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IS THE ENACTMENT OF A FREEDOM OF INFORMATION LAW THREAT TO NATIONAL SECURITY?



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A Directed Research essay submitted to the University of Zambia in partial fulfillment to the requirements for the award of the Bachelor of Laws Degree (LL.B)

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THE UNIVERSITY OF ZAMBIA
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ABSTRACT

Freedom of information law is vital to the development of any democratic society. People have the right to information that is held by public officials. It is only when citizens are informed, that there can truly be an accountable leadership. Freedom of information thereby promotes the basic principles of democracy, that is, accountable and transparent leadership. The fight against corruption cannot be won without freedom of information law. In as much as freedom of information is necessary in a democratic society, every government has a duty to ensure that the integrity and sovereignty of a nation is protected from outside forces. Every government owes it to its people to ensure that the security of their children, their property and themselves is a matter of unequalled priority. In protecting these interests, the State is left to itself to decide how best to achieve these ends in a way, best suited for a particular State. This is also dictated by the principles of sovereignty of State. In safeguarding the interests of the state, certain rights and freedoms may be circumscribed. However, derogations must be justifiable and must not be applied arbitrarily by government bodies simply to avoid embarrassment. In addressing issues of State Security and freedom of information, the State should strive to strike a balance between these two competing interests. Freedom of information and national security are not mutually exclusive, but are co-existent in a democratic society.

DEDICATION

This paper is dedicated to my mom and dad, Mr. and Mrs. Lumamba. Mom, you are the most hardworking and tireless woman I have ever known. You have sacrificed your all to enable me reach my goal. You are undoubtedly an example that I can follow. You inspire me to persevere even through the most difficult times. You're my teacher, my friend my mentor and my rock, who blesses me everyday

To My father, Nhandu Lumamba Snr., it's been over two years since you answered the Lord's call, but your ever enduring faith in me is still my driving force. You always believed in me even when I did not believe in myself. It's said that the worst misfortune that can happen to an ordinary human is to have an extraordinary father. You proved that wrong, because having an extraordinary father was the greatest fortune of my life. Your not here in body, but I celebrate with you in spirit every day. Your love is the glimpse I am permitted of eternity. I still miss you dearly, but the gratitude of having shared your life has finally conquered the loss.

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I would like to state that your help and support was not in vain.

May the Almighty richly bless you all.

TABLE OF LEGISLATION

Zambia

Constitution of the Republic of Zambia, Cap 1 of the Laws of Zambia.

State Security Act, Cap 111 of the Laws of Zambia

The Zambia National Broadcasting Corporation (Amendment) Act, No. 20 of 2002

The Information and Broadcasting Associations Act No. 17 of 2002

Freedom of Information Bill, Number 22 of 2002

South Africa

Promotion of Access to Information Act, Act 2 of 2000

CASES

1. Attorney General V Times Newspapers Ltd [1974] AC 273
2. Nikuv, Computers SCZ/8/75/96
3. The People v. Fred M'membe HP/130/99 (Unreported)
4. The People v. Fred M'membe, Masautso Phiri and Bright Mwape. HP/38/1996 (Unreported)
5. The People V Syatalimi (Unreported decision of Subordinate Court of 1995)

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CHAPTER ONE

THE IMPORTANCE OF ENACTING FREEDOM OF INFORMATION LAW

1.0 Introduction

The rational individual requires information and an opportunity to express his/her own ideas if he/she is to develop. It assists in the discovery of truth.¹ It has been stated that freedom of expression unsupported by freedom of information is unlikely to play as effective a part in sustaining modern representative Government, as it would in situations where there is free access to information relating to the workings of Government.² The right to access information is based on the idea that people should have access to the information in possession of the State that has impact on them.³

Despite an increase in the levels of awareness of the importance of enacting freedom of information legislation, the government of the republic of Zambia has been very reluctant in enacting the Freedom of Information Bill. This paper aims at discussing the importance of enacting freedom of information legislation in Zambia and whether or not it continues to be a threat to national security interests.

1.1 Statement of the Problem

The overall research problem addressed in this study is that despite an increase in the levels of awareness of the importance of enacting freedom of information legislation, the government of

¹ ABRAMS v. U.S. 250 U.S. 616 (1919)

² Matibini P. 2006. "The Legal Framework of the Right to Expression and Assembly in Zambia."

³ Brian M. Lingela. Advocating for Media Law Reform: The Case of Zambia. A paper presented to Media Institute for Southern Africa (MISA) Information Officers Training Workshop. Held from May 12-14 2003 at Breakwater Lodge, Cape Town, South Africa.

the republic of Zambia has been very reluctant in enacting the Freedom of information Bill. In 2001, the MMD in its manifesto stated that it would enact the freedom of information Act and initiate more media reforms. The Freedom of Information Bill, as well as other media bills, namely the Zambia Broadcasting Corporation (Amendment) Bill and the Independent Broadcasting Authority (IBA) Bill, were presented to Parliament by the Honorable Minister of Information and Broadcasting Services, Mr. Newstead Zimba on November 22 2002.

The IBA and ZNBC (Amendment) bills have since received Presidential assent, while the freedom of information Bill was deferred, to facilitate further consultations. The Bill has since not been taken to Parliament, and people have since pressed for constitutional changes as the only way through which to achieve the purpose, as the constitution is the starting point for comprehensive media law reform.

It is felt strongly in a number of circles that freedom of information is not absolute. Both international law and domestic law circumscribe this right by taking into account overriding interests such as defence, public safety and public morality. These concerns have intensified even further, with the global desire to end terrorism. This has augmented apprehension all over the world, relating to restrictions on freedom of expression or attempted restrictions justified on grounds of national security.⁴

Indeed there is no objection to the fact that National Security is a social value of the highest order upon which the protection of all human life depends. Without national security, basic human rights are always at risk. However, the problem is that governments across the world are known for invoking national security to cover a huge range of issues and information which they would rather not see in the public domain. The tension between freedom of information and national security is critical. Therefore, it is unjustifiable for any government to fail to guarantee freedom of information without legitimate justification as to national security interests. Acts of terrorism and other such vices require appropriate legislative response and should not be used as

⁴ Agness Callamard, Executive Director of ARTICLE 19 in a speech entitled; 'Freedom of Expression and Press Freedom: Protecting and Respecting Human Security.' During an Organisation for security and Cooperation in Europe (OSCE) Supplementary Meeting held from 13-14 July 2006.

a shield for the state to protect itself with. If citizens are not aware of what is happening in their society, if the actions of the rulers are hidden, then they cannot take a meaningful part in the affairs of the society.⁵ Failure to establish whether or not Freedom of Information is national security concern could be very fatal to the development of any democratic society like Zambia. This paper therefore seeks to establish whether or not freedom of information legislation is a threat to national security, and establish whether governments concerns in the delay to enact are legitimate or not.

