

**THE FREEDOMS OF EXPRESSION, SPEECH, AND THE PRESS UNDER
THE CURRENT CONSTITUTIONAL ORDER AND THEIR IMPACT ON
DEMOCRACY: A CRITICAL ANALYSIS OF CURRENT
EVENTS/HAPPENINGS**

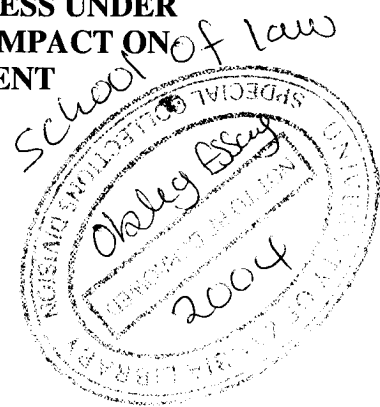
BY

HIBAJENE M. MULUNDA.

**Submitted in partial satisfaction of the requirement for the Degree of Bachelor
of Laws**

UNIVERSITY OF ZAMBIA

DECEMBER, 2004



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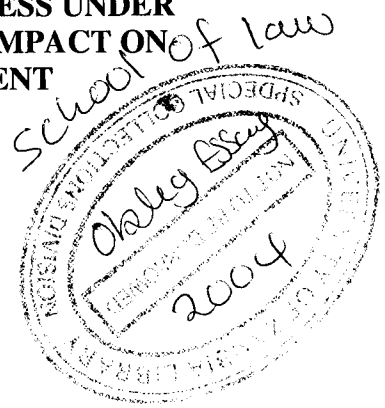
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DEDICATION

DEDICATED to Mum and Dad with supreme love and affection. Thanks for having inspired a spirit of hard work. Your counsel, moral and material support are beyond my capacity to repay.

ALSO with a heartfelt indebtedness to my brothers and sisters particularly Mweemba for the support rendered during my years of Tertiary education

THE UNIVERSITY OF ZAMBIA

SCHOOL OF LAW.

I recommend that the Obligatory Essay prepared under my supervision by
HIBAJENE M. MULUNDA.

Entitled

THE FREEDOMS OF EXPRESSION, SPEECH AND THE PRESS UNDER THE
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SUPERVISOR

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ULTIMATELY, this work could not have been accomplished without the guidance of the ALMIGHTY CREATOR.

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ABSTRACT

This work contains five chapters. The first chapter will discuss the historical development of the freedoms of expression, speech and the press. The second chapter is a critical analysis of the above mentioned freedoms as provided in the Zambian constitution, 1996. The third chapter discusses the freedoms of expression, speech and the press in the light of political interference and their impact on democracy. The fourth chapter looks at how freedoms of information would enhance the freedom of expression, speech and the press.

The last chapter (chapter five) will contain conclusions and recommendations.

CHAPTER ONE

HISTORICAL DEVELOPMENT OF THE FREEDOMS OF SPEECH, EXPRESSION AND PRESS.

1.1 INTRODUCTION

Every constitutional democracy that strives to live by the ideals of democracy must ensure that certain safeguards are put in place to promote full participation of the citizenry. This calls for the constitutional recognition of the fundamental rights and freedoms, which freedoms include; freedoms of the press, expression and speech. The freedoms of expression, press and speech are mutually interdependent as none of them can exist exclusively and independent of the others. Freedom of expression requires an independent media through which the ideas so expressed can be made known to the intended beneficiaries. This calls into picture freedom of the press. The above freedoms would be meaningless if freedom of speech was inhibited.

However, it is acceptable that in order to be able to comprehend present-day institutions in their entirety, their historical roots must on all accounts be revealed which gave rise to the institutions or had determined their initial first pattern. L.P. Zimba observes that, “if there is any demonstrably valid truth about the concept of human rights it is that in order to understand its present-day characteristics and its justification from theory point of view one should have recourse to its history in order to show the concept has persistently developed under different social and political conditions and how these have determined

its content and pattern of development.”¹ The author in the instant chapter will endeavour to explore the evolution of the freedoms of expression, speech and press with particular references to the crude concept of liberty as had under the natural law theory. Regard shall also be had to the development of the freedoms of expression, speech and press in the United States of America and the United Kingdom in order to show that the said freedoms cannot be attained by sudden flight. The Author will also consider the influence of classical writers on the development of the three freedoms in question.

1.2 NATURAL LAW THOERY AND ITS INFLUENCE OF FREEDOMS OF EXPRESSION, SPEECH AND PRESS.

Deol has argued that “the idea of natural and inalienable rights of the individual is one of the central themes of the liberal doctrine.”² It is commonly held that in the state of nature, people enjoyed the rights to life, liberty and property. A.W. Chanda authoritatively asserts thus: the theory of natural law played a predominant role in the development of natural rights; it is predicated on the assumption that there are natural laws, both theological and metaphysical which confer certain specific rights upon individual human beings. Such rights are either from divine will or from specified metaphysical absolutes.³

Arguably, it is the theory of natural law which initiated the belief that human rights or natural rights are designed to define the relation of the individual to the state and to

¹ L.P. Zimba (1975) The Constitutional Protection of Fundamental Rights and Freedoms in Zambia: A Historical and Comparative Study p.19

² Deol, D. (1990) Liberalism and Marxism: An Introduction to the Study of Contemporary Politics p.134

³ A.W. Chanda (1992) Zambia: A Case Study in Human Rights in Commonwealth p.3

protect the individual against the arbitrary or oppressive conduct of the state. Professor Lauterpacht observed, a fortiori ,

the substance of natural rights has been the denial of the absoluteness of the state and of its unconditional claim to obedience; the assertion of value and of the freedom of the individual as against the state, the view that the power of the state and of its rules is derived ultimately from the assent of those who compose the political community and the insistence that there are limits to the power of the state to interfere with man's rights to do what he conceives to be his duty.⁴

It is from the assertions of the natural law theory or as commonly called the theory of natural rights that the impetus to fight for the freedoms of the press, speech and expression was derived. A.W. Chanda has observed that “even after human rights and natural rights have become part of the positive fundamental law of mankind, the notions of natural law and natural rights which under lie them constitute that higher law which must forever remain the ultimate standard of fitness of all positive law whether national or international.”⁵

Furthermore, Professor Lauterpacht adds that, “whatever the criticisms the idea of the inherent rights of man ultimately state itself, is the continuous thread in historical pattern of legal and political thought.”⁶ Thus, the contention is true that both the Constitution of Virginia of 1776, the American Declaration of Independence and the French Declaration of the Rights of Man and of the Citizen were inspired by the theory of natural rights. A.W. Chanda in reference to the preceding observes that “these were the constitutional

⁴ Professor H. Lauterpacht (1945) An International Bill of Rights of Man p.17

⁵ A.W. Chanda supra p.3

⁶ Prof. Lauterpacht H. Supra p.18

*instruments of modern times to proclaim that the natural rights of man must as such form part of the fundamental law of the state and that their protection was a reason of its existence.”*⁷

The American Declaration of Independence which was adopted 4th July, 1776 reflects both the concept of natural right and Lockes’ theory of social contract. This document had an immeasurable impact on the development of human rights and constitutionalism throughout the world. The French Declaration proclaimed, inter alia, freedom of opinion and expression. It had a tremendous impact on the development of human rights on the continent of Europe and in the rest of the world. Lord Acton, a noted English Jurist, described it as “a single page....that outweighs libraries and stronger than all the armies of Napoleon.”⁸

In addition, the important point about the American and French incidents in the historical development of human rights is that for the first time ever this concept especially in the American model was raised to the level of a constitutional institution and also became a special constitutional law concept in that being part of the supreme law of the land all other legal norms in the legal system were subject to and derived their validity from it, and with this, the first stage of the historical development of human rights came to an end, the American and French experiences serving as models and examples which were to be followed in the process of constitutional evolution not only in Europe, but, with the

⁷ A.W. Chanda *supra* p.6

⁸ *Ibid* p.22

rapid growth of the international consciousness of brotherhood the idea of human rights was steadily becoming a problem to be dealt with on a universal basis.

