being brought into contempt or ridicule too. In this respect, it cannot be in conformity with the ideals of democracy to criminalise what may be said about the president. Furthermore, the very fact that the president's conduct or actions may be a subject of ridicule or contempt is a restraint on the president and may help to keep his conduct within the law. It may compel him to be sensitive to the moods of the people and use his authority wisely.<sup>138</sup> In this connection the observation by Dr. Alfred Chanda is instructive:

... [section 69] has the effect of stifling freedom of speech and the press as it does not lay down any guidelines for determining what constitutes an insulting matter. In a democratic state the president is a public figure. He is accountable to the people and should be transparent in his actions. This requires that the people, including the press, not be subjected to criminal sanctions for making unpalatable remarks about the president.<sup>139</sup>

The learned scholar stresses the point further by posing a rather thought provoking question: Why should the law give the president liberty to defame his

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<sup>137</sup> A.W. Chanda, "Human Rights and Public Order," *Supra* note 106, p.12.

<sup>138</sup> Report of the Task Force on Media Law Reform, para. 3.2, p. 31.

opponents at will by immunising him from legal suits while making it criminal for his opponents to defame him? He also argues that the civil law of defamation is sufficient to protect the reputation of the president and thus, he sees no justification for section 69 in a free and democratic society.<sup>140</sup>

It should be emphasised however, that in the cases of The People-v-Bright Mwape and Fred Mmembe,<sup>141</sup> Fred M'membe & Bright Mwape-v- The People and Fred M'membe, Masautso Phiri and Goliath Munkonge-v-The people<sup>142</sup> both the High Court and the Supreme Court upheld the constitutionality of section 69 on the ground that it is reasonably required in the interests of public order and is reasonably justified in a democratic society. The courts have reasoned that the constitution elevates the President above everyone else and he can, therefore, not be compared to an ordinary person. For instance, the President is immunised from both civil and criminal proceedings while in office. According to the court, given the fact that the President enjoys a special status in society it is legitimate and justifiable to seek to protect his reputation and dignity as section 69 does.

Furthermore, it is argued that allowing people to defame the President at will might lead to a breakdown of law and order as supporters of the President may physically attack those defaming the president. The present author

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<sup>139</sup> A.W. Chanda, "Freedom of Expression and the Law in Zambia," Supra note 88, p. 144.

<sup>140</sup> Ibid.

<sup>141</sup> HPR/36/94.

<sup>142</sup> SCZ Appeals Nos. 87 and 107 of 1995.

subscribes to Dr. Chanda's view that the arguments advanced in favour of section 69 by the courts "miss the point that the president is a servant of the people and not their master and whether or not he has a good reputation depends on his conduct in office."<sup>143</sup>

As the Task Force on Media Law Reform stated: "If the gains that have been made in the past few years in democratizing Zambia, are to be consolidated, and an open and free society created, section 69 must be repealed."<sup>144</sup> This view has been echoed by a number of human rights NGOs, among them, AFRONET, and media organisations such as ZIMA and PAZA.

### **3.3.0 THE STATE SECURITY ACT CAP.111.**

The State Security Act, 1969 was enacted at the time of heightened security concerns. It may be noted that in 1969, Zambia was surrounded mostly by hostile minority regimes, with the Portuguese in control of Angola and Mozambique and the White minority being in control of Rhodesia, South West Africa and South Africa.<sup>145</sup> In this regard, the Government considered the existing Official Secrets Act, 1967 inadequate in a number of respects. For instance, under the 1967 Act the State was compelled to disclose information in

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<sup>143</sup> A.W. Chanda, "Freedom of Expression and the Law in Zambia," Supra note 88, p. 144.

<sup>144</sup> Report of the Task Force on Media Law Reform, para. 3.2, p. 31.

<sup>145</sup> A.W. Chanda, "The State Security Act vs Open Society: Does a Democracy Need Secrets? Supra note 66, p. 36.

court or detainee proceedings, even if that information was highly prejudicial to the interest of the state to disclose.<sup>146</sup>

It is significant to note that the objects of the State Security Act are: to make better provision relating to state security; deal with espionage, sabotage and other activities prejudicial to the interests of the state; and to provides for purposes incidental to or connected therewith.<sup>147</sup>

The objects of the State Security Act are premised on the divine legal maxim: *salus populi est suprema lex*, that is to say, the safety of the nation is the supreme law which is an established principle of constitutional law.<sup>148</sup> The Act creates a number of offences which impinge on the operations of the media.

Section 3, which creates the offence of espionage, makes it an offence punishable with not less than twenty years imprisonment for any person, for any purpose prejudicial to the safety or interests of the state, not only to engage in specified conduct calculated to be useful to an enemy but also to approach, inspect or enter a 'protected place' within the meaning of the State Security Act.

Similarly, under section 4 of the Act, it is an offence punishable with up to between fifteen years and twenty-five years imprisonment to retain without permission or fail to take reasonable care of, information obtained as a result of one's present or former employment under the government or a government

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<sup>146</sup> Ibid.

<sup>147</sup> Preamble, State Security Act, CAP. 111, Laws of Zambia (1995 edition).

<sup>148</sup> K. Hangandu, Supra note 89, p. 123.

contract, or to communicate information so obtained, or entrusted to him in confidence by a person holding office under the government, or obtained in contravention of the Act, to anybody other than a person to whom one is authorised to convey it or to whom it is one's duty to communicate it in the interests of the state; or to receive such information knowing or having reasonable cause to believe it has been given in contravention of the Act.

On the other hand, section 5(1) of the Act stipulates that any person who communicates any 'classified matter' to any person other than a person to whom he is authorised to communicate it or to whom it is in the interests of the state his duty to communicate it, shall be guilty of an offence and liable on conviction to imprisonment for a term of not less than fifteen years not and exceeding twenty years. Under section 5(2), it shall be no defence for the accused person to prove that when he communicated the matter he did not know and could not reasonably have known that it was 'classified matter.' It may be noted that the government and the government alone decides what is to be considered to be classified matter.<sup>149</sup>

It remains to be pointed out that sections 3,4 and 5 of the State Security Act have been used by the state functionaries to harass, intimidate and prosecute journalists from the independent press for allegedly being opponents working to see the downfall of the MMD government. Most recently, the entire editorial staff of the independent Post Newspaper were arrested and charged

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<sup>149</sup> A.W. Chanda, "The State Security Act vs Open Society: Does a Democracy Need Secrets?", Supra note 66, p.38.

with espionage contrary to section 3 of the State Security Act following the publication of a front-page article headlined, "Angola Worries Zambia Army/ZAF" which appeared in The Post on 9<sup>th</sup> March, 1999. The article questioned the military capacity of Zambia to withstand an incursion from neighbouring Angola which had threatened to retaliate following Zambia's alleged involvement in Angola's civil war on the side of the rebel UNITA movement.<sup>150</sup>

This crackdown on the Post Newspaper by the state attracted resounding criticism from media and human rights groups from around the world as a serious violation of the Johannesburg Principles on National Security, Freedom of Expression and Access to Information as well as Article 19 of the International Covenant on Civil and Political Rights, 1966 to which Zambia is a signatory.<sup>151</sup>

In another case, The People-v-Fred M'membe, Masautso Phiri and Bright Mwape,<sup>152</sup> three editors of the independent Post newspaper were arrested and charged with receiving documents, articles or information knowing or having reasonable grounds to believe at the time that the same documents, article or information were communicated or received in contravention of section 4(3) of the State Security Act. The material in question, which concerned government's programme of work on Constitutional Reform Activities and Proposed Referendum on the Constitution, appeared in the Post's edition 401 of February

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<sup>150</sup> Southern Africa Media Law Briefing, volume 4, No. 4, November 1999, P.7, "Changing Legal Regime of Press Freedom in Southern Africa.; See also A.W. Chanda and M. Liswaniso, Supra note 83, p. 75.