1.2 Objectives

The objective of this study is to establish whether or not freedom of information legislation continues to be a threat to national security.

Specific objectives of the study will be to:

- Explain what freedom of information is;
- Explain the need and importance of national security;
- Explain where the tension arises in the interplay between the need for Freedom of Information, on one hand and on the other and the necessity to secure interests of State security;
- Consider whether each of the conflicting concerns is justifiable;
- Provide suggestions on how to reconcile national security, with the need for public access to information, in order to meet the challenges of a democratic society in the 21st century.

1.4 Methodology

The major method of data collection to be deployed will be desk research. Where necessary, this will be supplemented by interviews with various personnel in sectors that deal with

⁵ T. Mendel, 'The Public Right To Know- Principles of Freedom of Information Legislation', (Article 19 International Standards Series. June 1991, at 1)

advocacy and promotion of freedom of information law and other media laws. The data for this research will be sourced from books, Statutes (Zambian and foreign), journal articles, paper presentations, student obligatory essays, reports by mandated bodies, private sector reviews and, in a few and necessary cases, newspaper articles.

1.5 Reasons behind Freedom of Information Law

There are various reasons advanced as to why freedom of information law must be enacted and implemented. In a developing country like Zambia, information must flow. In order for development to occur, there must be a great increase in the flow of technical and political information. However, this is only possible if freedom of expression and information is available and protected.

Former Minister of Information and Broadcasting Services, Newstead Zimba, when presenting the Freedom of Information Bill to Parliament stated that the right to access information facilitated more effective participation in the good governance of any country as it promoted transparency and accountability of public officers.⁶ He further stated that freedom of information contributes to economic and social development, by enabling people to participate effectively in the process of government and to make informed choices in matters affecting their welfare, while at the same time enabling officials to benefit from public inputs, which facilitate their decision making or improve the quality of public officials on matters of public interest.⁷

Freedom of information laws allow people to closely monitor the government and its activities, resulting in a more honest government. Freedom of information laws ensure the rights of citizens

⁶ National Assembly, Second Reading, the Freedom of Information Bill Number 22 of 2002 at 10. (Transcript Proceedings)

⁷ Id.

to voice their opinions on matters of importance or ask why something was or was not done. This is crucial for the people to check on the candidates they entrusted with public office. In order to guarantee freedom of expression, people must be provided with the necessary information so as to make informed public debate. Freedom of expression is therefore dependant upon access to information. In the English case of *Attorney General V Times Newspapers Ltd*⁸, Lord Simon of Glaisdale stated that:

“The public interest in freedom of discussion... stems from the requirement that members of a democratic society should be sufficiently informed that they may influence intelligently the decisions which may affect themselves.”

The right to access information should be upheld because the information held by Government officials belongs to the people. Contrary to the belief by many government officials, the government does not own information, as it is for the public good in much the same way as clean air, electricity and water.⁹ Government holds information solely as a trustee for the people and cannot unnecessarily keep it from the public. Thus refusal to release public information is not a matter of exercising powers over the people, as public authorities are merely employees of the people. Freedom of information legislation is potentially an important tool to redress the imbalance in power.¹⁰ It also enables more effective supervision of the Executive within Parliament.¹¹ The fight against corruption cannot be won without a freedom of information law. Research has show that countries with freedom of information laws are perceived to be the least

⁸ [1974] AC 273 at 320

⁹ Maja Daruwala (Ed). Commonwealth Human Rights Initiative (CHRI) Executive Summary 2003: Looking for the right to information in the commonwealth.

¹⁰ Matibini, P. The Legal Framework of the Right to Expression and Assembly in Zambia.” A Ph.D Thesis submitted to the School of Law, University of Zambia. May 2006.

¹¹ Id.

corrupt. In 2002, of ten countries that were scoring best in Transparency International's annual corruption perception Index, no fewer than eight had effective legislation enabling the public to see government files. Of the ten countries perceived to be worst corrupt, not even one had a functioning access to information regime.¹² Zambia's fight against corruption has suffered serious drawbacks as a result of lack of access to information.

It is unacceptable in a democratic society that there should be a restraint on the publication of information relating to government, when the only vice of that information is that it enables the public to discuss, review and criticize Government actions.¹³ Freedom of information law is therefore an important ingredient in re-asserting the principle of accountability.¹⁴

1.6 Developments effected towards enacting freedom of information legislation in Zambia

Zambia has not lost ground in recognizing the importance attached to freedom of information law. The government of the Republic of Zambia recognized the need to enact a Freedom of Information Act to ensure the free flow of information. This led to the drafting of the freedom of information bill in 2001, which was presented to parliament on 22nd November 2002, by the then Minister of Information and Broadcasting Services Newstead Zimba. The Zambian government, however, has been very reluctant in enacting freedom of information legislation and has stated among other reasons, the threat to national security in delaying the enacting of such a law. For instance, when presenting the Bill to Parliament in 2002, Minister of Information and Broadcasting Services, Newstead Zimba, cautioned the House that terrorists and other insurgent

¹² Supra note 7 at page 10.

¹³ Supra note 8.

¹⁴ Id.

incidents had come to threaten the security of the world. As a result, it was argued on behalf of the government that it was necessary to exempt security institutions which dealt with information of a delicate and sensitive nature, lest the security of the country was compromised.¹⁵

The subsequent withdrawal of the Bill on 18th December 2002 shows a lack of commitment on the part of government in ensuring that people's right to access information is protected. In 2006, Vernon Mwaanga, then Minister of Information and Broadcasting, stated that, "there has to be an undertaking as to whatever information is collected is used for a constructive purpose. Because you want to ensure that whatever information is collected is not going to be passed to another party which has less than noble intentions of using it."¹⁶ Mwaanga further stated that government was not in a rush to pass the freedom of information Bill as Zambians had previously lived without it, saying that the Bill would only be enacted following appropriate discussion.¹⁷ Such contradictory statements by Government Ministers clearly highlight the absence of commitment on the part of Government in enacting freedom of information law.

1.6 The Johannesburg Principles.

In as much as freedom of information legislation is necessary in enhancing democracy, it must not be enacted at the expense of legitimate concerns such as national security. It should be borne in mind that whenever freedom of information law is being enacted, it ought to make provision for public authorities to claim exemption from release of information that is likely to cause substantial harm to the peace and security of the country.¹⁸ The subject of protection must,

¹⁵ Matibini, P.(2006). *The Struggle for Media Law Reforms in Zambia*. MISA-Zambia:Lusaka

¹⁶ Peter Clotney. Reporting an interview with Vernon Mwaanga on Voice of Amerca. 3rd July 2006.