It has been observed that long before the American Declaration of Independence and the French Declaration of the Rights of Man and the Citizen or even the English Bill of Rights, in the early Greek States or Polis citizens enjoyed political and civil freedom and rights. Greeks also enjoyed in particular freedom of speech, which they called *isigoria* or equal freedom of speech. However, Zimba cautions that when discussing the early Greeks practice of natural rights, one has to bear in mind that the notion was narrowly conceived and was a mere reflection of those societies' prevailing social and political rights." Irrespective of the preceding one may rightly assert that the Greeks laid down the foundations of the essential elements of the idea of human rights by constructing a political scheme which tended to place limitations on governmental power in order to safeguard individual rights and freedoms.⁹

1.3 DEVELOPMENTS IN ENGLAND

Development of freedoms of speech, expression and the press in England were coloured by protracted struggles between the populace on the one hand and the crown on the other. Repressions of ideas antithetical to the government was in operation by the 13th century. As early as 1275 parliament outlawed "any slanderous news...or any false news or tales whereby discord or occasion of discord or hatred may grow between the king and his people or the great men of the realm."¹⁰ This Act was re-enacted in 1379 under the guise of preventing the subversion and destruction of the realm via false speech. Any words

⁹ L.P Zimba supra p.19

¹⁰ Ibid p.6

that questioned the crown in any way were punished by the king's council sitting in the so called "starred chambers".¹¹

Moreover, a system of censorship was devised to prevent the wider dissemination of printed materials. Licensing was the core of the censorship. Violators of the licensing system were tried by the infamous court of star chambers, which became notorious for its secret proceedings and severe punishments.¹²

Friederick Siebert in his study of freedom of the press in England observes that convictions for seditious libel ran into hundreds, both in the Seventeenth and Eighteenth centuries.¹³ Siebert, however, positively observes that "of the period 1730-60 England witnessed the beginning of the revolt of the duties and failure of prosecutions."¹⁴ It was at this stage that the drive towards freedom of the press was gradually gathering momentum.

Furthermore, the trial of woodfall has been held by most scholars as the first cause celebre in the name of freedom of the press in England.¹⁵ This case concerned the publication of letters of junius between 1769-1771, which contained trenchant criticisms of the government of the day.

¹¹ T.B. Caster et al. (1988) The First Amendment and the Fourth Estate p.24

¹² L.W. Levy (1985) Emergency of a Free Press p.10

¹³ Ibid

¹⁴ Woodfall and Others, V.R. (1770) 895

¹⁵ J.E. Nowak et al (1986) Constitutional law p.833

Additionally, the passing of the Fox libel Act and Lord Campbell's Act gave rise to press freedom, since it was no longer automatic that a person would be convicted of seditious Libel by mere proof of publication of the matter charged as such. Truth, initially – held not to be a defence, was now a defence and what is more, the Jury could either convict or acquit the accused. Thus freedoms of expression, speech and press had some semblance of protection in the form of an impartial Jury.¹⁶

1.4 DEVELOPMENTS IN THE U.S.A

Foremost, it must be noted that the founders of the United States were mostly immigrants from England who were familiar with the Lockinean doctrines of liberty as well as the doctrine of natural and imprescriptible rights.

In the 1920's the colonies discovered the ardent views of the 'Cato' on freedom of speech in Benjamin's Pennsylvania Gazette.¹⁷ The 'Cato' was the Pseudonym of two whig journalists whose essays in London newspapers became very popular and were widely reprinted in the colonies.¹⁸ In these articles, free speech was posited and described as "the right of everyman as far as by it he does not hurt or control the right of another. And this is the only check it ought to suffer, the only bounds it ought to know. Free speech and free government thrived together or failed together. In those wretched countries where a man cannot call his tongue his own he can scarcely call anything his own and freedom of speech is ever the symptom as well as the effect of good

¹⁶ L.Levy (1966) Freedom of the press from Zenger to Jefferson pp.10-24

¹⁷ Ibid

¹⁸ Ibid

governance.”¹⁹ Cato favoured the fullest freedom of expression but conceded that extreme libels might be punished if they were false. In addition, the New York weekly which published several anonymous essays put forward sentiments such as, “liberty of the press is a curb, a birdle, a terror, a shame and restraints to evil ministers,” and it may only be the only punishments especially for a former. But when did columnies and lies ever destroy the character of one good minister. Truth will always prevail over falsehood.²⁰

Furthermore Leonard W.Levy observes that the Zenger case in 1735 gave press freedom to print, nevertheless the verdict of history is correct in regarding this case as a watershed in the evolution of the freedom of the press, not because it set a legal precedent for it set none, but because the Jury’s verdict resonated with popular opinion.²¹ He adds that “the Zenger verdict made people exult in liberty and the relationship of liberty of the press to liberty itself....it fortified their conviction that in a season of tyranny, citizens must be forthright in their censure of their government and should enjoy immunity for their courage in speaking out truthfully. It made them believe that interference in governing justified interference in expression and that intemperate criticism of an arbitrary or corrupt administration, if true, should not be a crime.”²²

Notably, the framers of the constitution of the Unites States felt no need to include in the original document a provision expressly upholding a general theory of freedom of

¹⁹ Ibid p.29

²⁰ Ibid

²¹ Ibid pp37-38

²² L.P. Zimba () supra p.20

speech, undoubtedly holding to the belief that the government they envisioned, limited to the enumerated powers, could not constitutionally enact a law in derogation of the principle of free speech.²³

1.5 THE INFLUENCE OF CLASSICAL WRITERS ON THE DEVELOPMENT OF FREEDOMS OF THE PRESS, SPEECH AND EXPRESSION

In 1644 John Milton in his well constructed epigram argued before parliament that “he who kills a man kills a reasonable creature...but he who destroys a good book, kills reason itself.”²⁴ And in another eloquent defence of free speech, in his tract *Areopagitica* Milton said, “though all the winds of doctrine were let loose to play upon the earth, so truth be in the field, we do injuriously, by licensing and prohibiting, to misconduct her strength. Let her and her falsehood grapple; whoever knew truth put to the worse in a free and open-encounter.”²⁵

In addition, John Stuart Mill expanded Milton’s argument two centuries later in his 1859 essays, on liberty by his recognition of the public good – the public enlightenment – which results from the free exchange of ideas. He hoped that truth would surface in an open and unperturbed debate. His was a model of free exchange and his doctrines emphasised the “struggle between liberty and authority.”²⁶ For him, the first freedom was liberty of

²³ J. Brigharm (1984) Civil Liberties and American Democracy p.40

²⁴ Ibid p.41

²⁵ J.E. Nowak supra p.885

²⁶ Ibid

thought and feeling; absolute freedom of opinion and sentiment on all subjects. He concluded that “the free expression of all opinions should be permitted on condition that the manner be temperate.”²⁷

The most authoritative common law views on the doctrine of the freedom of expression are to be found in Sir William Blackstone’s commentaries. He argued thus, “the liberty of the press is indeed essential to the nature of a free state, but this consists in laying no previous restraints upon publications and not from censure for criminal matter when published....”²⁸ Therefore, this requirement allowed all views to be presented to the public, although it did not protect against subsequent punishment if the expression turned out to be improper, mischievous or otherwise illegal for a printer could be jailed or fined for what he had printed. John Brigham adds that freedom of expression conceived in this way became an issue in the ratification process and many states in the U.S.A. thought to include it in the Federal constitution.”²⁹

Leonard Levy contends that “the presence of punishment afterwards for bad sentiments oral or published had an effect similar to a law authorising previous restraint.”³⁰ According to him “a man who may be whipped and jailed for what he says or prints is not likely to feel free to express his opinion even if he does not need a government license

²⁷ Abedi A.S. (1966) Freedom of expression and security p.10

²⁸ op cit p.40

²⁹ L.W. Levy supra p.11

³⁰ Ibid p.12

to do so.”³¹ It is therefore arguable that the common law definition, particularly of freedom of the press left the press at the mercy of the crown’s prosecutors and Judges.

1.6 CONCLUSION

In sum, the author is in total agreement with the renowned scholars’ assertion that the idea of freedoms of expression, press and speech is closely linked with the natural law theory in its historical evolution. It is also correct to assert that though these freedoms are fundamental and like natural rights are inherent, their realisation had to take a protracted struggle between the state and the citizenry. Their reduction into a document of constitutional significance was first achieved by the American Declaration for independence and the French declaration for the rights of man and the citizen. As shall be seen in the next chapter most of the ideas of constitutionalism were copied from the above documents.