<sup>151</sup> See Southern Africa Media Law Briefing, volume 4, No. 1 February, 1999, p. 12. "Outrage as Zambian Journalists are Charged with Espionage."

<sup>152</sup> HP/38/ 1996 (unreported).

5, 1996, which was banned by the president under section 53 of the Penal Code as we saw earlier.

It was held by the High Court that the three journalists had no case to answer as the ingredients of knowledge or reasonable ground for belief that the information was covered by the State Security Act had not been proved. Moreover, it had not been proved that the contents of the documents in issue were in fact matters of public security. Justice Peter Chitengi noted that the subject matter of the document, a referendum, could not be said to be prejudicial to public security. He noted that:

Referenda are known lawful ways of asking the general citizenry to decide by plebiscite certain contentious issues which the government does not want to decide on its own. The Zambian Constitution contains provisions for referendum. In any case a Referendum is nothing more than an election and there can be no secret about an election in these days of transparency, the revelation of which should invite the stiff penalties under the State Security Act. I think it would surprise many and even jar their instincts to hear that in Zambia three noisy journalists have been imprisoned for twenty years for prematurely announcing government's intentions to hold a referendum to decide a thorny constitutional issue...<sup>153</sup>

The judge also held that not everything classified by an authorised officer necessarily becomes a classified matter under the State Security Act. Examining the preamble and other provisions of the Act in order to determine the mischief the legislature intended to address by enacting the Act, Justice Chitengi added that:

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<sup>153</sup> Ibid., at R8 and R9.



Clearly the State Security Act is intended to deal with serious matters like espionage and sabotage, the activities that tend to subvert the interests of the state. And applying the ejusdem generis rule of interpretation the other activities referred to must be activities akin to espionage and sabotage. They must be activities that tend to subvert the interests of the state. The heavy penalties prescribed for these offences and the provision to deny accused bail indicate that the conduct aimed at must be very harmful to the interests of the state...<sup>154</sup>

### **3.3.1 THE CONSTITUTIONALITY OF SECTIONS 4 AND 5 OF THE STATE SECURITY ACT**

One issue which has continued to generate a great deal of public debate and to exercise the minds of academic and non-academic lawyers is whether or not sections 4 and 5 of the State Security Act are compatible with Article 20 of the Constitution as well as international standards. It would be recalled that Article 20(3) of the constitution of Zambia permits the state to impose certain legitimate restrictions on the exercise of the constitutional guarantees of freedom of expression and of the press.

However, to be valid, such restrictions must be prescribed by law and must be reasonably required in the interest of defence, public safety and public order, etc. Furthermore, the law in question must be reasonably justifiable in a free and democratic society.<sup>155</sup>

It is significant to note that in order for a restriction to be prescribed by law:

(a) the law must be accessible, unambiguous, drawn narrowly and with precision

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<sup>154</sup> Ibid., at R5.

<sup>155</sup> Constitution of Zambia, Article 20(3)(a) and (c).

so as to enable individuals to foresee whether a particular action is unlawful; and (b) the law should provide for adequate safeguards against abuse, including prompt, full and effective judicial scrutiny of the restriction by an independent court or tribunal.<sup>156</sup> Sections 4 and 5 of the State Security Act fall short of satisfying the requirements of restrictions prescribed by law in that the two sections are couched in vague and overbroad terms and also fail to provide any safeguards against abuse. As Chief Justice Ngulube said in Christine Mulundika and 7 others-v-The People<sup>157</sup> "Fundamental rights should not be denied to a citizen by any law which permits arbitrariness and is couched in wide and broad terms..."<sup>158</sup>

It has been argued that a restriction on freedom of expression and of the press or information that a government seeks to justify on national security grounds must have the genuine purpose and demonstrable effect of protecting a legitimate national security interest.<sup>159</sup> Furthermore, such a restriction is only legitimate if it is for a genuine purpose and its demonstrable effect is to protect a country's existence or territorial integrity against the use or threat of force, or its capacity to respond to the use or threat of force, whether from an external source, such as a military threat, or an internal source, such as incitement to violent overthrow of the government. In particular, a restriction is not legitimate if its genuine purpose or demonstrable effect is to protect interests unrelated to

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<sup>156</sup> A.W. Chanda, "The State Security Act vs Open Society: Does a Democracy Need Secrets?" Supra note 66, p. 42; see also ARTICLE 19, The Johannesburg Principles: National Security, Freedom of expression and Access to Information 3-4 (No.3, November 1996).

<sup>157</sup> 1995/SCZ/25 (unreported).

<sup>158</sup> Ibid.

<sup>159</sup> A.W. Chanda and M. Liswaniso, Supra note 83, p.79.

national security, including, for example, to protect a government from embarrassment or exposure of wrong-doing.<sup>160</sup>

Sections 4 and 5 clearly go beyond protecting a legitimate national interest since their effect is to indiscriminately deny the public access to information in the hands of the state regardless of whether the information affects national security or not.<sup>161</sup> Moreover, to establish that a restriction on freedom of expression or information is necessary to protect a legitimate national interest, a government must show that: (i) the expression or information in issue poses a serious threat to a legitimate national security interest; (ii) the restriction imposed is the least restrictive means possible of protecting that interest, and (iii) the restriction is compatible with democratic principles.<sup>162</sup> The State Security Act, in so far as it does not distinguish between information or documents that have a bearing on national security and those that do not, goes too far in restricting access to information held by the state.

The restrictions imposed by sections 4 and 5 on access to information held by the state and its organs are clearly not the least restrictive means possible of protecting national security. Thus, it is submitted that the restrictions imposed by the two sections are incompatible with the democratic principles of transparency, accountability and open government.<sup>163</sup> The preceding discussion has demonstrated that sections 4 and 5 of the State Security Act are

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<sup>160</sup> Ibid., p. 80.

<sup>161</sup> Ibid.

<sup>162</sup> Ibid.

