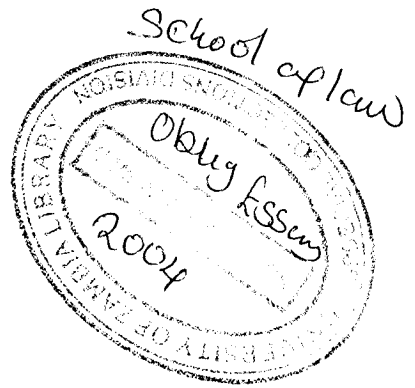


**THE FREEDOM OF EXPRESSION IN ZAMBIA: ARE
THERE ENOUGH LAWS TO STRENGTHEN THE
EXERCISE OF THIS FREEDOM OR DO MOST
LAWS PUT IN PLACE ROB IT OF ITS EFFICACY?**

BY

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LLB

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**A directed research essay submitted to the school of law of the
University of Zambia in partial fulfillment of the requirements for the
award of the Degree of Bachelor of Laws (LLB).**

**School of Law
University of Zambia
Lusaka**

December, 2004

THE UNIVERSITY OF ZAMBIA

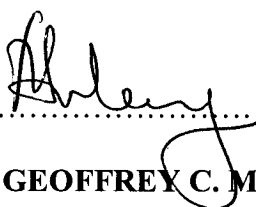
SCHOOL OF LAW

I recommend that the directed research essay prepared under my supervision by
BRIDGET HARAWA, entitled;

**THE FREEDOM OF EXPRESSION IN ZAMBIA: ARE THERE ENOUGH
LAWS PUT IN PLACE TO STRENGTHEN THE EXERCISE OF THIS
FREEDOM OR DO MOST LAWS ROB IT OF ITS EFFICACY?**

be accepted for examination. I have checked it carefully and I am satisfied that it fulfills
the requirements relating to format as laid down in the regulations governing Directed
Research essays.

Date : 28/12/04

Supervisor: 

MR. GEOFFREY C. MULENGA

DEDICATIONS

To my late father, **MR. JOHN D. HARAWA**, without his continuous love and support up to the time of his untimely death, I would never have gotten this far.

You may be gone dad, but your spirit will forever remain alive in me. Thank you for the seed you sowed in me, though you may not be around to enjoy its fruits, I know you are looking down at me very proud of the work you invested in me.

May your soul rest in peace.

To my beloved mother with profound love and gratitude, I remain forever indebted to you.

To my son, Mark, the joy of my life. You have been a great inspiration and a source of hope in all I do.

To my husband, Moffat, without your love and friendship, I would never have had the strength to go on. I love you.

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Special thanks go to my supervisor, MR. GEOFFREY CHILUFYA MULENGA, for guiding me throughout the completion of this work and for being so patient with me.

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I would also like to thank my sister Aziza and brothers, Feizal and John for all their love and support in my obtaining this degree.

Lastly, but not the least, I thank all who may not be mentioned but have helped in one way or another in the completion of this work.

I remain grateful to you all.

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ABSTRACT

The Constitution of Zambia, which is the supreme law of the Land, does recognize and guarantee the freedom of expression under Article 20. The constitution, under Article 20(i) provides that:-

“Except with his own consent, no person shall be hindered on the enjoyment of his freedom of expression, that is to say, freedom to hold opinions without interference, freedom to impart and communicate ideas and information without interference, whether the communication be to the public generally or to any person or class of persons, and freedom from interference with his correspondence.”

The preamble to the Zambian Constitution declares that Zambia will ‘uphold the values of democracy, transparency, accountability and good governance.’ Transparency, accountability and good governance are only possible where there is freedom of expression and the right of the public to know is assured. Freedom of expression includes not only freedom to hold opinions without interference, but also freedom to receive ideas and information, and to impart and communicate ideas and information without interference. “Freedom of expression is the life-blood of a democracy.” It has been observed that “democratization is closely tied to freedom of expression, together with that of assembly and association.”

The value of free expression is that it assures the individual of self-fulfillment and it also serves as a means of attaining the truth. Free speech in addition, creates a method of security for the participation of the members of a society in political and social decision

making and it further serves as a means of maintaining the balance between stability and change in a society.

In a democratic society, such as Zambia, what is at stake is the fundamental principle of the people's right to know. Since development is tied to good governance, which includes the freedom of expression, government has a duty to ensure that this freedom is guaranteed.

This study shall consist of four chapters. The first chapter will outline what the freedom of expression is, its sources and its nature. The second chapter will look at the development of the freedom of expression in Zambia. In the third chapter, a comparison will be drawn between laws that derogate or restrict the freedom of expression and those that enhance the exercise of this freedom. A general conclusion on whether there are enough laws in Zambia to secure and facilitate the exercise of the freedom of expression will make the fourth and final chapter of this work and recommendations will be made in the same chapter.

CHAPTER ONE

INTRODUCTION

The modern state is not an end by and for itself. It essentially derives legitimacy from acting according to human needs and responding to them in a never ending commitment to attain justice in a changing society. However, it is an essential fact of human life that we lack, to a large extent, comprehensive insights into what truly is right and just.

Democracy needs a long-term body whose thinking revolves around fundamental rights. The qualities of this body should be found in the scope of these fundamental rights; they stand for areas of human needs and necessities which are central to human existence. It follows that organs and procedures for the protection of fundamental rights must provide the atmosphere and the security without there which can be no discussion of the individual's plight. There ought to be a forum of communication encouraging the defenceless to speak up, even in cases which have gone unheard in democracy's conflict of opinions or have had no opportunity to emerge.¹

THE FREEDOM OF EXPRESSION

The theory of freedom of expression as known in recent times has developed from a background of open and unrestricted speech as was advocated for by such documents as the English Bill of Rights, 1689, from which emerged the Universal Declaration of Human Rights (UDHR), 1948.²

¹ "Fundamental Rights in Democracy", Jörg Paul Müller in HUMAN RIGHTS LAW JOURNAL VOLUME 4/Part 2 1983, p136 - 137

² R. E. Hiebert, Mass Media IV, New York, Longman, 1991, p.499.

Freedom of Expression has no precise definition. However, the underlying principle in freedom of expression is that an individual must be given as much latitude to express his thoughts and ideas as he requires without any unjustified restrictions. This freedom of an individual extends to his being free to receive whatever diverse views, on as many subjects as he desires. Therefore, there are two freedoms embodied in the freedom of expression. Firstly, there is the freedom to impart ideas, and secondly, that of receiving such ideas. With these two freedoms, an individual ensures that he attains personal fulfillment.³

It has been observed that “democratization is closely tied to freedom of expression, together with that of assembly and association.”⁴ Without a means of advancing the public interest by discriminating facts and opinions, it is impossible for individuals in society to make responsible judgements. The value of free expression is that it assures the individual of self-fulfillment and it also serves as a means of attaining the truth. Free speech in addition, creates a method of securing the participation of the members of a society in a political and social decision-making and it further serves as a means of maintaining the balance between stability and change in a society

Freedom of expression includes press freedom as it is through the medium of a free press that the individual is assured of the most effective way of influencing the government.⁵

Professor Brendt⁶ Head of Media Law of London University says of press freedom,

³ Derol, K, Mass Media and The Supreme Court, Hastings House, New York, 1982, p.350.

⁴ Zambia Human Rights Report, 1997, AFRONET, Lusaka, 27th April, 1998, p.11.

⁵ HUMAN RIGHTS LAW JOURNAL Volume 4/Part 2, 1983 “Freedom of the Press in Nigeria” by B. Oloinna Okere, N. P. Engel Publisher, p.150.

⁶ Quoted from Phillip Musonda, Freedom of Expression – A Serious Misunderstanding or a Fantastic Fiction in a Brief Comparison of the UK, USA and Zambian Situations.

"It is derivative, since the press is an instrument to foster free speech, if the press has no freedom, to inform the public, the public then have no freedom of speech."

Press freedom together with freedom of expression are therefore conceived as part of democracy's structure and they are not optional. Freedom of expression is, a constitutional condition for democracy.⁷

In the world today, there is a general trend towards liberal democracy, since particularly the collapse of communism. This trend has been made possible by the inalienable right of people to receive and impart ideas. A society endures to civilization only where ideas can be floated and sifted through to achieve progressive ideas. Therefore, a society that does not enjoy freedom of expression is robbed of an essential feature of society, that feature being evolution. To violate an individual's right to freedom of expression is to infringe the collective right of others to receive any information whatsoever and to have access to the thoughts expressed by others. (Prof. C. Anyangwe, The Right to Dissent (a paper presented at the Human Rights and the Law Seminar at ZIALE, 13-17 July 1998, Lusaka pg4).⁸

Generally, freedom of expression embraces other rights, such as the right to dissent, in as much as every individual enjoys a right to disagree, to protest and to hold contrary views

⁷ Ibid pg. 6.