³¹ Ibid

CHAPTER TWO

FREEDOMS OF EXPRESSION, SPEECH AND THE PRESS UNDER THE ZAMBIAN CONSTITUTION.

2.1 INTRODUCTION

Having laid down the foundation, the author in this chapter will endeavour to analyse the three freedoms viz: expression, speech and the press under the constitution. The author will also argue that while the constitution does provide for the freedoms of expression and press, it does not expressly provide for freedom of speech. Moreover, it is the author's contention that the derogation clauses provided for under the constitution are too vague and broad. These have an effect of taking away the rights/freedoms granted under the constitution. To this end the author will endeavour to analyse the Zambian constitutional provision in the light of internationally set standards.

2.2 ANALYSIS OF THE FREEDOMS OF EXPRESSION, SPEECH AND THE PRESS UNDER THE CONSTITUTION

Article 20 (1) of the Zambian Constitution resonates with Article 19 of International Covenant on Civil and Political Rights, 1966 and the Universal Declaration for Human Rights, 1948 as well as Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950. The constitution provides for freedom of expression in the following terms:

Except with his consent, a person shall not be hindered in the enjoyment of his freedom of expression, that is to say, freedom to hold opinions without interference, freedom to receive ideas and information without interference whether the communication be to the public generally or to any person or class of persons, and freedom from interference with his correspondence.³²

³² Article 20(1) Of the Constitution of Zambia

Ex facie the guarantee afforded by Article 20(1) seems very broad. Thus freedom of expression encompasses the right to hold opinions without interference and freedom from interference with one's correspondence. Furthermore, Article 20(2) of the Constitution protects press freedom in the following words:

Subject to the provisions of this constitution a law shall not make any provisions that derogate from freedom of the press.³³

Arguably, despite the express recognition of the above two freedoms the Constitution does not recognise as distinct the freedom of the press nor does it expressly recognise the freedom of speech. Milimo Moyo acknowledges that although the Constitution of Zambia recognises freedom of expression as a fundamental and basic human right in its Bill of Rights, no such recognition is given to press freedom. The absurdity of this omission cannot be overstressed.³⁴ It is a widely held view that freedom of expression cannot be fully enjoyed in an environment where media freedom is violated.

Additionally, Article 20(1) of the constitution would have no efficacy where media freedom is tramped upon. How are individuals supposed to, as per Article 20(1) hold opinions without interference, receive ideas and information without interference, if the media as the key avenue through which actions are executed is eliminated or otherwise reduced.³⁵ It was observed as respects the interconnection between freedoms of the press

³³ Ibid, Article 20(2)

³⁴ Milimo Moyo (2001, "Law Press and Freedom of Expression in Southern Africa: A comparative Critique) of Zambia, The Human Rights Observer Vol. 4 page22.

³⁵ Ibid

and expression, in the South African case of **Republic of South Africa v Sunday Times**

Newspapers as follows:

The role of the press in a democratic society cannot be understated. The press is in the frontline of the battle to maintain democracy. It is the function of the press to ferret out corruption, dishonesty and graft wherever it may occur and to expose the perpetrators. The press must reveal dishonest and mal – and inept administration. It must also contribute to the exchange of ideas. It must advance communication between the governors and those of the governed. The press must act as a watchdog of the governed.³⁶

The author, while respecting the views of renown media law scholars to the effect that press freedom falls within the ambits of freedom of expression, argues that press freedom must be distinctively recognized under the constitution. It can be submitted, further, that the lame ‘recognition’ of press freedom under Article (20) (2) of the constitution is inadequate in the light of the fact that the constitution does not define freedom of the press or articulate the legal framework for its enjoyment. Regrettably, this leaves room for any oppressive laws meant to infringe on press freedom. Arguably, “under this constitutional framework even if there is a law that derogates from freedom of the press, as it is generally understood, those criticizing such law will be doing so without a constitutional definition.”³⁷ Mostly, the interpretation of what constitutes press freedom is to be left to the unpredictable judicial definition and not based on a constitutional backing.

Another noticeable flaw in the constitution as regards the freedoms of expression, speech and press is failure to expressly recognize the right of access to government information.

³⁶ Milimo Moyo Supra, p.23

³⁷ (1995) (Z) SA 271(7): 227 (i).

For example, Section 32(1) of the South African Constitution states thus: Everyone has the right of access to:

- (a) any information held by the state; and
- (b) any information that is held by another person and that is required for the exercise or protection of any rights.³⁸

It is submitted that “this right is important for the enhancement of one’s right to free expression and facilitates effective reporting by the press.”³⁹ Fundamentally, it ensures transparency in government because the public will have information necessary to assess government actions.

2.3 RESTRICTIONS TO FREEDOMS OF EXPRESSION, SPEECH AND THE PRESS

The above freedoms just like any other rights are not absolute. A.W. Chanda referring to freedom of expression argues thus, “freedom of expression like any other rights is not absolute. Some legitimate restriction on the exercise of freedom of expression need to be placed by society in order to prevent its abuse.”⁴⁰ Other celebrated scholars like Nwabueze observes;

It is obvious that rights cannot be guaranteed in absolute terms if for no other reason than to protect the rights of other persons. To guarantee rights without qualification is to guarantee licence and anarchy...it follows that even if one were to guarantee rights in absolute terms as does the

³⁸ Article 32 of the Constitution of the Republic of South Africa

³⁹ Milimo Moyo OP.cit. p.23

⁴⁰ A.W. Chanda, [1998] “Freedom of Expression and the Law, In the Zambia Law Journal vol. 30, p.125.

American Bill of rights, they cannot, in fact be enjoyed without qualifications.⁴¹

However, for such restrictions to be sound they must meet a three tier test. First, any restrictions must be provided by law. Second, any restrictions must serve one of the legitimate purposes expressly enumerated in the text. Lastly, any restriction must be shown to be necessary. According to European standards as set by the European court of Human Rights "in order for a restriction to be prescribed by law, it must be adequately accessible and foreseeable that is, formulated with sufficient precision to enable the citizen to regulate his conduct."⁴² In the **Sunday Times, v. U. K.** the European Court of Human Rights stated thus:

To have a legitimate aim a restriction must be in furtherance of and genuinely aimed at protecting one of the permissible grounds listed in Article 10(2). The court mostly checks that there has been no abuse of power by the state to be necessary a restriction does not have to be indispensable but it must be more than merely 'reasonable' or desirable.⁴³

The court went on to state that:

A pressing social need must be demonstrated, the restriction must be proportionate to the legitimate aim pursued, and the reasons given to justify the restriction must be relevant and sufficient. In order to assess whether interference is justified by sufficient reasons, the court must consider any public interest aspect of the case. Where the information subject to restriction involves a matter of undisputed public concern, the information may be restricted only if it appears 'absolutely certain' that its dissemination would have the adverse consequences legitimately feared by the state.⁴⁴

⁴¹ B.O. Nwabueze, [1973] Constitutionalism in the Emergent States, p.39.

⁴² The Sunday times v. United Kingdom Judgement of 26th April 1979, Series A. No. 30 paragraph 49.

⁴³ Ibid at paragraph 63.

⁴⁴ At paras. 65-66

Additionally, the breadth of a restriction is also relevant. An absolute restriction (such as the prohibition of disclosure of all information concerning all pending cases) is clearly not acceptable; a court may sanction an interference with expression only when it is satisfied that the interference was necessary having regard to the facts and circumstances 'prevailing' in the specific case before it.⁴⁵

2.4 DEROGATIONS PERMITTED UNDER THE ZAMBIAN

CONSTITUTION: A CRITIQUE

According to Article 20(3) of the constitution, in order for a restriction on freedom of expression, speech or press to be valid; it must meet certain prerequisites. First, it must be provided by law and secondly, it must reasonably be required in any of the interests enumerated in clauses (a) to (c). Manifestly, the derogations are a typical characteristic of most African Constitutions that give abroad rights on the one hand and arbitrarily take them away. A.W. Chanda, has observed thus:

These interests especially those in clause (a) are expressed in very broad and vague terms. There is no definition of public safety; public order or defence. Almost any restriction can be justified on any of these grounds."⁴⁶ Chanda further observes that "a timid Judge will uphold all restrictions imposed by giving a broad interpretation to this clause."⁴⁷

Arguably, while there is an overriding need that a guarantee of rights must be balanced against the demands of public safety, public order and so forth the crucial question is

⁴⁵ The Observer and Guardian v. U.K. [Skycatcher case] Judgement of 26th November 1991, Series A, No. 216 para 65.