¹⁷ Id.

¹⁸ Christel & Hendrik Bussiek.2004. "Tool Box 4:Acces to Information," *The Media: Making Democracy Work*. Windhoek: Friedrich-Ebert-Stiftung.

however, be a legitimate national security interest. Merely protecting an incumbent Government's image is therefore not a legitimate interest.

The Johannesburg Principles: National Security, Freedom of Expression and Access to Information¹⁹ are a useful tool in resolving these issues. The principles were developed by 36 leading experts from all over the world at the invitation of an international lobby organization, ARTICLE 19 and the University of Witwatersrand, South Africa.²⁰ The principles are widely relied upon and have been endorsed by judges, lawyers, civil society actors, academics, journalists and others all in the name of freedom of expression.²¹ The goal of the principles is to set authoritative standards clarifying the legitimate scope of restriction on freedom of expression on grounds of protecting national security.²² They acknowledge the right of an individual to obtain information from public authorities, including that relating to national security.²³ The Johannesburg Principles further prohibit restrictions on the right to freedom of information unless government can demonstrate that the restriction is prescribed by law and is necessary in a democratic society to protect a legitimate security interest.²⁴ Principle 12 provides that a state may not categorically deny access to all information that is necessary to withhold in order to protect legitimate national security interest.

The Johannesburg Principles set out the importance of the right to access information. it is, therefore, imperative to make reference to these principles as they set out internationally accepted standards by taking into account relevant provisions of the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the United Nations

¹⁹ (1995) 28
²⁰ ARTICLE 19. "National Security and International Law." at <http://www.article19.org>.
²¹ Id.
²² Id.
²³ Principle 11, The Johannesburg Principles.
²⁴ Id.

Convention on the Rights of the Child, the United Nations Basic Principles on the Independence of the Judiciary, the African Charter on Human and Peoples' Rights, the American Convention on Human Rights and the European Convention on Human Rights.

The principles further highlight that it is fundamental, that human rights should be protected by the rule law, if people are not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression. They re-affirm the belief that freedom of expression and freedom of information are vital to a democratic society and are essential for its progress and welfare and for the enjoyment of other human rights and fundamental freedoms. The Johannesburg Principles are, thus, an indispensable tool to any democratic government as they address the importance of guaranteeing freedom of information, whilst still addressing other genuine concerns such as ensuring genuine national security concerns are protected. The principles therefore serve as a guide in the formulation of freedom of information law as they address the pertinent issue under discussion in this paper, that is, the fear of compromising state security at the expense of guaranteeing the enforcement of freedom of information law.

By making use of the Johannesburg Principles, a government can be better equipped with ensuring the right to freedom of information is protected, whilst still guaranteeing the protection of national security interests.

CHAPTER TWO

STATE SECURITY LAW

2.0 Introduction

Every sovereign country has the right to protect its national security interests which are absolutely essential to guarding it against foreign threats or enemies intent on undermining that country's national existence. National security is a social value of the highest order, upon which the protection of all human rights depends.²⁵ Protection of national interest may require the suppression of sensitive defence information or speech likely to promote violence against the state.²⁶ Without national security, basic human rights are always at risk. This section, will discuss the relevance of national security.

2.1 What constitutes national security?

In today's rapidly changing world, one of the most important issues is national security. It is the responsibility of a nation's government to protect its land and its citizens from outside threats. Every government has areas of operation in which it has legitimate need for secrecy, such as matters of defence and foreign affairs.²⁷ The national security argument is one of the most commonly given in justifying secrecy. However, no satisfactory definition has been given of this important term. There are undoubtedly certain defence secrets of which disclosure could

²⁵ Matibini, P. "The Legal Framework of the Right to Expression and Assembly in Zambia." A PhD thesis submitted to the University of Zambia, May 2006. p.219

²⁶ Ibid.

²⁷ Ibid. p.243

endanger the State or its operations.²⁸ These can be summarized as security, defence and intelligence matters. Secrecy is indeed justified in these areas, but there must be defined limits.

The problem, however, is that Governments across the world are well known for invoking national security to cover a huge range of issues and information which they would rather not see in the public domain.²⁹ National security laws enable Governments to administer State Security law even where there is no emergency and without scrutiny and criticism.³⁰ Thus, there is a loophole for measures that may infringe human rights and fundamental freedoms. In this regard the highest international standards dictate that any restriction on free speech invoked on the grounds of national security must meet stringent criteria.³¹ For instance, a restriction on freedom of expression or information must demonstrate that, firstly, the expression or information at issue poses a serious threat to a legitimate national security interest; secondly, the restriction imposed should be the least restrictive means possible for protecting that interest; and lastly, the restriction is compatible with democratic principles.³²

The Johannesburg Principles provide that a person should not be prosecuted on national security grounds for disclosing information that was obtained by virtue of Government service, if the public interest in knowing the information outweighs the harm of disclosure. This is referred to as the public interest test. If the public interest in not disclosing is equal to the public interest in disclosing then the information should not be disclosed.³³ A person, therefore, should not be punished on national security grounds for disclosure of information, if the information does not actually harm a legitimate national interest. Freedom of information law implies that disclosure

²⁸ Ibid

²⁹ Matibini, P. 2006. p243.

³⁰ Ibid. p.244.

³¹ Ibid.

³² Ibid. p.298.

³³ ARTICLE 19. "National Security and International Law" at <http://www.article19.org>.

takes precedence. Thus, public authorities are mandated to provide reasons as to why they cannot provide information asked for.³⁴

Tension sometimes exists between the preservation of the State (by maintaining self-determination and sovereignty) and the rights and freedoms of individuals. Although national security measures are imposed to protect society as a whole, such measures will necessarily tend to restrict the rights and freedoms of individuals. The concern is that where the exercise of national security laws and powers is not subject to good governance, the rule of law, and strict checks and balances, there is a risk that "national security" may simply serve as a pretext for suppressing unfavorable political and social views. Taken to its logical conclusion, this view contends that measures which may ostensibly serve a national security purpose (such as mass surveillance, and censorship of mass media), could ultimately lead to a police State. Government action has brought some of these issues to the forefront, raising two main questions: to what extent, for the sake of national security, should individual rights and freedoms be restricted and can the restriction of civil rights for the sake of national security be justified?