⁸ Prof. C. Anyangwe, The Right to Dissent, a paper presented at the Human Rights and the Law Seminar at ZIALE, 13-17 July 1998, Lusaka pg4.

or opinions on the strength of the above aspect of freedom of expression, some scholars have referred to this freedom as

*“a superior right, which is the foundation of other rights.”*⁹

The freedom of expression thus includes not only freedom to hold opinions without interference, but also freedom to receive ideas and information without interference. Freedom of expression as earlier alluded to is “the life-blood of a democracy.”¹⁰ Democracy can only exist where there is freedom of expression and the right of the public to know is assured. Freedom of expression helps an individual to attain self-fulfillment, discover the truth, strengthen his capacity to participate in a democracy society and it also provides a mechanism by which to establish a reasonable balance between stability and social change.”¹¹

SOURCES OF FREEDOM OF EXPRESSION

Internationally, there are several conventions which have given recognition to freedom of expression.

The Universal Declaration of Human Rights (UDHR), adopted by the General Assembly in 1948 was the first document to codify the International Bill of Human Rights, which document has been a model upon which most constitutions frame their Bill of Human Rights. The UDHR provides that:

⁹ Resolution xxi(a) of the Israeli and Lawyers’ Association Incorporation Symposium on FREE SPEECH (14 – 21 April, 1986, Tel Aviv University, T Aviv).

¹⁰ Chanda A. W. “The State Security Act vs Open Society: Does a Democracy Need Secrets?” Zambia Law Journal Vol. 29 1997 UNZAPRESS, p. 34.

¹¹ Ibid.

“Everyone has the right to freedom of opinion and expression: this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media regardless of frontier.”¹²

The International Convention on Civil and Political Rights, make provision for freedom of expression under Article 19, with similar wording. These provisions assert the liberty of peoples to receive and impart information and ideas of various forms. These documents echo the realization by the states of the world, of the importance and essence of such a freedom to society.

The European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 also recognizes under Article 10 that;

“Everyone has a right to freedom of expression. This right includes freedom to hold opinions and to receive and impart information and ideas without interference ..”

In like manner, the Organisation of American states (OAS) as a regional political organisation has made fruitful efforts towards protecting human rights in the American region. This document is given enforcement through the Inter-American Court of human Rights.

¹²Article 19 of the Universal Declaration of Human Rights 1948.

Closer to home, the African Charter on Human and People's Rights, in Article 9 provides that;

"1. Every individual shall have the right to receive information.

2. Every individual shall have the right to express and disseminate his opinions within the law."

Locally, the Constitution of Zambia, which is the Supreme Law of the Land, is the fundamental source of freedom of expression through its Bill of Rights found under Part III. The Zambian Constitution under Article 20(1), which in large measure reflects Article 19 of the International Convention on Civil and Political Rights, 1966 and the Universal Declaration of Human Rights 1948, 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 receive ideas, and information without interference, whether the communication be to the public generally, or to any person or class of persons and freedom from interference with his correspondence."

This article further provides under sub-Article 2 that;

"subject to the provisions of this constitution, a law shall not make provision that derogates from freedom of the press."

As earlier alluded to, freedom of the press is vital to freedom of expression.

On the face of it, the guarantee afforded by Article 20(1) of the Zambian Constitution seems broad in that the freedom of expression includes not only the right to hold opinions without interference, but also the right to impart and communicate ideas and information without interference and freedom from interference with one's correspondence. In providing for this freedom so broadly, the Zambian Constitution has recognized the important role freedom of expression plays in the democratic process. Similarly, by prohibiting the legislature from passing laws that may derogate from freedom of the press, the constitution underscores the indispensable role the press plays in the realization of freedom of expression. Without a free press, freedom of expression without a free press freedom of expression will just be an illusion.¹³

The Zambian Constitution, like other International human rights instruments, does make provision for the freedom of speech and freedom of the press and in this sense provides a fundamental source of the freedom of expression and press freedom in Zambia.

THE NATURE OF FREEDOM OF EXPRESSION

In the European case of **Handyside V United Kingdom**,¹⁴ it was stated that;

“freedom of expression constitutes one of the essential foundations of a democratic society, one of the basic conditions for its progress and for the development of every man it is applicable not only to ‘information’ or ‘ideas’ that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock

¹³ CHANDA A. W., “Freedom of Expression and the Law in Zambia” Zambia Law Journal. Volume 30.

¹⁴ European Court of Human Rights, HANDYSIDE Judgement of 7 December 1976, series A No. 24, 23, para. 49.

or disturb the state or any section of the population. Such are the demand of pluralism, tolerance and broadwardness without which there is no 'democratic society.'"

Going all the way back to the genesis of classical liberal thought in the English, French and American documents that live at the origin of the western tradition of human rights thinking, there is no lack of equally convincing formulations of freedom of expression as a pre-requisite for democracy. It is common to consider, within this tradition, that the freedom of expression, like other civil and political rights, requires only negative obligations on the part of the state. Meaning that the state only has an obligation to refrain from interfering with this right and not a positive one in favour of this right. In contrast, cultural, economic and social rights are seen as requiring the state to take positive action, to ensure the protection of these rights. For example, in ensuring that cultural, economic and social rights are well secured for their enjoyment, the state is expected to provide money, services, infrastructure and so on.

However, there are certain challenges that are placed to the idea asserting that civil and political rights such as the freedom of expression only requires a negative obligation on the part of the state and not in a positive one. In ensuring that freedom of expression and freedom of the press is properly secured by the state, is it enough to simply refrain from interfering with the enjoyment of these rights or need the state take a further step by ensuring a conducive environment for the exercise and enjoyment of these freedoms? Is it enough to simply refrain from interfering with the impartation and communication of ideas and information as well as expression of opinion and refrain from interfering with the press freedom and the right to one's correspondence and not secure a platform on

which these rights should be exercised and enjoyed? How does one enjoy press freedom if there is no media put in place such as television, radio and newspapers? How does one express his opinion if there is no state and private medium through which to express this opinion?

Clearly, the enjoyment of civil and political rights such as press freedom and freedom of expression, far from requiring only non-interference from the state, are to a great degree dependent on the state's positive engagement and even financial outlay.¹⁵

Both international and national courts have increasingly taken cognizance of the positive obligations on the part of the state to take steps to guarantee further aspects of freedom of expression.¹⁶ These include properly investigating crimes which have a chilling effect on the freedom of expression.¹⁷ Other obligations require balance and impartiality on state funded broadcasters and an obligation on public authorities to provide access to the information they hold.¹⁸

Recently, case law has revealed that states have a positive obligation towards freedom of expression.

In the Inter-American case of **Oropeza V. Mexico**,¹⁹ the Commission on Human Rights concluded that the state's failure to investigate and criminally sanction the perpetrators of the assassination was a violation of the right to 'public and free expression of

¹⁵ CLAPP, R. "Challenging the Traditional Conception of Civil Rights: positive obligations of the state under Freedom of Expression." Zambia Law Journal Vol. 33, 2001, UNZAPRESS, p. 52.

¹⁶ Article 19, The Virtual Freedom of Expression Handbook at <www.article19.org/homepage>.

¹⁷ The American Commission on Human Rights in the 1999 MIRANDA V. MEXICO case.

¹⁸ CLAPP, R. Ibid, p. 52.

¹⁹ Inter-American Commission on Human Rights, 19th November, 1999 Report No. 130/99. Case No. 11. 740.

information. In this case, the omonomous victim had criticized the authorities in his newspaper column and denounced close links between drug traffickers and local police. The complainants alleged that the victim had been killed in order to silence his criticism and that the authorities did not conduct an effective investigation, having put at the helm the very person criticized by the victim and actively blocking progress of the investigations. Even eight years afterwards, no person had been convicted of the murder. The Inter-American Commission found in favour of the complainants that the state had not conducted an effective investigation into the murder.

Similar conclusions were arrived at by the African Commission in the case of **COMMISSION NATIONALE DES DROITS DE L'HOMME ET DES LIBERTE'S v. CHAD**,²⁰ as regards the positive obligations of the state to ensure an environment conducive for the enjoyment of freedom of expression. The context in this case was one of generalized massive and severe violations of human rights, including attacks upon journalists both by government agents and unidentified individuals.²¹ It was found in this case that by not protecting journalists, the government had violated the latter's right to disseminate information and the public's right to receive information and opinions.

The United Nations has also made certain recommendations as regards the positive obligation of the state towards the freedom of expression. The 2001 Report of the United Nations Special Rapporteur on Freedom of Opinion and Expression states that even in the most difficult prevailing social and political situations, as in the CHAD case above, the

²⁰ October 1995 No. 74/92 African Commission on Human and People's Rights.

²¹ Ibid.

state is not relieved of its duty to exercise due diligence in the name to justice for victims of Human Rights violations as regards freedom of opinion and expression.²² The Rapporteur comes out firmly in favour of the states' positive obligations in this sense.

