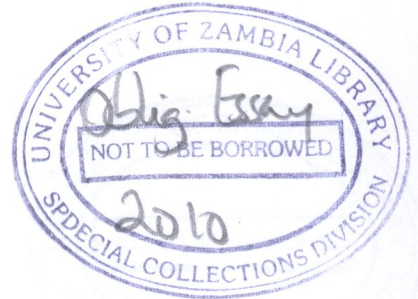


**FREEDOM OF EXPRESSION AND THE RIGHT TO PRIVACY: HOW
CAN THESE RIGHTS BE RECONCILED IN ZAMBIA?**

**BY
MUSONDA MWAPE.
26101769**



Approved by the coordinator, Dr. M. Musonda (LL.B., LL.M.) by Mr. John Peter Sangwa (LL.B., LL.M.).

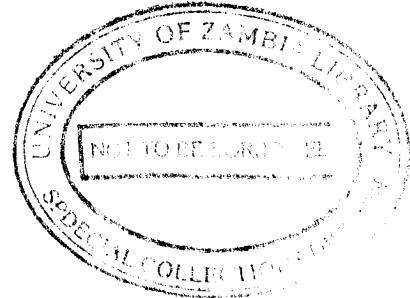
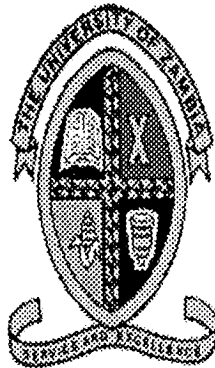
**SUBMITTED IN PARTIAL FULFILMENT FOR THE AWARD OF A BACHELORS
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2010

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**BY
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**THE UNIVERSITY ZAMBIA
GREAT EAST MAIN CAMPUS
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Approved by the coordinator- Dr. M. Munalula (LLB; LLM;), supervised by Mr. John Peter Sangwa (LLB; LLM;).

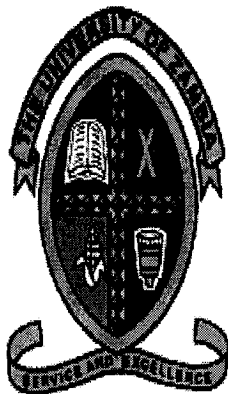
I, Mwape, Musonda. do hereby declare that I am the author of this Directed research, and that it is a creation of my own ingenuity. I therefore, remain accountable for the contents, errors and omissions herein. Further I depose with veracity verily to the best of my Knowledge, that this work has not previously been presented in any University for academic purposes.

Mwape 12/04/10

, **John Peter Sangwa**, do hereby recommend that this directed research prepared under my supervision by the said **Musonda Mwape**, entitled:

**FREEDOM OF EXPRESSION AND THE RIGHT TO PRIVACY: HOW CAN THESE
RIGHT BE RECONCILED IN ZAMBIA?**

Be accepted for examination. I have checked it carefully and I am satisfied that it fulfils the requirements pertaining to the format as laid down in the regulations governing directed Researches.



**THE UNIVERSITY ZAMBIA
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Mr, John Peter Sangwa (LLB; LL.M;)

Supervisor

12th April 2010

Date

ABSTRACT

Freedom of expression is no doubt relevant for any democratic society. This right has encountered a number of challenges in most developing countries and particularly in Zambia. However, even in the midst of all the challenges the enjoyment of freedom of expression has continued to grow in Zambia. The existence of this right is side by side with other right such as the right to privacy. The right to privacy has a scanty definition in the Zambian Constitution unlike other jurisdictions. Furthermore, the right to privacy has not been defined by any court in Zambia and this is another reason why it remains so vague. It has been established that in the exercise of the right to freedom of expression there is need for access to information as well as dissemination of information. This has not been well regulated due to lack of a proper media regulation and this has caused conflict with the right to privacy which has been defined in other jurisdictions to mean physical or bodily privacy, information or data privacy as well as communication privacy. Therefore, it is necessary to ensure that the two rights should be reconciled because in Zambia and it has been established that such reconciliation is not present following lack of laws protecting the right to privacy. Conflict is usually encountered between an individual's right to freedom of expression and another's right to privacy or the media's right to press freedom and individuals' right to privacy. It has clearly been established that for Zambia to maintain as a democratic society there is need to reconcile the right to privacy and the right to freedom of expression which rights are not properly balanced from what has been established in this paper.

DEDICATION

Dedicated to the memory of my mum and dad, Mr. and Mrs. Fred and Mumbi Mwape. I miss you so much

ACKNOWLEDGEMENTS

I would sincerely wish to extend my acknowledgments to Mr. J. P. Sangwa, my supervisor, for his guidance and academic excellence. Indeed it has been a journey where he has taught me so much and I will forever be grateful for that. I wish to acknowledge the Co-ordinator for this course, Dr. Munalula, who despite having so many other responsibilities as Dean of the Law School has been able to assist us with queries regarding the course. To both of you I say Thank You. I thank Dr. P. Matibini for his assistance during the short encounters with him. Special thanks also go to my Uncle and Aunt Mr. and Mrs. Kashinga and Chishala Sakala without whom I would not have come this far. I am so grateful for your love and support through my education. May God richly bless you. I would also like to thank Chakwaba Mwandira for your support and patience during the course of my research, you are simply the best. My friends Mirriam, Glory, Kate, Nancy, Mwelwa and Tina, thanks for your help and support during my stay in the Law school. To my entire class, it's been rough but I will miss you guys. Most of all I am indebted to My Heavenly father, without whom I am nothing. May your name be exalted because you have been faithful. You have made me a living testimony. All praises to you

TABLE OF STATUTES

Defamation Act Chapter 68 of the Laws of Zambia

English Law (Extent of Application) Act Chapter 11 of the Laws of Zambia

Printed Publication Act Chapter 161 of the Laws of Zambia

Public Order (Amendment) Act No. 1 of 1996

State Security Act Chapter 111 of the Laws of Zambia

The Constitution of the Republic of South Africa Act No. 103 of 1996

The Constitution of the Republic of Zambia Chapter 1 of the Laws of Zambia

The Penal Code Chapter 87 of the Laws of Zambia

Zambia National Broad Casting Corporation Act Chapter 154 of the Laws of Zambia

TABLE OF CASES

Abernethy v. Hutchinson [1825] 3 L. J. Ch. 209

Christine Mulundika and Seven Others v The People S.C.Z Judgment No. 25 of 1995

Cruzan v Director, Missouri Department of health 479 U.S 251

Entick v. Carrington [1774] All E.R.

Gosschalk v Rossouw [1966] 2 SA 476 (C) at 490

Handyside v U.K (1976), Series A No. 24

Henry Kalenga v Zambia Communication No. 326/1988

Indian Express Newspaper Bombay v Union India A. R. [1986] S. C. 515

John Geddes Lawrence and Tyron Garner, Petitioners v. Texas 2003

Lazarus Mumba v Zambia publishing Company. (1980) Z.R. 144

Mhlongo v Bailey [1958] 1SA 370 (W)

Patel v The Attorney General. (1968) Z. R. 99

Peter Chiiko Bwalya v Zambia Communication No. 314/1988

Pollard v. Photographic Co 40 Ch. Div. 345 (1888),

Re Munhumeso and others (1994) 1 L.R.C. 282

Resident Doctors v The Attorney General S.C.Z No. 12 of 2003

Safford Unified School District v. Redding, 557 U.S. (2009) 479

The Observer and Guardian v. the United Kingdom (1990) Series A. No. 216

The People v Fred M'membe, Bright Mwape and another (1996) HP/38

Tuck v Priestester [1887] 19 Q.B.D. 639

Walker v Van Wezel (1940) WLD 66

William Banda v the Attorney General (1992) HP/005 (unreported)

Wolf v Colorado 338 U.S. 2 (1949)

Wong-Fernandez v The State of Hawaii U.S. 1 P C (2008)

TABLE OF CONTENTS

Front Matters

Research topic.....	i
Declaration.....	ii
Supervisor's Approval	iii
Abstract	iv
Dedication	v
Acknowledgement	vi
Table of Statutes.....	vii
Table of Cases.....	viii

CHAPTER ONE

INTRODUCTION

1.0. Freedom of Expression and The right to privacy in General.....	1
1.1. Statement of the problem.....	3
1.2. Purpose of Study.....	4
1.3. Study Objectives.....	5
1.4. Specific research questions.....	5
1.5. Research methodology.....	5
1.6. Conclusion.....	6
1.7. Outline of Chapters.....	6

CHAPTER TWO:

THE SCOPE OF THE RIGHT TO FREEDOM OF EXPRESSION IN ZAMBIA

2.0. Introduction.....	8
2.1. Nature of Freedom of Expression.....	8
2.1.1. Freedom of Speech and Freedom to Impart and Receive Information.....	9
2.1.2. Press Freedom.....	9
2.2. Freedom of Expression in Zambia.....	10
2.3 The State of Press Freedom in Zambia.....	15
2.4. Regulation of the Media in Zambia.....	18
2.5. International Protection of Freedom of Expression.....	21
2.6. Restrictions on the Right to Freedom of Expression.....	24
2.7. Conclusion.....	25

CHAPTER THREE:

THE SCOPE OF THE RIGHT TO PRIVACY IN ZAMBIA

3.0. Introduction.....	26
3.1. Defining Privacy.....	26
3.2. Nature of the Right to Privacy.....	27
3.3. Types of Privacy.....	28
3.3.1. Physical Privacy.....	28
3.3.2. Informational Privacy.....	30
3.3.3. Privacy of Communication.....	31
3.3.4. Territorial Privacy.....	32
3.4 The Right to Privacy in Zambia.....	32
3. 5. Judicial Interpretation of the Right to Privacy.....	35

3.6. Restriction on the Right to.....	38
3.7. Conclusion.....	39

CHAPTER FOUR:
RECONCILING THE RIGHTS TO FREEDOM OF EXPRESSION AND PRIVACY
IN ZAMBIA

4.0. Introduction.....	40
4.1 Importance of Balancing the Rights to freedom of Expression and Privacy.....	40
4.2. Are the Rights to Privacy and Freedom of Expression Reconciled in Zambia....	41
4.3. Conclusion.....	46

CHAPTER FIVE:
OBSERVATIONS AND RECOMMENDATIONS

5.0. Introduction.....	47
5.1. General Observations.....	47
5.2. Recommendations.....	48
5.2.1 Policy Recommendations	48
5.2.2 Legal Recommendations.....	49
5.2.3. Institutional Recommendations.....	50
5.3. Conclusion.....	50

CHAPTER ONE

INTRODUCTION

1.0 Right to Freedom of Expression and Right to Privacy in General

This research is intended to establish how the right to freedom of expression and the right to privacy can be reconciled in Zambia. Zambia like many other developing countries is aspiring to be a democratic state. It has a written Constitution with a Bill of Rights which guarantees human rights that individuals inherently possess¹. The freedom of expression and the right to privacy are fundamental human rights, and like all other human rights, are inherently possessed by every human being. Because of this there are a number of International Instruments that guarantee and protect these human rights such as the Universal Declaration of Human Rights (UDHR) of 1948, the International Covenant on Civil and Political Rights (ICCPR) of 1976 as well as the African Charter (Banjul Charter) of 1981. In Zambia the freedom of expression is guaranteed in Article 20 of the Zambian Constitution².