<sup>163</sup> Ibid.

incompatible with Article 20 of the constitution in so far as they impose far reaching restrictions on the right of access to information held by the government. In this regard, it is plausible to argue that the two sections are unconstitutional and should be either repealed or amended if our nascent democracy is to grow stonger.<sup>164</sup>

### **3.3.2 THE RIGHT OF ACCESS TO INFORMATION HELD BY THE GOVERNMENT IN ZAMBIA'S THIRD REPUBLIC**

It has been stated that access by the public and the press to information held by the state is of crucial importance in a genuinely open and democratic society.<sup>165</sup> As the United Nations Special Rapporteur on Freedom of Opinion and Expression has observed, the right to seek and have access to information held by the state is an essential element of freedom of speech and expression. The right to receive information is not simply the converse of the right to impart information but is an independent right:

Freedom will be bereft of all effectiveness if the people have no access to information. Access to information is basic to the democratic way of life. The tendency to withhold information from the people at large is, therefore, to be strongly checked.<sup>166</sup>

Moreover, ARTICLE 19, a notable media organisation, has observed that "the value to democracy of government openness and accountability and of citizen participation cannot be overestimated. A multi-party system [of

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<sup>164</sup> A.W. Chanda, "The State Security Act vs Open Society: Does a Democracy Need Secrets?", Supra note 66, p. 47.

<sup>165</sup> Ibid., p.35.

<sup>166</sup> Special Rapporteur's Report to the UN Commission on Human Rights, E/CN.4/1995, Para. 35.

government] functions properly only when government is fully accountable to the people. This accountability, in turn, requires the population to have ready access to independent and accurate information about the workings of the [government] and other matters of public concern.”<sup>167</sup>

The courts have recognised that the right of access to information held by the state is a well-established right. In State of Uttar Pradesh-v-Raj Narain,<sup>168</sup> the Indian Supreme Court addressed the responsibility of government and urged a more open administration, stating:

In a government of responsibility like ours, where all the agents of the public must be responsible for their conduct, there can be but few secrets. The people of this country have a right to know every public act, everything that is done in a public way, by their public functionaries. They are entitled to know the particulars of every transaction in all its bearing. The right to know, which is derived from the concept of freedom of speech, though not absolute, is a factor which should make one wary when secrecy is claimed for transactions which can at any rate, have no repercussion on public security.<sup>169</sup>

The facts of the case were that the Indian government sought to withhold certain documents issued to the police regarding security arrangements for the Prime Minister's travels within the country. The Supreme Court ruled that the government had to make public all documents that would not endanger public order or the Prime Minister's security. In another case, Carvel and Guardian

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<sup>167</sup> Media Law and Practice in Southern Africa: Malawi-Submission to the Law Commissioner on Implementing the constitutional Guarantee of Freedom of Information (London, ARTICLE 19/ MISA, January, 1999), p.1.

<sup>168</sup> AIR [1975] SC 865.

<sup>169</sup> Ibid., at 884.

Newspaper Ltd-v-Council of the European Union,<sup>170</sup> the European Court of First Instance held that a journalist working for a British newspaper had a right to access the minutes of the law-making meetings of the Council of the European Union. The court decided that the council's policy of withholding information contravened a 1993 Code of Conduct that guaranteed European citizens the widest possible access to documents.

It is regrettable to note that in Zambia, the obnoxious provisions of the State Security Act make it almost virtually impossible for the public and the press to access information held by the government and its organs.

Moreover, the constitution of Zambia does not guarantee the right of access to information held by the government. It may be noted that the Mwanakatwe Constitutional Review Commission had recommended the inclusion of a justiciable right of access to information held by government but this was rejected by the government on the ground that guaranteeing such a right "would compromise state security and disrupt the smooth operation of Government Departments."<sup>171</sup>

The commission in fact expressed great concern at "the veil of secrecy that surrounded the workings of government as well as the legal prohibitions

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<sup>170</sup> Judgement of the Court of First Instance, 19<sup>th</sup> October 1995, Case T-194/94.

<sup>171</sup> Report of the Mwanakatwe Constitutional Review Commission and the Government reaction to the Report in the Government White Paper No. 1 of 1995, (Lusaka, Government Printers, 1995), Para. 7.2.16.

created by the State Security Act.”<sup>172</sup> However, the commission noted that informed opinion plays a critical role in fostering good governance and democracy. It is important to note that the Commission’s recommendation regarding the inclusion of a justifiable right of access to information held by the government was premised on Article 37 of the Constitution of the Republic of Malawi, which guarantees the right in the following words:

Subject to any Act of Parliament, every person shall have the right of access to all information held by the State or any of its organs at any level of Government in so far as such information is required for the exercise of his rights.

In addition Article 36 stipulates that “the press shall have the right to report and publish freely, within Malawi and abroad, and to be accorded the fullest possible facilities for access to public information.” On the other hand Article 44(2) and (3) provide as follows:

- (2) ... no restrictions or limitations may be placed on the exercise of any rights and freedoms provided for in this constitution other than those prescribed by Law, which are reasonable, recognised by international human rights standards and necessary in an open and democratic society.
- (3) ... Laws prescribing restrictions or limitations shall not negate the essential content of the right or freedom in question, shall be of general application.

It may be noted that there are a number of other democratic countries with constitutional guarantees of the right of access to information held by the state.

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<sup>172</sup> Ibid.

These include Austria, Costa Rica, Germany, Guatemala, South Africa, Sweden, Mexico and South Korea, etc.<sup>173</sup> In particular, section 32(1) of the Constitution of the Republic of South Africa provides as follows:

Everyone has the right of access to:-

- (a) any information held by the state; and
- (b) any information that is held by another person and that is required for the exercise or protection of any rights.

However, the exercise of this right may be limited or restricted only by “a law of general application to the extent that the limitation is reasonable, and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including (a) the nature of the right,...”<sup>174</sup> Furthermore, the South African Constitution in section 32(2) mandates the enactment of national legislation which will “give effect to the right and may provide for reasonable measures to alleviate the administrative and financial burden of the state.” This illustrates that a separate piece of legislation is necessary to put into practice the constitutional guarantee of the right of access to government-held information.

Indeed, South Africa is presently in the process of passing its Open Democracy Bill into law. The Bill sets out several objectives as steps towards increased access to information held by government. These include making information available in order to increase public understanding of government

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<sup>173</sup> For a detailed discussion on the subject see G. Scuttrups, International Freedom of Information Acts, (Washington D.C., The National Security Archive, October 1994).