CONCLUSION

It can be seen from the above stated cases and UN reports that recently, emphasis has been placed on the positive obligation of the state in ensuring that the freedom of expression is protected and its enjoyment is secured by the state.

The freedom of expression, therefore, does not only require the government's non-interference with its exercise and enjoyment but also requires the government to take positive measures in ensuring that this right is well secured and protected.

The nature of the freedom of expression is that it requires both negative as well as a positive obligations on the part of the state in order that the right is freely exercised and enjoyed by citizens.

²² UN Doc. E/CW. 4/2001/64, para. 52.

CHAPTER TWO

BRIEF BACKGROUND TO THE DEVELOPMENT OF THE FREEDOM OF EXPRESSION

INTRODUCTION

More than fifty years ago, there was no body of international human rights law to speak of. There were, to be sure, philosophies and theories, but the international rules that reflected them were absent. Today, through the United Nations and its half-century of enactments, an impressive body of human rights doctrine is embodied in international law.²³

1. THE THEORY OF NATURAL RIGHTS AND HUMAN RIGHTS

Philosophers and jurists, in their search for a law which was higher than positive law developed the theory of natural law. It was believed that natural law embodied those elementary principles of justice which were right reason, that is in accordance with nature, unalterable and eternal. Natural law theory led to natural rights theory, the theory most associated with modern human rights. Natural rights theory makes an important contribution to human rights. It affords an appeal from the realities of naked power to a higher authority which is asserted for the production of human rights. It identifies with human freedom and equality from which other human rights easily flow.²⁴

²³ Shestack J. J., "The Philosophical Foundations of Human Rights" in Human Rights Concept and Standards, Janusz Synid (ed) 2000, Dartmouth Ashgate, p.37.

²⁴ Ibid. p.38

The theory of natural rights is predicated on the assumption that there are natural laws, both theological and metaphysical, which confer certain specific rights upon individual human beings. It is important to point out that natural law and natural rights can never be a true substitute from the positive enactments of the law of status. However, even after human rights and freedoms have become part of the positive fundamental law of mankind the notion of natural law and natural rights which underlie them constitute “that higher law” will forever remain the ultimate standard of fitness of all positive law, whether national or international.

The theory of natural rights inspired the American Declaration of Independence and the French Declaration of the Rights of Man, and of the citizen. These were the first constitutional instruments of modern times to proclaim that the natural rights of man must, as such, form part of the fundamental law of the state and that their protection was the reason for its existence.²⁵

The following Human Rights Documents had an influence on the development of the freedom of expression:

I. THE MAGNA CARTA

The Magna Carta was born out of the struggle of nobles and barons against the despotic and tyrannical rule of the English Monarchy, King John. King John was forced to sign the Magna Carta after a successful revolt in 1215, which was designed to compel the king

²⁵ Chanda, A., Zambia: A Case Study in Human Rights, Commonwealth Africa. Thesis submitted to Yale University (1992). P.2.

to rule in a fair manner and to protect the barons and nobles from unfair treatment by the crown.

Chapter 39 of the Magna Carta protected the “freeman” against unlawful arrest, detention, expulsion and other institutions on personal liberty. Although initially the Magna Carta was confined to the nobles and barons in the course of time many of the rights and freedoms if guaranteed were extended to the common people.

Today the Magna Carta is marked as one of the most important landmarks in the history of human rights because it was the first written constitutional document to guarantee basic individual rights.²⁶

II. THE ENGLISH BILL OF RIGHTS

The failure of King John’s successors, especially the Stuart Kings, to honour the rights guaranteed in the Magna Carta led to a rebellion by the people against the crown in the 1600s. The outcome of the rebellion was the enactment of the petition of rights of 1628 and the English Bill of Rights of 1689. The Bill of Rights provided for the supremacy of the law, by denying the royal power to suspend it, and for equality before the law, by forbidding its dispensation in individual cases. The Bill of Rights, inter alia, provided for the free election of members of parliament, for frequent sessions, and for immunity of the proceedings in parliament, jury trials, the prohibition of excessive fines and bail as well as cruel and unusual forms of punishment, and freedom of speech.²⁷

²⁶ Ibid. p.10.

²⁷ Ibid

The English Bill of Rights had profound impact on the development of human rights in other countries, including the United States. Because of its emphasis on both political and civil rights, it came to serve as a model of human rights legislation for other countries.

III. THE FRENCH DECLARATION OF THE RIGHTS OF MAN

Another document that had tremendous impact on the development of human rights on the continent of Europe and in the rest of the world is the French Declaration of the Rights of Man (1789 and 1793). The French Declaration not only specifies individual rights but clothes them in a political philosophy with the words, “the aim of all political association is the protection of the natural and imprescriptible rights of man: liberty, property, security and resistance to oppression..... The law is the expression of the general will.”

After its general affirmation of faith, the French Declaration proclaimed the following “natural and imprescriptible rights of man” equality before the law, freedom from arrest except in accordance with the law, freedom of opinion, expression and religion, the right to property, the presumption of innocence, protection against retroactivity of the law, the right to representation in public institutions like parliament, and the right of control over public expenditure.²⁸ Many of the rights listed in the French Declaration found their way in the Universal Declaration of Human Rights.

²⁸ Ibid p. 15

The concept of natural law and natural rights, the English Bill of Rights, and the French Declaration, had a tremendous impact on international efforts to promote and protect human rights, to which the Freedom of Expression belongs.

2. THE DEVELOPMENT OF FREEDOM OF EXPRESSION IN ZAMBIA

The proceeding discussion involves a look at the development of the freedom of expression in Zambia by looking at Zambia's road to democracy from the colonial period to date. Further, instances of violation of the Freedom of Expression during this period will be looked at.

In this chapter, the state of the right to Freedom of Expression during colonial rule in Northern Rhodesia as Zambia was then known will be examined. It is important to examine that period because the colonial experience had a profound impact on the manner and extent to which human rights were respected in the post-independence period to date.

The law that applied to Northern Rhodesia was English Law. Under English law, human rights are protected by common law, as England does not have a written constitution and a Bill of Rights. Thus, the specific provisions protecting the interests of natives contained in the Northern Rhodesia order in Council of 1924 and the Royal Instructions, 1924, were merely supplementary to rights already protected by the common law. In theory, therefore, the people of Northern Rhodesia were entitled to rights and freedoms comparable to those enjoyed by the people in England.

However, in practice the scope of rights enjoyed by Northern Rhodesian natives was very limited. The freedom of thought and expression, in particular was severely limited. Government attempted to stifle freedom of expression by the wide use of sedition laws and censorship. The law against sedition was very comprehensive.²⁹ The government in Council was empowered, by proclamations to declare any newspaper, book or document to be a seditious publication, and to prohibit the importation into the territory of any newspaper, book or document.³⁰ Leading nationalists such as Mainza Chona were prosecuted for sedition and convicted by the courts. In **R V Chona (1962) R & N.L.R. 344**, the accused who was the National Secretary of UNIP, the main nationalist party, issued a press statement describing the evils of colonial rule. The statement alleged that there was no justice whatever under colonial rule anywhere in the world. The accused argued that the words were not seditious and were published merely to identify the errors or defects in the administration of justice, and to try and persuade inhabitants of the territory to procure by lawful means the alteration of the matter he complained of.

The High Court held that the statement was a seditious publication because it intended to bring into hatred or contempt, and to excite dissatisfaction against the administration of justice in the territory, for the purpose of promoting UNIP's policy of making the territory ungovernable.

²⁹ Penal Code No. 42 of 1950, S.53 provided "Any person who (a) conspires with other person or persons to do any act in furtherance of any seditious intention common to both or all of them, or (b) prints or publishes any words or working with a seditious intention or (c) sells, offers for sale, distributes or in his possession any newspaper, book or document the importation of which has been published, or which has been declared to be a seditious publication; or (d) imports into the territory any newspaper, book or document containing any seditious words or writing or any newspaper, book is guilty of a misdemeanor and is liable to imprisonment for 2 years.....

³⁰ Ibid. Ss 53 E and F.

Apart from censoring publications by use of sedition the colonial government, through the Native Film Censorship Board, screened all films that would be seen by Africans.³¹

The criteria for removing scenes included: showing women of easy virtue, prolonged embraces, capture and tying up of Europeans by natives including North American Indians; deliberate murder at close range; all scenes of obvious crimes; noting or insurrection scenes; and political document the importation of which has been prohibited, or which has been declared to be a seditious publication; or (d) imports into the Tertiary any newspaper, book or document continuing any seditious words or writing or any newspaper, book.... is guilty of a misdemeanor and is liable to imprisonment for 2 years demonstrations.³²

In 1963, a Bill of Rights was introduced, for the first time in Northern Rhodesia's history, in the constitution which established self-government.