This Article Provides that:

*Except with his own consent, a person shall not be hindered in the enjoyment of the freedom of expression, that is to say the freedom to hold opinions without interference, freedom to receive ideas and information without interference, freedom to impart and communicate ideas and information without interference, whether the communication be to the public generally or to any person or class of person and freedom from interference with his correspondence.*³

The paragraph that follows further provides that “a law shall not make any provision that derogates from freedom of the press.”⁴ Having mentioned these provisions it is important to

¹ Carlson Anyangwe. *Introduction to Human Rights and International Humanitarian Law* (Lusaka: UNZA Press, 2005), p.1

² Chapter 1 of the Laws of Zambia

³ Article 20 (1)

⁴ Article 20 (2)

note that this fundamental right is an important part of any democratic society. This has been illustrated in a number of decided cases which will be referred to in later chapters.

Similarly, the right to privacy is an important fundamental human right. This right, like the right to freedom of expression, is a Constitutionally guaranteed right and is also guaranteed by international human rights instruments like the International Covenant on Civil and Political Rights (ICCPR) as is the freedom of expression. Under the Zambian Constitution this right is guaranteed under Article 17 and it provides that:

*Except with his own consent, a person shall not be subjected to the search of his person or his property or the entry by others on his premises.*⁵

The right to privacy is also one of the most important fundamental rights. It includes the right not to be subjected to searches on one's person, home or property; seizure of private possessions; or interference with private communications, including mail and all forms of telecommunications. For instance, police officers are required to obtain a search warrant from a magistrate before they proceed to invade a person's privacy.⁶ Doing so would also be in line with the provision in the Constitution stipulating instances when this right can be derogated from⁷. In the case of *Wolf v Colorado*⁸ it was stated that security of one's privacy against arbitrary action by the police is basic in a free society.

According to Alfred Chanda, magistrates must not wantonly issue search warrants. They must carefully consider the evidence given by the police and ascertain whether or not there

⁵ Article 17(1) of Cap 1 of the Laws of Zambia

⁶ Alfred Chanda, *The Role of Lower Courts in the Domestic Implementation of Human Rights*. Vol.33. Zambia L.J. (2001)

⁷ Article 17(2)

⁸ 338 U.S. 2 (1949)

are reasonable grounds for the application. It should not just be a matter of signing search warrants as the right to privacy is highly valued in any civilised society.⁹

1.1 Statement of the Problem

This research paper is intended to investigate and establish how the freedom of expression and the right to privacy can be reconciled in Zambia. As has already been seen, the protection of an individual's right to privacy under the Zambian Constitution is not well elaborated. The Constitution provides for protection against invasion of privacy in so far as it relates to the searching of a person or his property or the entry by others on his premises. The provision is silent as regards other aspects of privacy. For instance, the Australian Privacy Act of 1988 regulates information privacy. Section 6 of the same Act interprets personal information covered under the Act to mean information or an opinion, whether true or not and whether recorded in a material form or not, about an individual whose identity is apparent, or can reasonably be ascertained, from the information or opinion. It further provides that such information includes information on an individual's medical information such as one's health as well as employment information such as their wages and salaries.

At Common Law there are mainly two ways in which the right to privacy can be violated. One way is by an unauthorised intrusion or acquaintance with private facts and the second way is by disclosure or publication of private facts.¹⁰ The problem arises with regard to the right to obtain and communicate information which right is enjoyed by both an individual and the press. The courts in Zambia have not interpreted what the right to privacy means and

⁹Alfred Chanda, *The Role of Lower Courts in the Domestic Implementation of Human Rights*. Vol.33. Zambia L. J. (2001)

¹⁰Lance Michalson, *IT Law with Insight: A Guide to Data Privacy Law in South Africa* (South Africa :Michalsons Attorneys, 2004): www.michalsonattorneys.com (accessed on the 15 of August 2009)

therefore if construed in the strict sense, it may appear to be limited in so far as it concerns other forms of privacy such as personal information privacy.

Attention is drawn to the allegation that the former Zambian President Chiluba was HIV positive by the Post Newspaper¹¹. Because Article 17 does not elaborate on the scope and extent of the right to privacy and the courts have not interpreted the extent of this right¹² it may appear that protection of personal information privacy is not covered by this provision strictly speaking. If this allegation was true, by virtue of it being a private fact, the publication of this would amount to intrusion on one's privacy had the law provided for it as was the case in the American case of *Wong-Fernandez v The State of Hawaii*¹³ where the Connecticut court established that the posting of the deceased's HIV results on the internet was a violation of privacy of the deceased by the accused.

The research will therefore focus on investigating how the right to freedom of expression as is provided for by the Constitution can be reconciled with the right to privacy in Zambia taking into account the definition of privacy by the Zambian Constitution and lack of interpretation by the courts.

1.2 Purpose of Study

¹¹ The Post News Paper, 16 April 2006.

¹² *Patel v The Attorney General* (1968) Z.R. 99

¹³ U.S. 1 P C (2008)

The study of the aforementioned problem is a very critical problem especially in a country that is aspiring to be a democratic state. This is because these two rights are equally important to democracy and therefore should both be protected equally. Freedom of the press means that there is transparency and no outside interference whether political or otherwise. Freedom of expression through the right to impart and receive information means a potential development of a state that is able to discuss any problems that a nation may face with potential solutions. With the expanding media in Zambia there is also a growing need to seek information. However, it is important that in the exercise of freedom of expression any competing rights such as the right to privacy are taken into consideration and therefore such rights should be reconciled.

1.3 Study Objective

The main objective of this paper is to investigate and establish how to reconcile the right to freedom of expression and the right to privacy in Zambia as guaranteed by the Constitution. It will also seek to establish what effect this reconciliation would have on a country aspiring to be a democratic state like Zambia.

1.4 Specific Research Questions

1. What is the scope of freedom of expression in Zambia?
2. What is the scope of the right to privacy in Zambia?
3. How can the enjoyment of these two rights be reconciled?
4. What impact would this reconciliation have on Zambia?

1.5 Research Methods

The research being conducted will mainly involve desk research and necessary research in the field. This basically means visiting institutions responsible for the upholding of human rights as well as institutions responsible for advocating for the freedom of expression. Therefore, primary data will comprise of interviews with people that may have been affected by the stated problem or those advocating for change with regard to the stated problem. Secondary data will be through books available on the subject as well as news papers, journals and the internet.

1.6 Conclusion

In conclusion it can be noted that fundamental human rights are equally important and should therefore be balanced. Therefore, there is need to reconcile the right to privacy and the freedom of expression in a country aspiring to be a democratic state like Zambia. This means that there should be a balance in the enjoyment of these fundamental human rights and lack of such balance is a concern in the *Zambian case*.

1.7 Outline of Chapters

This paper contains five chapters that will endeavour to investigate and establish how to reconcile the right to privacy and the freedom of expression. Chapter one is basically the introductory chapter to the research paper.

Chapter two will discuss the scope of the right to freedom of expression. This means that it will endeavour to discuss the nature and extent of the right to freedom of expression. It will further discuss how the courts have interpreted the right to freedom of expression both at international level and in Zambia.

Chapter three will discuss the scope of the right to privacy. This chapter will basically discuss the scope of the right to privacy. This will include discussing the various definitions of privacy as well as the types of privacy. The chapter will also discuss how this right has been interpreted by various courts. Thereafter it will discuss how this right is defined and interpreted in Zambia.

Chapter four will endeavour to show how these rights can be reconciled after having discussed the scope of each of these rights. Chapter five will give recommendations and conclusion of this research paper.

CHAPTER TWO

FREEDOM OF EXPRESSION IN ZAMBIA

2.0 Introduction

The chapter is intended to give a detailed understanding on freedom of expression as a fundamental right which will be relevant when looking at how this right can be reconciled with the right to privacy. The chapter focuses on examining the scope of the right to freedom of expression in Zambia. This will be done by discussing the nature of freedom of expression in general. Then it will be followed by taking into account how this right is guaranteed and interpreted by the courts through case law. In this chapter reference will be made to other jurisdictions on the protection and interpretation of the right to freedom of expression.

2.1 The Nature of Freedom of Expression

Freedom of expression is the cornerstone of any democratic society and it is essential in enabling democracy to work and public participation in decision-making.¹⁴ Everyone has the right to freedom of expression, which includes the freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his or her choice.¹⁵ Freedom of expression has been humanity's yearning, in ancient and modern times because of how important it is. The right of freedom of expression serves to strengthen democracy at several levels. The

¹⁴Human Rights Education Associates. *Freedom of Expression*. Human rights Education Association, <http://www.hrea.org/fredom-of-expression.html> (accessed on 16 August,2009)

¹⁵ Article 19(2) of International Covenant on Civil and Political Rights

capacity of individuals to communicate, exchange and confront ideas is an essential part of a well-functioning democratic system¹⁶

Freedom of expression can be broken down into three components which include freedom of speech, freedom to impart and receive information and ideas and press freedom.

2.1.1 Freedom of Speech and Freedom to Impart and Receive Information

The Chief Justice of the Supreme Court of Sri Lanka, in ruling that pamphlets which were highly critical of the government were nevertheless constitutionally protected, emphasized the importance to democracy of the public's right to receive information and opinions from sources independent of the government. He stated that freedom of speech and expression consists primarily not only in the liberty of the citizen to speak and write what he chooses, but in the liberty of the public to hear and read what it needs. The basic assumption in a democratic polity is that government shall be based on the consent of the governed. The consent of the governed implies not only that consent shall be free but also that it shall be grounded on adequate information and discussion aided by the widest possible dissemination of information from diverse and antagonistic sources.¹⁷

2.1.2 Press Freedom

The broad principle of press freedom gets very robust support. Majorities in most nations say that it is important "for the media to be free to publish news and ideas without government

¹⁶ Canadian Foundation for the Americas, *Report on the Freedom of Expression in Canada*. (Ottawa: 2004), p. 3

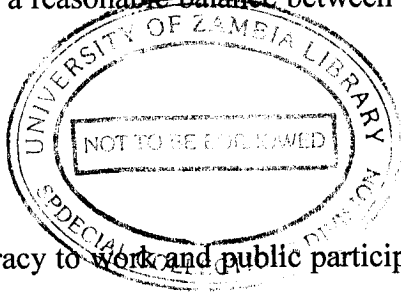
¹⁷ Article 19 *Freedom of expression Handbook: International and Comparative law, Standards and procedures 1993* : <http://www.article19.org> (accessed on September 20 2009)

control."¹⁸ Having said this it is a widely held view that in the absence of freedom of expression, it is impossible to protect life and liberty. According to *Baroness Frances D'Souza*¹⁹, it is no coincidence that the first action of would-be dictators is to muzzle the media in order to control information. Nor is it surprising that the history of censorship is coterminous with the history of political unification, the rise of monotheistic religion, and the desire to protect public morals. She further adds that in ancient China, Greece, Rome and India the move towards unity and harmony necessarily entailed reducing cultural and religious diversity as well as limiting ideas which threatened the established order. Information and ideas are powerful and governments aim to disarm the opposition through censorship.