In addressing these issues, focus should be on balancing the need to strengthen our national security and intelligence capabilities with the need to preserve our constitutionally protected freedoms.

2.2 State Security legislation and its importance.

The objects of national security legislation are premised on the maxim: '*salus populi est suprema lex*', which means the safety of the nations, is the supreme law, which is an established principle

³⁴ Matibini, P. the Role of Freedom of Information Law in Enhancing the Rights of Zambian Journalists. A paper presented to "The Rights of Journalists" Workshop organized by the Media Institute of Southern Africa (MISA) Zambia Chapter, at Andrews Motel on 24th February 2006.

of constitutional law.³⁵ There is need for every State to have regulations that secure its integrity from outside forces. It is incumbent upon every government to ensure that the security of its people and that of their children and property is a matter of high priority. State security legislation plays a vital role in facilitating the enjoyment of rights in a democratic society. This is for the obvious reason that fundamental human rights can only be enjoyed in politically independent and secure nations. It is paramount that issues of State security are discreetly thought out and restricted to real national security concerns- needless to say that some of the most serious violations of human rights are justified in the name of maintaining national security.

2.2.1 The Security Act

The State Security Act³⁶ (hereinafter referred to as the Act) which was enacted on 23rd October 1969, replaced the Official Secrets Act of 1967. The Act is based on the Official Secrets Act of 1911³⁷, 1920³⁸ and 1939³⁹ of the United Kingdom. The Act was passed at the time of heightened security concerns. At the time, Zambia was surrounded mostly by hostile minority regimes like the Portuguese in control of Angola and Mozambique and the white minority in control of Rhodesia, South West Africa and South Africa. The existing Official Secrets Act of 1967, was considered inadequate at the time due to the political situation pertaining in the region.

The objects of the State Security Act are -: to make better provisions relating to state security; to deal with espionage, sabotage and other activities prejudicial to the interest of the State; and to

³⁵ K. Hang'andu. "The Legal Constraints on Press freedom in the Third Republican Zambia." An obligatory essay submitted to the School of Law of The University of Zambia in partial fulfillment of the Bachelor of Laws award.

³⁶ Cap 111 of the Laws of Zambia

³⁷ 1 & 2 Geo 5c 28

³⁸ 10 & 11 Geo 5c 28

³⁹ 2 & 3 Geo 6c 121

provide the purposes incidental to or connected therewith.⁴⁰ The Act covers a number of activities. Section 3 which covers espionage, makes it an offence punishable with not less than twenty years imprisonment for any person, 'for any purpose prejudicial to the safety of interest of the State, not only to engage in specified conduct calculated to be useful to an enemy, but also to approach, inspect or enter a 'protected place'. There is a wide range of prohibition under the Act. For instance, it may be an offence under section 4 for civil servant to pass or for a researcher to acquire from him information about loans obtained by the Government from other governments or international financial institutions notwithstanding that the material has no bearing on security and is not even classified as confidential.⁴¹ This catch-all section is indeed convoluted and obtruse. It is not clear from section 4 whether guilty knowledge (or *mens rea*) has to be proved for unauthorized communication to an offence. The deterrent effect of this section on middle-grade civil servant is of considerable effect.⁴²

Section 5 (1) of the Act provides that any person who communicates any classified matter to any person other than a person to whom he is authorized to communicate it or to whom it is in the interests of the Republic his duty to communicate it, shall be guilty of an offence and liable on conviction to imprisonment for a term of not less than fifteen years and not exceeding twenty years. Under subsection (2), it shall be no defence of an accused person to prove that when he communicated the matter he did not know and could not reasonably have known that it was

⁴⁰ Preamble, State Security Act, Cap 111 of the Laws of Zambia.

⁴¹ Prof. A. W. Chanda, *The State Security Act Vs. Open Society: Does a Democracy Need Secrets?* Zambia Law Journal, Vol. 29 1997, p.38

⁴² *Ibid.*

classified matter. Thus, under this section, 'the Government, and Government alone, will decide what is to be classified matter'.⁴³

Section 5 has serious defects. First, it does not provide criterion upon which documents are to be classified. Under section 2 of the Act, 'classified matter' is merely defined as 'any information or thing declared to be classified by an authorized officer'. Secondly, section 5 does not stipulate who is to do the classification. Since there are no guidelines given, any document could presumably be classified confidential even if it has not the remotest connection with public security.⁴⁴ Moreover, any official working for the Government could be appointed as an authorized officer to do the classification.

These vague provisions are a serious danger to freedom of expression and information and undermine the right of the public to know.⁴⁵ The public as a result cannot access almost all Government documents. It is indisputable that the provisions under the Act make it very difficult to access publicly held information. The inevitable effects of this are that the public is ignorant of the operations of Government and there is very little informed debate on matters of public interest taking place.⁴⁶ The little public held information that is published is as a result of leaks to the media by Government officials. The absence of guidelines in the Act has given rise to abuse of the aforesaid sections.

In the case of *The People V Syatalimi*⁴⁷, Justice Chitengi in putting the Act into perspective stated the following:

⁴³ In the words of the Attorney General at the time, Mr. F. Chuula, see NATIONAL ASSEMBLY HANSARD Vol 18-20, col 416
⁴⁴ Supra note 8, p.39
⁴⁵ Ibid.
⁴⁶ Ibid.
⁴⁷ Unreported decision of Subordinate Court of 1995

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

Indeed in the *Nikuv*⁴⁸ case, the Supreme Court held, for instance that it was wrong to classify a contract for registration of voters as secret because transparency required that it be not. The foregoing statement by the learned Justice Peter Chitengi is in tune with the spirit of the Preamble to the State Security Act, which provides:

‘An Act to make better provision relating to state security to deal with espionage, sabotage and other activities prejudicial to the interests of the state; and to provide for purposes incidental to or connected therewith.’

2.3 Conclusion

The importance attached to national security cannot be over emphasized. However, in a democratic society the values of democracy demand that there be public accountability. The survival, safety and vitality of every nation are dependent upon security of a nation from outside forces. As earlier pointed out in this chapter, from these broad based concerns flow interests such as the physical security of a nations territory, the safety of its society and the protection of critical national infrastructure such as energy , banking and finance, telecommunications, transport, water systems and emergency services to name but the most critical. Such are the interests that every sovereign state is obliged to protect from sabotaging attack. National security is therefore, indispensable to every nation which is committed to its obligation to ensure security

⁴⁸ SCZ/8/75/96

of its citizens from external forces. In so doing, States are, however, expected to take into consideration important treaties and declarations that apply to all nations irrespective of their national ideologies, such as the International Covenant on Civil and Political Rights (ICCPR), the African Charter on Human and People's Rights (ACHPR), and the Universal Declaration on Human Rights (UDHR) to ensure that perpetration of human rights violation under the pretext of keeping national security is checked.