The decision to incorporate a Bill of Rights resulted from the unhappy experience of the federal era, which was marked by gross abuse of African Rights by the minority white settlers who dominated it.

Human rights of the native inhabitants, including the freedom of expression as shown above were violated during colonial rule. The Africans were, inter alia, denied their basic civil, economic and political rights. The colonial experience left a terrible legacy in terms of respect for human rights and democracy. This had enormous implications for the future of the country.

³¹ Chanda, A. W., Zambia: A Case Study in Human Rights in Commonwealth Africa. A Thesis submitted to the University Law Faculty. 1992. p.86 – 87.

³² Ibid

The Bill of Rights incorporated in the 1963 constitution was reproduced in 1964³³ in the independence constitution, in the one-party constitution of 1973³⁴ and the 1991 constitution. The form and content of most of the provisions had remained the same despite the significant changes in the political system that took place since independence. Freedom of expression was guaranteed by Article 22(1). It encompassed freedom to hold opinions without interference, freedom to receive ideas and information without interference (whether the communication be to the public generally or to any person or class of persons) and freedom from interference with one's correspondence. This freedom was however, not absolute even during the multi-party state. Article 22(2) permitted derogations –

- (a) that are reasonably required in the interests of defence, public safety, public order, public morality or public healing or
- (b) that are reasonably required for the purpose of protecting reputations, rights and freedoms of other persons or the 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 regulating the technical operation of telephone, telegraphy, postal, wireless broadcasting or television; or
- (c) that impose restrictions upon public officers.

³³ Sections 1 – 13 Chapter 3 Articles 13 – 25.

³⁴ The 1991 Constitution of Zambia.

These permitted derogations were so wide as to render the freedom of expression almost meaningless. Almost any law or practice could be made to fit within one of the derogations. The only test such a derogation needed to meet was that it had to be reasonably required in a democratic society, phrases which do not easily lead themselves to unambiguous definitions. A serious defect in Article 22 was that freedom of the press was not expressly protected. Yet it is in contradistinction that freedom of the press is indispensable for the operation of any democratic system of government. The lack of such freedom had serious consequences in Zambia.

Several laws, regulations and practices have operated to severely restrict the freedom of expression in Zambia. It has been shown that there was little difference in the protection of human rights between the colonial period and the post independence period, notwithstanding the existence of a Bill of Rights in the latter period. This is because there has been not enough laws put in place by the legislators to ensure that individual rights and freedoms, such as the freedom of expressing are respected.

Under the current constitution the freedom of expression is guaranteed under Article 20. This encompasses freedom:

To hold opinion without interference; freedom to receive ideas and information without interference, whether the communication be to the public generally or to any person or class of persons, and in freedom from interference with his correspondence. This right is however, still not absolute as uncontrolled liberty could lead to anarchy and disorder as well as the infringement of the rights of others.

For example, there are laws put in place such as the law on defamation under the Defamation Act, Public Order under the Public Order Act Cap 113 of the Laws of Zambia, that ensure that order is maintained and the rights of others are protected.

The constitution attempts to strike a balance between individual liberty and social control. This freedom of expression is subject to restrictions. Article 20 (3)(a) and 21 (2) (a) provide :

“nothing contained in or done under the authority of any law shall be held to be inconsistent with or is 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 morality or public health..... and except so far as that provision or, the thing done under the authority thereof as the case may be, is shown not be reasonably justifiable in a democratic society.”

To be valid, restrictions of fundamental rights must meet certain criteria.

CONCLUSION

Thus, it can be stated that the freedom of expression is guaranteed by the constitution of Zambia, but the question still remains; “is the freedom of expression enjoyed by the majority of Zambians or are the laws put in place to restrict the exercise of it so

restrictive that they in the long run rob it of its efficacy?” In a professed democratic state like Zambia, freedom of expression is not an absolute right, it is subject to restraint as laid down in the constitution. However, it should be emphasized that freedom of expression may be restrained, but such restraint ought to be justified in view of the important purposes freedom of expression serves.

In the next chapter, specific laws that limit the freedom of expression will be analysed as well as those that strengthen it in order to find out whether the freedom of expression is securely guaranteed through the laws put in place in Zambia or not.

CHAPTER THREE

INTRODUCTION

The first and second chapter have respectively outlined what the freedom of expression is, its sources and how it has developed in Zambia from the colonial period to date.

In view of the foregoing, this chapter examines the laws currently in Zambia that strengthens the exercise of the freedom of expression and those that derogate or restrict this freedom. The chapter will proceed to compare the Zambian laws on freedom of expression with the laws of other jurisdictions such as the United States and Britain.

Important laws that restrict or limit the exercise of the freedom of expression will also be analysed in order to outline the extent to which they should limit or restrict the enjoyment of the right to freedom of expression and the extent of its enjoyment shall be looked at as well. At the close of the chapter, it will be evident that the freedom of expression, which embodies press freedom, although not absolute, is a fundamental human rights which ought to be guaranteed and its guarantee should be strongly secured and upheld in every proposed democratic state such as Zambia.

IMPORTANCE AND FUNCTION OF THE FREEDOM OF EXPRESSION

Freedom of expression as secured in Article 20 of the Constitution of Zambia, constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress.

In Indian Express Newspaper Bombay vs Union of India,³⁵ the Supreme Court of India held that freedom of expression serves four broad purposes:

- a) it helps an individual to attain self-fulfillment,
- b) it assists in the discovery of the truth,³⁶
- c) it enhances the capacity of an individual to participate in a democratic society,
and
- d) it provides a mechanism by which to establish a reasonable balance between
stability and social change.

Freedom of expression is also said to be the lifeblood of any democracy. Justice Brandeis of the United States Supreme Court eloquently stated the importance of freedom of expression, when he observed in Whitney V California³⁷ that,

“Those who won our independence believed that the final end of the state was to make them free to develop their faculties and that the deliberate forces should prevail over the arbitrary. They valued liberty both as an end and as a means to an end. They believed that freedom to think is a 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 ordinary adequate protection against the dissemination of noxious doctrine, that the greatest menace to freedom is an inert people, that public discussion is

³⁵ (1986) SC 515

³⁶ “the best test of truth is the power of the thought to get itself accepted in the competition of the market.”
Per Justice Holmes in ABRAMS V US.

³⁷ 274 US 357 1927

a political duty and that this should be is a political duty and that this should be a fundamental principle of American government."

Freedom of expression enhances the capacity of an individual to participate in a democratic society. Alexander Meiklejohn, a renowned jurist, argues that free expression is essential not only to individual choice and development of a person's rational faculties, but also to effective government, the proclaimed intent of democracy. He states that:

*"when men govern themselves, it is they and no one else who must pass judgement upon unwisdom and unfairness and danger. And that means that unwise ideas must have a hearing as well as wise ones, unfair as well as fair, dangerous as well as safe... just so far as, at any point, the citizens who are to decide on issues are denied acquaintance with information or opinion or doubt or disbelief or criticism which is relevant to that issue, just so far the result must be ill-considered, ill-balanced planning for the general good...The principle of freedom of speech springs from the necessities of the program of self-government. It is not a law of nature or reason in the abstract. It is a deduction from the basic...agreement that public issues shall be decided by universal suffrage."*³⁸

Freedom of expression provides a mechanism by which to establish a reasonable balance between stability and social change.

³⁸ Meiklejohn, A., "Political Freedom," in Vol. 1 of Political Rights in the United States, 4th Ed. Boston: Little Brown, (1976) p.9.

SPECIFIC LAWS THAT DEROGATE OR RESTRICT THE EXERCISE OF THE FREEDOM OF EXPRESSION

Article 20 of the Zambian constitution guarantees the freedom of expression. This freedom encompasses freedom: to hold opinions without interference; freedom to receive ideas and information without interference, whether the communication be to the public generally or to any person or class of persons, and freedom from interference with his correspondence.

This freedom is however, subject to restrictions. Article 20 (3) (a) of the constitution provides:

“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 morality or public health....

and so far as that provision or the thing done under the authority thereof as the case may be is shown no to be reasonably justifiable in a democratic society.

The following laws derogate or restrict the freedom of expression:

a) **THE STATE SECURITY ACT, CAP 111**

The State Security Act, which was enacted on 23rd October 1979, replaced the official Secrets Act of 1967. The Act is based on the official Secrets Acts of 1911, 1920 and 1939 of UK. The act was passed at the time of heightened security concerns.

The objects of the State Security Act are: to make better provision relating to state security; to deal with espionage, sabotage and other activities prejudicial to the interests of the state; and to provide for purposes incidental to or connected therewith.³⁹

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 contract, or to communicate information so obtained, or entrusted to one 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 impart if 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.