⁴⁶ A.W. Chanda, Supra. 127.

⁴⁷ Ibid: For example in Kachasu v. Attorney-General [1967] ZR 145 Patel v. Attorney-General [1968] ZR 99; The People v. M'membe and Bright Mwape, HPR/36/94.

whether the phraseology of the exception to the substantive right strick the right balance or whether it tilts the balance in favour of one or the other. Plainly the formulation of the derogations from the freedoms import a balance tilted in favour of the derogative clauses themselves and not the substantive rights.

Moreover, the derogative clauses use ambiguous phrases such as “reasonably justifiable in a democratic society”. These are manifestly vague and flexible. As there is no yardstick to what constitutes a democratic behaviour, it is wondered how this test is to be applied uniformly in all cases. Might not this, “reasonably justifiable” test be used to justify or possibly advance a judge’s predilections.⁴⁸

Besides, a Judge who is legally trained to decide cases upon principles of law can never be a competent political analyst to decide what is reasonably justifiable in a democratic society. The phrase “reasonably justifiable” is very wide and gives too much discretion to the Judge. It has been suggested in certain spheres that the qualifying word “necessary” used in the European Convention on Human Rights or “reasonably required” used in the constitutions of some of the commonwealth countries such as Uganda, Jamaica and Kenya is preferable. A measure may be justifiable either because it is expedient or necessary from which it follows that “reasonably necessary” is more restrictive than reasonably justifiable. The High Court of Northern Nigeria once argued that a restriction upon a fundamental human right, must before, it may be considered

⁴⁸ Ibid.

“reasonably justifiable” (a) be necessary (b) not be excessive or out of proportion to the object which it is sought to achieve.”⁴⁹

Moreover, the derogative clauses seem to imply a presumption in favour of the validity of the derogatory law, therefore casting the onus on the person challenging it to show that it is not reasonably justifiable. Blagden J. stated in **Kachasu v. Attorney General** that “there is a presumption that the legislature has acted constitutionally and that the laws which it has passed are necessary and reasonably justifiable.”⁵⁰ Nwabweze suggests that “had the formulation read: “any law derogating from a guaranteed right shall be invalid unless it is reasonably justifiable, the onus of proving the reasonable justifiability of the law would have been cast upon the authorities and the guaranteed right would have been enhanced in value.”⁵¹ The preceding view was followed by Chitengi J. in **The People v. Mwape and M’membe** where he stated thus;

I respectfully agree with the reasoning of Magnus J. in **Patel v. Attorney General** because reading the constitution, particularly Article 1...it is clear to me that...the presumption of constitutionality is self imposed as it cannot be found in any of the Articles in the constitution.⁵²

In addition Chief Justice Ngulube (as he then was) in the landmark decision of **Mulundika and Seven Others v. The People** unveiled the defectiveness in the derogative clauses to freedom of expression, press and speech under the constitution, he observed that;

⁴⁹ Cheranchi v. Cheranchi [1960] N.R.N.L.R. 24 at p.29 per Bate J.

⁵⁰ [1967] ZR 145.

⁵¹ N.O. Nwabweze. Op.cit p.39.

⁵² Per Chitengi J. In the People v. M’membe and Bright Mwape HPR/36/94.

Others [AIR 1971, 1667 at 1675], the Supreme Court of India expressed the view on the laws imposing restrictions of fundamental rights that; in order to be a reasonable restriction, the same must not be arbitrary or excessive and the procedure and manner of imposition of the restriction must also be fair and just. Any restriction which is opposed to the fundamental principles of liberty and justice cannot be considered reasonable...We find the foregoing to be a sound exposition of the attitude to be adopted in these matters. The principles of fairness are principles in their own right and ought to be allowed to pervade all open and just societies.”⁵³

According to A.W. Chanda, “the restrictions need only be reasonably required to protect the listed interests as opposed to being ‘*necessary*’ as under Article 10 of the European Convention; Article 10 of the ICCPR 1966 and the U.D.H.R.,” 1948⁵⁴. Arguably the Zambian standard is less stringent as compared to international instruments. Under the Zambian standard all there is to be proved/shown is that the restriction is reasonable or desirable. There is no necessity to demonstrate a pressing social need or to give relevant and sufficient reasons for the restriction.

Moreover, the construction is inadequate as it does not define what is meant by the democratic society. Chanda postulates that, “this will depend on the social philosophy of the Judge hearing the case and the scales of value he places on public interests.”⁵⁵ Elsewhere, the European Court of Human Rights has framed standards for evaluating what constitutes a democratic society. It stated inter alia, that tolerance, pluralism and

⁵³ Per Ngulube C.J. in *Mulundika and 7 Other v. The People* [1995] Supreme Court of Zambia Judgement No. 25.

⁵⁴ Chanda A.W. *Supra* p.127.

⁵⁵ *Ibid*

open mindedness are intrinsic to a democratic society.⁵⁶ The court envisages a democratic society as an evolutionary society founded upon the freedom of expression.

The author is of the view that the derogative clauses are out of touch with reality and are instead a hindrance to the realisation of a democratic society as they give room to whimsical and capricious manouvres by the executive wing of government. Plainly derogative clauses in the Zambian constitution were drafted long before this country became democratic and were mostly enacted to muzzle critics to the colonial administration. A.W. Chanda concurs and expresses his displeasure at the current situation in the following words;

“The Zambia Legal system imposes many restrictions on freedom of expression. Almost all the laws that seriously impede freedom of expression were enacted during colonial days. The main purpose of this colonial legislation was to suppress the African Struggle. However the repressive Laws were not repealed at Independence instead they were retained in their original form or reinforced by the UNIP regime. The dawn of political pluralism in 1991 has not led to the repeal of the repressive legislation. This has been made possible by the wide derogation clauses contained in the constitution and lack of political commitment to individual rights on the part of government leaders.”⁵⁷

Indeed, if the concept of relativity of democracy holds then the author would not be faulted in his assertion that democratic developments are procesual or process based. Despite having achieved independence and subsequently reverted to political pluralism the freedoms of speech, expression and press are still inhibited and or impeded by undemocratic derogation clauses. In short Zambian democracy is static as people's views

⁵⁶ Report Prepared by D. Turk and L. Joint Special Rapporteurs (U.N. Doce/CN4/Sub.2/1992/9 at par. 111.

⁵⁷ Chanda A.W. Supra p.128.

are still being curtailed. An inspirational statement is to be found in the case of **Chief**

Arthur Nwanko v. The State where Olatawaru, J.C.A. stated thus,

We are no longer, the illiterate or the mob society our colonial masters had in mind when the law was promulgated. To retain Section 5.1 of the Criminal Code, in the present form, that is even if inconsistent with the freedom of expression guaranteed by our constitution, will be a deadly weapon to be used at will by a corrupt government or tyrant...let us not diminish from the freedom gained from our colonial masters by resorting to laws enacted by them to suit their purpose.⁵⁸

Additionally, the author's call for a constitutional reform as respects derogations to the freedoms of speech, expression and the press is further fortified by the dictum of the Sri Lanka Supreme Court in the case of **Joseph Perera v. Attorney-General**. It stated thus:

One of the basic values of a free society is founded on the conviction that there must be freedom not only for thought that we cherish but also for thought that we hate. Hence criticism of government, however, unpalatable it may be, cannot be restricted or penalized unless it is intended or has a tendency to undermine the security of the state or public order... Debate on public issues should be uninhibited robust and wide open and may well include vehement caustic and sometimes unpleasant sharp attacks on government such debate is not and does not bring government into hatred and contempt.⁵⁹

2.5 CONCLUSION

While the current Zambian constitutional order expressly recognizes freedom of expression it has merely given a lame recognition to press freedom thereby putting the press in a precarious position. In addition the constitution only implicitly recognizes freedom of speech as falling within the realm of freedom of expression. This is also a

⁵⁸ Per Olatawary J.C.A. in *Arthur Nwanko v. The State*, FCA/E/111/883, [1985] 6 NCLR 228.