<sup>174</sup> Constitution of the Republic of South Africa 1996, section 36(1).



functions, operations and decision-making processes, protecting individuals who disclose violations of the law and corruption, and other measures to empower the public effectively to scrutinise government decision-making, to promote open and accountable administration at all levels of government and to empower individuals to participate in governmental decision-making processes that affect them.<sup>175</sup>

It remains to be noted that in 1946 the United Nations in its Resolution 59(1) of 14<sup>th</sup> December, 1946 proclaimed that “freedom of information is a fundamental human right and is the touchstone of all the freedoms to which the United Nations is consecrated.” Considering the crucial role that freedom of information plays in fostering an open and accountable government, it becomes inevitable for the government to incorporate or guarantee the justiciable right of access to information held by the state and its organs in the Republican Constitution. It is hoped that greater public access to information will create an informed citizenry, which is necessary for sustaining a viable democratic society. In turn, that will lead to the transparency, accountability and good governance promised in the Constitution of Zambia.<sup>176</sup>

### **3.3.3 THE NEED FOR THE ENACTMENT OF A FREEDOM OF INFORMATION ACT IN ZAMBIA**

The preceding discussion has established that there is urgent need for the government to incorporate the right of access to government-held information in

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<sup>175</sup> See Open Democracy Bill, Revised Draft, prepared by the Task Group on Open Democracy.

the Republican Constitution. However, in order to put the constitutional guarantee of the right of access to information into practice there will be a further need to enact a relevant piece of legislation. It would be recalled that the Task Force on Media Law Reform recommended that the government should enact a Freedom of Information Act which should be a product of consensus between the government and all other stakeholders.<sup>177</sup>

It is interesting to note that government is presently "considering the possibility of enacting a Freedom of Information Act that will give the public and journalists access to public information which does not compromise national security. Under such an Act, the government will set conditions under which such information can be obtained. It will also declassify information when it considers it appropriate to do so."<sup>178</sup>

In this connection Dr. Alfred Chanda points out that Zambia is lagging behind several democratic countries like Malawi, South Africa, New Zealand and Sweden that have enacted legislation that promotes openness. To this effect, the learned scholar suggests that:

...There is need for the Government to enact a freedom of Information Act. Such a statute must designate only those specific and narrow categories of information that is necessary to withhold in order to protect a legitimate national security interest. The public must have the right to access information held by public authorities except in the few instances already mentioned. The Act should provide the procedures to be followed by the public in accessing

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<sup>176</sup> A.W. Chanda, "The State Security Act vs Open Society: Does Democracy Need Secrets?", *Supra* note 66, p.47.

<sup>177</sup> Report of the Task Force on Media Law Reform, Par. 3.3, p.54.

<sup>178</sup> National Capacity Building Programme for Good Governance in Zambia, *Supra* note 64, p.14.

public information. Such procedures must facilitate rather than hinder access. Moreover, the statute should require the authorities, if they deny a request for information, to specify their reasons for doing so in writing and as soon as reasonably possible. It should provide for a right of review of the merits and validity of the denial by an independent authority, including some form of judicial review of the legality of the denial.<sup>179</sup>

It may be noted that in New Zealand, the official Information Act, 1982 provides a qualified right of access to information held by Ministers of the crown, government departments and statutory bodies. This includes the right of access to information, which is directly enforceable by the courts and subject to a limited number of statutory reasons for withholding such information.

As regards such 'official information', the operative principle is that information should be made available unless a good reason exists for withholding it. Moreover, personal and official information may be withheld to protect any of the following broad interests: to prevent prejudice to the security, defence and international relations of New Zealand, to preserve the confidentiality; and the safety of any person or the economy.<sup>180</sup>

As earlier indicated categories of information which the government can legitimately withhold must be narrowly drawn. In this regard, the Johannesburg Principles on National Security, Freedom of Expression and Access to Information state that:

No restriction on freedom of expression or information on the ground of national security may be imposed unless

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<sup>179</sup> A.W. Chanda, "The State Security vs Open Society: Does a Democracy Need Secrets?", Supra note 66, p.45.

<sup>180</sup> Ibid.; see also official Information Act, 1982, S.6.

the government can demonstrate that the restriction is prescribed by law and is necessary in a democratic society to protect a legitimate national security interest. The burden of demonstrating the validity of the restriction rests with the government.<sup>181</sup>

Moreover, a legitimate national security interest is one whose genuine purpose and demonstrable effect is to protect a country's existence or territorial integrity against the use or threat of force, or to protect its capability to respond to the use or threat of force, whether from an external or internal source.<sup>182</sup> Thus, no restriction can be imposed, say to protect the government from embarrassment or exposure of wrongdoings or to conceal information about public institutions.

ARTICLE 19 has set out a number of principles which a Freedom of Information Act should embody if the right of access to information is to be guaranteed fully in practice.

First, a Freedom of Information Act should be guided by the principle of maximum disclosure which establishes a presumption that all information should be subject to disclosure and that this presumption may be over come only in very limited circumstances. This principle encapsulates the basic rationale underlying the very concept of freedom of information and ideally it should be provided for in the constitution to make it clear that access to information is a basic right.

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<sup>181</sup> ARTICLE 19, The Johannesburg Principles: National Security, Freedom of Expression and Access to Information, (No. 3 of 1996).

<sup>182</sup> Ibid.

This implies that public bodies have an obligation to disclose information and that every member of the public has a corresponding right to receive information. Information includes all records held by a public body, regardless of the form in which the information is stored (document, tape, electronic recording, etc.), its source and the date of production.<sup>183</sup>

Second, public bodies should be under an obligation to publish key information. Freedom of information implies not only that public bodies accede to requests for information but also that they publish and disseminate widely documents of significant public interest, subject only to reasonable limits based on resources and capacity. The law should establish both a general obligation to publish and key categories of information that must be published. However, the nature of the information to be published will depend mainly on the nature of the public body concerned.<sup>184</sup>

Thirdly, public bodies must actively promote open government. Informing the public of their rights and promoting a culture of openness within government is essential if the goals of a Freedom of Information Act are to be realised. Thus, the law should make provision for public education and the dissemination of information, the scope of information which is available and the manner in which such rights may be exercised by members of the public.

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<sup>183</sup> Media Law and Practice in Southern Africa: Malawi, Supra note 167 pp. 15-16.

<sup>184</sup> Ibid., p. 16.

The law should provide for a number of mechanisms to address the problem of a culture of secrecy within government. These should include, for example, a requirement that public bodies provide freedom of information training for their employees. Such training should address the importance and scope of freedom of information, procedural mechanisms for accessing information, how to maintain and access records efficiently; and what sort of information is required to be published.<sup>185</sup>

Fourth, exceptions should be clearly and narrowly drawn and subject to strict 'harm' and 'public interest' tests. All individual requests for information from public bodies should be met unless the public body can show that the information falls within the scope of the limited regime of exceptions. A refusal to disclose is not justified unless the public authority can show that the information meets a strict three-part test: it must relate to a legitimate aim listed in the law; disclosure must threaten to cause substantial harm to that aim; and the harm to the aim must be greater than the public interest in having the information.<sup>186</sup> A complete list of legitimate aims that may justify an exception should be detailed in the law. This list should be limited to such legitimate interests as national security, commercial and other confidentiality, public safety, and the effectiveness and integrity of government decision-making processes, etc. The law should apply to all information held by all branches of government-executive, legislature and judicial branches and their departments.

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<sup>185</sup> Ibid., p.17.

<sup>186</sup> Ibid., p.18.

Exceptions should be narrowly drawn so as to avoid including material that does not harm the legitimate interest.

Fifth, requests for information should be processed rapidly and fairly and an independent review of any refusal should be available.<sup>187</sup> A process for deciding upon requests for information should be specified at three different levels: within the public body; appeals to an independent administrative body; and appeals to the courts.