There is no doubt that these are wide ranging prohibitions. For instance, it may be an offence under Section 4 for a civil servant to pass on, or for a researcher to acquire from him, information about loans obtained by the government from another government or international financial institution not from another government or international financial

³⁹ Preamble, State Security Act, Cap 111, Laws of Zambia (1995 Edition)

institution notwithstanding that the material has no bearing on security and is not even classified as confidential.

Section 5(1) of the Act provides that any person who communicates any classified matter to any person other than a person to whom he is authorized to communicate if or to whom it is in the interest of the Republic 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 and not exceeding twenty years. It shall be an offence for the accused person to prove that when he communicated the matter he did not know and could not reasonably have known that, it now classified matter.⁴⁰ Thus, under this section, 'the government,' in the words of the Attorney-General, 'and the government alone, will decide what is to be classified matter.'⁴¹

Section 5 of the state security act is vague and poses a serious danger to freedom of expression and undermine the right of the public to know. First, it does not provide any criterion upon which documents are to be classified under Section 2, 'classified matter' is merely defined as 'any information or thing declared to be classified by an authorized officer, second, Section 5 does not stipulate who is to do the classification. Since there are no guidelines given, any document could presumably be classified confidential even if it has not the remotest connection with public security. Moreover, any official working for the government could be appointed as an 'authorised officer' to do the classification.⁴²

⁴⁰ Section 5 (2) of Cap 111, STATE SECURITY ACT

⁴¹ ZAMBIA NATIONAL ASSEMBLY HANSARD Vol. 18 – 20, Col 41 (1969)

⁴² Section 2 defines an 'authorized officer' as 'a person authorized by the person responsible for the administration of this Act to exercise the powers or perform the duties conferred or imposed by such provision.'

Access to information and government documents to the public, in this case becomes difficult, if not possible.

Infringement of the two sections attracts penalties which by any standards are excessive. Under the United Kingdom Secrets Act, similar provisions create only misdemeanors and attract imprisonment of no more than two years.⁴³

Moreover, Section 10 of the Act centers a number of presumptions which in effect shift the onus of proof of certain matters to an accused person. An accused person shall be deemed to have acted for a purpose prejudicial to the safety or interests of the republic, unless the contrary is proved.

The provisions outlined above make it very difficult for people to access publicly held information. The effect of lack of access to such information is that the public is ignorant of the operations of government and there is little informed debate on matters of public interest taking place. This results in lack of transparency on the part of government which is detrimental in a democratic society when the people have a right to know what their government is doing in matters that concern the general public. The lack of guidelines in the Act has given rise to abuse of the said provisions.

In the case of the **The People Vs Fred M'membe, Masautso Phiri and Bright Mwape**,⁴⁴ three editors of the Post Newspaper were charged with receiving documents, articles or believe at the time that the same documents, article or information were

⁴³ Official Secrets Act 1989, Section 10.

⁴⁴ HP/38/1996

communicated or received in contravention of Section 4(3) of the State Security Act. The said material which related to government's programme of work on constitutional Reform Activities and a Proposed Referendum on the constitution, appeared in The Post, Edition No. 401 of 5 February 1996, which was banned by the President under Section 53 of the Penal Code.⁴⁵ The High Court held that the accused had no case to answer as the essential ingredient of knowledge or reasonable ground for belief that the information was covered by the State Security Act had not been proved. It had not even been proved that the contents of the documents in issue were in fact matters of public security.

The vagueness of sections 4 and 5 of the State Security Act casts a lot of doubt as to whether the Act is in accordance and compatible with Section 20 of the Constitution of Zambia as well as international standards. The constitution permits the state to impose restrictions on freedom of expression which restrictions must be prescribed by law and must be reasonably be required in the interest of defence, public safety and public order, to be valid. Moreover, the law in question must be reasonably justifiable in a democratic society.⁴⁶

b) **THE PENAL CODE**⁴⁷

Section 57(1) of the Penal Code prohibits sedition. Any person who does any of the following is guilty of an offence and is liable for first offence to imprisonment for seven years:

⁴⁵ Cap 88 of the Laws of Zambia

⁴⁶ Article 20 (3) (a) and (c) of the CONSTITUTION OF Zambia.

⁴⁷ CHAPTER 87 of the Laws of Zambia.

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

Section 60 (1) defines a seditious intention as an intention.

- (a) to advocate the desirability of overthrowing the government of unlawful means; or
- (b) to bring into hatred or contempt or to excite dissatisfaction against the government ...;
- or
- (c) to excite the people of Zambia to attempt to procure the attention, otherwise than by lawful means, of any other nation 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
- (f) to provide feelings of ill-will or hostility between different parts of the community; or
- (g) to promote feelings of ill-will or hostility between different classes of the population in Zambia; or
- (h) to advocate the desirability of any part of Zambia becoming an independent state or otherwise seceding from the Republic; or

(i) to incite resistance, either active or passive, or disobedience to any law or the administration thereof.

Section 60 (2) stipulates that in determining whether the intention with which any act was done, any words spoken, or any document was published, was or was not seditious, every person shall be 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.

These sections are a serious fetter on press freedom and freedom of speech generally. In a democratic society many of the activities prohibited by Section 60 (1) are normal. What makes this section pernicious is not only that it prohibits peaceful opposition to the government but the fact that truth is not a defence.

In Britain, the courts have considerably narrowed the common law crime of seditious libel over the years so that the prevailing view now is that it is limited to speech that is both likely and intended to incite violence.⁴⁸

In Nigeria, the Court of Appeal (Enugu Division) Invalidated the provisions of the criminal code concerning seditious publications in the case of **Chief Arthur Nwanko V The State**.⁴⁹ The appellants had been convicted of publishing and distributing 'seditious publications,' for having published and distributed a book accusing the governor or government of Anambra state of attempting to import arms into the state. The court unanimously held that the pertinent sections of the criminal code which were similar to

⁴⁸ R V CHIEF METROPOLITAN STIPENDIARY MAGISTRATE, EX PARTE CHOUDHURY (1991) 1QB 429

⁴⁹ FCA/E/111/883, (1985) 6 NCLR 228

those of Zambia, were invalid because they violated the right to freedom of expression guaranteed by the constitution and were not saved by the constitutional provisions which permitted derogation from the right to freedom of expression in the interest of public order and safety.

The court found the provisions 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 publication was likely to lead to a breakdown in public order.

These decisions from other commonwealth jurisdictions clearly show that the provisions on sedition in the Zambian Penal Code are outdated and must either be repealed or substantially revised. They are not compatible with the present democratic dispensation.

Section 53 (1) of the Penal Code grants the President absolute discretion to prohibit any publication or series of publications published within or outside Zambia, that he considers to be contrary to the public interest. What constitutes 'public interest' is in his sole discretion. Any person who sells, imports, publishes, offers for sale, distributes, or reproduces any prohibited publications is liable to imprisonment for up to three years.

This section is clearly incompatible with democracy as the existence of a free press is entirely dependant on the goodwill of the President. In 1996 the President banned edition 401 of The Post Newspaper because it prematurely disclosed a plan by the government to organize a referendum over the constitution.⁵⁰ It can be said that this section is

⁵⁰ THE PEOPLE V FRED M'MEMBE & OTHERS HP/38/1996.

unconstitutional as the powers given to the President are over broad and cannot be reasonably justified in a democratic society. In the case of **Handyside V United Kingdom**,⁵¹ it was held that no matter how offensive, shocking, disturbing, the state or other segment of the population, may perceive such expression, such are the demands of pluralism, tolerance and broadmindedness without which there is no democratic society.

Under section 67 (1), the penal Code prohibits the publication of false news. It stipulates that any person who publishes whether orally or in writing or otherwise any statement, rumour or report which is likely to cause fear and alarm to the public order disturb the public peace, knowing or having to believe that such statement, rumour or report is false is guilty of an offence and is liable to imprisonment for up to three years.

This provision has a chilling effect on the freedom of the press as journalists publish stories at their own risk.

In **Hector V Attorney-General of Antigua and Bermuda**,⁵² the judicial committee of the primary council held that a criminal law provision valued the constitution of Antigua and Bermuda to the extent that it made the printing or distribution of any false statement which was likely to undermine public confidence in the conduct of public affairs, a criminal offence. The court reasoned that it would be a grave impediment to the freedom of the press if those who printed or distributed matter reflecting critically on public authorities could do so with impunity only if they could first verify the accuracy of all statements of fact on which the criticism was based.

⁵¹ (1976) EUROPEAN HUMAN RIGHTS REPORT, 737.

⁵² (1990) 2 AC 313

Freedom of expression in America and European jurisprudence is only restricted by the use of strictly and precisely construed restrictions. It must be shown that the restrictions are legitimate, prescribed by law and are in conformity with the just demands of a democratic society.

Section 69 of the Penal Code seeks to protect the president's reputation and the 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 is guilty of an offence and is liable on conviction to imprisonment for up to 3 years.

