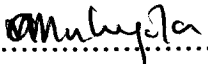


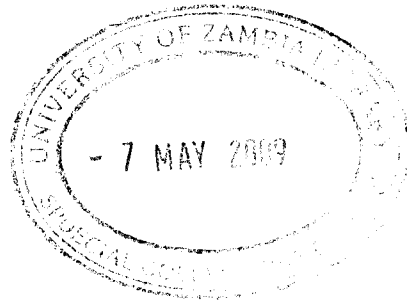
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This Obligatory Essay of **MILDRED CHUUNGA MUHYILA** is approved as fulfilling the partial fulfilment of the requirements for the award of the LLB Degree in L410 – Directed Research by the University of Zambia.

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ABSTRACT

Freedom of expression is a fundamental right guaranteed under international law by all the three main regional human rights treaties, namely the African Charter on Human and People's Rights, the American Convention on Human Rights and the European Convention for the Protection of Human Rights and Fundamental Freedoms and also by almost every national constitution with a bill of rights. It is now increasingly accepted that this right includes the right to access information held by public authorities.

The Zambian Constitution does not have a specific provision dealing with the right to access information. Instead, access to information is provided for under the extensive reach of the right to freedom of expression. Because of this, it is sometimes referred to as "a passive right to information." The right to access information entails not only the right of any citizen to express any view, but to have access to the full range of views expressed, more so through the media. If the right of access is accepted, then the media should play its vital role as a central provider of access to information.

Article 20 (1) of the Zambian Constitution states that:-

"...no person shall be hindered in the enjoyment of his...freedom to receive ideas and impart information...freedom to impart and communicate ideas and information, whether the communication be to the public generally or to any person or class of persons"

This wording is similar to Article 19 of the International Covenant on Civil and Political Rights (ICCPR), which states that:

"Everyone shall have the right to freedom of expression, this right shall include the freedom to seek and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice"

In both instruments, the right to access information is an incident of the right to freedom of expression. In other words, freedom of information is part of a cluster of rights that fall under the umbrella of the right to freedom of expression. Because of this, access to information through the media is a conceptually complex issue and is often subjected to restrictions on various grounds, such as national security, public order or public peace.

The right to access information has gained widespread recognition in all regions worldwide, as evidenced by the rapid growth in the number of countries that have passed freedom of information legislation. In Africa, South Africa and Zimbabwe are the only countries to have enacted access to information legislation. In Zambia, a Freedom of Information Bill was drafted in 2001, but it has not yet been passed into law.

The lack of constitutional and legal protection of the right to access information has even become more acute particularly amongst media organisations that have the mandate to act as a link between the public and the government.

This Essay outlines the legal and ethical implications of the media in fostering freedom of access to information in Zambia.

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LIST OF LEGISLATION

Constitution of Zambia, Cap. 1 of the Laws of Zambia
 National Assembly (Powers and Privileges) Act, Cap. 12 of the Laws of Zambia
 Penal Code, Cap. 87 of the Laws of Zambia
 State Security Act, Cap. 111 of the Laws of Zambia
 The Constitution of the United States of America

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 Castells v Spain [(1992) European Human Rights Reports]
 Derbyshire County Council v Times Newspapers Limited and Others [1993] A.C. 536
 Edmonton Journal v Alberta, [1989] 2 SCR 1326
 Handyside v The United Kingdom [(1986) European Human Rights Reports]
 Hector v Attorney General of Antigua and Barbada [1990] 2 AC 312
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 The Attorney General, The Speaker of the National Assembly v Ludwig Sodashi SCZ
 No.6 of 2003
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 The State v The Ivory Trumpet Publishing Company Limited and Others, [1984]
 NCLR 736
 Thornhill v Alabama 310 US 88
 Whitney v California, 274 US 357 (71 Law ed)

LIST OF ABBREVIATIONS

FOI:	Freedom of Information
FOIB:	Freedom of Information Bill
ICCPR:	International Covenant on Civil and Political Rights
MISA:	Media Institute of Southern Africa
PAZA:	Press Association of Zambia
UNESCO:	United Nations Educational, Scientific and Cultural Organisation
USA:	United States of America

1.0 DEFINITIONS OF KEY TERMS

1.1 Information: Any material which communicates facts, opinions, data or any other matter relating to the management, administration, operations or decisions of a public authority, regardless of its form, characteristics or when it was created.

1.2 Media: The main means of mass communication, especially, newspapers and broadcasting (television and radio) regarded collectively.

1.0 CHAPTER ONE

1.1 Introduction

The principles of democracy, the rule of law, good governance and respect for human rights and fundamental freedoms are interlinked and cannot be guaranteed by politicians alone, whether they are elected or nominated. In the end, it is a question of people's opportunities to influence their situation, claim their rights and be able to voice their concerns. But to exercise these rights presupposes that citizens have access to information that has not been filtered, censored or distorted. Ideally, they should know all of their options, and then they can decide which is the best option.

One such fundamental right is freedom of expression which is enshrined in the *Zambian Constitution* and it provides that "...except with his own consent, no person shall be hindered in the enjoyment of his...freedom to receive ideas and information..."^[1] the *International Covenant on Civil and Political Rights* provides that freedom of expression includes the right to seek 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.^[2] Though the *Zambian constitution* has a clause that talks generally about freedom of access to information, there is need for a clear, definitive freedom of information law. One fundamental cornerstone in Zambia is the principle of public access to official documents because it is very important when scrutinizing the exercise of power by government and other public agencies, but it is also a cornerstone of a an open society. This chapter aims at highlighting the relationship between the media and access to public information

[1] Constitution of Zambia, Cap. 1, Art. 20 (1)

[2] International Covenant on Civil and Political Rights, Article 10

1.2 Statement of the Problem

It has been observed that access to information about government processes does not amount to interference with the functioning of the system. The media should scrutinize all the three wings of the government in order to keep them within their democratic parameters. In addition, without the media, Zambia's democracy would suffer or indeed fail. On one hand, one argument which has been advanced by the government is that not all information about government processes can be divulged to the public because it is held to enhance national security. On the other hand, the public contends that it need information in order to participate positively in the running of the nation.

1.3 Objectives

- a) The study was to endeavor to determine whether the public's access to government information would make government accountable and exposed to the judgment and evaluation of the citizens.
- b) The study was to establish the fact that the more people know about government processes firsthand, the greater the chance that the system would be fair.
- c) Finally, the study was to ascertain whether the media distorts the public's perception of government processes.

1.4 Research Questions

1. What is the existing policy, if any, regarding freedom of access to information in Zambia?
2. On a comparative approach, what is the status of freedom of access to information in a developed nation, namely, the United States of America and Zambia, which is a less developed nation?
3. Does access to information enhance the accountability by the government?
4. Does the media enhance access to information?

1.5 Rationale of the Study

The importance of the right of citizens to express themselves freely and to have access to information of public interest held or in the custody of the Government or other public institutions cannot be over emphasized. The purpose of this study was to investigate the medias role in enhancing access to public information which information is very essential to democratic governance, transparency, accountability and development.

1.6 Methodology

Both primary and secondary data was collected from various stakeholders, such as the Media Institute of Zambia, Press Association of Zambia, and Zambia Union of Journalists. In addition, secondary data on the subject was collected from cases, review of and legislation related to the subject and visits to Libraries and Information centres in Lusaka.

1.7 Meaning of access to information

In order to elaborate on the nature, content and extent of the right provided for under of the African Charter on Human and People's Rights,^[3] the African Commission on Human and People's Rights.^[4] adopted the Declaration of Principles on Freedom of Expression in Africa and recommended to the African States to guarantee the freedom by adding that "everyone shall have an equal opportunity to exercise the right to freedom of expression and to access information without discrimination."