There is need, in a democratic society, to strike a balance between freedom of information and State Security interests. It cannot be overemphasized that it is the solemn duty of every government to safeguard the security interests of its citizens. In so doing, the rights of individuals in some instances may have to be restricted for purposes of safeguarding and maintaining public morality, public defence and peace. The interplay between State Security and freedom of information shall be discussed in the succeeding chapter. The paper will proceed to discuss the relevance of circumscribing the right to information in the light of justifiable national security concerns and how these restrictions have been applied by the Zambian government, and further how these two competing interests can be harmonized in a democratic society.

CHAPTER THREE

NATIONAL SECURITY VERSUS FREEDOM OF INFORMATION LAW

3.0 Introduction

This chapter seeks to investigate the relationship between national security and freedom of information. The chapter will begin by discussing the need to circumscribe the right to information. Thereafter, the paper will give an analysis of the Zambian Government's attempts in circumscribing the right to information and whether or not the reasons for such actions have been justified. The paper will further look at the interplay between freedom of information and national security by taking into account the decisions of the courts of law in interpreting these two competing issues.

3.1 Circumscribing the right to information

It is strongly argued that the right to information is not absolute. Both international law and domestic law limit this right by restrictions, taking into account overriding interests such as defense, public safety and public morality.⁴⁹ These concerns have intensified even further, world over, especially with the nations' desire to end terrorism. This has led to increased concerns all over the world relating to restrictions on freedom of expression or attempted restrictions justified on grounds of national security.⁵⁰ The September 11 2001 attacks on the United States raised

⁴⁹ Newstead Zimba, former Minister of Information and Broadcasting, when presenting the Freedom of Information Bill to National Assembly. National Assembly, Second Reading, The Freedom of Information Bill Number 22 of 2002 at 10. (Transcript proceedings).

⁵⁰ Agnes Callamard, Executive Director of ARTICLE 19, in a speech entitled; "Freedom of Expression and Press Freedom: Protecting and Respecting Human Security." During an Organization for Security and Cooperation in Europe (OSCE) Supplementary Meeting held between 13 - 14 July 2006.

alarm and caused a number of uncertainties. For instance, former Vice President of the Republic of Zambia, Enock Kavindele, cited the said incident as forming part of the reasons why the Freedom of Information Bill,⁵¹ was withdrawn to allow for further consultations despite the debate relating to the Bill having reached an advanced stage.⁵² Similar remarks were made by other Government Ministers saying, “we could not allow journalists to lay Government bare, as this would compromise state security.”⁵³

Indeed there is no objection that national security is a social value of the highest order upon which the protection of all human rights depends.⁵⁴ Therefore, acts of terrorism and other such vices need appropriate legislative response. Unfortunately, some of the laws intended to address these concerns are often vague and overly broad, leaving them open to abuse. For instance, sections 4 and 5 of the State Securities Act⁵⁵, cover a broad- spectrum and do not provide any safeguards against abuse. No procedure for making information available to the public is provided.

3.1.1 Government efforts in restricting the right to information

It cannot be overemphasized that it is the solemn duty of every Government to safeguard the security interests of its citizens. In so doing, the rights of individuals in some instances may have to be restricted or limited. For instance, Article 20(3) of the Zambian Constitution⁵⁶ permits the state to impose restrictions on freedom of expression. However, to be valid, such restrictions

⁵¹ No. 22 of 2002,

⁵² David Simpson. ‘Freedom of Information – Its your right.’ At <http://www.lowdown.co.zm>

⁵³ Id.

⁵⁴ Christel & Hendriek Bussiek. 2004. “Tool Box 1: The Media- Making Democracy Work.

⁵⁵ Discussed in chapter two of this paper.

⁵⁶ Cap 1 of the laws of Zambia.

must be prescribed by law, and must be reasonably required in the interest of defence, public safety and public order. Moreover, the law in question must be reasonably justified in a democratic society.

On 11 January 2008, during the official opening of Parliament, Zambian President Levy Mwanawasa, as he then was, announced that the government had decided to re-introduce the Freedom of Information Bill (FOI) back into Parliament in 2008, following wide consultation. In his speech, President Mwanawasa said his government recognized the media as a powerful educative and information tool for development. He said it was for this reason that his government would remain committed to creating an environment in which the media can operate freely. Mwanawasa added that government wanted to ensure that the free flow of information among Zambian citizens can be enhanced through such laws. He said the media were a key tool that could help reduce corruption and poverty, as media coverage provides checks and balances on society and government. It is for this reason that government remained committed to the creation of a conducive environment for the media to operate freely and to ensure free flow of information.

In Zambia, there is officially freedom of speech and expression, however, this freedom is subject to a number of restrictions placed on the media. As an example, there was a crackdown on *The Post*, the biggest independent newspaper in Zambia, in 1999, after an article on the insufficient Zambian army compared to the threat from Angola.⁵⁷ Following this incident, on March 10th 1999, police also besieged the editorial offices and the printing press of *The Post*, cutting off power and water supplies and trapping a number of staff inside. The police siege of *The Post* was

⁵⁷ Amnesty International (AI), *Zambia Press Freedom Under Siege*, <http://web.amnesty.org/library/Index/ENGAFR630031999?open&of=ENG-ZMB>, (April 3rd, 2007)

called off on March 12th 1999, shortly after the six journalists were released on a writ of habeas corpus.⁵⁸ On March 17, police went to *The Post's* editorial offices to issue summonses and formally charge the six journalists with espionage. Thereafter, all six were granted bail. Fred M'membe, the *Post's* editor in chief, was arrested on the same charge on March 22 and immediately released on bail.

Between March 30 and March 31 of the same year, four more *Post* journalists--Jere, Nampito, Kayumba, and Reuben Phiri--were also charged with espionage. On April 16, 12 of the 13 journalists were committed to the High Court for trial on espionage charges.⁵⁹ (The 13th, Malupenga, was discharged after all charges against him were dropped without explanation.) Three days later, police arrested two more *Post* reporters, Hapande and Muyumba, on similar espionage charges. They were picked up at their homes, detained briefly, and then released. In November 21st 1999, Alphonsius Hamachila, a reporter for the independent *Monitor* newspaper, was abducted and beaten in Mazabuka by members of the ruling Movement for Multi-Party Democracy (MMD). Party officials were apparently enraged by an article that Hamachila had published in *The Monitor* a few days earlier alleging MMD politician Gary Gaali Nkombo's involvement in a corruption scandal. Nkombo was the MMD candidate for the parliamentary by-election in Mazabuka that took place on November 30th 1999. On March 3rd 1999, Zambian police briefly detained three foreign journalists for filming in Chilenje, a township near Lusaka. The journalists were reporting on a severe water shortage in Lusaka that resulted from the February bombings.⁶⁰

⁵⁸ Id.