In 1995, the Supreme Court held in the case of **The People V Fred M'membe and Bright Mwape**⁵³ that freedom of expression is not absolute. It is subject to derogations as stipulated under the constitution. It was specifically found that criminal prosecution for defamation of the President is justified on the ground that defamation of the President would have adverse effects on public order, and was therefore, against the public interest.

Such justification is highly questionable. The provision 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 the case above, the appellants were prosecuted under Section 69 of the Penal Code for a story in The Post Newspaper limited entitled "**Chiluba the Twit**". In a democratic state the President is a public figure. He is

⁵³ (1994) HP/36/94 Unreported.

accountable to the people and should be transparent in his actions. This requires that people, including the press, not to be subjected to criminal sanctions for making remarks which are unpalatable about the President. As noted under the American and European judicial interpretation of the right to freedom of expression, the demands of pluralism include among others, tolerance and broad mindedness to offensive, shocking and disturbing expressions,⁵⁴ especially where such expressions in themselves do not amount to an affront to compelling public interest.

c) **DEFAMATION**⁵⁵

Defamation is the publication of a statement that reflects on a person's reputation and tends to lower him in the estimation of right thinking members of society generally or leads to make them shun or avoid him. The defamatory meaning of the communication may be apparent on its face or it may arise from extrinsic circumstances which the plaintiff is then required to prove.

The law of defamation is important as it is aimed at protecting the reputations of other persons. Both the Constitution of Zambia in Article 20 (3) (b), and international and regional instruments, recognize the need to protect reputations. Freedom of expression is not an excuse for destroying the reputations of other people.

However, a rigorous implementation of defamation law may have a chilling effect on freedom of expression. It may also undermine good governance, transparency and accountability, as the press, for example, may not publish certain information for fear of

⁵⁴ HANYSIDE V U.K/1976 E.H.R.R. 737.

⁵⁵ As in accordance with the Defamation Act, Cap. 68.

legal suits. Members of the public may also be reluctant to provide information to the press or the authorities for the same reason. Laws on defamation may thus hinder public debate of national issues.

The challenge in a democracy is, therefore, to strike an optimum balance between the legitimate interests of individuals not to have their reputations tarnished and in the interests of the public to have access to relevant information and to have unilateral debate of public issues. This is especially important with regard to public figures.

The European Court of Human Rights distinguishes between private individuals and public figures, especially politicians. In Lingens V Austria,⁵⁶ the court ruled that ‘the limits of acceptable criticism are wider as regards a politician as such as than as regards a private individual. This is because freedom of the press affords the public of the best means of discovering and forming an opinion of the ideas and attitudes of political leaders.

The courts in the United States have adopted a similar approach in cases of defamation. In New York Times V Sullivan,⁵⁷ the Supreme Court held that public officials, in order to sustain an action for defamation must prove the falsity of the allegedly defamatory statement as well as ‘actual malice,’ that is, that the defendant published a falsehood with knowledge that it was false or with reckless disregard of its truth and falsity. In Curtis Publishing Co. V Butts and Associated Press V Walker,⁵⁸ the Supreme Court extended the Sullivan rule to apply to all ‘public figures’ because public figures have access to the

⁵⁶ Judgement of 8 July 1986, Series No. 103.

⁵⁷ 376 US 254 (1964)

⁵⁸ 388 US 130 (1967)

media to counteract false statements and, at least to some degree, invite the comment to which they are exposed.

In Zambia, the courts can learn a valuable lesson from the decisions of the European Court as well as the American Courts. These decisions are very protective of freedom of the press and go a long way in promoting public debate and scrutiny of public officials and public figures.

In the case of **Micheal Chilufya Sata V The Post Newspaper Limited and Another**,⁵⁹ the then Chief Justice Ngulube made some important observations as regards the freedom of expression and press freedom specifically. He acknowledged that,

“Article 20 of our constitution of 1991 specifically recognizes the principle of freedom of the press, and it is now time to modify the common law principles of the law of defamation in their application to plaintiffs who are public officials, as to the right of action, the burden and standard of proof, and the latitude the press should be given to subject public officials to criticism and scrutiny.”

This can be sought to protect the freedom of expression of individuals alleged to have defamed public officials. The above case drew support from the American **Sullivan**⁶⁰ case where a heavier burden of proof was placed upon the public officials in cases of libel.⁶¹

⁵⁹ (1995) HCZ Judgement No. 1 of 1995.

⁶⁰ Cited Supra

⁶¹ This is defamatory statement or representation in permanent form as per Section 18 of the Defamation Act, Cap. 68.

PERMITTED RESTRICTONS ON THE FREEDOM OF EXPRESSION

Like any other right, the freedom of expression is not absolute and is therefore entitled to be placed under some legitimate restrictions on its exercise. This is so in order to prevent its abuse. Such restrictions must, however, meet a three-part test in order to be valid. First any restriction must be provided by law, second, it must serve one of the legitimate purposes expressly enumerated in the text, and lastly, any restriction must be shown to be necessary.⁶²

According to the European Court of Human Rights, in order for a restriction to be 'prescribed by law,' it must be adequately accessible' and foreseeable, that is 'formulated with sufficient precision to enable the citizen to regulate his conduct. To have a legitimate aim a restriction must be in furtherance of, and genuinely aimed at protecting one of the permissible grounds listed in Article 10(2). There must be no abuse of power by the state. To be 'necessary,' a restriction doesn't 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. Any public interests of a case must be considered in order to justify the restriction.⁶³ Where the information subject to restriction involves a matter of 'undisputed 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.'⁶⁴

⁶² CHANDA, A. W., "FREEDOM OF EXPRESSION AND THE LAW IN ZAMBIA," Vol. 30. Zambia Law Journal, p.125

⁶³ The Sunday Times V U.K. Judgement of 1979, Series A. No. 30. Para. 49.

⁶⁴ Ibid

In Zambia Article 20 (3) of the constitution provides for permitted restrictions on the freedom of expression. The article provides that in order for a restriction on freedom of expression to be valid it must first, be provided by law, second, it must be reasonably required in any of the interests enumerated in clauses (a) to (c). Third, the restriction must be reasonably justifiable in a democratic society.

The legal system in Zambia does impose many restrictions of the freedom of expression as we have seen in the laws outlined earlier in the discussion. However, there is need to repeal most of these laws, which were enacted during the colonial days, in order that their provisions match-up with international standards as they place restrictions on such a fundamental right as the freedom of expression. The provisions on sedition are overbroad and undemocratic as they are directed at stifling freedom of speech. The laws on defamation also need reform to ensure that the individual's freedom of expression is protected as well as other people's reputation.

LAWS THAT FACILITATE AND ENHANCE THE EXERCISE OF FREEDOM OF EXPRESSION

Having had a look at the laws in Zambia that restrict the freedom of expression, are there any laws that actually, strengthen the exercise of this freedom and give it is efficiency.

The proceeding discussion is an outline of the laws that are put in place in Zambia that make provision for the exercise of the freedom of expression. These laws are put in place

to try and secure the guarantee by the constitution of the freedom of expression, a cardinal freedom, in a democratic society.

A. LEGISLATION

I. THE ZAMBIA NATIONAL BROADCASTING CORPORATION ACT,

CHAPTER 154 OF THE LAWS

Under the ZNBC Act, “broadcasting service” means a radio communication service for reception by members of the general public.

Radio communication service involves the transmission of writing, signs, signals, pictures and sounds of all descriptions whatsoever, wholly or partly by means of electromagnetic waves of frequencies. (5.2).

The Act under Section 3 establishes the Zambian National Broadcasting Corporation which corporation is established to provide broadcasting services in Zambia. The functions of the corporation are stated to include carrying on broadcasting services for the information, education and entertainment of listeners in Zambia and to carry on broadcasting services for reception by listeners outside Zambia, for such purposes as the minister may specify.⁶⁵

The ZNBC Act creates a platform that is used to impart and receive information and ideas and allows the citizens of Zambia to express their opinions through radio and television broadcasts. This makes provision for the exercise of one’s freedom of

⁶⁵ Section 7, Chapter 154 of the Laws of Zambia.

expression but such exercise can only be complete if done without any form of interference from anyone or anywhere.

II. THE RADIO COMMUNICATIONS ACT (Chapter 169 of the Laws of Zambia)

Among the Zambian laws, another Act of Parliament that creates a platform for the exercise of the freedom of expression and thereby enhances this freedom is the Radio Communications Act.

This Act was put in place to regulate the provision of radio communication services, to provide for the functions of the Communications Authority in connection with radio communications and to provide for matters connected to and incidental to radio communications.

Radio communications means a service whose primary activity is the transmission or reception of radio communications.

Any person, according to the Act, may apply to the authority to obtain a licence permitting such a person to provide radio communications.⁶⁶ This licence authorizes such a person to establish and operate one or more radio stations at such places as may be specified in the licence and to provide a radio communications service by means of the station or stations in accordance with the provisions of the Act and the conditions laid out in the licence itself.⁶⁷

⁶⁶ Section 6(1), Chapter 169.