Sixth, individuals should not be deterred from making requests for information by excessive costs. The cost of gaining access to information held by public bodies should not be so high as to deter potential applicants, given that the whole rationale behind freedom of information laws is to promote open access to information.<sup>188</sup>

Seventh, laws which are inconsistent with the principle of maximum disclosure should be amended or repealed. The Freedom of information Act should include a provision that it should prevail in case of conflict with other legislation. In particular, secrecy laws should not make it illegal for officials to divulge information that they are required to disclose under the Freedom of Information Act.<sup>189</sup> In addition, officials, should be protected from sanctions where they have, reasonably and in good faith, disclosed information pursuant to

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<sup>187</sup> See A.W. Chanda "state Security vs Open Society: Does a Democracy Need Secrets?", Supra note 66, p. 45.

<sup>188</sup> Media Law and Practice in Southern Africa: Malawi, Supra note 167, p. 20.

<sup>189</sup> Ibid., p. 21.

a freedom of information request even if it subsequently transpires that the information is not subject to disclosure. Moreover, all laws relating to freedom of information should be brought in line with the principles underpinning the freedom of Information Act.

Finally, individuals who release information on wrongdoing (whistle blowers) must be protected. Individuals should be protected from any legal, administrative or employment-related sanctions for releasing information on wrong doing.<sup>190</sup> Wrong doing in this context includes committing a criminal offence, failure to comply with a legal obligation, miscarriage of justice, corruption, dishonesty or serious misadministration regarding a public body.<sup>191</sup>

It has been established that freedom of information implies that the public bodies publish and disseminate information on their own initiative and that individuals have a right to obtain publicly held information upon request. The key to implementation in practice lies in the adoption of a strong Freedom of Information Act. Such a piece of legislation should promote greater openness in the government and serve as a vehicle for informing the public about their right to information.

It is the author's hope that the government will enact a Freedom of Information Act which will embody the principles enumerated above.

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<sup>190</sup> Ibid., pp. 21-22.

<sup>191</sup> Ibid.



The next chapter examines the law granting state monopoly in broadcasting and the need for the establishment of an Independent Broadcasting Authority (IBA) with responsibility to regulate broadcasting services in Zambia.

## **CHAPTER FOUR**

### **A CRITICAL EXAMINATION OF THE LAW GRANTING STATE MONOPOLY IN BROADCASTING AND THE NEED FOR THE ESTABLISHMENT OF AN INDEPENDENT BROADCASTING AUTHORITY**

#### **4.1 STATE MONOPOLY IN BROADCASTING UNDER THE ZAMBIA NATIONAL BROADCASTING ACT, CAP. 154.**

It may be noted from the outset that the issuing of radio and television broadcasting licences is regulated by the Zambia National Broadcasting Act (ZNBC Act), which was enacted in 1987. This Act provides for the establishment of the Zambia National Broadcasting Corporation (ZNBC) and the definition of its functions and powers. The Act also provides for the control and regulation of broadcasting and diffusion services and other relevant matters.

The ZNBC Act confers a monopoly in broadcasting upon ZNBC. To this end, section 25 of the Act stipulates that no person other than ZNBC shall operate a broadcasting service in Zambia otherwise than in accordance with the terms and conditions of a licence issued by the Minister. Furthermore, the Zambia National Broadcasting (Licensing) Regulations 1993 provide that no person is permitted to operate a radio or television station without a license issued by the Minister of Information and Broadcasting Services.<sup>192</sup>

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<sup>192</sup> Regulation 3(1).

It is needless to say that state monopoly in broadcasting in Zambia's Third Republic has reduced the idea of press freedom to a mere theoretical concept.<sup>193</sup> As one writer has remarked, if the Minister of Information continues to retain his wide discretionary power to issue or refuse to issue a licence to operate a radio or television station, as is presently the case under section 25 of the ZNBC Act, agitation for press freedom in the Third Republic will remain but an elusive ideal.<sup>194</sup> In this connection, the Media Institute of Southern Africa (MISA) observes that, "there is not an independent broadcasting authority [in Zambia] and the Minister of Information is the final authority in the issuing of all broadcasting licences. The criteria for granting private licences is not known, except that preference has been given to private Christian broadcasters."<sup>195</sup>

Furthermore, Professor Francis Kasoma once observed that Zambia should no longer entrust the media of broadcasting for information and public opinion in the hands of any government, no matter how well-intentioned it may be. This is because there is always a danger that the government of the day will abuse the trust of the people and start using the public broadcasting media to feather its own political nest. He, therefore, argues that the broadcasting media should be divorced from government control and ownership either by having them managed by a genuine public corporation along the lines of the British Broadcasting Corporation (BBC) or selling them to private enterprise.<sup>196</sup>

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<sup>193</sup> K. Hang'andu, *Supra* note 89, p.134.

<sup>194</sup> *Ibid.*

<sup>195</sup> D. Nthengwe and B. Mwape, *Supra* note 61, p.141.

<sup>196</sup> F.P. Kasoma, "Press Freedom in Multiparty Democratic Zambia", *Supra* note 71, p.12.

However, it would be recalled that the MMD government has reneged on its pre-1991 promise to privatise the state-owned media. Government has maintained that anyone who wishes to venture into broadcasting is free to do so and to compete with the country's only national broadcaster, the Zambia National Broadcasting Corporation.<sup>197</sup> It is perhaps instructive to use the MMD Manifesto as a guide on the subject of privatisation of the state-owned electronic media. With specific reference to the Mass Media the Manifesto reads in part: "... Under the MMD government, state-owned media will serve as vehicles to promote national unity, reconstruction, development and international co-operation."<sup>198</sup>

To this effect, in July 1996, the then Deputy Minister of Foreign Affairs, Dr. Peter Machungwa, was quoted in *The Monitor* newspaper as having said that "there is nowhere in any part of the MMD Manifesto any specific or implied reference to privatising state-owned media."<sup>199</sup> Perhaps this serves to explain why government has reneged on its pre-1991 promise to privatise state-owned media.

As noted earlier, the ZNBC Act makes it difficult for individuals and companies to establish private radio and television stations. Moreover, the absence of an independent broadcasting authority to consider applications for broadcasting licences exposes the licensing regime to political manipulation as only the Minister of Information is empowered to issue licences.<sup>200</sup> The position

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<sup>197</sup> D. Nthengwe and B. Mwape, *Supra* note 61, p.138.

<sup>198</sup> MMD Manifesto, Lusaka, 1991.

<sup>199</sup> *The Monitor Newspaper*, 12-18 July, 1996.

<sup>200</sup> A.W. Chanda and M. Liswaniso, *Supra* note 83, p.26.

is even worsened by the fact that there are no safeguards provided in the ZNBC Act to protect applicants who are refused broadcasting licences on frivolous grounds.<sup>201</sup>

## **4.2 STATE INTERFERENCE IN THE OPERATIONS OF ZNBC**

ZNBC, which is the main radio and television station in Zambia, is established under section 3 of the ZNBC Act as a body corporate having independent legal personality. The control of ZNBC is vested in the Board of Directors of the corporation who are appointed by Minister of Information. In effect, the control of ZNBC is vested in the Government.<sup>202</sup> The Minister is empowered by section 7 of the ZNBC Act to give to the Board such general or specific directions with respect to the carrying out of its functions as he may consider necessary and the Board is obliged to give effect to such directions. It is, therefore, plausible to argue that ZNBC practically functions under the directions of the Minister of Information. This overwhelming government control of ZNBC virtually renders the corporation a government mouthpiece.<sup>203</sup> The sweeping powers conferred upon the Minister of Information by the ZNBC Act empower him to even direct the style and content of the corporation's radio and television news broadcasts thereby allowing him to lay prior restraints on what the corporation can broadcast. This is clearly a flagrant violation of the tenets of

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<sup>201</sup> Ibid.