⁵⁹ Id.

⁶⁰ Attacks on the Press 1999: Zambia. <http://www.cpj.org>

This shows that there is still a long way to go until the society is completely free. In a report on human rights practices in Zambia made by the United States Ministry of Foreign Affairs one reads:

*“The law provides for freedom of speech and of the press; however, the government at times restricted these rights in practice. The law includes provisions that may be interpreted broadly to restrict these freedoms. Journalists in the government-owned media generally practiced self-censorship; the private print media routinely criticized the government.”*⁶¹

The Post has come under fire on numerous occasions for its verbatim representations of high-profile cases that make the public aware of the exact nature of events and statements as told by witnesses and accused persons to the court. Though the publication of verbatim reports is legal, affected members of the public, especially concerned government officials have been uncomfortable about the delivery of this information to the general public. As a result, the newspaper has a history of legal difficulties, including arbitrary arrests and lawsuits, over cases involving high profile government officials.

As so often in Africa, the Zambian press has been an easy scapegoat whenever the political climate deteriorates.⁶² In Zambia, where press offences come under criminal law, government partisans can use unfair laws to throw any journalist in prison at whim as has been illustrated above. In consequence, criticizing the head of state is a high risk exercise for editorialists.⁶³

Government secrecy breeds corruption. A democratic government should be totally and completely open and free. They are there to serve the people. For instance, contracts that the government, both local and national or NGO, enter are to be automatically a matter of public

⁶¹ US Ministry of Foreign Affairs, *Country Reports on Human Rights Practices 2005 – Zambia*, (April 3rd, 2007)

⁶² *Id.*

⁶³ Reporters sans Frontières, *Freedom of the Press Worldwide in 2006*, http://www.rsf.org/article.php3?id_article=17406, (April 5th, 2007)

record. However, the trend in Zambia has been to restrict disclosure of any information such as contracts involving Government agencies. For instance, contracts that are entered into between the Zambia army and third parties for supply of goods are not disclosed on the basis of national security. The effect of this is that it has encouraged corruption to breed in the public sector. For instance, former Zambia National Service (ZNS) commandant, Wilford Funjika, a retired Lieutenant General was accused in the first count, of corrupt practices as a public officer when £15,000 was corruptly paid to his children as a reward for awarding contracts to Seymon Holdings without following laid down procedures.⁶⁴ In the second count, he was charged with abuse of authority of office when he allegedly engaged Seymon Holdings to supply raincoats to ZNS at the value of £72,000. This was in a case where he was accused of having obtained property as a result of the tender authority he allegedly gave to the said company to supply raincoats to the service.

There have been various corruption cases undertaken by the Task Force on Corruption involving Zambia Army Generals. In this light it has been argued that defence budgeting and expenditure should be a public process because it involves the optimal allocation of resources. Defence economists argue that the choice of the level of military expenditure is a political decision which reflects the preferences of the government in power, and consequently needs the ordinary people's support if it has to work effectively judged against other needs.⁶⁵ Military expenditure is one area where civil society intervention and academic scholarship could render support to Parliament and other bureaucratic structures such as the Ministry of Defence.⁶⁶ Collaboration on such issues would definitely strengthen the military in subtle but important ways. This is

⁶⁴ Id.

⁶⁵ Id.

⁶⁶ Id.

especially important in Zambia where the economy is in decline. What this means is that the inept and incompetent management of defence resources turns into a major mechanism not only for internal welfare but also for external security.⁶⁷

There is something rather conning and deceptive about the Zambian government's continued argument of safeguarding national security interests which hinder the public from having access to information that would reveal corrupt practices committed by government agencies and public officers that are reported by the media. This clearly raises more questions than answers. What are the "military secrets" that the journalist have divulged? And who are the enemies?

But the most troubling and disingenuous of the Government of Zambia's charge against the media is when it categorically states that the article was intended to "reveal national defence information to a foreign power for the purpose of injuring Zambia in the event of a military or diplomatic confrontation". Clearly, nothing could be further from the truth and unfounded by this statement. Clearly it is in the best interest of the nation that such abuses of public office are divulged to the public. The purpose of freedom of information legislation is to increase the openness and transparency of government. This would stop any corruption, as tax payers can see the true costs of any contract. The usual purpose of these laws is to enable citizens and journalists to examine government activity to detect political corruption, or to allow them to have input into government decisions that affect them. Many consider strong laws guaranteeing freedom of information to be vitally important to journalism, especially investigative journalism. The *Johannesburg Principles* clearly state under principle 8 that expression may not be prevented or punished merely because it transmits information issued by or about an organization that a government has declared threatens national security or a related interest.

⁶⁷ Id.

3.2 The response of the Zambian Judiciary

Freedom of information can only flourish in a truly democratic environment. Therefore government, on the one hand, must be committed to democratic principles and not always believing in oppressing other rival groups. On the other hand, the electorate must be ready to adapt and take up the challenge of a shift from a closed society to an open society. The judiciary also plays an important role. There is need for a courageous judiciary ready to enforce fundamental rights of the citizens.

Victims of censorship, particularly journalists, have turned to the judiciary for protection. By and large an independent judiciary in free democratic societies has proved a good sentinel on the quid vie.⁶⁸ It is the duty of the courts to secure liberty of thought, expression, belief, to all citizens. The judiciary must secure equality; see to it that the dignity of the individual is maintained, as well as the unity and integrity of the nation.⁶⁹ In Zambia, Parliament has the exclusive authority to enact laws. However, judges have the last word on the interpretation of an Act of Parliament. In some instances, vague laws and competing principles have to be balanced. The courts are called upon to determine the import and extent of the issues.

In the case of *The People v. Fred M'membe, Masautso Phiri and Bright Mwape*⁷⁰, three editors of *The Post Newspaper*, Zambia's largest independent Newspaper, were charged with receiving documents, articles or information knowing or having reasonable grounds to believe at the time that the same documents, articles or information were communicated or received in contravention of section 4(3) of the State Security Act, which provides that, "any person who

⁶⁸ Soli J. Sorabjee, *The Importance and use of international and comparative law: The Indian Experience*, Article XIX Handbook of Media Laws, 1991, p3

⁶⁹ George Kunda. *The Zambian Judiciary in the 21st Century*, Zambia Law Journal, Vol. 30, 1998.