Further, it was stated in the case of R v Zundel^[5] that a democratic society like Zambia respects and promotes the citizens' individual right to freedom of expression, because it derives benefit from the exercise of that freedom by its citizens. It was also observed in the case of Arthur Wina & 6 Others v The Attorney General^[6] that in order for the Zambian citizens to be able to enjoy this freedom, they must be able to receive and publish information. The receipt part will be called the inlet of information to the person. The publication is the outlet of information from that person to another person or other persons. If either of these, inlet or outlet, is blocked without the consent of the individual in question and without any legal justification for the blockage, then that is a denial of the constitutional freedom of expression. This is especially so where the blockage is effected by means of a piece of legislation or by any person in the performance of the functions of any public office authority.

[3] African Charter on Human and People's Rights, Article 9

[4] African Commission on Human and People's Rights

[5] [1992] 10 CCR 193

[6] HP/ 1878 of 1990 (Unreported)

It is an appreciated fact that in order for the people of Zambia to partake in self-government, they require a communications system to distribute and exchange ideas and messages among themselves. A large and complex society such as Zambia requires a complex and expansive communications system to facilitate this need. This system of communications has come to be called "the media". The media includes the instruments of communication such as books, newspapers, television, film and the Internet and it also involves the people and organizations that support the production and distribution of the messages. [7] If people are going to make the right kinds of decisions in governing themselves, they need a wide array of information and the media should facilitate this information flow. In addition, given that people are able to govern themselves if they have information and competing ideas, the media is therefore an important source of information as it acts as a link between the holders of public information and the public.

The government of Zambia, has acknowledged the need to enact access to information legislation but has up to now done nothing in that regard. It seems that the government of Zambia does not appreciate the importance of the right to access to information and its value for democracy. Access to information is a requirement for consolidating democracy in the sense that it enhances values of accountability, transparency, openness and responsiveness in the affairs of government institutions. These four values are some of the key concepts in promoting and safeguarding effective and efficient government operations.

[7] <http://www.JasonDiceman.com>. 17th September, 2008

Currently, access to information in Zambia is hindered by the fact that there is failure to include a clear open guarantee of the right of access to official documents, failure to include information held by legislative, judicial and other public bodies under the scope of the right of access to official documents. Access to information is critical in the sense that it acts as a check and balance on government by the governed.

Hiebert^[8] suggests that there is an apparent relationship between an individual's freedom of access to information and the media. The individual on one hand has a right to access the information and the media on the other hand, has the mandate to provide the information.

Everybody depends on the media to keep them aware of dangers and opportunities on the horizon. People rely on the media to tell them what is going on because they are simply unable to experience everything of importance to them in the society. The media has a role to inform people about their environment, that is, the political, economic, social and cultural development that affects their life. In other words, in reading newspapers and magazines one should be able to know what is happening and what it is connected to.^[9] Another important role of the media is to entertain. This role is of no less importance than other roles because human beings do not understand social phenomena through rational discussions only but their emotional side as well^[10]

[8] R. E. Hiebert. *Mass Media* (New York: Longman, 1991) p. 411

[9] The Post. 6th March, 1996

[10] The Post. 6th October, 1996.

Another important role is that the media should be a watchdog of the public in relation to the functions of public institutions. The watchdog role includes making sure that public figures and officials in public institutions exercise their functions in a transparent and accountable manner. It is also the duty of the media to be on guard against abuse of power.^[11]

The media can for instance, expose political malpractice when it scrutinizes government operations. To exercise its watchdog role the media has to engage in investigative journalism so that it is able to provide accurate, quality information, balance and objectivity to the best of its ability and to act in an acceptable ethical manner.^[12]

The media also has an educative role. Modern citizenship requires one to base decisions partly on being an informed person. The educative role of the media enables citizens to participate in the decision making process. The media is seen as a link or bridge or mediator between government and the people. It is the conveyor belt for information from government to the people and vice versa. The government being the institution through which the state maintains social order, provides public services and enforces decisions that are binding on all the people living in the country. It should therefore be open about its operations. An accountable and transparent government does not operate in secrecy.^[13]

Despite Zambia still being in its democratic infancy, the government does not do much in

[11] The Post. 6th October, 1996

[12] The Post . 6th October, 1996

[13] <http://www.yahoo.answer.htm>. 22nd September, 2008.

order to ensure its maturity into a democratic state with democratic ideals. Access to information is restricted and is usually justified on account of national security, public order and wider public interest. The Zambian Constitution^[14] states that laws restricting these rights may be passed if they are – among others – “reasonably required in the interest of defence, public safety, public order, public morality or public health”.

It is sad to note that government still withholds a lot of information that does not even deserve to be classified as state secret. Speaking during a MISA Zambia debate at Lusaka’s Fairview Hotel on July 16th 2007, Dr Patrick Matibini,^[15] and a prominent Lusaka lawyer stated that certain functions by security wings were of public interest and did not endanger national security. He stated that freedom of information is potentially an important tool to redress the imbalance in power and it enables effective supervision of the government by both the legislature and the public.

He added that the government had in its possession a vast amount of information and was in a position to authorize selective disclosure in a manner and at a time convenient for the government, saying in this respect that partial disclosure could distort accountability. He further said that the principle of maximum disclosure established a presumption that all information held by public authorities needed to be subject to disclosure only to be overruled in very limited circumstances.

[14] Constitution of Zambia, Cap 1, Art. 20 (3)

[15] Patrick Matibini. MISA News. July to September, 2007. p. 9

The principle encloses in on the basic rationale underlying the very concept of freedom of information and ideally it should be provided for in the constitution to make it clear that access to official information is a basic right. Freedom of information and the transparency it promotes has a direct consequence on, for example fighting corruption, which in turn has a tangible impact on development. Former World Bank President James Wolfensohn ^[16] often identified government corruption as the primary hindrance to development and an independent media sector as the number one tool to fight public corruption. This implies that the media has a very important role in fostering freedom of access to information for Zambian citizens.

The media can perform this function because it is well placed by means of its reach, power and institutional experience and can thus promote the growth of the country's infant democracy. For the media to be able to succeed in this noble duty, it needs to have adequate access to public records so that the trickle down effect can then be felt by the public, in the sense that an informed media will obtain information from public offices and then disseminate the information to the public.

There is a direct relationship among the government, the media and the people. Former Minister of Information and Broadcasting Services, Mike Mulongoti, ^[17] speaking during the commemoration of World Press Freedom day on May 3, 2007 stated that "government could not carry out its policies and functions without the co-operation of the

[16] <http://www.un.org>. 23rd September, 2008.

[17] Matibini, MISA News, p. 9

media because it was the link between government and the people.” Despite this seemingly reassuring statement, it is not so much the absence of explicit constitutional provisions on media freedom which is worrying, but the fact that where legal provisions exist, they are rendered useless by a host of repressive subordinate legislation. It has however been observed that the media faces various restrictions in its endeavor to provide certain types or categories of information to the public, especially information regarding government operations processes. One argument which has been advanced by the government is that not all information about governmental processes can be divulged to the public because it is held to enhance national security and is subsequently bared by statute from publication. However, not all governmental processes are bared by statute or by rules of practice from media coverage.

1.8 Review of legislation regarding access to information in Zambia

In Zambia, like many other democratic countries, the media operates on the basis that they have a duty to inform the people. This duty is given effect by many domestic statutes and international instruments to which Zambia has pledged loyalty such as the African Charter on Peoples and Human Rights ^[18] and the Universal Declaration of Human Rights.^[19] Despite all the foregoing instruments giving different definitions of freedom of expression and access to information, they all emphasize that this right extends to holding, receiving and imparting all forms of opinions, ideas and information. At national level, there is the very exhaustive provisions of the Constitution,^[20] and other statutes whose detailed discussion is contained in the following paragraphs.