Freedom of expression serves four broad purposes in particular and these include the fact that it helps in the attainment of self fulfilment by an individual. Secondly it assists in the discovery of the truth through being able to publicize issues that people may not be aware of. Finally it provides a mechanism by which to establish a reasonable balance between stability and social change.²⁰

2.2 Freedom of Expression in Zambia

Freedom of expression is essential in enabling democracy to work and public participation in decision-making.²¹ Citizens cannot exercise their right to vote effectively or take part in public decision-making if they do not have free access to information and ideas and are not able to express their views freely. Freedom of expression is thus not only important for



¹⁸Article 19, Defending freedom of expression , 20th Anniversary Book(2006)
¹⁹ Article 19 *Freedom of expression Handbook: International and Comparative law, Standards and procedures 1993* : <http://www.article19.org> (accessed on September 20 2009)
²⁰ Indian Express Newspaper Bombay v Union India A. R. [1986] S. C. 515
²¹ Re Munhumeso and others (1994) 1 L.R.C. 282

individual dignity but also to participation, accountability and democracy.²² In Zambia the right to freedom of expression is guaranteed under Article 20 of the Constitution.²³ This Article provides that:

(1) except with his own consent, a person shall not be hindered in the enjoyment of the freedom of expression, that is to say the freedom to hold opinions without interference, freedom to receive ideas and information without interference, freedom to impart and communicate ideas and information without interference, whether the communication be to the public generally or to any person or class of person and freedom from interference with his correspondence.

(2) Subject to the provisions of this Constitution, a law shall not make any provision that derogates from freedom of the press.²⁴

The following provisions, however, provide for exceptions to the enjoyment of freedom of expression. Paragraph 3(a) and (b) of the said Article provides that:

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

(a) that is reasonably required in the interests of defence, public safety, public order, public morality or public health; or

(b) that it is reasonably required for the purpose of protecting the 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 instruction therein, or the registration of, or regulating the technical administration or the technical operation of, newspapers and other publications, telephony, telegraphy, posts, wireless broadcasting or television...

The purpose of these provisions is basically to balance the interests of the public with those of an individual's. For instance, while an individual may have the right to freedom of expression, the Public Order Act²⁵ in subsection 3(a) of section 5 provides that any regulating officer may issue directions for the purpose of regulating the extent to which music may be

²² Human Rights Education Associates. *Freedom of Expression*. Human rights Education Association, <http://www.hrea.org/freedom-of-expression.html> (accessed on 16 August,2009)

²³ Chapter 1 of the Laws of Zambia

²⁴ Article 20 (1) and (2)

²⁵ Chapter 113 of the Laws of Zambia

played on public roads and streets within his area on the occasion of festivities or ceremonies. In other instances the said Act may seek to balance an individual's right to freely express himself during a demonstration with public order. To this effect the section 5 (5) (c) of the Public Order Act as amended by the Public Order (Amendment) Act²⁶ reads:

. . . persons intending to assemble or convene a public meeting, procession or demonstration that order and peace shall be maintained through the observance of the following conditions . . . that marshals of a number sufficient to monitor the public meeting, procession or demonstration are available and shall co-operate with the police to ensure peace and order. . .

This provision indicates that in the absence of the said marshals, any demonstration or such other public meeting would not take place, thus limiting the right to freedom of expression. Therefore, the overall purpose of the said provisions is to balance conflicting interests under the provision of the law. In the case of *Christine Mulundika and Seven Others v The People*²⁷, before the aforementioned amendment, *Justice Ngulube* illustrated the importance of this right when he noted that the requirement of prior permission to hold processions as was provided by section 5(4) was an obvious hindrance to two very important freedoms under the constitution since the right to organise and participate in a public gathering is inherent in the freedom to express and to receive ideas and information without interference and to communicated ideas and information without interference. In passing judgment he further stated that “the courts have long recognised the importance of freedom of speech and assembly in a democratic society. For example, the European Court of Human Rights has placed high value on the freedom of expression.”²⁸

²⁶ Act No. 1 of 1996

²⁷ S.C.Z Judgment No. 25 of 1995

²⁸ Ibid

The importance of the right to freedom of expression has been illustrated in courts of different jurisdictions. It was established by the Supreme Court of Zimbabwe in the case of *Re Munhumeso and others*²⁹ that freedom of expression, one of the most precious of all the guaranteed freedoms has four broad special purposes to serve: (i) it helps an individual to obtain self fulfilment; (ii) it assists in the discovery of truth; (iii) it strengthens the capacity of an individual to participate in decision making; and (iv) it provides a mechanism by which it would be possible to establish a reasonable balance between stability and social change.”

In another case of *The State v The Ivory Trumpet Publishing Company Ltd and others*³⁰ it was established that freedom of speech is, no doubt the very foundation of every democratic society for without free discussion particularly on political issues, no public education or enlightenment, so essential for the proper functioning and execution of the processes of responsible government is possible.³¹

The *Mung’omba Constitution Review Commission*³² makes a very important point on freedom of expression as a civil right when it notes that; “this right is the corner stone of any democracy and it should be protected.” In the case of Zambia it has already been alluded to that the International Covenant on Civil and Political Rights expresses duties on member states in the protection of the right to freedom of expression. However, according to Joseph Shultz³³ the implementation of the rights there in is primarily a domestic matter. This is due to the fact that these instruments are not directly applicable in some jurisdiction; meaning that for the provisions under the ICCPR, for instance, to be enforced it has to be incorporated into

²⁹ (1994) 1 L.R.C. 282

³⁰ (1984) 5 N.C.L.R. 736

³¹ Ibid: at p. 747

³² Interim Report (2005)

³³ Joseph Shultz and M. Castan *International Covenant on Civil and Political Rights: Cases and Material and Commentary* (London: Oxford University Press, 2000), 28

the domestic law in which it is to be applied. In Zambia it is necessary that before an international norm can be part of the municipal law of the country, an Act of Parliament is enacted to transform such a treaty into domestic law and this called domestication.³⁴

In Zambia it has been left to citizens to challenge legislation and acts that violate the right to freedom of expression through the courts.³⁵ This saw the ability of individuals to complain to other authorities other than the courts of Zambia such as the Human Rights committee on violation of fundamental rights and freedoms. Examples of such cases include the cases of *Henry Kalenga v Zambia*³⁶ and *Peter Chiiko Bwalya v Zambia*.³⁷ In these cases Peter Chiiko Bwalya was the chairman, and Henry Kalenga an active member, a political party that challenged the then, one-party rule. Both were harassed, arrested for their political activities and detained without trial for years. They were later released but placed under surveillance and denied passports. Both of them contended that one of the rights that were violated is the right to freedom of expression. The Committee found that the parties' right to freedom of expression under Article 20 was violated.

It should further be noted that in the recent years, the freedom of expression has been developing and has been better protected than it used to be in the past. The courts have extended their view on the freedom of expression. An example is the case of *William Banda v the Attorney General*.³⁸ The petitioner was a member of the United National Independent Party (UNIP). His party applied for police permits, pursuant to the provisions of section 5(4) of the Public Order Act, to hold public rallies. On all occasions his name was deleted from

³⁴ Carlson Anyangwe, *Introduction to Human Rights and International Humanitarian Law* (Lusaka: UNZA Press, 2004), 191

³⁵ John Sangwa. *Press Freedom in Zambia. Southern Africa Media Law briefing*, Vol. 1 (Institute of Freedom of Expression: 1999)

³⁶ Henry Kalenga vs. Zambia, Communication No. 326/1988,

³⁷ Peter Chiiko Bwalya vs. Zambia, Communication No. 314/1988,

³⁸ (1992) HP/005. (Unreported)

the list of speakers and no reasons were given. The petitioner argued that his freedom of expression had been violated. It was argued for the state that the petitioner was a non-Zambian and hence should not be allowed to address rallies, that member of the ruling Movement for Multi-Party Democracy (MMD) were against his speeches and that the petitioner's previous speeches were provocative. The court found that the petitioner's right to freedom of expression had been violated in that the regulating officer had not properly exercised his discretionary powers.

In Zambia, freedom of expression has been enjoyed to a greater length than it used to be in the first and second republic. One of the contributing factors was the amendment to the Public Order Act in 1996 following the case of *Christine Mulundika v the Attorney General* ³⁹where the Supreme Court of Zambia struck down section 5(4) of the Public Order Act as being in contravention with sections 20 and 22 of the Constitution. This amendment meant that there was no more need to ask for permission to exercise the rights to freedom of expression and assembly as it appeared to be before the amendment. However, just a mere notification was needed to ensure that the police could be available at the event for purposes of public safety. The cases that followed such as the case of *Resident Doctors v The Attorney General* ⁴⁰ also followed the ruling in *Mulundika* and held police officers to have been in violation of the public Order Act as well petitioners' rights to freedom of expression and assembly when they refused to police the event within a time not specified in the Act.

2.3 The State of Press Freedom in Zambia

The media's rights in Zambia are basically guaranteed by Article 20(2) of the Constitution which provides that *subject to the provisions of this Constitution, a law shall not make any*

³⁹S.C.Z. Judgment No. 25 of 1995

⁴⁰ S.C.Z. Judgment No. 12 of 2003

provision that derogates from freedom of the press. There are no other Acts that have been enacted pursuant to this provision as regards the protection of the right to press freedom and there has been a call for the enactment of laws that strengthen the protection of press freedom. On the other hand there are Acts that enable the existence of certain sections of the media such as news paper publication by the Printed Publication Act⁴¹. This Act basically provides for the registration of newspapers and for the printing and publication of books and the preservation of printed works published in Zambia. There is also the ZNBC Act⁴² which is an Act establishing the Zambia National Broadcasting Corporation which is a government owned media corporation.