⁷⁰ HP/38/1996 Unreported

receives any information knowing or having reasonable grounds to believe at the time that the said information has been communicated to him in contravention of the provisions of this Act... shall be guilty of an offence." At the material time there was an on going debate in the country regarding the making of a new Constitution.⁷¹ Justice Peter Chitengi found that the subject matter of the charge could not be said to be pre-judicial to State Security. The judge went further and stated that referenda are the known lawful means of enquiring from the people about their views on a contentious issue.

He maintained that for one to be held criminally liable, the information received had to be classified matter and that one had to receive the information with knowledge or reasonable grounds to believe at the time when he received the information that the same information had been communicated to him in contravention of the Act. The judge held that on proper construction of the State Security Act, not everything that was classified by an authorized officer necessarily becomes a classified matter under the State Security Act. The matters to be classified for the purposes of the Act have to be those that the legislature intended to be covered by the State Security Act. The mischief that the legislature intended to stop when it passed this Act is revealed in the preamble which states that the objects of the Act are to make better provision relating to State Security, to deal with espionage, sabotage and other activities pre-judicial to the interests of the State. The heavy penalties prescribed for these offences and the provision to deny the accused bail indicate that the conduct aimed at must be very harmful to the interest of the State.

⁷¹ Debate surrounding the need for a referenda centered on whether or not the new Constitution should be adopted by a constituent assembly, which was recommended by the Mwanakatwe Constitutional Review Commission of 1995.

The court found it surprising that the State, with the whole world watching, would want to cause itself to be ridiculed for imprisoning journalists who were merely carrying out the noble cause of informing the people about issues the people are entitled to know, being human beings living in a democratic polity, where such information is vital. The learned judge further stated:

“I think it would surprise many and even jar their instincts to hear that in Zambia three nosy journalists have been imprisoned for twenty years for prematurely announcing Government intentions to hold a referendum to decide a thorny constitutional issue. In fact, the announcement shorn of the political statements it contains, and which political statements are no concern of this court, would boost the image of Government locally and abroad. Such announcement has nothing to do with the security of the State.”⁷²

In this case, the judge proceeded to dismiss the charges against the accused. The judge clarified the State Security Act in that some of the contentious ambiguities in the Act were explained. This decision of the High Court made it clear that it is not just any matter that is so classified in the subjective determination of the authorized officer that falls in the ambit of section 4 of the Act. It is obvious that matters that the Act is meant to guard against are intended to be such serious matters as tend to subvert the interests of the State.⁷³ This decision is well reasoned as it underscores an important *Johannesburg Principle* that stipulates and sums up the contribution that this case has made important strides towards freedom of information. Namely that:

“No person may be punished on national security grounds for disclosure of information if the disclosure of information if the disclosure does not actually harm a legitimate national security interest, or if the public interest in knowing the information outweighs the harm from disclosure.”

⁷² Ibid.

⁷³ See also Johannesburg Principles, Principle 16.

In *The People v. Fred M'membe*⁷⁴ the facts of the case were that at the material time there had been allegations made by the Angolan Government that some top Zambian Ministers had been involved in supplying arms to the National Union for the Total Independence of Angola (*União Nacional para a Independência Total de Angola*, or UNITA) rebel faction. The Zambian Government denied all the allegations. As a consequence, the recognized Government base in Luanda threatened to attack Zambia. In response, the Zambian Government replied⁷⁵ that it would retaliate if the worst came to worst. It was in response to this statement by the Zambian Government, that *The Post* carried a story comparing the military strength of the two countries and about Zambia's inability to withstand a military incursion. The court in ruling in favor of the defendant stated that what the accused did was merely publish an article in a newspaper and no more than that. He did not communicate the information to the Angolans. The prosecution did not prove that the intention of the accused was to prejudice the nation. The fact that he published the information when Angola was threatening to attack Zambia did not prove to the court that the accused was at the time spying for Angola or helping the Angolan Government. It was the duty of the prosecution to show that he was actually working for Angola and that by publishing the article he was passing over information to Angola or another foreign power.

Essentially what these cases have done is underscoring the point that freedom of information is one of the pillars of a democratic society and therefore any limitation thereon must be prescribed by law. Moreover such a restriction must be justified on the grounds of public morality, public safety and defence. All in all, the judiciary has played its traditional role of a *watchdog* over the executive branch of government. It has ensured that, the executive, in enforcing the provisions of the State Security Act, do so for the purposes for which the legislature meant it and not abuse it

⁷⁴ HP/130/99 (Unreported)

⁷⁵ The Post, 8t March 1999.

for the purposes of muzzling the voices of government's critics. It's important that in safeguarding national security interests, not a great deal of collateral damage to the Constitution.

3.3 Harmonizing freedom of information and national security

The ideals of a democratic society favor open government to the extent consistent with the demands of reason and common sense. It is fundamental to the Zambian political consensus that self government presupposes an informed electorate. If a people are meant to be their own Governors, they must be armed with the power which knowledge gives. It follows from this proposition that excessive secrecy in government poses an unacceptable bar to the acquisition of information on the workings of government essential to a popular understanding of the issues before the country. It has been observed that to cover with the veil of secrecy the common routine of government business is an abomination in the eyes of intelligent men. It is precisely because of the natural tendency of government to shroud its operations in such a veil of secrecy that there have been large numbers of corruption cases involving public officers.

The principle upon which freedom of information law stands is the guarantee of an informed citizenry. It is indispensable in a democratic society as it provides checks against corruption and promotes accountable leadership. Such intent is, of course, unexceptionable; but in the real world, to insure an informed citizenry" cannot mean an unrestricted right of public access to government information. Instead, freedom of information law is designed to strike a reasonable and workable balance between two legitimate but competing interests: the need of the people to

know how their government works and the sometimes countervailing need of government to observe secrecy so that it can act effectively in maintaining the national security, without which all the rights of the people would be in serious jeopardy

It is also necessary for the very operation of government to allow it to keep confidential certain material, such as the investigatory files of the Zambia Intelligence Service. It is not an easy task to balance the opposing interests, but it is not an impossible one either. It is not necessary to conclude that to protect one of the interests, the other must, of necessity, either be abrogated or substantially subordinated. Success lies in providing a workable formula which encompasses balances, and protects all interests.