[18] African Charter on Peoples and Human Rights

[19] Universal Declaration of Human Rights

[20] Constitution of Zambia, Cap. 1, Art. 20 (1)

MISA Namibia^[21] observes that despite the Zambian Constitution itself providing for freedom of expression and for media freedom, these constitutional provisions notwithstanding the legal protection they purport to provide, are non-existent as there are numerous other statutes that the State can invoke to override these constitutional provisions. This makes a mockery of the whole situation because the Constitution ought to be supreme.^[22] Laws restricting freedom of expression and those that unreasonably interfere with the operations of the media exist and remain in force, some of them going as far back as 1911.^[23] Further, it was observed in the case of The Attorney General, The Speaker of the National Assembly v Ludwig Sodashi^[24], that “*Article 20 of the Constitution provides for the protection of freedom of expression, which includes freedom to hold opinions without interference and freedom to impart and communicate ideas and information without interference. But the freedom enshrined in Article 20 is not absolute as Clause 3 of the same Article provides for derogations which fetter the right on grounds of public safety, defence or public order.*” It is interesting to note that despite the supremacy of the Constitution, these derogations are greatly used by government in its attempt to inhibit access to information. Ideally, dependence on these derogations should be found to be *ultra vires* the Constitution. It has however been observed that this is not the case as government has successfully based arguments on the derogations. A detailed discussion of these derogations is beyond the confines of this Essay. However, they are outlined in brief in the following paragraphs.

[21] MISA. So This is Democracy – State of Media Freedom in Southern Africa. (MISA: Namibia, 2007). P114

[22] MISA. So This is Democracy. P114

[23] MISA. African Media Barometer- Zambia. (MISA: Namibia, 2007). P. 3

[24] SCZ No.6 of 2003

The Penal Code, ^[25] in force since 1930, empowers the President to ban publications deemed to be against the public interest and criminalizes publication of “false news with intent to cause fear and alarm to the public”. ^[26] Sections on Sedition and related practices proscribe public debate on issues and publication of information deemed likely to arouse popular disaffection against the state. Section 177 (1) ^[27] criminalizes publication of obscenity without defining what indeed is deemed to constitute obscene matter. Sections 57 (1) ^[28] and 60 (1) ^[29] prohibit sedition and defines “seditious intention” among others as the “intention ...to excite disaffection against the government” or “to raise discontent or disaffection among the people pf Zambia”.

Section 69^[30] deals with defamation of the President and provides that “any person who, with intent to bring the President into hatred, ridicule or contempt, publishes any defamatory or insulting matter...is guilty of an offence. The State Security Act^[31] makes it an offence to retain or communicate to other persons any information obtained as a result of ones present or former employment with government. Parliament enjoys special “protection” under the National Assembly Act. ^[32] To “show disrespect or manner towards the Speaker” or to “commit any other act of intentional disrespect with reference to the proceedings of the Assembly” is an offence. The government has successfully relied on these derogations to prevent disclosure of public information

[25] Penal Code, Cap. 87 of the Laws of Zambia

[26] Penal Code. s 53 and 67

[27] Penal Code. s 177 (1)

[28] Penal Code. s 57 (1)

[29] Penal Code. s 60 (1)

[30] Penal Code. s 69

[31] State Security Act, Cap. 111, s. 4 of the Laws of Zambia

[32] National Assembly (Powers and Privileges) Act, Cap. 12, s 19 of the Laws of Zambia

The importance of access to information cannot be over emphasized. The Director General of UNESCO, Mr. Koichiro Matura,^[33] on the occasion of World Press Freedom Day, 2008, stated that media freedom and access to information feed into a wider development objective of empowering people by giving people the information that can help them gain control over their own lives. This empowerment supports participatory democracy by giving citizens the capacity to engage in public debate and to hold governments and others accountable. But this flow of communication does not happen automatically. It has to be fostered by a free, pluralistic, independent and professional media. Following all these developments, a need arose to enact a Freedom of Information Act so that the flow of information, particularly from the executive wing of government, is enhanced and to meet the demands of democratic governance.

The freedom of information bill was first presented in parliament on 22nd November, 2002 by the then information and broadcasting minister Newsteadimba, who had described the legislation as the backbone of representative government, but the bill was deferred. Later, the former Information and Broadcasting Minister, Vernon Mwaanga, said that the bill needed to be seriously scrutinized. In a paper presented at a workshop for MP's entitled "The need for members of Parliament to support the enactment of FOIB", opposition MP Sakwiba Sikota, who is also a lawyer, called on fellow MP's, the media and the general public, to become strong advocates for the enactment of the bill. He observed that MP's sometimes thought that FOIB was only for journalists without realising the benefits they would also reap.^[34]

[33] MISA. **African Media Barometer- Zambia**. (MISA: Namibia, 2007). P. 4

[34] <http://thewip.net/>. 25th September, 2008

Sikota further noted that the Zambia constitution has a clause that talks generally about freedom of access to information but there is need for a clear, definitive freedom of information law. To hinder one from communicating or disseminating information would therefore infringe on that part of the constitution. He added that with adequate sanctions to prevent obstruction of the Act, the government would not be in a position to deter answering or providing the information, as was sometimes the case. ^[35]

Unfortunately, government has been dragging its feet claiming that it is still consulting stakeholders. It is important to note that what is even more embarrassing is the fact that the government contradicts its own Ministry of Information and Broadcasting Service's mission statement which states that the Ministry "seeks to promote and facilitate the growth of a sustainable media industry capable of enhancing free flow of information and freedom of expression for national development" ^[36]. Phiri^[37] also adds that "at a time when the media is being seen as one of the catalysts for development, it is disturbing to note that African governments, instead of embracing the media and providing the legal environment to operate freely, are gagging journalists while threatening the very foundations of free expression".

[35] <http://thewip.net/>. 25th September, 2008

[36] MISA. **So This is Democracy – State of Media Freedom in Southern Africa**. (MISA: Namibia, 2007). P113

[37] Zambia Daily Mail. 17th September, 2008

1.9 **Conclusion**

Freedom of information is not aimed at journalists but all citizens because everyone has the right to information and an effective and independent system of enforcement of the public's right to access information is essential. It is also intended to allow the people to ask for public information held on their behalf by public officers. The Freedom of Information Bill, which is, as intimated by the government, likely to be tabled in Parliament soon will be a major breakthrough in the quest for greater access to information held by the government. This is of course if, the government does not renege on its promise, and the proposed law is eventually enacted. This Act will force the government to be more accountable as its operations will no longer be shrouded in secrecy. The bill is yet to be made public.

2.0 CHAPTER TWO

2.1 Introduction

Access to public information is an essential part of a good government. A well informed public is required for democracy to prosper. Democracy has been defined as government for the people by the people and of the people. This therefore implies that information is the oxygen of democracy. It is required to be accessed in order for the public to participate meaningfully and effectively in the democratic process of the nation. Conversely, bad governments thrive on a culture of secrecy. Ironically, most governments prefer to conduct their business in secret away from the eyes of the public.

^[1] A study conducted by MISA- Zambia revealed that 80% to 90 % of government information is held in secrecy. The public only have access to a very small percentage of information. It is against the principles of democracy to govern in secrecy because citizens cannot be masters of their own destiny if they do not have ample and correct information on how the leaders they have entrusted to run the affairs of the country are carrying out their duties. ^[2] This secrecy is usually justified on account of national security, public order and wider public interest. Further, the *Zambian Constitution*^[3] states that laws restricting these rights may be passed if they are – among others – “reasonably required in the interest of defence, public safety, public order, public morality or public health”. It is sad to note that government still withholds a lot of information that does not even deserve to be classified as state secret. This Chapter examines the role of information in a democratic society.