⁵⁹ *Perera v. Attorney General*; SCAPP. Nos. 107 –9/86, Decision of 25 May 1987.

flaw in that freedom of speech like that of the press, is left without a constitutional definition and thus left to the determination of unpredictable judicial pronouncements. Moreover, the freedoms of expressions, speech and press have suffered a legal impediment in the form of broad derogations thereto. While it is acceptable that inevitably most rights have derogative clauses, the derogative clauses to the above freedoms are out of touch with current realities and are not reasonably justifiable in a democratic society. They have carried forward the despotic tendencies of the colonial masters and provide room for the unjustifiable curtailment of the rights and are undesirable in a country that purports to be democratic.

CHAPTER THREE

THE FREEDOM OF EPRESSION, SPEECH, AND PRESS IN THE LIGHT OF POLITICAL INTERFERENCE, THEIR IMPACT AND IMPORTANCE IN A DEMOCRATIC SOCIETY.

3.1 INTRODUCTION

This chapter discusses the importance of the freedoms of expression, speech and the press to the democratic society. The author argues that these freedoms have been constricted and hampered by legislative enactments. The author will cite the Penal Code Chapter 87 of the Laws of Zambia as one such piece of legislation. Some provisions of the Penal Code, it has been observed, give leeway to the executive to encroach upon the freedoms of the press, speech and expression in the name of maintenance of public order, security and preservation of the reputation of the president.

3.2 FREEDOM OF EXPRESSION V. DEMOCRACY.

Freedom of expression constitutes one of the essential foundations of a democratic society. Fundamentally, the freedom of expression plays four pivotal roles. First, it helps in the discovery of truth. Second it enhances the capacity of an individual to participate in a democratic society. Third, it helps in the attainment of self-fulfillment and lastly it provides a mechanism through which a reasonable balance between stability and social change can be established.⁶⁰ Thus freedom of expression is synonymous to democracy itself. It was observed in **Clark v. Attorney General** as follows;

Freedom of expression constitutes one of the essential foundations of a democratic society. One of the basic conditions for the development of every man subject to exceptions in public interest.⁶¹

⁶⁰ Indian Express Newspapers [Bombay] v UNION of India, AIR (1986) SC 515

⁶¹ Roy Clark v Attorney General 2004/Hp/0003

Arguably the starting point and guiding principle should be that freedom of expression is a fundamental human right explicitly recognized and guaranteed by the constitution.

Thus it was stated in the case of **Clark v. Attorney-General** in reference to a satirical article that

The article is not only applicable to information or ideas that are favourably received, but also to those that offend, shock or disturb the state or any sector of the population. Such are demands of that pluralism, tolerance, and broadmindedness without which there is no democratic society.⁶²

Moreover, in a liberal democracy, it must be remembered that the majority have an eternal obligation to leave open all those political channels by which it can be replaced when it is no longer able to command popular support. Abraham argues thus

Repression of expression only serves to sharpen the sense of injustice and provide added arguments and rationalization for desperate perhaps reckless measures. Surely, the loyalty of the mass of men to liberal democracy has been strengthened by the right to free expression and the consequent feeling of a genuine state in society. It is also recognized that freedom of expression even though it be rebellious constitutes a safety valve that gives timely warning of dangerous pressures in our society.⁶³

Therefore, freedom of expression is fathomed to be beneficial to both those governing and the governed. To the governors it acts as a reminder as well as informer on the pressing socio-economic and political needs. And to the governed it acts as a conduit, medium and channel through which they can raise pressing issues affecting them individually and collectively.

⁶² Ibid

⁶³ Ibid

3.3 FREEDOM OF SPEECH V. DEMOCRACY.

Free speech means that frank, free, full and orderly expression which every man and woman in the land, citizen or alien, may engage in, in a lawful and orderly fashion.⁶⁴

Black.J in **Milk wagon Drivers Union v.Meadowmoor Dairies** argued thus:

Freedom to speak and write about public questions is as important to the life of our government as is the heart of our human body. In fact this privilege is the heart of our government. If that heart be weakened the result is debilitation, if it be stilled the result is death.⁶⁵

Arising from the preceding analogy and well concocted epigram is the deduction that a system that inhibits freedom of speech thwarts every hope of realizing the minimum ideals of a democratic society.

It is also contestable that, a constitutional democracy based on a government of limited powers under a written constitution, must be generous to dissenters. In John Mills exhortation “all mankind has no right to silence one dissenter (for) all silencing of discussion is an assumption of infallibility”.⁶⁶ Even near unanimity does not give society the right to deprive the individual of his constitutional rights. Accordingly, Mr. Justice Jackson argued in **Bell V. Maryland** that

Those who begin coercive elimination of dissent soon find themselves eliminating dissenters. Compulsory unification of opinion achieves only the unanimity of the graveyard. the very purpose of the Bill of Rights is to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One’s right to free speech... and other fundamental rights may not be submitted to a vote. They do not depend on the outcome of elections.⁶⁷

⁶⁴ Per Mayer, J. in U.S. v Phillips Poull, Dept Justice No. 145 [S.D. N.Y. 1917]

⁶⁵ Milk Wagon Drivers Union v Meadowmoor Dairies cited in Whitney v California 274 U.S. [1927]

⁶⁶ Henry, J. Abraham Supra p.126

⁶⁷ Ibid

In addition, Mr. Justice Brandeis, in one of the oft cited dicta and case on the importance of freedom of speech to a democratic society, argued thus;

Those who won our independence believed that freedom to think as you will and speak as you think are means indispensable to the discovery and spread of political truth; that without free speech discussion would be futile, that.... discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty and that this should be a fundamental principle of the American government.⁶⁸

In sum the constitutional provisions of free speech have been purposefully meant to protect parties in the free publication of matters of public concern. To secure their right to discussion of public events and public measures and to enable every citizen at any time and rate to bring the government and any person in authority to the bar of public opinion by any just criticism upon their conduct in the exercise of the authority which the people have conferred upon them.

3.4 PRESS FREEDOM V. DEMOCRACY.

Freedom of the press is a constitutive and intrinsic feature of any vibrant democracy and is important for the promotion as well as respect of all human rights. It affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of their leaders. It also gives politicians the opportunity to reflect and comment on the opinion of the general public. In this way press freedom enables everyone to participate in free political debate, which forms the basis of a democratic society.

Indeed, freedom of the press has been given a notional backing as a fourth pillar of government. Thayer argues that:

Freedom of the press is a superior right which together with the similar right to freedom of conscience constitutes the pre-requisites to the realization of all other freedoms. The press provides people with valuable materials on which to

⁶⁸ Per Justice Brandeis in *Whitney v California* 271 U.S [1927]

base their judgments as they participate in the nation's politics and serve the people's right to know.⁶⁹

Additionally, not only is the press an important safeguard in any democratic society; it is also the deciding feature that determines the success of the democratic society itself. Democratic governments thrive on the free flow of information to and from all the stakeholders. Without such a flow of information it would be impossible for the many to have any part in their governance.

The press in its role of disseminating news and views is a tool that is indispensable to the very process of democratic governance. A free press stands as one of the great interpreters between the government and the people. To allow it to be fettered is to better ourselves.