⁶⁷ Section 6(2) of Chapter 169.

A licence is subject to conditions specified by the Communications Authority, an authority established by the Act,⁶⁸ in the licence when it is granted and to such other conditions that may be prescribed by the Minister of Information, on the advice of the authority.⁶⁹

Radio stations in Zambia and in all other parts of the world, like television stations, have been used by to serve the interests of the public by contributing to the development of ways and means used to freely express people's opinions and ideas and also as a means of receiving vital information. This gives the citizen an opportunity to exercise their freedom of expression as guaranteed by the constitution,⁷⁰ an element which is extremely important and required in a democratic society, such as Zambia.

The Zambian citizens have so far utilized this law and have set up radio stations in different parts of the country. These radio stations are extending their transmissions to even the remotest parts of the country to allow every citizen to enjoy the freedom to express themselves through radio communications.

Such laws as the Radio Communications Act, can be said to enhance the exercise of the freedom of expression which is guaranteed under the Zambian Constitution, and must be enjoyed by all.

⁶⁸ As specified in the Preamble.

⁶⁹ Section 7(1) of the Chapter 169.

⁷⁰ By Article 20.

B. JUDICIAL DECISIONS

Case law has also highlighted the importance of the freedom of expression in a democratic society such as Zambia. The law, through the courts, has disregarded certain restrictions that have been placed on the freedom of expressions through such laws as contempt of parliament,⁷¹ defamation laws and laws on sedition. For example, **Veronica Mvunga and Leemans Nyirenda V Times Newspaper Limited**⁷² is a case which sought to protect the freedom of expression of individuals alleged to have defamed public officials. Part of the rationale of the case was that citizens and the press should not be constrained in criticizing public officials in their discharge of public duties. Furthermore, the freedom of expression of individuals deserves to be protected in view of the fact that public officials are entitled to several forum upon which they are able to refute allegations that are untrue about them.

This case counteracted the restrictions placed on the freedom of expression by the laws on defamation which seek to protect the reputation of individuals. The High Court of Zambia has also held that it is an affront to freedom of expression to suspend a member of parliament from the House, on the strength of his advancing opinions which are not consistent with those of the House generally. In the case of **Ludwig Sondashi V The Speaker of the National Assembly and the Attorney General**,⁷³ the appellant was suspended from parliament after making a statement that “coups can be positive,” in the 28th October 1997 attempted coup. Judge Tamulakakusa, in his ruling observed that the suspension was a violation of the Member of Parliament’s freedom of expression, especially that such a comment was made outside the precincts of parliament.

⁷¹ The National Assembly (Powers and Privileges) Act, Chapter 12 of the Laws of Zambia, Section 19.

⁷² (1995) Unreported.

⁷³ (1998) Unreported.

An application for leave to apply for judicial review by Roy Clarke⁷⁴ is another case which enhances the freedom of expression. This was an application for leave and the same leave to act as stay against deportation of the applicant by the Honourable Minister of Home Affairs under Section 26(2) of the Immigration and Deportation Act. The deportation was pursuant to the article in the Post of 1st January, 2004 which was satirical, but which was offensive and disturbing to the Permanent Secretary and the Honourable Minister of Home Affairs. The court granted leave, which operated as a stay, and the matter was heard inter-parte on the 26th January, 2004.

The applicant sought an order for Certiorari for the court to quash the decision of the Honourable Minister of Home Affairs to reconsider his decisions to deport the applicant, a declaration that the decision to deport the applicant was unconstitutional pursuant to Article 20 of the Constitution and a declaration that the respondent was obliged to afford the applicant an opportunity to be heard in person.

The decision to deport the applicant it was contended was defiant of logic, procedurally improper and unconstitutional.

The applicant deposed that on Thursday, 1st January, 2004, he submitted an article entitled 'Mfuwe,' that as a result of the publication of the said article, the Permanent Secretary in the Ministry of Home Affairs, issued a statement indicating that he had recommended to the Minister of Home Affairs, to deport the applicant. Consequently

⁷⁴ ROY CLARKE V ATTORNEY-GENERAL 2004/4P/003

upon issuance of the statement, which statement appeared in the Zambia Daily Mail and the Post Newspaper of 5th January, 2004, the Minister of Home Affairs indicated that the applicant had not more than 24 hours in the country.

According to the Minister of Home Affairs, the article, written by the applicant was not satire but a direct insult on the government, its leader and the people of Zambia and that as such, the applicant was a danger to good order.

Mr. Clarke in response stated that as a Zambian resident, he was only exercising his right to freedom of the press guaranteed by the Zambian Constitution and that exercise of such freedom is not a danger to good order. The decision to deport him, when the article in question was published by Post Newspapers Limited, is violative of his fundamental right to expression and freedom of the press.

The applicant's advocate, Mr. Patrick Matibini submitted that freedom of expression as secured in Article 26 of the constitution of Zambia, constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress. He also submitted that freedom of expression is the livelihood of any democracy. He further submitted that freedom of expression is critical to the development of a democratic government. Therefore, the decision to deport the applicant was a serious and unjustified assault on both the freedom of expression and freedom of the press.

The court found that Mr. Clarke's activities were lawful and that it was not right for the court to ignore and overlook constitutional rights. It was further stated by the court that

“in a constitutional democracy no organ or institution of government can take away a right guaranteed under the constitutions unless as prescribed by the constitution nor can any law do that unless in a manner prescribed by the constitution.”

The judge concluded by reiterating what the European Court of Human Rights said in **Handyside V UK**, in interpreting Article 10 (2) of the European Convention of Human Rights that;

“Freedom of expression constitutes one of the essential foundations of a society, one of the basic conditions for its progress and for the development of every man subject to exceptions in public interest. The article is not only applicable to ‘information’ or ‘ideas’ that are favourably received, but also to those that offend, shock or disturb the state or any sector of the population. Such are the demands of pluralism, tolerance and broadmindedness without which there is no democratic society.”

The court further ordered that the deportation decision be quashed for violating the constitution, violating section 26 (2), for procedural impropriety and for being unreasonable.

The decision, is one of the few decision that upholds the importance of the freedom of expression which is even extended to Zambian residents, of foreign dissent.

CONCLUSION

Freedom of expression can only be said to be protected in a society where people are tolerant of dissent and divergent views. The demands of a democratic society include tolerance of even the most cynical views and ideas. Although this paper in no way suggests that freedom of expression should at any rate be absolute, the restriction must be exercised only in very warranting and precarious situations. Furthermore, the laws put in place to facilitate for the strengthening of this freedom should be adequate enough to ensure that its enjoyment is properly secured under the law.

CHAPTER FOUR

SUMMARY

The first chapter has outlined the freedom of expression as it is guaranteed by the Zambian Constitution under Article 20. In the same chapter the nature, sources and importance of the freedom of expression have been outlined. This has been done with the view of emphasizing the importance of having such a freedom in a democratic society such as Zambia. As it was stated in chapter one, the freedom of expression is the lifeblood of a democracy. It creates a method of securing the participation of the members of a society in political and social decision making and it further serves as a means of maintaining the balance between stability and change in society.⁷⁵

It has further been shown in chapter one that freedom of expression and press freedom go hand in hand. The press serves as an instrument to foster speech, if the press have no freedom to inform the public, then the public will have no freedom of speech and ultimately no freedom to express themselves.

Chapter One also shows that the freedom of expression is not only a 'negative' freedom in as it requires the state to refrain from interfering with the exercise of this freedom, but that the freedom of expression is also a 'positive' right. This means that in as much as the government needs refrain to from interfering with this right, they should also create a platform for enhancing the exercise of this freedom.

⁷⁵ K. Devol, Mass Media and the Supreme Court, Hastings House, New York, 1982, pg. 354.

Chapter two outlines and traces the development of the freedom of expression from the early theories of natural law, from which came the theory of Human Rights through the enactment of such early documents as the Magna Carta, the French Declaration of the Rights of Man and the English Bill of Rights, which documents all recognized and guaranteed the freedom of expression.

Chapter two also looked at the development of the freedom of expression in Zambia from the colonial period to date. It has been noted though this chapter that the people of Zambia have for a long time been guaranteed the freedom of expression by the previous constitutions such as the independence constitution, the one party constitution, the 1991 Constitution and the current constitution of Zambia. Even as far back as the colonial days, the freedom of expression was protected through the Northern Rhodesia Orders in Council which obtained their authority from common law through English Law, even though there was no written bill of rights to guarantee this protection. It has also been noted that even though the rights and freedoms of the individual were and have been protected by constitutions through a Bill of Rights, these rights, such as the freedom of expression have not in practice been enjoyed as there have been too many restrictions, derogations and limitations placed on them. This has been done through laws that have been put in place to restrict the exercise of the freedom of expression and have derogated from it, rendering it almost meaningless.