[1] Namwila Christine. MISA News. April – June, 2007. p. 3

[2] Namwila. MISA News. p. 3

[3] Constitution of Zambia. Cap I. Article 20 (3) of the Laws of Zambia

2.2 Role of information in a democratic society

For an attempt at the definition of what is a democratic society, reference is made to Patel v The Attorney General^[4] where it was stated that there are countries of greatly differing ideological character, all of whom claim that they are democracies, although in many cases they may arrive at one conclusion. That democracy is:

“Government by the people; that form of government in which the sovereign power resides in the people as a whole, and is exercised either directly by them (as in the small republics of antiquity) or by officers elected by them. It is a state or community in which the government is vested in the people as whole.”

In the United States, there are at least two cases in which an attempt was made to define what constituted a "democratic country". In Speiser v Randell^[5] it was defined as "a free society in which government is based upon the consent of an informed citizenry and is dedicated to the protection of the rights of all, even the most despised minorities".

In Yates v U.S.^[6], it was described as "a free government - one that leaves the way wide open to favour, discuss, advocate, or incite causes and doctrines however obnoxious and antagonistic such views may be to the rest of us". There are certain minimum attributes in any democracy and according to Handyside v UK,^[7] freedom of expression constitutes one of the essential foundations of a democratic society...it is applicable not only to information or ideas that are favourably received or regarded as inoffensive or as a matter

[4] [1968] ZR 99

[5] 357 U.S. 513 [1958]

[6] 354 U.S. 298 [1958]

[7] European Court of Human Rights – 7 December 1986, Series A No 24

of indifference, but also to those which offend, shock or disturb the state or any other sector of the population. In The State v The Ivory Trumpet Publishing Company Limited and Others,^[8] B Araka CJ said freedom of expression is, no doubt, the very foundation of ever democratic society; for without free discussion particularly on political issues, no public education of enlightenment, so essential for the proper functioning and execution of the processes of responsible government, is possible.

In Whitney v California,^[9] they believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that with then, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine, that the greatest menace to freedom is an inert people; that discussion is a political duty and that this should be fundamental principle of the American Government. The right to express views is so important to democracy that the Supreme Court of India was constrained to observe in Rangarajan v Jagjivan Ram and Others^[10] that in a democracy, it is not necessary that everyone should sing the same song...democracy is a government by the people via open discussion...the public discussion with people's participation is a basic feature...of democracy; democracy can neither work nor prosper unless people go out to share their views. The truth is that public discussion on issues relating to administration has positive value. In an Indian case, Romesh Thapper v State of Madras^[11] . It was stated that: "Freedom of expression and of the Press lay at the foundation of all democratic organization, for, without free

[8] [1984] NCLR 736

[9] 274 US 357 (71 Law ed)

[10] [1990] LRC (Const) 412

[11] [1950] S.C.R. 594

political discussion, no public education, so essential for the proper functioning of the processes of popular Government is possible."

The distinguishing features of a democracy includes the free flow of information to and from the people and in line with this there is need for the people to be furnished with the alternatives to allow them to make informed democratic decisions to allow democracy to work. Democracy is all about the participation of the people in their own governance and with their empowerment by furnishing them with the necessary alternatives. A democratic government, in the same vein, needs the media in the sense that it needs to account to the people in the whole country, which is only possible by use of the media.^[12]

Further, the European Court of Human Rights^[13] added that freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment. In order for citizens to engage in public debate and to hold their governments and others accountable- key elements of living in a participatory democracy- citizens must have access to free, pluralistic, independent and professional information through the media.

The idea that communication and dialogue between different members of society will occur naturally cannot be taken for granted, and the media provides a means of access to information and in so doing, ignites dialogue.

[12] F. P. Kasoma. **The Press in Zambia**. (Lusaka: Multimedia, 1994). P. 540

[13] European Human Rights Reports. 1992

According to the Post Newspaper,^[14] one function of the media is to inform and educate. The media enables citizens to be well informed and therefore enable them to participate in their society, which in turn generates real empowerment.

Accurate, fair and unbiased reporting is the best defense against ignorance and uninformed decision-making. To make intelligent decisions about public matters, people need accurate, timely information.

The system would argue on one hand that the freedom of the press and freedom of speech and the public's right to know are all noble and worthy concepts but priorities have to be set every day of our lives where these various liberties conflict. On the other hand, the fundamental principle of democracy is for the citizenry to have the rights to demand information and accountability from all public office holders, and as such, the judiciary, for instance, should not be allowed to hide under the cloak of judicial independence, to mete out injustice to the public. The central issue is how to strike a balance between the public's right to information and the individuals right to privacy. Line drawing is inevitable as to what will be protected and what can be proscribed or limited.^[15] It appears that although the press gives access to knowledge and events far beyond the boundaries of an individual's own observation and experience, there is a problem that the public does not know in detail what is going on in our government and courtrooms.^[16]

Fact driven decision-making can significantly alter our political, social and economic

[14] The Post. 29th September, 2008

[15] E. Chemerinsky. **Constitutional Law**, 2nd Ed. (New York: Aspen Publishers, 2005). p. 1047

[16] E. L. Sommerland. **The Press in Developing Countries**. (Sidney: University Press, 1976). p. 56

perspectives. The right to access information can be interpreted within the legal frameworks that support freedom of information as it applies to information held by public bodies, or in a wider sense to encompass both access and circulation of information held by other actors, where it becomes intrinsically linked to freedom of expression. Freedom of expression includes the right to seek, receive, express and disseminate opinions, ideas and information without interference and to do so either orally or in writing through any media.^[17] Access to information is primordial to the exercise of the basic human right of freedom of expression. The media need to have access to information so as to be able to ensure the flow of this information to the public. Such access is indispensable in fighting vices, such as corruption for example, which has been defined as one of the primary obstacles to development.^[18] In his address to commemorate the World Press Freedom Day which fell on the 3rd of May 2008 and whose theme was “ Access to Information and the Empowerment of the People”, the General Assembly President of UNESCO Mr. Srgjan Kerim^[19] stressed that the media contributes to the process of democratisation, to the strengthening of the rule of law and ultimately to institution building by asking the “right and often difficult” questions, providing access to information and representing all views impartially. In addition, the State Security Act^[20] in Zambia still prohibits disclosure of government-held information. As a result government operations are, for the most part, shrouded in secrecy and when the media uses unorthodox means to get this information, they are in danger of violating “some laws”

[17] <http://www.un.org>. 27th October, 2008.

[18] www.un.org. 27th October, 2008.

[19] www.un.org. 27th October, 2008.

[20] State Security Act, Cap 111 Section 4 of the Laws of Zambia

In Edmonton Journal v Alberta,^[21] it was held that it is difficult to imagine a guaranteed right more important to democratic society than freedom of expression. Indeed a democracy cannot exist without the freedom to express new ideas and to put forward opinions about the functioning of public institutions. In addition, the Judicial Committee of the Privy Council in Hector v Attorney General of Antigua and Barbada,^[22] held that in a free democratic society, it is almost too obvious to need stating that those who hold office in government and who are responsible for public administration must always be open to criticism. According to the Post Newspaper,^[23] the public needs to be informed about the happenings in the country and also to keep a check on government. After all, an informed public is the most potent of all restraints on misgovernment. This is meant to keep government on its feet precisely so because government is entrusted with the governing of the country on behalf of the people. It's actions or lack of them is therefore an issue of public concern which should in this regard be watched by the media as it is supposed to be ever conscious of the fact that the media are eagerly waiting to expose whatever misdeeds it gets involved in.^[24]

The public is an essential component of the complex system of checks and balances that characterises democratic societies and no one, and in particular politicians and civil servants, should be above the law and exempt of scrutiny.^[25] The checking value posits that government officials will carry out their duties more fairly and effectively if their activities are closely watched.

[21] [1989] 2 SCR 1326

[22] [1990] 2 AC 312

[23] The Post. 29th September, 2008

[24] F. M'membe. "**Media Ethics**". Paper presented at a seminar held by the Ministry of Information, Siavonga, 1994

[25] <http://www.regeringen>. 14th October, 2008.