Furthermore, press freedom fosters and promotes transparency, accountability and good governance. Pandit Neru, the then Prime Minister of India stated thus:

The freedom of the press is not just a slogan...it is an essential attribute of the democratic process. I have no doubt that even if the government dislikes the liberties taken by the press and considers them dangerous, it is wrong to interfere with the freedom of the press. By imposing restrictions you do not change anything, you merely suppress thoughts underpinning them to spread further. Therefore, I would rather have a completely free press with all the dangers that arise from wrong use of that freedom than have a suppressed regulated press.⁷⁰

Abernathy underscored the importance of freedom of the press in the following words:

The nexus between a free press and the democratic process is of critical importance. Freedom of the press occupies a peculiar position relative to the democratic process and to

⁶⁹ Thayer Frank [1962] *The Legal Control of the Press*. 4th Ed p.261

⁷⁰ cited in Chris, H. Chirwa [1997] *Press Freedom in Zambia*.

restrict substantially this right is to cut the arteries that feed the heart of the democracy.⁷¹

Thus, government owes it to the people to explain its actions or the lack of them and does this mainly through the media of public communication. In **Perera v Attorney General**, the Supreme Court of Sri Lanka observed thus:-

The press has a role of a watchdog in that it is the duty of the press to bark whenever anything alien to what is expected is done. The press has the responsibility of alerting the citizenry against misuse of power and bad governance. Government must be prevented from assuming the guardianship of the public mind. Truth can be sifted out of falsehood only if the government is rigorously and constantly examined.⁷²

Moreover, the High Court for South Africa asserted the essentiality of press freedom in the following terms:

The role of the press in a democratic society cannot be understated. The press is in the frontline of the battle to maintain democracy. It is the function of the press to ferret out corruption, dishonest and mal- and inept administration. It must also contribute to the exchange of ideas. It must advance communication between the governed and those of the governors. The press must act as a watchdog of the governed.⁷³

The author herein, argues that no measures of displeasure at the criticisms in the media could warrant suppression of the press by those in power. Nelson Mandela once stated that “none of our irritations with the perceived inadequacies of the media should ever allow us to even suggest faintly that the press could be compromised or coerced.”⁷⁴

⁷¹ Abernathy [1970] Civil Liberties Under the Constitution. P.330

⁷² Perera v Attorney General Sc App No.s 107 – 9/86, Decision of 25th May 1987.

⁷³ Republic of South Africa v The Sunday Times Newspapers [1995] (Z) SA 271 [7]: 227(i)

⁷⁴ The Post 16th June, 2002

3.5 JUSTIFICATION FOR POLITICAL INTERFERENCE

As the author had an opportunity to comment in chapter two of this work, the freedoms of expression, press and speech are not absolute. It is simply not possible to get away from the concept of balancing liberty and authority, freedom and responsibility. There is a need that these freedoms should not be abused. In the American case of **State v McKee**, the court observed thus:

Every citizen has an equal right to use his mental endowment;...but he has no right to use them so as to injure his fellow citizens or to endanger the vital interests of society. Immunity in the mischievous use is as inconsistent with civil liberty as prohibition of the harmless use. The liberty protected is not the right to perpetrate the acts of licentiousness, or any inconsistent with the peace or safety of the state. Freedom of speech and press do not include the abuse of the power or pen.⁷⁵

Therefore, political interference would be legitimate when done for the sole purpose of securing public order, security, national interests and protection of individual rights. Thayer argues that

The constitutional freedom guaranteed to the people to print and publish may be said to give the right to commit libel, in the first instance while it is a generally accepted legal doctrine that the guaranty of liberty of the press is not a shield for malice, license and defamatory statement when published with bad motives for unjustified ends⁷⁶

However, it is contestable that in the absence of danger, clear, present and, imminent, we must presume the scale to be weighted on the side of the individual.

⁷⁵ 17 Conn, 18, 28 [1900]

⁷⁶ Thayer, F. Supra p.83

3.6 LEGISLATIVE ENACTMENTS IMPEDING FREEDOMS OF EXPRESSION, PRESS AND SPEECH.

3.6 (a) THE PENAL CODE

Manifestly, some provisions under the *Zambian Penal Code* are archaic and anachronistic. These are incompatible if not repugnant with and to the prevailing democratic tendencies. The historical progression of the *Zambian Penal Code* shows that the same piece of legislation was hitherto used to perpetuate the whimsical, capricious and demagogic rule of the colonialist by muzzling critics to its administration.

3.6 (a) (i) SEDITION UNDER THE PENAL CODE

Section 57(1) of the *Zambian Penal Code* provides for the offence of sedition. Pursuant to section 57(1)(c) “a person commits sedition if he prints, sells, publishes, offers for sale, distributes, or reproduces any seditious publication unless he has no reason to believe it is seditious”. The requisite intention to a charge of sedition is provided under section 60(1).⁷⁷

According to A.W. Chanda “these sections are a serious fetter on press freedom and freedom of speech generally.”⁷⁸ He asserts that,

In a democratic society many of the activities prohibited by section 60(1) are normal. Opposition parties...work day and night to create disaffection against the government so that they can be elected at the next election.” What makes these sections even more pernicious is not merely the prohibition but the fact that truth is not a defence.⁷⁹

⁷⁷ Section 57(1) and 60(1) of Cap 87 of the Laws of Zambia

⁷⁸ A.W. Chanda [1998] “Freedom of Expression and the Law in Zambia” p.129

⁷⁹ Ibid

Indeed these sections have a chilling effect on freedom of expression, speech, and the press as almost any criticism of government can be deemed seditious. The United States Supreme Court observed in **Cowan v Fairbrother**, with reference to press freedom, that in its broadest sense freedom of the press includes not only exemption from censorship but security against laws enacted by the legislative department, or measures resorted to by either of the other branches for the purpose of stifling just criticism and opinion.⁸⁰

According to Stephen

...there can be no such offence as sedition. There may indeed be breaches of the peace which may destroy or endanger life, limb, or property, and their may be incitements to such offences but no imaginable censure of the government short of a censure which has an immediate tendency to produce such a breach of the peace ought to be regarded criminal.⁸¹

Exemplarily, the British Courts have considerably narrowed the common law crime of seditious libel, over the years so that the prevailing view now is that it is limited to speech that is both likely and intended to initiate violence. For instance, in the Canadian case of **Boucher v The King** Kellock, J argued that:

It cannot be that words which for example are intended to create ill-will even to the extent of violence between any two of the innumerable groups into which society is divided can, without more, be seditious. In my opinion to render the intention seditious, there must be an intention to incite to violence or resistance or defiance for the purpose of disturbing constituted authority. I do not think there is any basis in the authorities for defining the crime on any lower plane.⁸²

Plainly, these decisions from the commonwealth jurisdiction show that the provisions on sedition in the Zambian Penal Code are out dated and must be repealed or substantially

⁸⁰ H. Cowan v Fairbrother 118 N.C 406, 418, 245, S.E. 212, 32 L.R.A., 829, 54 AM St Rep 733 [1896]

⁸¹ Stephen [] History of the Criminal Law p.300

⁸² Roucher v The King [1951] 2 DLR 369

revised. These provisions are incompatible with the demands of the present democratic dispensations.

3.6 (a) (ii) POWER TO BAN PUBLICATIONS

The Penal Code in section 53(1) authorizes the president to exercise an absolute discretion to prohibit any publication or series of publications published within and outside Zambia that he considers to be contrary to the public interest.⁸³ For obvious reasons this section is incompatible with democracy as the existence of a free press is entirely dependent on the good will of the president. In such circumstances freedom of the press is rendered nugatory a mockery and a delusion and the phrase itself a byword if, while every man is at liberty to publish what he pleased the president might nevertheless punish him for and or banish harmless publications. A.W. Chanda argues that, "as long as we have timid Judges who are reluctant to review the president's actions this power will continue to be abused."⁸⁴ For instance, the Post in 1996, had its 401st Edition banned by the president because it prematurely disclosed a plan by government to organize a referendum over the constitution.

3.6 (a) (iii) PUBLICATION OF FALSE NEWS

Section 67(1) of the Penal Code prohibits the publication of false news.⁸⁵ Arguably this provision has a chilling effect on the freedom of the press as journalists publish stories at their own risk."⁸⁶

The European Court of Human Rights suggested in the case of **Thorgeirson v Iceland** that

A person should not be held liable for publishing allegations especially regarding matters of serious public

⁸³ Section 53(1) of Cap 87 of the laws of Zambia

⁸⁴ A.W. Chanda Supra p.132

⁸⁵ Ibid

⁸⁶ Section 67(1) of Cap 87 of the Laws of Zambia

concern that are based on public opinion, rumours, stories or the statement of others, so long as the nature of factual support for allegations is clearly stated.⁸⁷

In another case of **Hector v Attorney General of Antigua and Bernunda** the Judicial committee of the privy council stated, *inter alia*,

It would be a grave impediment to the freedom of the press if those who printed or, distributed matter reflecting critically on public authorities could do so with impunity only if they could verify the accuracy of all statements of fact on which the criticism was based.⁸⁸

3.6 (a) (iv) **DEFAMATION OF THE PRESIDENT**

Much as is appreciable that reputations of individuals have to be protected a rigorous implementation of defamation law may have a chilling effect on the freedoms of expression, press and speech. It may also undermine good governance, transparency and accountability, as the press, for example, may not publish certain information for fear of legal actions.⁸⁹ Section 69 of the Penal Code cap 87 of the laws of Zambia provides for the offence of defamation of the president.⁹⁰ It is submitted that defamation law may act as an impediment to public debate of national issues.