According to John Sangwa⁴³, the Zambian media has been struggling to expand the boundaries of freedom of expression. Press freedom is not discussed in any detail in the Constitution (1996), but is inferred from the general freedom of expression provisions, which include freedom to hold opinions, receive, impart and communicate ideas and information without interference, whether to the general public or to any person or class of persons. However, it should also be noted that since the beginning of the 1990s, coinciding with the emergence of independent media, a number of cases have gone to court seeking to expand the boundaries of freedom of expression.⁴⁴

More evidence to show the transition of the media has been through the recognition of the Community media sector. The community media sector has, during the decade or so of

⁴¹ Chapter 161 of the Laws of Zambia

⁴² Chapter 154 of the Laws of Zambia

⁴³ Southern African Media. *Press Freedom in Zambia*. (Southern African Media Law Briefing, 1998)

⁴⁴ John Sangwa, *Press Freedom in Zambia*. *Southern Africa Media Law briefing* Vol. 1 (Institute of Freedom of Expression:1999)

existence in Zambia, shown promise and risen to a position of eminence as champions of press freedom and communication empowerment at the grass roots level in communities where they operate. This is basically because the decision by the new Movement for Multi-party Democracy (MMD) government to make good its pre-election promise to liberalize the mass media scene. The government fulfilled the promise by lifting the restrictions on broadcasting which had hitherto been the preserve of government. Community mass media are media on a relatively small scale, owned by the community for coverage of the community, using participatory, democratic governance structures. However, the industry has also shown notable weaknesses, which need timely intervention if the industry is to become sustainable such as absence of legislation and acceptable regulations specifically for community mass media and lack of sufficient finances for sustainability of media,⁴⁵

The media plays a significant role in shaping public opinions and perceptions of these phenomena in a country. This is in view of the increased exposure to various forms of media and communication that Zambians continue to have. Being what the media are, an agent for socioeconomic, political and cultural development in any society, it is clear that the media has tremendous potential to contribute to stability or instability of Zambia. Therefore, it matters how the media conduct their day-to-day reportage of events, situations and circumstances. "The media can disrupt a society or can stabilize and strengthen a society. It can lend decisive support to the stability of a country."⁴⁶

⁴⁵ Fidelis Muzyamba "Country Report on Community/local media in Zambia" Monday, 08 June 2009

⁴⁶ Muhammed Abbas "Media and National Stability", Pakistani Times July 7 2007 cited on www.pakistantimes.net (accessed on March 26 2009)

In Zambia one of the major advocates for freedom of expression is the Media Institute of Southern Africa Zambia (MISA). MISA Zambia disclosed that MISA Zambia has advocacy meetings which include strategic meetings with the Zambian Government in an attempt to advocate for support in the protection of the right to freedom of the press. It also has public meetings to increase awareness to the public on their right to freedom of expression as well as their right to information. Having said this it also important to note that the media in Zambia has been better protected in the past recent years than was in the past.⁴⁷

2.4 Regulation of the Media in Zambia

Suffice it is to note that Zambia, in practice, is far better than many so called democratic states in honouring media freedom. The mushrooming of independent newspapers and radio stations pay testimony to this fact. Yet there is need for legislation and policy that is conducive to the media for the media freedom to be fully guaranteed.⁴⁸ Having stated this, it should be noted that in an orderly civilized society freedom of expression cannot be absolute, and this raises crucial issues of the permissible limits of restrictions on freedom of expression. Such issues involve consideration of the nature of the restriction, its scope and extent, its duration and the presence or absence of an efficacious corrective machinery to challenge the restriction. Generally, it is the judiciary which performs the task of reconciling freedom of expression with certain imperatives of public interest such as national security, public order, public health or morals, and individual rights such as the right to reputation and the right of privacy.⁴⁹

⁴⁷ Media Institute of Southern Africa, *Southern Africa media directory 2004/*: *Zambia at a glance*. (Windhoek: MISA 2005):<http://www.misazambia.org>. (accessed on January 15 2010)

⁴⁸ Jesuit Centre for Theological Reflection *Media Legislation and policy in Zambia: How it Impacts on Media freedom* 2005: <http://www.jctr.org.zm> (accessed on January 15 2010)

⁴⁹Article 19 *Freedom of expression Handbook: International and Comparative law, Standards and procedures* 1993 : <http://www.article19.org> (accessed on September 20 2009)

Another way that the media are kept in check is through media ethics. Media ethics are said to be the moral restrictions concerning lies, deceit, violence and censorship in journalism.⁵⁰ Media ethics are very broad because they range from news gathering ethics, news dissemination ethics as well as photo journalism ethics. Ethics in media basically mean the morals behind the media. For instance, when publishing information the most important question taken into consideration is whether the publication is in the interest of the public or whether it promotes good value. If such publication is not in the public's interest then it should not be published.⁵¹

Another important ethical issue is in the aspect of photo journalism. Because images evoke almost immediate emotional responses among viewers, pictures have tremendous impact. With well-chosen words, visual messages combine to educate, entertain and persuade. But the flip side to such visual power is that images can also offend, shock, mislead, stereotype and confuse.⁵² A good example of this was the publication of photos of a woman giving birth at the University Teaching Hospital in Zambia. The public was in state of shock and confusion as to whether the publication was right in itself.⁵³

In the field of the media there is a tendency to take pictures and publish them without the consent of the person whose picture is taken. Privacy concerns are almost always voiced by ordinary citizens or celebrities who are suddenly thrust in front of the unblinking lens of a camera because of connection to some sensational news story. Seldom do you hear viewers

⁵⁰ Matthew Keiran. *Media Ethics: A Philosophical Approach* (California: Greenwood Publishing Group, 1997), 3

⁵¹ Eustace Nkandu, Department of Mass Communication The University of Zambia Main Campus Media Ethics in Zambia (02/03/10)

⁵² Paul Martin, *Photo journalism Ethics: Timeless Issues* (California: Brown and Benchmark Publications, 1995), 239

⁵³ The Post Newspaper June 15 2009

complain about violating someone else's right to privacy. Courts in America have consistently maintained that privacy rights differ between private and public persons. Private citizens have much more strictly enforced rights to their own privacy than celebrities who often ask for media attention.⁵⁴

With the improvement in the recognition of the right to freedom of expression through the media, there is a growing concern. The concerns raised on the conduct of the media by organizations such as the Media Ethics Council of Zambia (MECOZ) were also raised by some of the most influential opposition Members of Parliament (MPs). Some of the Members of Parliament who were the strongest advocates of media freedom in the Zambian Parliament called for statutory regulation because of the way the press covered the 2008 elections.⁵⁵ Concerns were also about why some major media organizations were not part of the MECOZ. MECOZ was a voluntary institution that was supposed to regulate the media by ensuring that they conform to the relevant media ethics. However, MECOZ came under fire and was accused of lacking teeth to punish erring media organizations. This made the calls for self-regulation even stronger because the Zambian media seemed divided on the matter.⁵⁶ Government of Zambia gave the media organizations in the country a six months ultimatum in which to put in place self-regulatory measures failure to which the would impose statutory regulation on them. This was the subject of controversy by the media and MISA Zambia

⁵⁴Paul Martin, *Photo journalism Ethics: Timeless Issues* (California: Brown and Benchmark Publications,1995), 239

⁵⁵ The Media Institute of Southern Africa, *So this is Democracy? State of Media in Southern Africa 2008:Annual Publication of MISA* (Windhoek: MISA,2008),113

⁵⁶ Ibid

together with the above named media associations joined together in the trying to prevent this ultimatum by the government.⁵⁷

One of the main arguments advanced for this resistance was that there are already a number of laws that pose restrictions on the media in Zambia such as the Penal Code⁵⁸ in section 53 which accords the President many powers to declare any publication within and outside Zambia prohibited, if according to his/her opinion such materials are deemed to threaten national security. This presidential prerogative to prohibit publication in the guise of serving public interest impedes press freedom, media freedom and the freedom to information and ideas.⁵⁹ The State Security Act⁶⁰ in section 4 and 5 deems it an offence to communicate classified information. However, there is no definition of what classified means.

This was also discussed in the case of *The People v Fred M'meembe, Bright Mwape and another*⁶¹ where three editors of the Post, an independent Newspaper, were charged with receiving information, articles or documents knowing or having reasonably believed that at the time of receiving the documents they were in contravention of section 4(3) of the state security Act. The Publication of such information was banned by the President pursuant to section 53 of the Penal Code. The High court found the accused with no case to answer on ground that the reasonable belief had not been proved.

2.5 International Protection of Freedom of Expression

⁵⁷ MISA Zambia "Self-Regulation: The Big Ethical Question": http://www.misazambia.org.zm/self_reg_/ (accessed on September 20 2009)

⁵⁸ Cap 87 of the Laws of Za2ambia

⁵⁹ Jesuit Centre for Theological "Reflection Media Legislation and policy in Zambia: How it Impacts on Media freedom" 2005: <http://www.jctr.org.zm> (accessed on January 15 2010)

⁶⁰ Chapter 111 of the Laws of Zambia

⁶¹ (1996) HP/38(Unreported)

At international level freedom of expression is guaranteed, as was mentioned in chapter one, by the Universal Declaration of Human Rights (UDHR), International Covenant on Civil and Political Rights (ICCPR) and The European Convention on Human Rights (ECHR). Article 19 of the UDHR, like the ICCPR, proclaims the right to freedom of expression, which includes freedom "to seek, receive and impart information and ideas through any media and regardless of frontiers."⁶² This provision is similar to Article 19 of the (ICCPR). However, the ICCPR extends and broadens this provision by providing that freedom includes "to seek, receive and impart information and ideas of all kinds expressed either orally, in writing or in print in form of art or other media".

The right of freedom of expression serves to strengthen democracy at several levels. The capacity of individuals to communicate, exchange and confront ideas is an essential part of a well-functioning democratic system and the basis of the creation of social bonds within a society. Yet the question is asked, how do we define freedom of expression? Article 19 of the UDHR, has been interpreted to mean that when there is freedom of expression there is the right to hold an opinion and there is a right to seek, receive and impart information and ideas.⁶³ Article 10 of the European Convention on Human Rights guarantees freedom of expression, and it states that "everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers." But, pursuant to paragraph 2, the exercise of these freedoms "may be subject to such formalities, conditions, restrictions or

⁶² Article 19, *Defining Defamation: Freedom of Expression and Protection of Reputation*. (London: Article 19, 2000), 3

⁶³ United Nations Organization. *Universal Declaration On Human Rights*. (New York: United Nations Organizations. <http://www.un.org/Overview/rights.html> (consulted on January 30, 2004).

penalties as are prescribed by law and are necessary in a democratic society" in order to protect various public and private interests.⁶⁴

In England there is common ground between the protections of freedom of expression in English law and under the European Convention on Human Right (ECHR) against a background of the incorporation of the ECHR into English law in the Human Rights Act 1998. In 1998, the United Kingdom incorporated the European Convention, and the guarantee of freedom of expression it contains in Article 10, into its domestic law under the Human Rights Act. The protection of freedom of expression in English law, under influence of the Human Rights Act, is based on three aspects that determine that the protection of freedom of expression can be distinguished. Firstly, the approach to the notion of the right to freedom of expression, then the methods of protection applied by the courts and the consideration and appreciation of facts and circumstance. These aspects are examined and analyzed through the case law of the ECHR and the case law of the English courts, in order to determine the extent of common ground with regard to them.⁶⁵

In the case of *Handyside v U.K.*⁶⁶ the European Court of Human Rights stated that freedom of expression constitutes one of the essential foundations of such 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 which offend, shock or disturb the state or any other sector of the population. Such are the demands of pluralism, tolerance and broadmindedness

⁶⁴ The Observer and Guardian v the United Kingdom (1990) Series A No. 216

⁶⁵ Herleen Bosma, *Freedom of Expression in England and EHCR: In Search of Common Ground: A Foundation for the Application of the Human Rights Acts 1998 in English Law*. (London: Intersentia 2000)