Reference here is made to the cases of Handyside v U.K.^[26], Castells v Spain^[27] and Derbyshire County Council v Times Newspapers Limited and Others^[28] on the theme of the importance of the freedom of expression and free press in a democratic society and the need and importance of criticising public officials and the government in a democratic society. These cases emphasised the fact that the President and public officers more than anybody else should be open to the severest criticism even though that criticism seems to the authorities to be offending. The public should therefore be provided with a suitable environment to enable it live up to its mandate of monitoring the government and other public institutions in order to ensure that the citizenry gets the best of government delivery. Access to information is essential in any modern society. Without it, democratic structures cannot operate as they should.

Further, some petitioners to the Mungomba Constitution Review Commission^[29] made submissions that the right to access public information held by the Government should be guaranteed by the Constitution and should be made a justiciable right, including the right to make all official documents public unless such documents have been classified “secret”. The Commission observed that public information is generally understood to mean all that information of a public interest held or in the custody of the Government or other public institutions. They argued that the public had a right to receive information, including that held by the State.

[26] (1986) European Human Rights Reports

[27] (1992) European Human Rights Reports

[28] [1993] A.C. 536

[29] Mungomba Constitution Review Commission. December 2005

The main reason advanced by petitioners who advocated these rights and freedoms was that these were essential to democratic governance, transparency, accountability and development. They further argued that an informed public would participate in and contribute better to the development of the country.^[30]

In all facets of community life, information plays a central role as the conduit for enlightenment and potentially a catalyst for activism and change. A well informed public can result into a non-threatening informed debate which can ensure that it yields positive outcomes for all stakeholders.

2.3 Conclusion

Freedom of expression is recognised and protected by many international conventions and declarations as well as national constitutions. Although the Zambian Constitution does not define what constitutes freedom of expression, it is generally accepted that it entails freedom to hold opinions and to seek, receive and impart information and ideas of all kinds, either orally, in writing, in print, in the form of art, or through other chosen media, without interference by public authority and regardless of frontiers^[31] In Thornhill v Alabama^[32] the United States Supreme Court observed that freedom of access to information is a special freedom within the scope of freedom of expression. Lord Denning said in Schering Chemicals v Falkman Ltd^[33] that freedom of access to

[30] Mungomba CRC

[31] Art 19, ICCPR and Art 10, European Convention on Human Rights

[32] 310 US 88

[33] [1981] 2 WLR 848

information covers not only the right to impart information of general interest or concern but also the right of the public to seek and receive it.

Freedom of expression enables the public to receive information and ideas, which are essential for them to participate in their governance and protect the values of democratic governance, on the basis of informed decisions. It promotes a market place of ideas.

It also enables those in government or authority to be brought to public scrutiny and thereby hold them accountable. According to Chirwa, ^[34] democracy is about transparency, accountability and good governance and to this effect the public has the right to scrutinize the actions of its leaders and engage the government in an uninhibited debate on their actions, policies and programmes that affect their daily livelihoods.

[34] Chirwa, J. MISA News. January – March, 2008. p. 3

3.0 CHAPTER THREE

3.1 Introduction

The importance of the right of citizens to express themselves freely and to have access to information of public interest held or in the custody of the Government or other public institutions cannot be over emphasized, hence, a need arose in Zambia to draft a Freedom of Information Bill (FOIB) so that the flow of information, particularly from the executive wing of government, is enhanced and to meet the demands of democratic governance. Unfortunately, government has been dragging its feet claiming that it is still consulting stakeholders.

In addition, with such legislation in place, access to information regarding several important issues for the general public would be guaranteed. The FOI legislation would affect all public authorities, ranging from the central government to the local authorities. If enacted, there is no doubt that this Act will have a big impact on the information available to the general public in the sense that more people will have increased access to governmental information through the internet.

Further, a journalist Phiri, ^[1] states that the FOIB is not aimed at journalists but all citizens because everyone has the right to information and an effective and independent system of enforcement of the public's right to access information is essential.

[1] Francesca Phiri. MISA News. October to March 2007. p. 3

The FOIB, suggests another journalist Chirwa,^[2] is also intended to allow the people to ask for public information held on their behalf by public officers. This will enhance efficiency at every level of government starting from the local market in the communities to the top government offices. The FOIB, which is, as intimated by the government, likely to be tabled in Parliament soon^[3] will be a major breakthrough in the quest for greater access to information held by the government. This is of course if, the government does not renege on its promise, and the proposed law is eventually enacted. The Act will force the government to be more accountable as its operations will no longer be shrouded in secrecy. The bill is yet to be made public. This chapter comprises of a comparative outline of freedom of access to information between Zambia and The United States of America.

3.2 Comparison of access to information in Zambia and the United States of America

In Zambia, the rationale advanced to support access to information and therefore the imposition on government of a statutory obligation to make information available is threefold, namely that: government must be open so as to be accountable and exposed to the judgment and evaluation of the citizens; the provision of adequate information facilitates more effective public participation in the process of policy making and government; and access to public or official information enhances the freedom of expression.^[4]

[2] Jane Chirwa. **MISA News**. January to March, 2008. p. 3

[3] MISA News . January – March 2008. p. 10

[4] MISA – Zambia Brochure on Freedom of Information Bill, 2002

Freedom of information, including a right to access information held by public bodies, is now widely recognised as a fundamental human right, as well as an aspect of the right to freedom of expression. Freedom of expression constitutes one of the essential foundations of a democratic society and it is a basic condition of the progress and development of citizens and society. ^[5] Without freedom of expression, free discussion, particularly on political issues, so essential for the proper functioning and execution of the processes of responsible government is not possible. The public interest in freedom of discussion stems from the requirement that members of a democratic society should be sufficiently informed in order for them to influence intelligently the decisions which may affect them.

The FOIB, according to Matibini^[6] and if not amended, aims at achieving maximum disclosure, promotion of open government and an obligation to publish. The FOIB, as previously noted, allows for a limited scope of exceptions. Requests for information should be met unless the public body shows that the information falls within a narrow category of exceptions, in line with a three part test: ^[7]

- ❑ The information must relate to a legitimate aim listed in the law
- ❑ Disclosure must threaten substantial harm to that aim and
- ❑ The harm must be greater than public interest in disclosure.

Restrictions that protect government from embarrassment of exposure of wrongdoing can never be justified.

[5] E. Chemerinsky. **Constitutional Law 2nd**. (New York: ASPEN Publishers, 2005). P. 1047

[6] P. Matibini. **The Struggle for Media Law Reforms in Zambia** (Lusaka: MISA ZAMBIA, 2006).p. 102

[7] MISA – Zambia Brochure Supra Note. 4.

America, unlike Zambia, has enacted the Freedom of Information Act (FOIA) and it dates back to 1966. ^[8] Its introduction improved public access to official records by allowing any person, regardless of nationality or need, to obtain documents outside the nine exemptions granted by the Act. The Act, for the first time, shifted the burden of proof as to why information should be withheld from the public to the government of the United States.

Equally, in its current form, the FOIB in Zambia demands that all requests for information should be processed quickly and fairly. ^[9] In addition, in case of denial, the Zambian FOIB, like the American FOIA, provides a procedure for appeal to an independent, Public Information Commission and from there to the High Court by way of Judicial Review. ^[10]

The Zambian FOIB, like the American FOIA provides that the costs of access to information should not be so high as to deter requests. ^[11] Further the Zambian FOIB establishes the presumption that all meetings of governing bodies are open to the public so that the public is aware of what the public authority are doing and is able to participate in decision making process. ^[12]

[8] World Book. About America: The Constitution of the USA with Explanatory notes. (America: World Book, 2004). P. 70

[9] MISA – Zambia Brochure

[10] Matibini, P. The Struggle for Media Law Reforms in Zambia (Lusaka: MISA ZAMBIA, 2006).p. 104

[11] Matibini. p. 97

[12] Matibini. p. 96

The Zambian FOIB, like the American FOIA provides that other legislation should be interpreted in a manner that renders it consistent with the disclosure requirements. In particular between Freedom of information law and a secrecy law, the former should prevail. ^[13] In addition, unlike the American FOIA, the FOIB has security provisions to protect sensitive institutions such as the army and the intelligence wings. ^[14] The FOIA applies to all administrative agencies of the executive branch of government, including the armed forces but excluding Congress, the Courts and the President's personal staff. ^[15]

Finally the Zambian FOIB, like the American FOIA protects individuals from legal, administrative or employment related sanctions for releasing information of wrongdoing.