Moreover, the civil law of defamation is sufficient to protect the reputation of the president. A.W. Chanda argues that

In fact almost all democracies do not have such discriminatory laws. In most occasions, this provision has been used as a tool for stifling freedom of speech and the press as it does not lay down any guidelines for determining what constitutes an insulting matter.”⁹¹ it is not in any way compatible with democratic values as the president is in a democratic state to be treated as a public figure. He is

⁸⁷ A.W. Chanda Supra p.133

³⁰ Thorgeirson v Iceland Judgement of 25th June, 1992 Series A, No. 239

³¹ [1990] 2 AC 313

³² A.W. Chanda O.p. Cit p.134

³³ Section 69 of Cap 87 of the Laws of Zambia

accountable to the people and should be transparent in his actions.

Inevitably, his being a public figure means that the people including the press should not be subjected to criminal sanctions for making unpalatable remarks about the president. This section has oftentimes been used as a tool for silencing journalists and other citizens critical to the president.

The United States' Supreme Court observed in **Terminiello v Chicago** that

A function of free speech under our system of government is to invite dispute. It may best serve its highest purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are or even stirs people to anger.”⁹²

In a similar note Dan Quayle argued that

One of the surest protections of democracy is free and open criticism. Democracy welcomes criticism from inside and outside. The true democrat has no fears of opposing views or of unsolicited advice. There is no government on the face of the earth whose citizens do not desire a government that respects the freedom of speech and freedom of press which is the life blood of democracy.⁹³

In this breath the Penal Code provision regarding defamation of the president must be repealed for being inconsistent with democratic values of transparent and open as well as uninhibited debate on public issues.

3.7 CONCLUSION

Freedoms of expression, speech and the press play a vital role in a democratic society and are themselves a life-blood of democracy. However, there are instances when political

⁹² Op Cit p.144

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Osinbivo and A Kalu and the Law P.33 cited in Clark V. Attorney-General, Supra

interference would be necessary in order to preserve public order, security, national interests and private individual rights. The freedoms in question have been adversely constricted by legislative enactments, notably some provisions in the Penal Code. The provisions on sedition are overbroad and undemocratic as they are pointed at stifling freedom of speech. A democratic society can only thrive and endure if peaceful protest against government is allowed. Moreover, criminal libel has no place in a democratic society as it is mostly used to muzzle critics to the government. The Zambian legal system must copy the practice in other democratic countries where criminal libel has been abolished and has its scope severely circumscribed. Moreover provisions on defamation of the president need to be completely repealed as there is no need to give further protection to the president over and above the common law remedy. As a public figure the president must be accountable to the citizenry.

CHAPTER FOUR

FREEDOM OF INFORMATION: HOW IT WOULD ENHANCE THE FREEDOMS OF EXPRESSION, SPEECH AND THE PRESS.

4.1 INTRODUCTION

It is the purpose of this chapter to highlight the need and importance of information Law in Zambia as a means of enhancing the freedoms of expression, press and speech. These indubitably, enhance government's accountability to the people. The freedom of information wall acts as a means by which the citizenry are provided with valuable information to enable them make an informed assessment of their government's performance. The author observes, comparatively, that freedom of expression, speech and the press in Zambia are still inhibited as compared to countries that have put the freedom of information into law. Preferably the freedom of information must be constitutionalised.

4.2 FREEDOM OF INFORMATION V. FREEDOMS OF THE PRESS, SPEECH AND EXPRESSION.

Access to government held information helps enhance the individual's understanding of and his ability to discuss freely political, social, economical and cultural matters. H.L. Cross, a renowned American Jurist authoritatively observed that "freedom of information is the very foundation for all those freedoms that the first Amendment of our (American) constitution was intended to guarantee".⁹⁴

Arguably the right of access to government information is one associated to the freedom of expression. This right is important because it enhance one's right to free expression and facilitates effective reporting by the press⁹⁵. Milimo Moyo while referring to the freedom of access to government information observes that "the Zambian government

⁹⁴H.L.Cross (1953), *The people are right to know*, P. 164.

⁹⁵ Milimo, M. 2001; *Law, Press and Freedom of Expression in Southern Africa: A comparative critique of Zambia*, page 23.

has neglected to include this right. This refusal is a legal impediment to freedom of expression.”⁹⁶

For instance, the supreme court of India has held that “the right to know is an integral part of the constitutional right to freedom of speech and expression”.⁹⁷ In **S.P.Gupta V. Union of India**,⁹⁸ whose brief facts are that the federal government of India sought to withhold correspondence between the Union law minister, the federal chief justice and, the chief justices of some high Courts regarding the governments controversial policy of transferring high Court Judges from one state to another; the Indian Supreme Court noted that “ the concept of an open government is a direct emanation from the right to know which seems implicit in the right of free speech and expression.”⁹⁹

Furthermore, in another Indian case of **State of Uttar Pradesh V. Raj Narain** it was stated, inter alia that,

In a government of responsibility like ours, where all the agents of the public must be responsible for their conduct, there can be few secrets. The people of this country have a right to know every public act, everything that is done in a public way by their public functionaries..... the right to know which is derived from the concept of freedom of speech is a factor which should make one worry when secrecy is claimed for transactions which can at any rate have no repercussion on public security.¹⁰⁰

It is observable that a self governing people need facts relative to the conduct of public affairs. The press has a correlative duty to gather and impart information balanced against its guaranteed freedom of expression. Frank Thayer has argued that

secrecy in government menaces democracy and set a pattern that follows the political philosophy of the totalitarian State, citizens in a self governing society need to examine the conduct of public necessity.¹⁰¹

⁹⁶ Ibid.

⁹⁷ AIR (1982) SC149

⁹⁸ Ibid.

⁹⁹ Ibid

¹⁰⁰ AIR (1975) SC 865 at 884

¹⁰¹ Frank Thayer (1962) the Legal Control of the press. 4th Edition, P. 164.

This contention is augmented by a well concocted epigram by James Madison one of the authors of the constitution of the United States of America. He argued thus:

A popular government without popular information or the means of acquiring it is but a prologue to a farce or tragedy; or perhaps both, knowledge will forever govern ignorance. And people who mean to be their governors must arm themselves with power which knowledge gives.¹⁰²

Arguably, an uninformed or ill- informed citizenry cannot participate meaningfully and effectively in the affairs of the society. Thus access to information is an essential part of good governance. Additionally, the preamble to the New York's Freedom of Information Law stresses the role of information in enhancing the freedoms of the press, speech and expression in the words stated hereunder;

A free society is maintained when government is responsive and responsible to the public, and when the public is aware of governmental actions. The more open a government is with the citizenry, the greater the understanding and participation of the public in government... the people's right to know the process of governmental decision making and to review the documents and statistics leading to determinations is basic to our society. Access to such information should not be thwarted by shrouding it with the cloak of secrecy or confidentiality.¹⁰³

Sokoni has argued that "having freedom of information law is an important aspect of maintaining an open society in which the public is aware of how government is managing their affairs,"¹⁰⁴ Indeed it would provide a tool with which the people can criticize government's policies and thereby act as a means of curbing corruption and abuse because government is under such circumstances compelled to operate in a an open manner. For instance, a New York Appeals Court explained the purpose of a freedom of

¹⁰² Article 19, freedom of expression :Handbook of international and comparative Law Standards and procedures 91, (1993)