<sup>202</sup> Report of the Task Force on Media Law Reform, Para. 3.2, p.46.

<sup>203</sup> K. Hang'andu, Supra note 89, p.132.

a free and independent press. By an independent press is meant a press independent from governmental, political or economic control.<sup>204</sup>

What is even worse is the Minister's power to censor ZNBC broadcasts. In this regard, section 27 of the ZNBC Act makes the Minister of Information a censor capable of prohibiting in advance of publication, the broadcast of certain matter which in his opinion is defamatory, blasphemous, obscene or seditious. It is argued that this is a flagrant and outrageous violation of freedom of the press. As Mr. Hang'andu argues, "the Minister of Information may ban any political programme on radio or television which sharply criticises the government if in his opinion he deems it seditious. Section 27 of the ZNBC Act may equally be employed to unfairly deny opposition parties coverage time on television if the Minister of Information thinks that their criticism of government may possibly cause disaffection among the viewers and, therefore, amount to sedition."<sup>205</sup>

In this connection, Dr. Chanda ably sums up the subject in the following words:

...The ZNBC does not enjoy any institutional independence given the Minister's vast powers over the Board as well as his power to censor broadcasts. The lack of independence of ZNBC has limited the public's access to the state-owned media as the opposition parties and perceived critics of the government are rarely given coverage. Instead the ruling party and government officials monopolise the [state-owned] media.<sup>206</sup>

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<sup>204</sup> Windhoek Declaration on Promoting an Independent and Pluralistic African press, May 3, 1991, Article 2.

<sup>205</sup> K. Hang'andu, Supra note 89, p.133.

He further argues that the public media in Zambia must be freed from government control so as to provide equitable access to pluralistic and divergent views and information. Furthermore, in order to protect journalists against government interference, Dr. Chanda advocates for the establishment of an Independent Broadcasting Authority which would create a structure of formal independence likely to give ZNBC journalists greater confidence in their capacity to operate in a professional manner.<sup>207</sup>

#### **4.3 THE NEED FOR THE ESTABLISHMENT OF AN INDEPENDENT BROADCASTING AUTHORITY (IBA)**

As earlier noted, individuals and companies are more often than not denied radio and television broadcasting licences by the Minister of Information. This is due to the vast discretionary power given to the Minister of Information under the ZNBC Act to either issue or refuse to issue a radio or television broadcasting licence. It is against this background that media organisations, particularly ZIMA, have advocated for the establishment of an Independent Broadcasting Authority (IBA) with responsibility to allocate licences and frequencies and to regulate broadcasting services in Zambia.

In this regard, it would be recalled that the Task Force on Media Law Reform recommended the creation of an Independent Broadcasting Authority with responsibility to regulate broadcasting services in Zambia and the allocation of licences and frequencies. Moreover, the IBA should be vested with the

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<sup>206</sup> A.W. Chanda and M. Liswaniso, *Supra* note 83, p.26.

responsibility to monitor the operations of broadcasters and, where necessary, to revoke licences for failure to comply with the terms and conditions of the licence.<sup>208</sup> There is, therefore, urgent need to enact a piece of legislation providing for the establishment, functions, powers and membership of the IBA. The Act establishing the IBA must clearly spell out that the IBA shall enjoy institutional independence, that is to say, it shall be independent and free from any form of government interference and control. This means that public servants, Members of Parliament and political office bears should not be eligible to serve as members of the IBA. Furthermore, the members of the IBA should not maintain any interest, political or financial, that could impair or compromise their ability to discharge their duties in a fair and impartial manner.

Moreover, the Act creating the IBA must clearly state the procedure of appointment of members of the IBA. It is suggested that members should be selected from a cross-section of society so as to ensure diversity of political, ethnic, religious, social and professional background. The appointment process should contain safeguards, such as appointment by an independent panel of generally respected citizens, to ensure that neither the government nor any political party will be able to dominate or undermine the independence of the IBA.

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<sup>207</sup> Ibid., pp.26-27

<sup>208</sup> See Report of Zimbabwe's National Forum on the Future of Broadcasting, jointly organised by MISA – Zimbabwe and Panos Institute of Southern Africa, held between 12<sup>th</sup> – 16<sup>th</sup> February 1997.



The members of the IBA should serve for a fixed term of office of say five years, and re-appointments should be for a second term only.<sup>209</sup> Furthermore, the members of the IBA should elect a chairperson from amongst themselves, and in the absence of the chairperson members should elect someone to act as chairperson. To ensure institutional independence of the IBA, it is suggested that it should be funded by money voted by Parliament and not by direct grants from the government.<sup>210</sup>

It is further suggested that the IBA should be directly responsible to Parliament. The IBA should be presenting its reports to Parliament annually, detailing its actions during the year. To prevent the IBA from abusing its powers, its decisions should be subject to appeal to the High Court which should have the final say on the matter. It is hoped that the enactment of a new piece of legislation creating the IBA will foster equitable pluralism of the airwaves, and will provide safeguards through an appropriate regulatory mechanism. The new Act should demonopolise broadcasting and should strive to serve the interest of Zambians by offering public, community and commercial broadcasting. To this end, ZNBC should be restructured to become a true public service broadcaster, for the purposes of surviving in a competitive environment and legitimately serving public needs. In other words, ZNBC should be transformed from a state-

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<sup>209</sup> D. Nthengwe and B. Mwape, Supra note 61, p.195.

<sup>210</sup> For a detailed discussion of membership and financing of the IBA see J. Hills and M. Michalis, Independent Regulation and Broadcasting, (London, International institute for Regulators in Telecommunications, 1998), pp.2-3.

run entity into a public service broadcaster so as to bring it in line with the new dispensation of liberalisation.

The control of ZNBC should be vested in an independent Board of Directors accountable to an Independent Broadcasting Authority. It is interesting to note that the government is presently considering the possibility of establishing an Independent Broadcasting Authority<sup>211</sup> as well as commercialising ZNBC.<sup>212</sup>

The Fifth Chapter, concludes the study by making some recommendations on the ways in which press freedom can be more effectively protected and promoted in Zambia's Third Republic.

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<sup>211</sup> The Zambia Daily Mail, February 8, 2000, p.1, "Broadcasting Monopoly to end soon, says State."