⁶⁶ (1976), Series A No. 24

without which there is no “democratic society.” This case basically illustrates the importance of freedom of expression in order for democracy to exist

The right to freedom of expression in South Africa is guaranteed under the South African Constitution. In the South African Constitution the right to freedom of expression includes freedom of the press, freedom of information, artistic, academic and scientific research. However, like in many other jurisdictions it excludes war propaganda, advocacy of violence and hatred. In South Africa, the media has taken the commercial route and this has impacted negatively on the freedom of expression and the right to access information. Communications Authority of South Africa (ICASA) makes it hard for community radio stations to exist without any heavy financial backing. The licensing processes and other maintenance expenses make it hard for community radio stations not to fall into the trap of going commercial.⁶⁷

2.6 Restrictions on the Right to Freedom of Expression

Freedom of expression like any other fundamental right is not guaranteed in absolute terms by International Human Rights Law. The various provisions that provide for its guarantee these rights provide for derogation clauses. Therefore, as regards the right to freedom of expression in the ICCPR, paragraph 3 of Article 19 provides for such restrictions. It lays down conditions under which freedom of expression can be restricted and it is only subject to these conditions that restrictions may be imposed. These restrictions must be ‘provided by law’ and they may only be imposed for one of the purposes set out in sub-paragraphs (a) and (b) of paragraph 3 and must be justified as ‘necessary’ for that State party for one of those

⁶⁷ Mlando Magwaza, “The Struggle for freedom of expression in South Africa “,(July 11, 2007), p.4

purposes.⁶⁸ Article 10 of the European Convention also protects the right to freedom of expression. However, under paragraph 2, the exercise of these freedoms "may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society" in order to protect various public and private interests..

The UK however also poses a number of limitations on the right to freedom of expression that are not present in other developed jurisdictions. For example, its laws recognise the crimes of incitement to racial hatred and incitement to religious hatred. UK laws on defamation are also considered among the strictest in the Western world, imposing a high burden of proof on the defendant.⁶⁹

2.7 Conclusion

In the final analysis it can be concluded that fundamental rights and freedoms are protected by law in many countries in the world. The freedom of expression has been established to be necessary for any democratic society because its attributes show how democracy should be exercised. It has also been established that in Zambia protection of freedom of expression and press freedom has faced a number of challenges. However, in comparison to the case before the Third Republic, this right has expanded and is now better protected. This has been evident from the growing media in Zambia. However, one of the demerits of the media in Zambia is that they do not have a well established regulation system which is needed for the regulation of press freedom because without this there is a likelihood of abuse by the right holder.

⁶⁸ *Report of the Human Rights Committee to the General Assembly*, 38th Sess., Supp. No. 40, 1983 (A/38/40), Annexe VI General Comment 10

⁶⁹ *ibid*

CHAPTER THREE

THE RIGHT TO PRIVACY IN ZAMBIA

3.0 Introduction

This chapter will discuss the scope of the right to privacy in Zambia. It is relevant to understand the nature and extent of this right because this understanding will be necessary in order to establish how the right to privacy can be reconciled with the right to freedom of expression discussed in the previous chapter. This discussion will begin by establishing the definition of privacy and thereafter discuss how the nature of this right by establishing the types of privacy encompassed in the right to privacy. The discussion will go on to establish how this right has been guaranteed by the Constitution and interpreted by the courts in Zambia. Reference will be made to other jurisdictions on how they have defined and interpreted this right by their courts.

3.1 Defining Privacy

The law of privacy can be traced as far back as 1361, when the Justices of the Peace Act in England provided for the arrest of peeping toms and eavesdroppers.⁷⁰ The term privacy does not have one conventionally known definition. In the 1890s, *Louis Brandeis* articulated a concept of privacy that argued that it was the individual's "right to be left alone." Brandeis argued that privacy was one of the most cherished of freedoms in a democracy, and he was concerned that it should be reflected in the Constitution.⁷¹ The boundaries and content of what is considered private differ among cultures and individuals, but share basic common

⁷⁰ James Michael, *Privacy and Human Rights*, (UNESCO: 1994) p.15

⁷¹ Samuel Warren and Louis Brandeis, *The right to privacy*. (4 Harvard Law Review, 1890) p. 193 - 220.

themes. Therefore, privacy is the ability of an individual or group to seclude themselves or information about themselves and thereby reveal themselves selectively.⁷²

Alan Westin defined privacy as the desire of people to choose freely under what circumstances and to what extent they will expose themselves, their attitude and their behaviour to others.⁷³ According to *Edward Bloustein*, privacy is an interest of the human personality. It protects the inviolate personality, the individual's independence, dignity and integrity.⁷⁴ *Ruth Gavison*, on the other hand, stated there are three elements in privacy which are secrecy, anonymity and solitude. She further said that it is a state which can be lost, whether through the choice of the person in that state or through the action of another person.⁷⁵

3.2 Nature of the Right to Privacy

Privacy is a fundamental human right recognized in the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and in many other international and regional treaties. Privacy underpins human dignity and other key values such as freedom of association and freedom of speech. It has become one of the most important human rights issues of the modern age.⁷⁶ When something is private to a person, it usually means there is something within them that is considered inherently special or personally sensitive. The degree to which private information is exposed therefore depends on how the public will receive this information, which differs between places and over time.

⁷² *ibid*

⁷³ *Alan Westin, Privacy and Freedom*, (New York: Atheneum, 1968), p. 7.

⁷⁴ *Edward Bloustein, Privacy as an Aspect of Human Dignity*, (39 New York U. L.R. 1964) p.971

⁷⁵ *Ruth Gavison Privacy and the Limits of Law*, Yale L.J Vol. 89. (1980) 421, p. 428

⁷⁶ *Samuel Warren and Louis Brandeis, The Right To Privacy*, 4 Harvard Law Review 193 (1890)

Privacy protection is frequently seen as a way of drawing the line at how far society can intrude into a person's affairs.⁷⁷

It has been argued by most American scholars that privacy is also at the core of democratic values. An individual therefore has an interest in the protection of his or her privacy because preserving privacy fosters individual autonomy, dignity, self-determination, and ultimately promotes a more robust, participatory citizenry. They further argue that a watched society is a conformist society and unwanted exposure may lead to discrimination, loss of benefits, loss of intimacy, stigma, and embarrassment.⁷⁸

3.3 Types of privacy

The term privacy means many things in different contexts. Different people, cultures, and nations have a wide variety of expectations about how much privacy a person is entitled to or what constitutes an invasion of privacy. There are different types of privacy which include physical privacy, informational privacy, communications privacy and territorial privacy.

3.3.1 Physical Privacy

Physical privacy could be defined as preventing intrusions into one's physical space or solitude. This would include such concerns as preventing intimate acts or one's body from being seen by others for the purpose of modesty, video, as aptly named graphics, or intimate acts, behaviours or body part, preventing unwelcome searching of one's personal possessions,

⁷⁷ Simon Davies, *Big Brother : Britain's web of surveillance and the new technological order*, (London: Pan, 1996) p. 23

⁷⁸ 23rd International Conference of Data Protection Commissioners in Paris (24-26 September 2001)

preventing unauthorized access to one's home or vehicle.⁷⁹ Physical privacy may be a matter of cultural sensitivity or personal dignity.

Medical privacy is the right to make fundamental medical decisions without governmental coercion or third party review, in relation to one's body. A good example is the case of *Cruzan v Director, Missouri Department of health*.⁸⁰ In this case the Petitioner Nancy Beth Cruzan was rendered incompetent as a result of severe injuries sustained during an automobile accident. Co-petitioners Lester and Joyce Cruzan, Nancy's parents and co-guardians, sought a court order directing the withdrawal of their daughter's artificial feeding and hydration equipment after it became apparent that she had virtually no chance of recovering her cognitive faculties. The Supreme Court of Missouri held that because there was no clear and convincing evidence of Nancy's desire to have life-sustaining treatment withdrawn under such circumstances, her parents lacked authority to effectuate such a request. This was because she still maintained her right to physical privacy following medical examinations on her mental capacity.

An example of the legal basis for the right to physical privacy would be the United States of America's Constitution where the Fourth Amendment guarantees "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures"⁸¹ In the case of *Savana Redding v Safford Unified School District*⁸² the United States Supreme Court held that the officials would have been justified had they limited their

⁷⁹ Ruth Gavison *Privacy and the Limits of Law*, Vol. 89. Yale L.J (1980) p.421

⁸⁰ 497 U.S. 261 (1990)

⁸¹ *Fixing the Fourth Amendment with trade secret law: A response to Kyllo v. United States*
Georgetown Law Journal

⁸² 557 U.S. (2009) 479

tipped that she had prescription pills. But in searching her undergarments, they went too far and violated her Fourth Amendment privacy rights.

3.3.2 Informational privacy

Informational or data privacy refers to the evolving relationship between technology and the legal right to, or public expectation of privacy in the collection and sharing of data about one's self. Privacy concerns exist whenever uniquely identifiable data relating to a person or persons are collected and stored, in digital form or otherwise. In some cases these concerns refer to how data is collected, stored, and associated. In other cases the issue is who is given access to information.⁸³

Various types of personal information often come under privacy concerns. For various reasons, individuals may not wish for personal information such as their religion, sexual orientation, political affiliations, or personal activities to be revealed. This may be to avoid discrimination, personal embarrassment, or damage to one's professional reputation.⁸⁴

Financial privacy, in which information about a person's financial transactions is guarded, is important for the avoidance of fraud or identity theft. Information about a person's purchases can also reveal a great deal about that person's history, such as places they have visited, whom they have had contact with, products they use, their activities and habits, or medications they have used.

Internet privacy is the ability to control what information one reveals about oneself over the Internet, and to control who can access that information. These concerns include whether email can be stored or read by third parties without consent, or whether third parties can track

⁸³ Alan Westin, *Privacy and freedom* (New York: Atheneum, 1968), p. 29

⁸⁴ Ronald Standler, *Report on Privacy Law in the USA* (New York: 1997)

the web sites someone has visited. Another concern is whether web sites which are visited collect, store, and possibly share personally identifiable information about users.⁸⁵

Medical privacy allows a person to keep their medical records from being revealed to others. This may be because they have concern that it might affect their insurance coverage or employment. Or it may be because they would not wish for others to know about medical or psychological conditions or treatment which would be embarrassing. Revealing medical data could also reveal other details about one's personal life. This was the case in the case of *Wong-Fernandez v The State of Hawaii*⁸⁶ where the accused published the HIV results of the deceased on the internet. This was held to be a breach of their medical privacy and she was convicted to one year in prison.

Sexual privacy prevents a person from being forced to carry a pregnancy to term and enables individuals to acquire and use contraceptives and safe sex supplies and information without community or legal review.⁸⁷

Political privacy has been a concern since voting systems emerged in ancient times. The secret ballot is the simplest and most widespread measure to ensure that political views are not known to anyone other than the original voter it is nearly universal in modern democracy, and considered a basic right of citizenship. In fact even where other rights of privacy do not exist, this type of privacy very often does.