The most important theme is that American democracy depends upon freedom of expression. The ability to express one's political, religious, economic or social ideas, no matter how unorthodox, without fear of government suppression or punishment, is at the heart of a free society. In America, the government may not use the cloaks of "national security" or "public order" to stifle differing or critical viewpoints. Since government is the most powerful instrument in society, special care must be taken to see that such great power is not abused. ^[16]

[13] Matibini. p. 104

[14] Annie Kapepula – MISA News . January – March 2008. p. 8

[15] J. Elster. Constitutionalism & Democracy. (Paris: Cambridge University Press, 1997). P. 104

[16] Elster. p 34

3.3 Conclusion

Development cannot take place without adequate information to communities, societies and the public at large. When comparing the Zambia scenario against western countries such as America, one discovers that the western nations are developed partly because of a vibrant media. ^[17] MISA- Zambia National Director- 2006, Mr Chembo said countries with access to information legislation seemed to develop more than the ones that didn't have such laws.

The First Amendment encourages commentary on public affairs, including criticism of the government and its officials. Justice William Brennan once stated that:- *“There is a central meaning of the First Amendment that includes a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.”* ^[38] The United States has some of the world's strongest protection for civil rights. It has progressive constitutional protections and laws that promote freedom of speech, freedom of information and privacy. In fact, the First Amendment provides for the strongest protection of freedom of expression when compared against any constitution in the world.

[17] Annie Kapepula. MISA. News

[18] J. M. Feinman. Law 101: Everything you need to know about the American Legal system. 2nd Ed. (United States: Oxford University Press, 2006). p. 69

4.0 CHAPTER FOUR

4.1 Introduction

The whole exercise of governance is a matter of balancing the interests of the government and those of the people. All the three wings of government have the responsibility of managing the affairs of the nation for the common good of all and secure the greatest happiness of the greatest number of the people.^[1] However, on one hand, the government left alone without scrutiny may work to the detriment of the very people it is supposed to serve and on the other hand, the people given unfettered liberty may destroy the very foundation of government. Access to information through the media about what government is doing is necessary to keep government in check. This Chapter discusses the impact of access to information through the media on government processes.

4.2 Access to information on government processes through the media

There are a few examples of why the role of media is crucial to the development of a country. The quality of the information an individual is able to access will, by necessity, greatly influence his or her ability to participate in the political process. In other words, the media has a responsibility towards their fellow citizens to provide correct and analytical information.^[2]

[1] Carlson Anyangwe. An Outline of the Study of Jurisprudence. (Lusaka: UNZA Press, 2005). P. 162

[2] <http://www.regeringen>. 14th October, 2008

With the extremely large number of voices in our society, and the historical scarcity of mass media space, only a very small number of people have the opportunity to be part of the media. These privileged communicators are supposed to represent the rest of the people, much like how our elected officials are supposed to represent their constituents. It would be impractical to represent every individual, instead, it is more productive to represent communities, demographics and organisations. This representation should not be that of the average, but of the diverse groups of all sizes. The media should give a voice to all those groups that wish to be heard.^[3]

The media contributes to the process of democratization, to the strengthening of the rule of law and ultimately to institution building by asking the “right and often difficult” questions, providing access to information and representing all views impartially.^[4] The proliferation of strengthened secrecy laws means that the media is forced to resort to speculation; there-by distorting information, which can then be used against them to further undermine their credibility, or even as a justification for initiating legal proceedings against them.

As such, the media is a part of the whole package of democracy without which a modern

[3] <http://www.JasonDiceman.com>. 17th September, 2008.

[4] F. M'membe. “**Media Ethics**”.

[5] F. P. Kasoma. **The Role of the Independent Media in Africa's charge to Democracy, media, culture and society**. (London: SAGE, 1995) Vol. 17. p. 539

democratic government such as Zambia, which has large areas to administer, would virtually be impossible to operate. ^[6] The views of the people have to be reflected and published to make government answerable and accountable to its electorate. In the same vein, the electorate should have access to information regarding government operations.

To take away a media that performs these functions from a democracy is, in essence, the equivalent of changing the system of government in an entirely different way, away from the requirements of a democracy of an informed public.

It is however generally felt that the media misinforms the public thereby distorting the public's understanding of government and judicial operations and processes. That is the reason why the media is only expected to report facts, especially in case of proceedings and not to report opinions. But the role of media in a modern society is not only limited to factual reporting and not analysing specific events. Journalists are also opinion builders in their own right. ^[7]

One of the roles of the media is to represent and inform the public. To serve a democratic society like Zambia, the media must perform this role through close response to public interest. Even if parts of society do not always communicate with the media, the media should be able to always realise the different concerns and interests of the public and attempt to represent and inform those interests. The priorities of importance presented by

[6] Kasoma. The Role of the Independent Media in Africa's charge to Democracy, media, culture and society. P. 541

[7] <http://www.regeringen>. 14th October, 2008

the media should be the priorities held by the public. Although it may be contested whether the media follows or creates public interest, its proper role in a democracy is to facilitate an exchange of ideas, not to determine what should be of interest.

The media can also sometimes play the role of “setting the agenda”. Since they can’t report everything, the news media for example, must choose which issues to report and which ones to ignore. In carrying out this task, the media should take into consideration public interest more than anything else. However, the study revealed that the media instead looks for information based on news judgment more than anything else. They should look for information that present issues that are important and will be of interest to the public.^[8] These decisions, in turn influence the public’s perception of what issues are most important.

Concern for the integrity and confidence in Zambia’s courts for instance, is not enhanced by media coverage. Generally speaking, media coverage of court proceedings for example, does not educate the public. Instead, it serves to sensationalize and entertain. Our judicial system does not need the unnecessary and extraneous interference that the sensational media coverage brings to its proceedings.

The media must not be seen to go for cases like a bee chasing honey to a point where they just get obsessed with it and facts don’t matter; tainting evidence doesn’t matter; undermining the criminal justice system doesn’t matter all in the name of freedom of

[8] MISA News. April – June 2008. p.12

expression and access to information. In so doing, they will feed the public an image of proceedings that is deeply skewed, deeply flawed and ultimately untenable and can therefore make many, many mistakes. This might in turn cost the prosecution losing witnesses, losing evidence and giving the public a perception of guilt without giving them all of the reasonable doubts that were clearly developed during the course of a trial.

The danger is that judges will be influenced by the talking heads and by the media coverage and that tactical decisions will be made by lawyers and by judges based on the media focus on the case. And that can be a great danger.

Media focus, however, can also be a protection. It means that everybody is watching the government, and the government has to be more accountable- not necessarily accountable to the general public for the results that are achieved, but at least in terms of honesty and lack of corruptibility. A judge during the trial, for example would do things that a judge would normally never do, simply because he was aware that the public was watching. The media's role in how it covers the criminal justice system has taken a turn for the worse, because it has gotten to a point where criminal trials are seen as forms of mass entertainment. Trials are not supposed to be entertainment for the masses. They're supposed to be serious public processes in which judges are asked to do a very difficult job. And instead of respecting the job that judges do, the public discounts and discredits it, thereby acting as "assistant judges" when they are not in a position to know what the judges know, to see what the judges saw, and the public feels entitled to express thier

opinions about guilt or innocence based on what they don't know, apart from media reports of what goes on.