Chapter three lays down the laws that derogate or restrict the freedom of expression and also those that actually give it its efficacy. This chapter also shows, however, that the freedom of expression is not an absolute freedom and thus there are necessary restrictions

that it can be subjected to but these must be in accordance with the law and must reasonably be justifiable in a democratic society.⁷⁶ It is also shown in this chapter the extent to which a law should derogate from the freedom of expression according to international standards.

Chapter three also shows how the freedom of expression is upheld in other jurisdictions such as Britain, America and Nigeria, which jurisdictions Zambia has to learn from.

By laying down the laws that restrict the exercise of the freedom of expression as well as those that enhance the exercise of this freedom, a comparison has been drawn in chapter three between these laws, including judicial decisions and it has been noted that there are more laws that rob the freedom of expression of its efficacy than there are those that are put in place to enhance the exercise of this freedom in Zambia.

As noted in chapter one, the freedom of expression is both a negative right as well as a positive right. It not only requires the government to refrain from interfering with the exercise of it but it also requires the government to take positive steps in ensuring that the exercise of this freedom is well secured. For example, it has been seen in chapter three that the government through such Acts of Parliament as the Zambia National Broadcasting Corporation Act and the Radio communications Act, does make provision for the establishment of televisions stations that serve as platforms for people to freely receive ideas and information, as well as to impart ideas and information⁷⁷ and this must be done without interference. It is provided under the International Covenant on Civil

⁷⁶ As provided by Article 20(3) of the Constitution.

⁷⁷ As is provided by Article 9 of the African Charter on Human and People's Rights.

and Political Rights, an International Human Rights document to which Zambia has acceded that;

*“Everyone shall have the right to freedom of expression, this right shall include the freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, or in writing or in part, in the form of art or through any media of his choice.”*⁷⁸

This provision asserts the liberty of peoples to receive and impart information and ideas of various forms. This document echoes the realization by the states of the world of the importance and essence of such a freedom of society and thus requires them to take positive measures to ensure that this freedom is freely exercised and enjoyed.

Judicial decisions such as the recent case of **Roy Clarke V The Attorney General**,⁷⁹ have also shown how the courts have upheld the freedom of expression. Decisions set a precedent to enhance the freedom of expression as this is important in a democratic society. The case of **Ludwig Sondashi V The Speaker of the National Assembly and the Attorney-General**,⁸⁰ shows how the court held that it is an affront to freedom of expression to suspend a Member of Parliament from the House, on the strength of his advancing opinions which are not consistent with those of the House generally. In this case, the appellant was suspended from Parliament after making a statement that “coups can be positive,” in response to a journalist’s question about what he thought to the 28th

⁷⁸ Article 19(2) of the ICCPR.

⁷⁹ 2004/HP/003 Unreported.

⁸⁰ (1998) Unreported.

October, 1997 attempted coup. Judge Tamula Kakusa, observed in his ruling that the suspension was a violation of the Member of Parliament's freedom of expression.

These laws, as outlined in chapter there do enhance the freedom of expression, but the question still remains; are there enough laws in Zambia to strengthen the exercise of the freedom of expression?

The answer to this question remains negative. This is because the weight of the laws that restrict the exercise of this freedom is too much as compared to those that enhance it.

RECOMMENDATIONS

Even after analysing the laws that provide for the exercise of the freedom of expression, both judicial and legislative, it has been noted that these laws alone are not enough to enhance the freedom of expression in Zambia. There is need to put in place laws that will nullify or reduce the negative effect which such laws as defamation laws, laws on sedition, libel and the restrictions placed by the State Securities Act, have on the freedom of expression.

It is agreed that people should not be allowed to speak anyhow in order that the interests and rights of other people are protected, but restrictions on the freedom of expression should not be so wide as to render the freedom meaningless. There is need to revise these laws and limit the restrictions or remove the restrictions that continue to be a stumbling block for the realization of this important right. Laws on defamation of the President, under the Penal Code, sedition and contempt of court and Parliament Laws should be

revisited to ensure that they are not stumbling blocks to freedom of expression. All vagueness must be removed from such laws. According to a Ghanaian writer, **Berit Apenteng**,⁸¹ most African countries have been constrained in their efforts to protect freedom of expression due to laws on libel, sedition and contempt which are in themselves outdated and offer punitive effects on journalists and private individuals. He further observes that the sheer cumbersome nature of legal litigation become serious impediments to the development of freedom of expression in the media.

As regards the restrictions placed by the State Security Act, Chapter 111 of the Laws of Zambia, there is need to get rid of the vagueness of such provisions as sections 4 and 5 of the Act as outlined in Chapter Three. Such vagueness pose a serious danger to freedom of expression and undermine the right of the public to know.

Further, there is need to reduce the penalties attached to infringement of Section 4 and 5 of the State Security Act which are by any standards, excessive. Section 5(1) provides that any person who communicates any classified matter to any person other than a person to whom he is authorized to communicate it or to whom it is in the interest of the republic his duty to communication, shall be liable on convictions to imprisonment for a term of not less than fifteen years and not exceeding twenty years.

Under the United Kingdom Secrets Act, similar provisions create only misdemeanors and attract imprisonment of no more than two years.⁸²

⁸¹ Apenteng, B. Freedom of Expression and Information In a Democratic Society – The case of Ghana (A paper presented at the Ghana Broadcasting Corporation Symposium 26 May, 1995) Accra, Ghana, pg. 5.

⁸² Official Secrets Act 1989, Section 10.

This provision makes it very difficult for people to access publicly held information. The effect of lack of access to such information is that the public is ignorant of the operations of government and there is little informed debate on matters of public interest taking place. This results in lack of transparency on the part of government which is detrimental in a democratic society.

It is therefore recommended that public information should be made more accessible to the Zambian public and if there should be any sanctions imposed, these should be imposed in relation to those public officials who will deny any citizen information which according to that citizen is vital information, unless such information is specifically rated as 'restricted' information.

There is therefore need to enact information laws, as in the case of America where the public's right to access government records is contained in both federal and state law. The New York State Freedom of Information Law, which is similar to the Federal Freedom of Information Act (FOIA), guarantees the public's access to government records unless they are specifically exempt from disclosure. This statute requires all government agencies, and public corporations to establish values and regulations pertaining to the availability of records. The New York Freedom of Information Law lays down certain exemptions that may be denied access to.⁸³

While some of the exemptions in the law are necessary, such as those if disclosed would endanger the life or safety of any person, government must resist the temptations to place

⁸³ New York Public Officer's Law, p. 87.

too many restrictions on the public's right to access information. Excessive restrictions would be counter productive and the New York courts have interpreted the exemptions very narrowly in order to ensure maximum availability of public records. In the case of **Miller V Village of Freeport**,⁸⁴ a New York Appeals Court ruled that a request by a newspaper for the names and salaries of public employees was subject to disclosure under the Freedom of Information Laws (FOIL).

Upon enacting the Freedom of Information Laws, the New Yorker legislature also established an agency called the 'Committee on Open Government' whose role is, inter alia, to oversee the implementation of 'FOIL' in that state and to render advisory opinions to government agencies and to members of the public regarding FOIL.

It is therefore, important that there should be freedom of Information Law put in place in Zambia because these are means of enhancing the right to freedom of expression, in which is encompassed the right to access information. Information Laws ensure that members of the public who have a need for public information can access it, irrespective of the purpose, be it academic, research, recreational or other purposes.

In enacting Freedom of Information law that is best suited to the Zambian context, the law makers will need to take into account views from across the section of the population including the media, the opposition and civic organisations. There is also need to expand and improve on the proposed Freedom of Information Bill of 2002 which was rejected by

⁸⁴ (379 NYS 2d 517; 57 AD 2d 765).

Parliament. This proposed bill is good law in as far as enhancing the freedom of expression is concerned because it provides under Section 4 that

“the provision of a written law in force immediately before the commencement of this Act prohibiting, restricting or preventing disclosure of information under the control of a public authority shall have no effect to the extent to which those provisions are inconsistent with this Act.”

It is therefore, recommended that the lawmakers should be persistent in proposing such laws as the Freedom of Information Bill, 2002, that enhance the freedom of expression.

CONCLUSION

It is clear from this discussion that there are more laws in Zambia that limit the exercise of the freedom of expression than there are those that enhance this freedom. The majority of Zambians have consequently been denied the right to freely receive and impart information due to the imminence of such restrictions, derogations and limitations on the freedom of expression as outlined in this discussion. There is need therefore to revisit such laws in order to get rid of the restrictions which may not be reasonably justified in a democratic society and further, to put in place more laws that will ensure that the freedom of expression, as guaranteed by the constitution is further strengthened and freely enjoyed by everyone in the republic.

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