3.3.3 Privacy of Communications

⁸⁵ Micheal Godwin, *Cyber Rights: Defending Free Speech in The Digital Age* (New York: Times Books, 1998), p. 19

⁸⁶ U.S. 1 P C (2008)

⁸⁷ *Griswold v. Connecticut* 381 U.S. 479 (1965)

This type of privacy covers the security and privacy of mail, telephones, email and other forms of communication.

3.3.4 Territorial Privacy,

This type of privacy concerns the setting of limits on intrusion into the domestic and other environments such as the workplace or public space. The Supreme Court of the United States in the case of *John Geddes Lawrence and Tyron Garner, Petitioners v. Texas*⁸⁸ was brought to answer whether Petitioners' criminal convictions for adult consensual sexual intimacy in the home violate their vital interests in liberty and privacy protected by the Due Process Clause of the Fourteenth Amendment. *Justice Kennedy* delivered the opinion of the Court stating that liberty protects the person from unwarranted government intrusions into a dwelling or other private places. In our tradition the State is not omnipresent in the home. And there are other spheres of our lives and existence, outside the home, where the State should not be a dominant presence. Freedom extends beyond spatial bounds. Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct. The instant case involves liberty of the person both in its spatial and more transcendent dimensions.

3. 4 The Right to Privacy in Zambia

Privacy rights in Zambia are contained in the Constitution of Zambia as well as the State Security Act. Article 17 of the Constitution provides that:

(1) Except with his own consent, a person shall not be subjected to the search of his person or his property or the entry by others on his premises.

(2) 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-

⁸⁸71 U.S. 4574 (2003)

(a) that is reasonably required in the interests of defence, public safety, public order, public morality, public health, town and country planning, the development and utilisation of mineral resources, or in order to secure the development or utilisation of any property for a purpose beneficial to the community;

(b) that is reasonably required for the purpose of protecting the rights or freedoms of other persons;

c) that authorises an officer or agent of the Government, a local government authority or a body corporate established by law for a public purpose to enter on the premises of any person in order to inspect those premises or anything thereon for the purpose of any tax, rate or due or in order to carry out work connected with any property that is lawfully on those premises and that belongs to the Government, authority or body corporate, as the case may be; or

(d) that authorises, for the purpose of enforcing the judgment or order of a court in any civil proceedings, the search of any person or property by order of a court or entry upon any premises by such order;

and except so far as that provision or, as the case may be, anything done under the authority thereof is shown not to be reasonably justifiable in a democratic society.

It should be noted that there are very few cases that discuss the right to privacy in Zambia.

This is because this is one area that has not been widely discussed. However, one case that touched on this right is the case of *Patel v The Attorney General*.⁸⁹ This is one of the very few cases in Zambia that deals with an individual's Constitutional right to privacy. It affirmed Article 17(2)(c) which provides for when a person's right not to be searched without their consent can occur. In this case the right to privacy was limited on the ground that it was reasonably required to do so. The question here was, "does a customs officer, no matter what his instructions are, have the right to subject to search the correspondence of an individual, when there is enshrined in the Constitution a protection against this sort of arbitrary action?" It was held by *Magnus J.* that the searching of the applicant's property was within the confines of the derogation clause. He stated that he could not say that regulation 35 of the Exchange Control Regulations is not reasonably justifiable in a democratic society and using the objective test he found that the authorised officer had reasonable suspicion that the

⁸⁹ (1968)Z. R. 99

package was used for illegal transactions. Therefore, it was reasonably justifiable to have searched the applicant's property.⁹⁰

From the Constitutional provision, it is clear that it protects mainly two types of privacy which are physical privacy and territorial privacy. The provision states that *except with his own consent, a person shall not be subjected to the search of his person or his property or the entry by others on his premises*. In this case *searching of a person* in this case is what will amount to invasion of physical privacy. Secondly, *entry by others a person's premises* entails invasion of territorial privacy. However, the Constitution is silent as regards other forms of privacy that have earlier been mentioned such as communications privacy and information privacy.

Having said this however, it does not mean that instance of invasion of information privacy do not occur in Zambia. Publications of stories or photos of personal facts do infringe on an individual's right to privacy when the consent of the concerned parties is not sought. This has happened in Zambia but has not been adjudicated upon. For instance, in the year 2006 the Post newspaper made allegations that the former president Chiluba was HIV positive⁹¹. There was a claim for defamation on this allegation as opposed to invasion of privacy. From what has earlier been discussed, such a publication falls in the category of invasion of information privacy. This however, is not indicted to be within the provisions of Article 17 of the Zambian Constitution.

On an ethical point of view, most of the photos published cannot be seen to be in the public interest such as pictures of a person dancing at a night club and totally unaware that there are

⁹⁰ Ibid at p. 131

⁹¹ The Post Newspaper 16 April, 2006

cameras around. This has been a subject of controversy from the government as to whether it is right to publish pictures of the sick and those entertaining themselves without their consent.⁹² It has been argued that what goes on in the night club is usually in people's private time and therefore should not be subjected to the realm of society. However, journalists have reiterated that clubs are public places and therefore there is nothing wrong with taking such pictures. However, the question often asked is whether individuals leave their right to privacy in their home when they go into the public.⁹³ All this boils down to the question of whether the right to privacy is taken into contemplation in all these publications.

In such a case as in Zambia reference would be made to English Common Law in deciding cases of a nature not provided for under the Constitution. This is based on the English Law (Extent of Application) Act.⁹⁴ Section 2 of that Act provides that

Subject to the provisions of the Constitution of Zambia and to any other written law-
(a) the common law; and
(b) the doctrines of equity...
...shall be in force in the Republic.

This means that judicial precedents from England can be made reference to as authority where no Zambian case law is present

3.5 Judicial Interpretation of the Right to Privacy

The courts in different Jurisdictions have attempted to interpret the right to privacy. For instance, for a long time the courts in Great Britain human rights developed within the frameworks of the common law tradition but invasion of privacy was treated as a breach of

⁹² Mwala Kalaluka "Kafunda Acquits Kabwela" The Post Online, November 17 2009:<http://www.thepost.zm>(accessed on March 4 2010)

⁹³ *ibid*

⁹⁴ Chapter 2 of the Laws of Zambia

confidence. A classical example of the breach of confidence is the unauthorized disclosure of trade secrets. In two decisions of *Attorney general v. Jonathan cape Ltd.*⁹⁵ and *Attorney general v. Guardian Newspapers*⁹⁶ where the British court concluded that confidentiality could be applied more broadly and be accepted as a relevant ground for stopping a publication in the media, which is confidential and is political by nature. The most effective measure in these cases would be an injunction forbidding publication.

The fact that the specific violation of the right to privacy does not develop within the British legal system reflects upon the general protection of rights. Thus, if the telephone of an individual is tapped he/she cannot sue for infringement of privacy but a publication, which is an outcome of the unlawful interception can be restrained as being a breach of confidence. In cases of photographing and door-stepping, victims may refer the matter to the press complaints commission or the broadcasting standards commission, which are bodies set up voluntarily and entitled to defend high journalistic criteria and encourage their application in the everyday media work.⁹⁷

Similarly in *Abernethy v. Hutchinson*⁹⁸ where the plaintiff, a distinguished surgeon, sought to restrain the publication in the "Lancet" of unpublished lectures which he had delivered as St. Bartholomew's Hospital in London, *Lord Eldon* doubted whether there could be property in lectures which had not been reduced to writing, but granted the injunction on the ground of breach of confidence, holding "that when persons were admitted as pupils or otherwise, to hear these lectures, although they were orally delivered, and although the parties might go to the extent, if they were able to do so, of putting down the whole by means of short-hand, yet

⁹⁵ [1976] QB 752

⁹⁶ [1990] The Times 28th February

⁹⁷ Samuel Warren and Louis Brandeis, *The right to privacy*. (4Harvard Law Review, 1890): p. 193 - 220

⁹⁸ (1825), 3 L. J. Ch. 209

they could do that only for the purposes of their own information, and could not publish, for profit, that which they had not obtained the right of selling."

After the Human Rights Act (HRA) was passed in the year 2000 and through the adoption of the principles of the European Court of Human Rights the formulation and constitutional endorsement of an autonomous privacy right become plausible in Great Britain. In recent decisions such as *Douglas v. Hello! Ltd.*⁹⁹, the British court ruled against the injunction prohibiting the publication of wedding photos by a rival magazine, which had managed to take them secretly during the party though the exclusive right for this has been contracted to another magazine. The House of Lords however, concluded that "English law recognizes the right to privacy."

In another decision, *R. v. Brcs. Standard Commission, ex parte BBC*¹⁰⁰ the court affirmed the decision of the Broadcasting Standards Commission, according to which legal persons can also take legal proceedings in case its privacy right is abused. In this respect the British court followed the criteria of the ECHR. Owing to the nature of the instruments by which privacy is invaded, the injury inflicted bears a superficial resemblance to the wrongs dealt with by the law of slander and of libel, while a legal remedy for such injury seems to involve the treatment of mere wounded feelings, as a substantive cause of action.¹⁰¹

In South Africa in the case of *Gosschalk v Rossouw*¹⁰² Corbett J defined privacy with reference to *O'Keeffe* stating that "the rights relating to dignity include, it would seem . . . a qualified right to privacy." South African Constitution of 1996 states,

⁹⁹ (2001, CA unreported)

¹⁰⁰ (2000) E.M.L.R.

¹⁰¹ Samuel Warren and Louis Brandeis, *The Right To Privacy*, (4 Harvard Law Review 1890) p. 193

¹⁰² (1966) 2 SA 476 (C) at 490

"Everyone has the right to privacy, which includes the right not to have –
(a) their person or home searched;
(b) their property searched;
(c) their possessions seized; or
(d) the privacy of their communications infringed."

This provision unlike the Zambian Constitution is broader in that it includes communications privacy.

The US constitutional theory distinguishes between four different ways of invasion of privacy entailing civil liability in four branches: appropriation of another's name or likeness, unreasonable intrusion in another's seclusion, publicity which unreasonably pales another in a false light before the public and unreasonable publicity given to another's private life.

3.6 Restrictions on the Right to Privacy

Like any other right, the right to privacy also has its limitations. As has been noted in Article 8(2) of Convention for the Protection of Human Rights and Fundamental Freedoms, this right will be restricted in so far as it is in the public interest to do so. An example to illustrate this point is the case the right to physical privacy which states that a person shall have the right to make fundamental medical decisions without governmental coercion or third party review, most widely applied to questions of contraception. In the case of *In Jacobson v. Massachusetts*¹⁰³ for instance, the Court balanced an individual's liberty interest in declining an unwanted smallpox vaccine against the State's interest in preventing disease.