What many seem to forget is that the Court has repeatedly given the press broad rights to cover legal proceedings because the founding fathers knew well the problems of letting the government and the law operate without public scrutiny. There is a public interest in media coverage of some court proceedings, but the increased pressure they bring can sometimes be detrimental to the process. The question is how does the court in each case balance the individual and social interest in freedom of expression against the social interest sought by the regulation which restricts expression? There are times when the matters before the court are of such a serious nature or of great concern to the public that the public may be interested in following closely. However, the people's right to be informed is undermined by the Penal Code.^[9]

The right to privacy entails that people have a right to limit access to and dissemination of private information to others. But people are also social beings as well. They enter into relationships that impact on others, including the private spaces of others. This is especially so with public figures, whose claims on the right to privacy may be outweighed by overriding considerations of public interest. When it comes to government officials, they are put into office on the basis of a commitment to open and accountable government.

[9] Penal Code, Cap 87. Section 117 of the Laws of Zambia

This was illustrated in the case of The People v Bright Mwape & Fred M'membe^[10] in which it was stated that:-

“The President and public officials, more than anybody else should be open to the severest criticism even though that criticism seems to the authorities to be offending. It cannot be denied that freedom of expression, press and criticism of the government and public officials including the President himself is very essential in a democratic society.”

However, this does not mean that it is open season on all private facts of public figures, but merely those that impact on the public figure's ability to fulfil their public functions, and hence impact on others.

There is no magic formula when it comes to weighing up which comes first: the right to privacy or the public interest. Often, it may be in the public interest for private facts to remain precisely that; private. Getting the balance right depends on the facts of a particular story, and it involves high levels of judgement on the part of the media. But the general rule of thumb is that, if the information relates to a person's official functions, then the rights of access to information and freedom of expression can and should take precedence over the right to privacy. For instance ministers behaving badly cannot expect to be shielded from public scrutiny, they cannot have a reasonable expectation of privacy in such situations.

The media at least when they operate optimally, do not just give the public a pile of facts.

[10] Appeal No. 87 and 197 of 1995

Instead they should tell the public what is important. They should interpret facts and provide context so that the public might make sense of the issues. In so doing they should not report issues in such a way that they distort the information by inappropriate interpretations.

The information should however be, timely and relevant. Further, communication can only be considered useful to the democratic process if it is accurate. Not only should the messages be accurate, they should also be balanced to best represent the true state of affairs. People will make better decisions if they are accurately informed and are better placed to understand all legitimate perspectives related to the issue.

4.3 Conclusion

Some media advocates say that media coverage does nothing to change the situation. Others disagree. Any journalist or reporter who has spent any time in the field will testify that, anytime coverage is put into a situation, it changes that situation; it simply changes the reality. Sometimes, it has very little effect, sometimes, it can have a great effect. It is believed the impact of media coverage, not major in most cases. The judges, for example, may behave better with media coverage and lawyers may grandstand a little more, but the outcome is rarely affected. Perhaps it also is time to quit treating justice as a game between two clever lawyers trying to outwit the judge. Perhaps it is time to worry more about what really happened, how it happened, and why it happened than how one side or the other can win or lose.

It might do all of us some good to remember this and not to let the myths about media coverage determine our future. Media do not govern the people or collect taxes or throw anyone in jail. All media do is throw out great volumes of information, some important, some trivial, some in bad taste, some unnecessary and some vital. It is up to the people to decide what pieces they want to read or listen to or watch. Not the lawyers. Not the judges. Not the journalists. Just the people.

5.0 CHAPTER FIVE

5.1 Summary

The right to know strengthens democracy and democracy is enhanced when people meaningfully engage with their institutions of governance and form their judgements on the basis of facts and evidence, rather than empty promises and political slogans. In fact the foundation of democracy is an informed constituency, informed about the people they elect and their activities while in government. The FOIB seeks to create a statutory right for citizens to be able to access information held by public officers. This is vital because citizens can only fully take part in the governance of their country if they have access to relevant and sufficient information.^[1]

Participatory government takes place when people are taken in and not closed out and development should not be owned by governments and donors only, it should be owned primarily by the people. For the people to claim their right to development and determine development road maps, they need to be empowered through relevant and open information.

Appropriate information assists communities to put development that has lost its way back on track. When people are left out of development processes to address their basic needs, they use violence to claim that right to be involved so as to know and be leaders of their own destinies.

[1] MISA News_April – June 2007

By increasing transparency through opening public decision-making processes to scrutiny, the right to information is a proven anti-corruption tool. To this extent, when there is a choice between maximum and minimum disclosure, maximum disclosure should override secrecy. The Zambian government stands to benefit through promoting pro-active disclosure especially on matters such as their structure, norms, functioning, documents they hold, their finances and activities. Such pro-active disclosure is encouraged in over 150 countries with access to information laws worldwide because the public has a right to be provided with this basic information. ^[2]

Systems that allow people to be part of and to personally scrutinise decision-making processes reduce citizens' feelings of powerlessness and weaken perceptions of unfair advantage of one group (the governed) over another (the governors). By reducing conflict, the right to know facilitates national, economic and human peaceful development. As such, the media is therefore a critical tool in national development and its "agenda setting role" is also critical if the citizens have to be drawn to issues of national interest. That is why the media should provide information upon which the public can make informed decisions. In doing so, the media should, without fear, bring to surface the excesses and abuses of those vested with power and authority. ^[3]

The media should strategise on how it would use its strengths, taking advantage of its opportunities to deal with its weaknesses, threats and existing problems to ensure that it is responsive to the needs of the public. ^[4]

[2] <http://www.fxj.org.za>. 14th November, 2008.

[3] MISA News. April – June 2006

[4] MISA News. Jan – March 2008

A saying goes, “*A little sunlight is the best disinfectant.*”^[5] To this end, the public has the right to scrutinise the actions of their leaders and to engage the government in full, open, uninhibited and if need be, robust debate about their actions, policies and programmes. In addition Freedom of information law is also a key tool in combating corruption and wrong doing in government.^[6]

Democratic societies have a wide range of participating mechanisms. These mechanisms include conduct of regular, free and fair elections; fight against graft and provision of public debates on policies and actions of government. Effective participation at all these levels depends on information. Democracy is essentially about transparency, accountability and good governance. This reason was also advanced by petitioners to the Mungomba Constitution Review Commission^[7] who advocated freedom of access to information, saying these rights and freedoms were essential to democratic governance, transparency, accountability and development. They further argued that an informed public would participate in and contribute better to the development of the country. One petitioner, however, said that the right of access to public information held by the Government should be subject to national security considerations.^[8] Government matters have always been a public matter. For example, the Zambian Constitution^[9] states that any person charged with a criminal offence... shall be afforded a fair hearing within a reasonable time. However, is a trial still fair if the public does not get involved?

[5] Louis Brandes. **Other People’s Money And How The Bankers Use It.** New York: Frederick A Stokes Company, 1914. p. 92

[6] P. Matibini, **The Struggle for Media Law Reforms in Zambia.** Lusaka: MISA ZAMBIA, 2006. p. 95

[7] Report of the Mungomba Constitution Review Commission. December 2005

[8] Mungomba CRC

[9] Constitution of Zambia, Cap 1. Article 18 (1) of the Laws of Zambia

The framers of our constitution obviously believed that public scrutiny of the trial process for instance, worked to the advantage of the defendant, that courtroom actors who are under public observation would be better prepared, more careful and more likely to accord the defendant all the due process protections afforded under our Constitution. The ability of the media to report proceedings without inhibition could be argued to provide most of the necessary safeguards to allow public scrutiny of the process. It is believed that the administration of justice is just about the most important aspect of a free society and therefore there should be no distractions in accessing information concerning in particular, the judicial processes and other government operations.