## CHAPTER FIVE

### CONCLUSION AND RECOMMENDATIONS

#### 5.1 SUMMARY

The first chapter discussed the historical development of the print media in Zambia from 1906 to 2000. It was established that the majority, if not all, of the newspapers in the pre-independence era were owned and controlled by the white settlers who used their papers to perpetuate white rule in Northern Rhodesia (now Zambia). The post-independence era, in particular the Second Republic, saw the nationalisation of privately owned newspapers. The only truly independent newspaper that existed and challenged the policies of the government during the one party state era was the National Mirror.

On the other hand, the advent of the Third Republic witnessed the proliferation of privately owned newspapers such as The Post, The Confidential, The Sun, The Monitor, Financial Gnome, The Citizen and many more. It was noted that the Third Republic has been characterised by incessant arrests and prosecution of journalists in the private media for allegedly being opponents working to see the downfall of the MMD government. Besides the problem of polarisation between government owned and privately owned media, the MMD government has completely reneged on its pre-1991 promise to privatise the state-owned media. In addition, the government continues to deny independent newspapers revenue by directing all its advertisements to the state-owned

media. The government has also denied private newspaper companies critical revenue by discontinuing the purchase of newspapers printed by private media institutions.

The second chapter discussed in detail the nature, meaning and constitutional protection of press freedom in Zambia's Third Republic. The chapter demonstrated that a free and independent press is the cornerstone or foundation of any emerging democracy, Zambia inclusive. It was noted that the values of democracy, transparency, accountability and good governance can only be upheld where there is a free and independent press. In short, a free and independent press is indispensable in an open and democratic society.

It was further established that the Constitution of Zambia Act No. 1 of 1991 (as amended) does not expressly provide for press freedom as a fundamental human right distinct and separate from the general right of freedom of expression despite numerous representations for such express provision from a number of people, including some donors, journalists and human rights Non-governmental organisations. We pointed out that the Mwanakatwe Constitutional Review Commission recommended express entrenchment of press freedom in the Republican Constitution. However, this recommendation was rejected by the government.

Whilst appreciating that society is entitled to place some legitimate restrictions on the exercise of freedom of the press, it was observed that the host of qualifications or exceptions contained in Article 20(3) of the Republican

Constitution completely fetter the protection of freedom of the press which is purportedly guaranteed by Article 20(2). It was also noted that restrictions on press freedom under the Zambian Constitution do not meet international standards.

The third chapter focused on the need for media law reforms in Zambia's Third Republic. The chapter demonstrated that even after thirty-six (36) years of political independence Zambia still retains a myriad of archaic pieces of legislation in the statute books which directly or indirectly hinder press freedom and ultimately the very survival of media institutions. It was noted that most of the repressive laws were enacted by the British colonial masters and their main purpose was to suppress the African struggle for independence.

In particular the chapter examined some of the obnoxious provisions in the Penal Code and the State Security Act. It was argued that sections 53, 57, 67 and 69 of the Penal Code are unconstitutional, outdated and incompatible with the present democratic dispensation; and that they must be repealed immediately. Similarly, it was demonstrated that sections 4 and 5 of the State Security Act are unconstitutional and incompatible with the dictates of an open and democratic society insofar as their overall effect is to deny the public and the press access to information held by the government and its organs. It was argued that the two provisions must be repealed immediately.

Furthermore, the chapter established that the Zambian constitution does not guarantee the right of access to information held by the government. We

saw that the Mwanakatwe Constitutional Review Commission recommended the inclusion of this right in the Constitution but the government rejected the recommendation on the ground that guaranteeing such a right would compromise state security and disrupt the smooth operation of Government Departments. In addition, it was stated that there is an urgent need to guarantee the right of access to information held by the government in the Republican Constitution. Furthermore, in order to put the constitutional guarantee of the right into practice, there is need to enact a Freedom of Information Act. Moreover, it was observed that government is currently considering enacting a Freedom of Information Act which will give the public and the press wide access to public information that does not compromise national security. To this end, government has intimated that the Act will declassify certain kinds of information.

The fourth chapter critically examined the law granting state monopoly in broadcasting and the need for the establishment of an Independent Broadcasting Authority (IBA). It was established that in addition to conferring a monopoly in broadcasting upon ZNBC, the Zambia National Broadcasting Act (ZNBC Act) confers vast powers upon the Minister of Information to issue broadcasting licences and censor broadcasts. It was further suggested that ZNBC should be restructured or transformed from a state-run entity into a genuine public service broadcaster along the lines of the British Broadcasting Corporation (BBC) or sold to a private enterprise.

Furthermore, it was argued that a piece of legislation creating the Independent Broadcasting Authority (IBA) should be promulgated as soon as possible. The Act should vest the responsibility of regulating broadcasting services and issuing of broadcasting licences in the IBA. It was further stated that ZNBC should be controlled by an independent Board of Directors accountable to the IBA.

Above all, the IBA should enjoy institutional independence from any form of government interference and control. In this regard, it was recommended that the IBA should be funded by money voted by Parliament and not by direct grants from the government. Funding the IBA by way of direct grants from the government is likely to compromise the institutional independence of the IBA. Moreover, it was argued that the new piece of legislation establishing the IBA should completely demonopolise broadcasting in Zambia. In addition, the new Act should strive to serve the interest of Zambians by offering public, community and commercial broadcasting services.

## **RECOMMENDATIONS FOR MEDIA REFORM IN ZAMBIA'S THIRD REPUBLIC**

### **5.2.1 CONSTITUTIONAL GUARANTEE OF PRESS FREEDOM AND THE RIGHT TO GOVERNMENT-HELD INFORMATION**

The Constitution of Zambia Act No. 1 of 1991 (as amended) does not adequately protect and promote press freedom in that it does not expressly

provide for freedom of the press and other media as a fundamental human right distinct and separate from the general right of freedom of expression. Moreover, the numerous derogations or exceptions contained in Article 20(3) render the purportedly guaranteed right completely meaningless in the sense that repressive laws and executive actions may be easily justified as coming within the exceptions.

It is accordingly recommended that the Republican Constitution should expressly guarantee press freedom in absolute language along the lines of the American Bill of Rights which guarantees press freedom in a positive manner without any derogations or list of exceptions which render the protected right completely watered or fettered.

However, taking into account the fact that press freedom anywhere in the world is relative and not absolute, it is further recommended that any legitimate restriction on press freedom must be prescribed by law; reasonable; recognised by international human rights standards; and necessary in an open and democratic society.

Moreover, the Constitution does not guarantee the right of access to information held by the government and its organs. Considering the crucial role that informed opinion plays in fostering good governance and democracy, it is accordingly recommended that the constitution should contain a provision to the effect that every person shall have the right of access to all information held by the state or any of its organs at any level of Government insofar as such



information is required for the exercise or protection of any of his or her constitutional rights. Furthermore, any restriction sought to be imposed on the right of access to public information must be prescribed by law; reasonable; recognised by international human rights standards; and necessary in an open and democratic society.