The right against unsanctioned invasion of privacy by the government, corporations or individuals is part of many countries' privacy laws, and in some cases, constitutions. Almost all countries have laws which in some way limit privacy; an example of this would be law

¹⁰³ 197 U.S. 11 (1905),

concerning taxation, which normally require the sharing of information about personal income or earnings. In some countries individual privacy may conflict with freedom of speech laws and some laws may require public disclosure of information which would be considered private in other countries and cultures. Privacy may be voluntarily sacrificed, normally in exchange for perceived benefits and very often with specific dangers and losses, although this is a very strategic view of human relationships.¹⁰⁴

3.6 Conclusion

The right to privacy as is guaranteed by the Constitution is silent on a number of privacy protection known in other jurisdictions such as South Africa and now the UK. This can be viewed as a down side because the Constitutional guarantee of the right to privacy does not make extension to other forms of privacy such as information privacy as well as communication privacy. It has been established that in Zambia because in the past years there have been very few cases pertaining to a person's invasion of privacy and because of this reference can be made to Common Law.

¹⁰⁴ David Solove and Others *Privacy, Information, and Technology*, (Aspen: Aspen Publications, 2006) p. 9-11

CHAPTER FOUR

RECONCILING THE RIGHTS TO FREEDOM OF EXPRESSION AND PRIVACY IN

ZAMBIA

4.0 Introduction

This Chapter will endeavour to show whether the right to freedom of expression and the right to privacy, as have been discussed in the previous chapters, are reconciled and how they are reconciled in Zambia. This chapter will discuss the relevance of reconciling these rights in Zambia and whether this has an impact on a democratic country like Zambia. It will begin by looking into the importance of reconciling the fundamental human rights. It will then discuss whether the rights to privacy and freedom of expression reconciled in Zambia based on what has been established in the previous chapters.

4.1 Importance of Reconciling the Rights to Freedom of Expression and Privacy

Though essential for the development of the democratic society the individual and the institutional or media's right to free expression are not absolute. In the course of media operation a controversy may occur between the activity of the operators aiming at gathering and disseminating various information and ideas to the public and the right to privacy.¹⁰⁵ Reconciliation of rights basically entails that rights are brought into harmony with each other. In other words this means that where rights are in conflict, they should be harmonised for purposes of their co-existence. Therefore, reconciling such rights would entail ensuring that the enjoyment of these rights is exercised with regard to other competing rights by balancing of interests of other right holders.

¹⁰⁵ Don McGoldrick. *The Human Rights Committee* (Oxford: Clarendon Press, 1991)

For instance the Constitution provides for freedom of expression however, the Defamation Act¹⁰⁶ protects people from publication about them that may cause them to be shunned and ridiculed in society. The best illustration is the case of *Lazarus Mumba v Zambia Publishing Co.*¹⁰⁷ where the appellant brought an action for defamation against the respondent. The respondent published an article that made reference to a suit for divorce filed by the appellant's wife which was alleged to be defamatory. *Chief Justice Ngulube* found and stated that because the facts in the article were inaccurate, the comment was neither fair nor accurate. He further held that for a defence under section 8 of the Defamation Act to succeed, the account must be contemporaneous, fair and accurate. A failure of any one of these three conditions destroys the absolute privilege. The article was found to be indeed defamatory as there was failure on these three conditions and the appeal was allowed.

This means that, while the Constitution guarantees the right to freedom of expression under Article 20(2) which provides for press freedom, this has to co-exist with another individual's person's reputation and dignity. This is one way to reconcile these conflicting rights. In a democratic society, it is important that rights are balanced in order to ensure that there is no infringement of a section of the society while others are enjoying their rights. This ensures that enjoyment of rights is not abused.

4.2 Are the Rights to Privacy and Freedom of Expression Reconciled in Zambia?

Being a powerful instrument for impact and justice, law may find it considerably difficult to control the media and deter its interference in the individual private sphere because the limitations may hamper the right of an open and democratic society to get the information

¹⁰⁶ Chapter 68 of the Laws of Zambia

¹⁰⁷ (1982) Z R 53 S.C

necessary for its normal functioning. Difficulties in reconciling the right to privacy and freedom of expression are due to objective and subjective reasons such as: the impossibility to give a precise definition of privacy; the limited opportunities of the legal tools to regulate effectively a sphere related to the most intimate human nature as well as the rapid advancement of the new technologies opening vast opportunities for communication and impact. Therefore, the crucial problem is how best regulators can reconcile the individual and the public interests in the modern complex environment.¹⁰⁸

It has already been established in the earlier chapters that the right to privacy as guaranteed by the Zambia Constitution has not been interpreted by the Zambian courts. At common law, however, it has been noted that the right to privacy takes many forms. One such form is the right to privacy of personal information. According to the case of *Douglas and Zeta-Jones v Hello! Ltd.*¹⁰⁹, the Privy Council stated that the common law meaning of the right to privacy has been developed and it would include such things as publication of personal pictures as well as other personal information about an individual.

It has been difficult to reconcile the right to privacy and press freedom in Zambia. One of the reasons for this is because of the Constitutional interpretation of the right to privacy in Zambia which is narrowly construed as opposed to the Common Law. Secondly, it is because the media in Zambia have a self regulatory system that makes it difficult to have a defined set of regulations as regards other people's rights. It was earlier stated that Zambia uses the

¹⁰⁸Geoffrey Robertson and Andrew Nicol. *Media Law* (London: Longman Group UK. Ltd., 1990) p. 208

¹⁰⁹ 2001(C.A. Unreported)

Common Law by virtue of it being a former British colony and by the authority of English Law (Extent of Application) Act¹¹⁰.

The courts in South Africa for instance acknowledged that the right to privacy is a right as important as any other right. Therefore cases brought for invasion of privacy are handled in light of their Constitution as well as the Common Law. In Zambia such cases are seldom brought before the courts of law. Nevertheless, by virtue of the said Act, Common Law can be made reference to by the Zambian courts considering the definition provided by the Constitution is not exhaustive. However, the problem is that Common Law and a constitutionally guaranteed right cannot be reconciled. This is because the Constitution is superior over Common Law and therefore such rights cannot be said to be guaranteed equally.

The Zambian courts have not interpreted the scope and extent of the right to privacy as some jurisdictions have as has been alluded to in Chapter three. However, that is not to say that there are no instances that involve the violation of the right to privacy of personal information. A classic example is the instance where the former president Chiluba was alleged to be HIV positive by the Post newspaper.¹¹¹ It has also been established that in the publication of pictures of people who are not aware of such pictures being taken is done without their consent is a violation of the right to privacy. From the case of *Mhlongo v Bailey*¹¹² which has already been referred to concerning the wrongful publication of a photograph of nurses, Kuper J, following *Walker v Van Wezel*¹¹³, stated clearly that a remedy

¹¹⁰ Chapter 11 of the Laws of Zambia

¹¹¹ The Post News paper, 16 April 2006

¹¹² [1958] 1SA 370 (W) at 372

¹¹³ [1940] WLD 66

should be given only when the words or conduct or such publication complained of involves an element of degradation or insulting

This case can be applicable in the case of publishing a picture of a person dancing at a night club. Similarly, if a publication concerns the medical status of a person that is embarrassing that would amount to invasion of privacy according Kuper J. However, Zeta-Jones and Douglas successfully sued Hello! Ltd for publication of their wedding photos without their consent and these photos were not necessarily degrading and this was held to be invasion of privacy. In the case of Zambia consideration is not given as to whether such publications have an element of degradation nor is the issue of consent brought into contention and this seen in the numerous newspapers published over the end of the week.¹¹⁴

In an interview with Mr. Eustace Nkandu¹¹⁵ it was established that while the media has self regulation as regards their conduct, most of these regulations are not followed. This is especially so as regards right to personal privacy in publications which is not constitutionally guaranteed. He further said that the recourse for most private individuals whose right to privacy has been violated is to write to the paper for any grievances but does not help the situation. In the U.S.A medical information of an individual is defined as personal information and this was affirmed by the case of *Wong-Fernandez v The State of Hawaii*¹¹⁶ where the court established the posting of the results of deceased for an HIV test on the internet was a violation of his medical privacy and she was convicted and sentenced to one year in prison. The accused was working for Straub Clinic and Hospital where she accessed

¹¹⁴ The Post News Paper, January 29, 2010 issue, February 26, 2010 issue, February 12 2010 issue

¹¹⁵ Eustace Nkandu, March 2nd, 2010

¹¹⁶ U.S. 1 PC (2008)

the medical records and posted them to the deceased's sister online in a publication called 'the vile, hurtful and ugly truth'.

Most of the cases where there is a publication of personal facts which were either false or true in Zambia are brought before the courts in actions for defamation. The injured party is quick to establish that such a position is not true other than the fact that even if it is true, the press has no right to publish such information without their consent. Examples of this include the case mentioned earlier of *Lazarus Mumba v Zambia publishing Company*.¹¹⁷ This case showed an invasion of privacy when there was publication of matters relating to a divorce petition against the plaintiff. According to Article 20(3) of the constitution:

*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....that is reasonably required for the purpose of protecting the 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....*¹¹⁸

This provision means that the law can abrogate from the right to freedom of expression in so far as it is necessary to protect the private lives of parties to legal proceedings. Therefore, it can be argued that in the mentioned case had the judge decided in relation to publication of matters touching on the private lives of the parties to proceedings, a ruling against Zambia Publishing Company would not have been contrary to Article 20 of the Constitution.

However, most national and international conventions and other legislation on human rights argue in favour of establishing some limits to protect the privacy and the reputation of people,

¹¹⁷ (1980) Z.R. 144

¹¹⁸ Article 20(3)(b)

as well as the maintenance of public order and of national security. While this has been generally accepted, advocates of the right of freedom of expression have stressed that these limitations should be reduced to the minimum and that they should be clearly prescribed by law to avoid any discretionary power in the application of the exemptions to prevent criticism or denunciation of wrongdoing and/or corruption of public officials.¹¹⁹

Zambia unlike South Africa, which is also a developing country, has developed relatively slower in terms of privacy rights. South, like the UK and Australia, does not have any written law outside its Constitution protecting the right to privacy but yet it has an abundance of case law with regard to personal information privacy. These cases have been determined by the use of Common law by virtue of it having a mixed legal system.¹²⁰

4.4 Conclusion

In conclusion, it has been established that the rights to freedom of expression and privacy should be balanced in order to ensure that the rights given are not abused. It is also to ensure that other people's rights are not infringed in the process of enjoyment of those rights. From this, the Zambian courts have not been faced with many reported cases where they had to determine whether an individual's right to privacy as provided at common law has been infringed. At common law it has proved very important to reconcile and balance the right to privacy and freedom of expression because the right to privacy is just as important as the right to freedom of expression in a democracy. However, the lack of express provisions protecting certain aspects of privacy remains the main problem for lack of this reconciliation in Zambia.

¹¹⁹Article 19. *Privacy International*. 20th Anniversary Book (2008):<http://www.article19.org> (accessed on 29th September 2009)

¹²⁰ Reinhard Zimmerman and Daniel Visser *Civil Law and Common Law in South Africa* (Oxford: Clarendon Press, 1996), 188

CHAPTER FIVE

OBSERVATIONS AND RECOMMENDATIONS

5.0 Introduction

This Chapter is intended to give conclusions on what has been established in this research paper and thereafter give recommendations to that effect. This will be done by making reference to the findings of what should be the ideal case in relation to reconciling the right to privacy.