In fact concern for the integrity and confidence of the Zambia legal system is not affected by media coverage. Generally, people perceive that media coverage of court proceedings educates the public, rather they agree that it serves to sensationalise and entertain. Our judicial system does not need the unnecessary and extraneous interference that sensational media coverage brings to court proceedings. One problem that prevents people from understanding the system is the fact that the media and the system itself, that is, judges, lawyers, etc- keep perpetuating myths about the process that only mislead people. These myths are basically the ideals of justice. Examples are presumption of innocence, reasonable doubt, etc. These represent goals and depict the way things would work in an ideal democratic society.

The reality is much less laudable, but lawyers and journalists insist on portraying the myths as the way things work, rather than as the ideals they are. Criminal defence

lawyers know, for example, that it's extremely rare for the defendant to truly enjoy a presumption of innocence.

If lawyers would stop preaching that these myths about the fairness of the system exist in reality, and if the media would do a better job of explaining that these ideals are rarely achieved, perhaps the public would understand the system better and would therefore not feel so much like the system is a failure.

The media should realise that holding government and especially the judiciary accountable to the citizens is not a bed of roses as such. A worthy exercise is often fraught with challenges like resistance from an impervious judiciary, danger of reducing the respect and reverence of the seat of justice in the public eye, contempt of court charges, capacity to understand and analyse judicial phenomena, real or imagined charges of having an ideological or political agenda, among others. The media should not be daunted by these obstacles but rather they must endeavour to familiarise themselves with how the justice system works and learn to promote the judiciary.^[10]

In Zambia, unlike in the US, freedom of the media is not explicitly guaranteed in the constitution. However, it is provided for by way of inference in Article 20(1)^[11] which relates to freedom of expression. Following all the developments discussed in the foregoing chapters, a need arose to enact a Freedom of Information Act so that the flow of information, particularly from the executive wing of government, is enhanced and to

[10] <http://allafrica.com>. 18th November, 2008.

[11] Constitution of Zambia, Cap 1. Article 20 (1) of the Laws of Zambia

meet the demands of democratic governance. In the same vein, Minister of Information and Broadcasting Services, as he then was, Newstaed Zimba, informed the House that he undertook a tour of the United Kingdom and obtained drafts of similar reforms in Europe.

[12] Furthermore Zimba informed the House that the Bill was a product of wide consultations with the public as well as media associations and he was therefore convinced that it was a Bill for which the House should have been unanimous in passing. This resulted in the Freedom of Information Bill. On 18th December 2002, however, the government, in a surprise turn of events, deferred consideration of the Freedom of Information Bill. The reasons for the withdrawal of the Bill were shrouded in mystery.^[13]

On 30th December 2003, in an article entitled "*Freedom of Information Bill to be tabled soon*", then Information and Broadcasting Services Minister Mutale Nalumango indicated that the Freedom of Information Bill would be tabled the ensuing month. Nalumango appealed to stakeholders to be patient and not to rush in condemning the government because it was still committed to the media reforms and press freedom. Nalumango assured the nation in general and the media community in particular, that before the end of 2004, the Freedom of Information Bill would be enacted into law^[14]

The Times Of Zambia^[15] reported that Media Institute of Southern Africa (MISA) and Press Association of Zambia (PAZA) launched a campaign to enact the Freedom of

[12] National Assembly. Second Reading of the Freedom of Information Bill Number 22 of 2002 – (Transcript Proceedings). p. 12

[13] Zambia Daily Mail 30th December, 2003

[14] Matibini. p. 121

[15] Times of Zambia. 9th February 2004

Information Bill and at the launch, it was pointed out that the Bill would not only benefit the media community, but the public at large. Freedom of information law would enable any member of public to demand information from the government and the government would also be obliged to release the information unless release of such information bordered on national security.^[16]

Since the withdrawal of the Freedom of Information Bill on 18th December 2002, the government has issued a variety of contradictory, oblique and even comical explanations for withdrawing the Bill.^[17] The withdrawal of the Bill on insubstantial reasons raises serious questions about government's commitment and political will to enact a freedom of information law. The challenge that lies ahead, therefore, is to ensure that the FOIB No. 22 of 2002 is re-submitted to the National Assembly and enacted into law,^[18] like what the United States of America has done.

The FOI is not a fight against government, but a fight for accountability and a fight against corruption. Therefore every Zambia should ensure the enactment of the FOIB by Parliament. In America, despite the qualified freedom of the press under the First Amendment, the wording of the provisions gives Americans a broad right to speak and publish on matters of conscience and consequence without fear of reprisal by the

[16] Times of Zambia. 9th February 2004

[17] Matibini. p. 123

[18] Matibini. p. 124

government. This means that publishers are given the right to freely criticise public officials on matters of public interest provided that such criticism is not done with actual malice. This privilege has been justified by the public's need to be informed about the activities of government. Since most citizens can not observe government directly, those (the media) doing it on their behalf need to be able to report without fear of being sued or reprisals from the government.^[19]

The courts in the US have even gone further and extended the freedom to criticise government and public officials. In the landmark case of New York Times v Sullivan,^[20] it was held that the Seditious Act of 1798 which had prohibited any conspiracy to oppose the government and “any false, scandalous and malicious writing” against government and its officials was unconstitutional because of the restraint it imposed upon criticism of government.

5.2 Recommendations

Speaking at a meeting initiated by the media bodies in Lusaka to discuss with the Minister of Information and Broadcasting, among other things, the proposed regulation of the media and the general landscape of the media industry in Zambia, Chief Government spokesperson Ronnie Shikapwasha assured media bodies that the FOIB will be taken back to Parliament for reconsideration in the year 2009.^[21] In view of this development, it is highly recommended that this time around, the government does not back track on its assurance.

[19] K. R. Middleton. **The Law of Public Communication** New York: Longman, 1988. P. 144

[20] 390 US 727 (1968)

[21] Zambia Daily Mail . 11th December 2008

Further, Attorney General Mumba Malila^[22] has opposed calls by some members of parliament for statutory media regulation, saying it would stifle the media landscape. In the same vein, it is recommended that media bodies come up with proposals that could facilitate self-regulation so as to enhance press freedom. It is also important to add here that press freedom is a right much linked or connected to the freedom of expression and is to be enjoyed by every citizen and not only journalists. Malila also added that government will only provide a framework on how the media can operate, which is through enactment of the FOIB.

5.3 Conclusion

The free flow of information and ideas lies at the heart of the very notion of democracy and is crucial to the effective respect of human rights. In addition, human rights abuses will continue taking place in secret as there is no way of exposing a corrupt and inefficient government through the media. Central to the guarantee of this right is the principle that public bodies hold information not for themselves, but on behalf of the public. These bodies hold a vast wealth of information and, if this is held in secret, the right to freedom of expression, guaranteed under international law as well as most constitutions, is seriously undermined.^[23]

It therefore becomes imperative for the media to operate in an environment that will facilitate free flow of information between the governed and the governors. The FOIB,

[22] The Post . 11th December 2008

[23] Toby, Mendel. **Freedom of Information: A Comparative Legal Survey** USA: Macro Graphics Pvt Ltd, 2003.p.1

much as it will assist the media to access information much more easily, is also intended to allow the *Zambian* people to ask for public information held on their behalf by public officers. This will enhance efficiency at every level of governance.

The study singled out freedom of access to information, a silent aspect of freedom of expression as a fundamental human right and has outlined the impact of the media on it. The study also looked at the role the media plays in a democratic society. However, although freedom of expression is a fundamental value, access to all public records is not permitted. Freedom of expression is not absolute. There are conflicting social values such as national security, public interest, fair commercial markets and individual reputation, that may override the value of freedom of access to information. The study further highlighted, in a comparative study the status of freedom of access to information in *Zambia* and the *United States of America*. In concluding, it can be mentioned that, reconciling values that conflict with this freedom is the work of the law. The law determines when and why freedom of access to information must defer to other social values and personal interests.^[24]

[24] Middleton. p. 45

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