¹⁰³ Cited in the *Zambian Law Journal* Vol. 35, 2003 by K. Sokoni, *infra* P.21

¹⁰⁴ Sokini, K. (2003) "Right to freedom of information. *Zambia Law Journal* Vol. 35. P. 21

information vis- a- vis freedoms of expression, speech and the press as "... to shed light on governmental activities and to expose governmental waste, negligence and abuse."¹⁰⁵

A.W. Chanda postulates that greater public access to information will create an informed citizenry and contribute to the good governance, transparency and accountability promised in the preamble to the constitution."¹⁰⁶The public's right to know is an intrinsic aspect of an informed political debate crucial to genuine democracy. The Mwanakatwe constitutional Review Commission recommended the inclusion of a justifiable right to access to information held by government. It is stated thus;

*Informed opinion was necessary in a democracy. It is also true that government is a natural custodian of public documents, yet administrative measures as well statutory prohibitions may effectively deny citizens access to vital information noting the crucial role informed opinion played in fostering good governance, the commission recommends that the right of access to information be a justifiable right.*¹⁰⁷

4.3 FREEDOMS OF EXPRESSION, PRESS AND SPEECH IN ZAMBIA V. OTHER COMMON WEALTH STATES.

It is the author's contention that unless and until the freedom of information is constitutionalised the above freedoms will be a mere farce. The press will continually find difficulties in reporting as access to government held information will be almost impossible. Freedom of speech will equally be inhibited due to the fact that the citizenry will not have any basis upon which to base their arguments. Moreover, constructive and critical expression of views depends on the quality and availability of information.

The author observes that the Zambian government's failure to constitutionalise the freedom of information is an astute ploy to suppress dissenting views. It is the author's view that the intended freedom of information Act will be of little value as it will still be

¹⁰⁵ Tartan Oil corp. V. State Department of Taxation and Finance, 239 AD 2d 36 N.Y supreme Court, Appellate Division, 3rd Department, 1998.

¹⁰⁶ A.W. Chanda, 1997. The State security Act V. open society: Does Democracy need secrets? Z.L.P. 35.

¹⁰⁷ Para. 7.2.16.

overridden by the broad derogations to the freedoms of expression, speech and the press provided in the constitution. The best solution is to constitutionalise it the freedom of expression or the right of access to government information.

For instance, Article 32 of the constitution of South Africa provides that, every person has the right of access to:-

any information held by the State; and any information that is held by another person that is required for the exercise or protection of any right.¹⁰⁸

Again section 37 of the constitution of Malawi, for example, provides that;

(b) subject to any Act of parliament every person shall have the right of access to all information held by the State or any of its organs at any level of government in so far as such information is required for the exercise of his right.¹⁰⁹

The possible logical conclusion is that the freedoms of expressions, speech and the press are enhanced in countries that have constitutionalised the freedom of information.

4.4. CONCLUSION.

Freedom of information enhances the freedoms of expression, speech and the press in that it provides the basis upon which the latter freedoms can be fully realized. Thus there is need to constitutionalise the freedom of information in order for it to have more efficacy. H.L.Cross once argued that “the dishonest public official favours secrecy for his crooked or questionable deals. The demagogue in his effort to dominate his political organization helps screen pertinent information from the public.”¹¹⁰

¹⁰⁸ Section 32 of the Constitution of the Republic of South Africa.

¹⁰⁹ Section 37 of the Malawian Constitution.

¹¹⁰ Cross. H.L. Supra

CHAPTER FIVE

5.1 CONCLUSION AND RECOMMENDATIONS

Chapter one covered the broad introduction on the historical development of the right to freedoms of expression, speech and press. Therein was discussed the developments of freedoms of expression, speech and the press in both the U.S.A and U.K as well as the influence of classical writers on the development of the aforesaid freedoms. The author concluded that the idea of freedoms of expression, press and speech is closely linked with the natural law theory in its historical evolution. The author observed further that, though inherent, inalienable, imprescriptible and inviolable, the realization of the above named freedoms had to take a protracted struggle between the state and the citizenry. It has been observed also that there reduction into a document of constitutional significance was first achieved by the American Declaration for Independence and the French Declaration for the Rights of Man and the Citizen.

Furthermore, chapter two analysed the three freedoms viz: expression, speech and the press under the constitution. The author observed that though the constitution does provide for the freedoms of expression and the press it does not provide for freedom of speech. It is also observed that the constitution merely gives a lame recognition to the freedom of press and thus leaves the press without a constitutional definition. The author also argued that the restrictions to the freedoms of expression, speech and press are by far too broad as compared to European standards. It has been argued also that the derogations under the constitution are a typical characteristic of most African constitutions that give broad rights on the one hand and arbitrarily take them away. The author also observes that apart from being broad the restrictions use terms like public safety, public order or defence whose definition the constitution does not spell out.

Thus almost any restriction can be justified on any of these grounds, the author concluded that the restrictions to the freedoms of expression, speech and press under the constitution are out of touch with current realities and cannot be reasonably justified in a democratic

society. They have carried forward the despotic tendencies of the colonial masters and provide room for the unjustifiable curtailment of the rights and are undesirable in a country that purports to be democratic.

Chapter three discussed the three freedoms under consideration in the light of political interference; with political interference basically entailing executive and legislative interference with freedoms of expression, press and speech. The author conceded that the foregoing freedoms are not absolute and thus need restrictions in order to safeguard the rights of others as well as the community at large.

However, the author argued that there are certain legislative enactment such as the penal code that have provisions which fetter freedoms of expression, press and speech. These provisions include; section 57 on sedition, section 53 (1) on the power to ban publications, section 67 (1) on the prohibition of publication of false news and section 69 on the defamation of the president. The author concluded that the provision on sedition are overbroad and undemocratic as they are pointed at stifling freedom of speech. A democratic society can only thrive and endure if peaceful protest against government is allowed moreover criminal libel has no place in a democratic society as it is mostly used to muzzle critics to the government. It has also been observed that section 69 of the penal code is not necessary as the reputation of the president can adequately be protected by common law.

Chapter four analysed the need for the freedom of information law and how the same can act as a booster to freedoms of expression, speech and the press. The author concluded that freedom or right to information especially information held by government provides a basis upon which the freedoms of expression, speech and the press can be fully realized. The author also observed that freedom of information is necessary as it gives impetus to the realization of a democratic society where accountability, transparency and openness are the dogmas.

5.2 RECOMMENDATIONS

The author herein firmly recommends that the Zambian bill of rights be revised to suit the current democratic dispensations. The derogative clauses to the freedoms of speech, expression and the press are archaic and anachronistic. These have carried on the tendencies of the colonialist. There is too much room for astute manoeuvres by the executive in the name of political expediency, public security and order. Roscoe Pound once observed that

Undoubtedly if certain legal rights were definitely established by the constitution there would be a menace to the general security, if the court which must ultimately interpret and apply the provisions of that instrument were to suffer a state legislature to infringe those rights on mere considerations of political expediency.¹¹¹

Therefore, it is recommended that the derogative clauses to the above named freedoms be narrowly construed. The derogations must have their width reduced. It is also recommended that freedom of the press must be properly spelt out for it to have a constitutional backing. In the same breath, freedom of speech needs to have a distinctive recognition as is the case in the American Bill of rights. It is also recommended that the freedoms of expression, speech and press be backed by a feeder freedom; the freedom of access to information. This freedom must be constitutionally recognized as the case is in South Africa and Malawi. There is also a need to amend the provisions of the Penal Code such as those dealing with sedition, defamations of the President, prohibition of publication of false news and powers of the President to ban publications. The Zambian legal system must copy the practice in other countries where the above provisions have been substantially amended and or repealed.

Finally, the Zambian jurisprudence must be abreast with current democratic dispensations for it to be relevant and acceptable to the people it is meant to serve. Justice Learned Hand, while arguing on sociological jurisprudential lines observed thus;

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The profession of the law is changed with circulation and final incidence of the successive efforts towards justice; it must feel the circulation of communal blood or it will wither and drop, a useless member. It is in this respect that the profession of law is in danger of failing in times like our own when deep changes are taking place in the convictions of men. If they forget their pregnant element of the faith they profess.¹¹²

¹¹² Learned Hand (1916). The speech of Justice. P.470

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