5.1 General Observations

Having looked at the scope of the right to privacy in Zambia and in other jurisdictions it has been observed that the protection of the right to freedom expression in Zambia has improved greatly compared to. From the research conducted it has been observed that Zambia like many developing countries has a growing media sector. Reports made reference to from MISA Zambia in chapter two clearly show the growth and extension of the media such as community media. Further, the extent to which the press can exercise their right does not pose restrictions on how they can respect other people's right to privacy in any written law in Zambia apart from Article 20(3) regarding parties to proceedings. Therefore there is need for measures to be taken in order to reconcile these two competing rights because as it stands in Zambia these two rights have not been reconciled.

5.2 Recommendations

Having looked at a brief overview of what has been discussed this research paper, it is important take into account the measures that can be put in place to ensure that there is a balance between the right to freedom of expression and the right to privacy.

5.2.1. Policy Recommendations

Most of the conflicts between the right to free expression of the media and privacy rights can be regulated through the improvement of the professional skills, culture and taste of the mass media. Professional and ethical codes are more effective regulators than legal norms. Instead of the lack of regulation or the rigorous legal regulation which may have a chilling effect on the media and hamper its fourth power role, it is better the application of self-regulatory rules to be more thorough. This thoroughness can only be done by ensuring a standard set of regulations and well defined sanctions for non conformity to these regulations for institutions such as the media.

Further it is important to improve skills training for the many people that are in the field of the media. For instance, it is important to train journalists at community level on the ethical codes that are expected to be followed by them in all areas of publication. This is particularly important because there are a number of individuals that work as journalists that have not gone through the proper training procedure and may be oblivious to relevance of ethical codes. This is very important as there has been a registered growth in the media sector. It is also important to ensure that in a developing country like Zambia people are sensitized on their right to privacy and any remedy available to them where there is breach of their right.

5.2.2. Legal Recommendations

As regards recommendations pertaining to legal framework in Zambia it is important that there is a fusion and enrichment between the Zambian legal system and the Common Law. As has already been alluded to, Zambia makes reference to the Common law and principles

of equity by virtue of the English Law (Extent of Application) Act.¹²¹ However, there is need to ensure that the Common Law on invasion of privacy assists in making Zambian laws for the protection of the right to privacy. This basically means that the principles of the judge made law on invasion of privacy can be codified into law in Zambia for the protection of the right to personal privacy. An example of this is the Partnership Act of 1890. This act was mainly the codification of Common Law principles because it encompassed principles from decisions by the courts on partnerships.¹²² This can improve the methods and generally the practice of Zambian courts when entertaining cases in which right to free expression and privacy rights are competing, which in most cases involve the media and private individuals.

This conflict, which is of great importance for contemporary democratic society, can be an object of special legislative attention as it has been done in Great Britain by adopting the Human Rights Act where the right to free expression and the media enjoy a privileged treatment by public bodies. The effective protection of privacy and all elements related to it such as home, office, correspondence, personal data, mandates revision of the Criminal Code and updating the relevant norms by bringing them in conformity with the spirit and language of the Constitution. Another proposal relates to the systematic improvement of the Criminal Code from the aspect of rights by grouping the different norms protecting the complex right to privacy in a separate section, which will facilitate their application and interpretation.¹²³

From the above stated it is important to note that in as much as it is necessary to have laws that protect media laws apart from the Constitution, it is also important that laws protecting

²¹ Cap 11 of the Laws of Zambia

²² Denis Keenan and Sarah Riches, *Business Law* (London: Pitman Publishing, 1996), 105

²³ Article 19. *Privacy International*. 20th Anniversary Book (2008): <http://www.article19.org> accessed on 29th September 2009)

personal privacy are enacted such as the Privacy Act of Australia as well as the Human rights Acts of the UK. This is because with some form of written law protecting and guaranteeing the right to privacy, conformity easier and there is certainty.

5.2.3 Institutional Recommendations

It is important that to reconcile these rights, there is need to put in place an institution that will be able to ensure that the media ethics are being adhered to. MECOZ was one such institution but it was condemned as not having been independent and therefore media organizations did not want to be a part of it for fear of being under government control. After the defunct MECOZ therefore there is need for another institution which will evidently be an independent institution that will be able to oversee the adherence to ethical codes of the media and firmly sanction inability to comply to these codes. The establishment of such an institution will mean that the press' conduct will be kept in check and thus other people's rights will be protected in doing so and one such right is the right to privacy.

Further, it is also recommended that just like there is MISA Zambia, an institution advocating for press freedom, there should also be an institution that advocates for privacy rights. This institution can be responsible in ensuring the sensitization of people on their inherent right to privacy and how relevant it is to a democratic society.

5.3 Conclusion

Finally, it can be concluded that the right to privacy and freedom of expression are both fundamental rights that are constitutionally guaranteed. However, the right to scope and extent of the right to privacy in Zambia has not been defined by the courts unlike freedom of expression. Therefore, using the Constitutional definition of privacy, other types of privacy

are not constitutionally guaranteed such as the information privacy and communications privacy. Common Law principles may be employed regarding the protection against invasion of privacy. However, it has been concluded that Common Law can not be reconciled with a constitutionally guaranteed right. These rights in Zambia are not reconciled from the research and therefore the need for implementation of the proposed recommendations.

BIBLIOGRAPHY

BOOKS

Anyangwe, C. *Introduction to Human Rights and International Humanitarian Law* Lusaka: UNZA Press, 2005

Article 19, *Defining Defamation: Freedom of Expression and Protection of Reputation*. London: Article 19, 2000

Davies, S. *Big Brother: Britain's web of surveillance and the new technological order*, London: Pan, 1996

Godwin, M. *Cyber Rights: Defending Free Speech in the Digital Age* New York: Times Books, 1998

Keenan, D. and Riches, S. *Business Law*. London: Pitman Publishing, 1996

Keiran, M. *Media Ethics: A Philosophical Approach*. California: Greenwood Publishing Group, 1997

Michael, J. *Privacy and Human Rights*, UNESCO: 1994

Martin, P. *Photo journalism Ethics: Timeless Issues*. California: Brown and Benchmark Publications, 1995

McGoldrick, D, *The Human Rights Committee* Oxford: Clarendon Press, 1991

Robertson, G. and Nicol, A. *Media Law* London: Longman Group UK. Ltd., 1990

Shultz, J. and Castan M. *International Covenant on Civil and Political Rights: Cases and Material and Commentary*. London: Oxford University Press, 2000

Solove, D. J. and Others *Privacy, Information, and Technology*. Aspen: Aspen Publ., 2006

The Article 19, *Defining Defamation: Freedom of Expression and Protection of Reputation*. London: Article 19, 2000

The Media Institute of Southern Africa, *So this is Democracy? State of Media in Southern Africa 2008: Annual Publication of MISA*. Windhoek: MISA, 2008

Westin, A. *Privacy and Freedom*. New York: Athenaeum, 1968

Zimmerman, R. and Visser, D. *Civil Law and Common Law in South Africa*. Oxford: Clarendon Press, 1996

INTERNATIONAL INSTRUMENTS

Convention for the Protection of Human Rights and Fundamental Freedoms Rome, 4.XI.1950

International Covenant on Civil and Political Rights

The European Convention on Human Rights

Universal Declaration of Human Rights



INTERNET SOURCES

Abbas, M. "Media and National Stability", Pakistani Times July 7 2007 cited on www.pakistantimes.net (accessed on March 26 2009)

Article 19. Privacy International. 20th Anniversary Book (2008): <http://www.article19.org> (accessed on 29th September 2009)

Article 19 Freedom of expression Handbook: International and Comparative law, Standards and procedures 1993 : <http://www.article19.org> (accessed on September 20 2009)

Human Rights Education Associates, *Freedom of Expression*. Human rights Education Association, <http://www.hrea.org/freedom-of-expression.html> (accessed on 16 August, 2009)

Jesuit Centre for Theological "Reflection Media Legislation and policy in Zambia: How it Impacts on Media freedom" 2005: <http://www.jctr.org.zm> (accessed on January 15 2010)

MISA Zambia "Self-Regulation: The Big Ethical Question": http://www.misazambia.org.zm/self_reg_/ (accessed on September 20 2009)

www.thepost.zm (accessed on March 4 2010)

Michalson, L. *IT Law with Insight: A Guide to Data Privacy Law in South Africa* (South Africa: Michalsons Attorneys, 2004): www.michalsonattorneys.com (accessed on the 15 of August 2009

Media Institute of Southern Africa, *Southern Africa media directory 2004/: Zambia at a glance*. (Windhoek: MISA 2005):<http://www.misazambia.org>. (accessed on January 15 2010)

United Nations Organization. *Universal Declaration On Human Rights*. New York: United Nations Organizations. <http://www.un.org/Overview/rights.html> (accessed on January 30, 2004).

JOURNALS

Alfred Chanda, *The Role of Lower Courts in the Domestic Implementation of Human Rights*. Vol.33. Zambia L. J. (2001)

Edward Bloustein, *Privacy as an Aspect of Human Dignity*, 39 New York U. L.R. 1964 p.971.

Fixing the Fourth Amendment with trade secret law: A response to Kyllo v. United States
Georgetown Law Journal

Gavison, R. Privacy and the Limits of Law, 89 Yale L.J. [1980] 421, p. 428

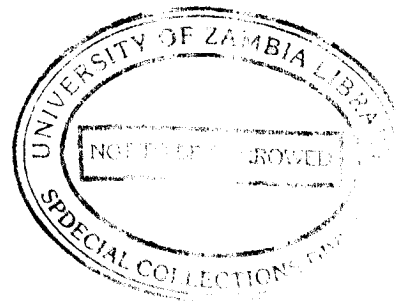
Sangwa, J. *Press Freedom in Zambia*. *Southern Africa Media Law Briefing*, Vol. 1 (1999)
Southern African Media. *Press Freedom in Zambia*. Southern African Media Law Briefing, (July 1998.)

Warren, S. and Brandeis, L. *The right to privacy*. 4Harvard Law Review, 1890

NEWS PAPER SOURCES

The Sunday Times

The Post News Paper



REPORTS

Article 19. Defending freedom of expression Report (2006)

Mung'omba Constitution Review Commission Interim Report (2005)

Report of the Human Rights Committee to the General Assembly, 38th Sess., Supp. No. 40, 1983 (A/38/40), Annex VI General Comment 10

Standler, R. Report on Privacy Law in the USA (New York: 1997)

ARTICLES

Muzyamba, F. "Country Report on Community/local media in Zambia" Monday, 08 June 2009

M. Magwaza, "The Struggle for freedom of expression in South Africa ",(July 11, 2007),

Kalaluka, M. "Kafunda Acquits Kabwela" The Post Online, November 17 2009

INTERVIEWS

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