### **5.2.2 REFORM OF REPRESSIVE MEDIA LAWS AND ENACTING NEW LEGISLATION**

Despite the endorsement of a new democratic order in 1991, Zambia still retains a myriad of repressive or draconian pieces of legislation in the statute books which directly or indirectly hamper or hinder freedom of the press and ultimately the very survival of media institutions. The draconian laws in question include the Penal Code, State Security Act, Protected Places Act, National Assembly (Powers and Privileges) Act, Printed Publications Act, Theatres and Cinematography Act, Zambia National Broadcasting Act, Radio Communications Act, Defamation Act, Ministerial and Parliamentary Code of Conduct Act and the Contempt of Court (Miscellaneous Provisions) Act, etc.

To ensure effective protection and promotion of freedom of the press and other media in Zambia's Third Republic, it is accordingly recommended that Parliament should immediately abrogate or at least amend all laws and must not pass new laws which directly or indirectly impinge on freedom of the press and other media. In this connection, the government should implement the

recommendations of the Task Force on Media Law Reform of January 2000 as soon as possible.

In addition, Parliament should enact new pieces of legislation specifically designed to foster and promote freedom of the press and other media. In particular, it is accordingly recommended that Parliament should enact a Freedom of Information Act that will give the public and journalists wide access to public information. It is hoped that greater access to public information will create an informed citizenry, which is necessary for sustaining a viable democratic society. Furthermore, it is recommended that Parliament should enact a new piece of legislation providing for the establishment, functions, powers and membership of an Independent Broadcasting Authority (IBA) with responsibility to regulate broadcasting services in Zambia. This piece of legislation must vest the responsibility of issuing broadcasting licences and allocating frequencies in the IBA. The new Act must provide for the institutional independence of the IBA from any form of government interference and control. Moreover, the new piece of legislation should expressly demonopolise broadcasting services in Zambia in order to promote pluralism or diversity of ideas and information.

### **5.2.3 PRIVATISATION OF ALL STATE-OWNED MEDIA INSTITUTIONS**

It would be remembered that the MMD government has completely reneged on its pre-1991 promise to privatise the state-owned media. The

government has maintained that anyone who wishes to venture into newspaper publishing or broadcasting is free to do so and to compete with the subsidised government owned newspapers (Times of Zambia and Zambia Daily Mail, etc) as well as the country's only national broadcaster, ZNBC.

However, considering that state-ownership and control of the media always poses the real danger of the government in power or the ruling party using it for its own benefit (that is, to feather its own political nest), it, is accordingly recommended that all state-owned media institutions should be privatised immediately in line with the MMD's policy of liberalisation and private enterprise. To this end, the two government newspaper publishing companies, Times Printpark Limited and Zambia Daily Mail Limited, Zambia Information Services (ZIS); and Zambia News Agency (ZANA) should be sold to private enterprise immediately.

Similarly, ZNBC should either be transformed into a genuine public service broadcaster along the lines of the British Broadcasting Corporation (BBC) or sold to private enterprise as soon as possible. If transformed into a public service broadcaster, then it is further recommended that ZNBC should be controlled by an Independent Board of Directors directly accountable to an Independent Broadcasting Authority (IBA).

#### **5.2.4 HARRASSMENT OF INDEPENDENT MEDIA PERSONNEL BY STATE FUNCTIONARIES**

Zambia's Third Republic has been and continues to be characterised by rampant cases of harassment, intimidation, arrests and prosecution of independent media personnel for allegedly being opponents working to see the downfall of the MMD government. The government perceives independent media personnel as the "opposition" and as a result nearly every day there are press reports of a journalist from the independent media being either arrested, harassed, intimidated or being prosecuted in the courts of law on flimsy charges such as defamation of the president, and being in possession of classified documents, etc.

It is accordingly recommended that government should forthwith stop harassing the independent press under whatever excuse or pretext. To this effect, papers should be free to operate and publicise any information they feel like publishing. On the other hand, members of the public should retain the right to sue newspapers for defamation if they feel that a particular newspaper has maligned or defamed them. Furthermore, the government should create an atmosphere in which the independent press will feel that they are free to operate and publicise any information to the public.

### **5.2.5 TAXATION AND IMPORT DUTIES ON NEWSPAPER INPUTS**

It may be noted that about ninety-nine percent of inputs into newspaper production in Zambia are imported. Moreover, the prices of newspaper inputs are on the increase whenever the value of the Kwacha depreciates against international currencies. The situation is worsened by high taxes and import duties imposed on these inputs. The high cost of inputs has led to increases in the cover price of newspapers. The net consequence is that many people in the country cannot afford to buy newspapers and hence have no access to information.

It is accordingly recommended that:

- (a) inputs for the media industry be gradually exempted from import tax duty;
- (b) VAT on advertising be reduced to increase the advertising base;
- (c) VAT be removed on all educational materials and programmes; and
- (d) Company tax for companies involved in the media industry be reduced to encourage investment in the sector.

The above measures are likely to attract more investors, thereby enabling the more rapid growth in the size and diversity of the media industry in Zambia's Third Republic.

## **5.2.6 GOVERNMENT'S ATTITUDE TOWARDS PRIVATE MEDIA INSTITUTIONS**

It may be noted that although government has liberalised the media industry, it is still a key player in the allocation and distribution of resources to the sector. There has been an unfair allocation and distribution of resources in the sense that government directs all its advertisements to the government-owned media institutions. The private media institutions rarely receive advertisements from the government and government departments. Furthermore, the government has denied private newspaper publishing companies revenue by boycotting the purchase of their newspapers.

It is accordingly recommended that government should immediately abandon its practice of withholding advertisements from private media institutions, but should instead equitably distribute advertisements to all media institutions. Moreover, government should abandon its boycott of newspapers printed by private media institutions.

## **5.2.7 RELATIONSHIP BETWEEN PUBLIC AND PRIVATE MEDIA**

It would be recalled that there is polarisation between the government and the private media institutions. The government-owned media are seen as too pro-government while the private media are viewed as too critical of government. The division has led to the establishment of two main media organisations, ZIMA and PAZA, representing employees in private and government media institutions

respectively. It is the author's view that this polarisation does not favour the development of the media industry in Zambia's Third Republic in terms of the quality of information that is made available for consumption to the public.

It is accordingly recommended that ZIMA and PAZA should work together and formulate a single code of Ethics. The two media organisations should work towards the creation of a single Media Council with jurisdiction over professional and ethical matters affecting their members with a single code of Ethics. However, the Media council should be voluntary and not statutory; and should comprise independent minded eminent persons in society.

#### **5.2.8 NATIONAL INFORMATION AND MEDIA POLICY**

The MMD government has not yet formulated a pragmatic national Information and Media Policy. It is accordingly recommended that government should come up with a clear policy on the Mass Media in Zambia which will be a guide to its dealings with the press. Moreover, this media policy should be a product of consensus and consultation with all stakeholders involved in the media industry. The actions of government vis-à-vis the media need to be seen in the light of a clear media policy. An articulated Media policy should be concerned with both the philosophical outlook of the roles of the media in a given society as well as the modus operandi in attaining these roles. It is in the Media Policy document that the role of the mass media in a democracy such as ours would be clearly spelt out so that government action is guided by it. It is the

present author's considered view that without a pragmatic Media Policy, the MMD government will continue groping in the dark as far as the effective protection and promotion of press freedom in Zambia's Third Republic is concerned.



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