The issue is not one of evil versus good; it is one of competing interests, both legitimate and both within the bounds of our political tradition. Put another way, the issue is between the desirability of an informed body politic and the need for secrecy to the extent necessary for the protection of government's ability to safeguard its existence and govern effectively within those areas legitimately assigned to it under the Constitution. So viewed, it becomes apparent that secrecy, like power generally, is neither good nor evil in absolute terms; it is simply neutral, and may be good or bad depending on the circumstances of its application.

It is vital to our way of life to reach a workable balance between the right of the public to know and the need of government to keep information in confidence to the extent necessary without permitting unnecessary secrecy. The concept of freedom of information springs from the assertion that a democracy works best when the people have all the information that the security of the nation permits.

3.3 Conclusion

This chapter has established the importance of striking a balance between the competing interests of protecting national security interest, whilst ensuring the safeguard of the right to information.

These two issues are not mutually exclusive but have to be balanced in a democratic society.

Freedom of information law has been successfully enacted and implemented in a number of countries all over the world. The succeeding chapter will consider a case study of how freedom of information law has been implemented in other countries and the measures that have been taken into account in safeguarding their national security concerns. Ultimately the paper will consider whether such measures would be workable in the Zambian context.

CHAPTER FOUR

ENACTING AND IMPLEMENTING FOI LAW: A CASE STUDY

4.0 Introduction

Accessibility to information is achieved when there is a frequent and unimpeded release and dissemination of information. Those in charge of information abound both in the public and private sectors, corporate organizations and government officials. Indeed, concealment of information is a great disservice to the society by those responsible for its dissemination. Society develops and succeeds in an environment characterized by the free flow of information. In an era that has seen an explosion in the number of countries passing Freedom of Information Acts (FOI), it has been noted that Africa has been largely absent.⁷⁶ South Africa is the only country to have implemented such a law; Angola and Uganda have passed such “right to know” Acts but not yet brought them into force.⁷⁷ Such laws do not only benefit activists and journalists. Properly implemented FOI “is now regarded as a multi-dimensional human right that can make a huge difference to both people and their governments”.⁷⁸ Many African leaders have been reluctant to enact and implement such laws.

⁷⁶ Mukelani Dimba September 26, 2008. “[BlogReview - Africa: Freedom of information in Africa.](#)” Posted by Anita Howarth under [Africa](#), [Election campaigns](#). [Blog at WordPress.com.](#)

⁷⁷ Id.

⁷⁸ Id.

4.1 Freedom of Information Law in South Africa

South Africa passed the Promotion of Access to Information Act (PAIA) on 2 February 2000. It is intended "*To give effect to the constitutional right of access to any information held by the State and any information that is held by another person and that is required for the exercise or protection of any rights*". The right of access to privately held information is an interesting feature, as most freedom of information laws only covers governmental bodies.

One consequence of decades of intellectual repression in South Africa has been the growth of organizations that have been established to ensure that information is accessed by the citizens. Various organizations and bodies are set up in South Africa to enable the public have access to information. Access to information has always been heavily restricted in South Africa, both through State censorship and lack of systematic gathering, collecting and preservation of material (oral and written). The South African History Archive (SAHA) is beginning to address this situation by gathering information and making it accessible and available. Numerous laws which govern the gathering and dissemination of information remain on the statute books. SAHA is one of the organizations whose purpose, in whole or in part, has been to counter the monopolization of information in South Africa. SAHA is an independent archive, housed at the University of the Witwatersrand, and documents the struggles for justice in South Africa. Its Freedom of Information Programme is in the forefront of testing the parameters of the new PAIA in that country. "The goal is to test government transparency in post-apartheid South Africa".⁷⁹

⁷⁹ Michele Pickover and Verne Harris. South African History Archive. May 2001. School of Information News Archive. <http://www.news-detail.htm>

PAIA is intended to be the legislative cornerstone of freedom of information (FOI) in South Africa. Technically it is sound, drawing on the experiences of drafters and implementers of such legislation in a number of other countries, most notably the United States of America. Uniquely, it goes beyond defining the right of public access to information held by the State, also defining the Constitutional right of access to information held by private bodies.⁸⁰ Its numerous possible grounds for refusing access are to be weighed against the public interest in disclosure, thus giving to the courts the burden of interpreting competing imperatives and thus determining the parameters of FOI for South Africa. This reliance on judicial interpretation would be argued, as being appropriate to a fledgling and rapidly developing democracy.

However, as with any piece of legislation, the key issue is that PAIA is dependent on a variety of processes to ensure its effective implementation. And here there are several concerns. Firstly, in order to exercise their rights, it is imperative that South Africans have adequate access to information about what records are in the custody of public and private bodies.⁸¹ In other words, knowing what is available precedes utilizing availability. PAIA embraces this principle primarily through its requirement that every public and private body produce a regularly updated manual detailing their records systems and related contextual information.⁸²

Generally, the citizens of South Africa have benefited from this Act by becoming informed about their government. Armed with information, citizens are able to fully enjoy the benefits of the democratic system. When necessary, the information has led to challenges of the government,

⁸⁰ Id.

⁸¹ Id.

⁸² Id.

and sometimes resignations of high ranking public officials. The experience in South Africa may have put many African Governments off as there has been more exposure of corruption by public officials. The media in South Africa have routinely used FOI to obtain information that has been highly embarrassing for the government and for individual ministers not least because it has created the impression of endemic corruption. It does not mean that scandals did not exist before, but rather that they were not able to detect them. The Freedom of Information laws have changed this, making South Africa a better place to live by making the government accountable for its actions.

Freedom of Information, however, has a long road to travel in South Africa. Former South African President, Thabo Mbeki, in his resignation address to the nation in 2008, admitted that one of the main failures of his administration had been in tackling corruption. It has been earlier noted that countries that curtail the right to information feature highly among the most corrupt. Together the Constitution and the PAIA provide an excellent map and rules of the road. But numerous energies remain to be harnessed if the journey is to be successful.⁸³ Most importantly, Government must be seen to be committing itself to effective implementation strategies.

4.2 Towards enactment of freedom of information law in Zambia

Zambia has not lagged behind in recognizing the importance attached to freedom of information law. On 18th December 2002, Government deferred the Freedom of Information Bill, which together with the ZNBC (Amendment) and IBA Bills had passed through Committee stage.⁸⁴

⁸³ Id.

⁸⁴ Patrick Matibini. "*The Legal Framework of the Right to Expression and Assembly in Zambia.*" A PhD Thesis submitted to the School of Law, University of Zambia. May 2006. p63

The action was later followed by a number of contradictory statements from Government Ministers. For example, Mutale Nalumango, then Minister of Information and Broadcasting, stated that the Bill would be tabled before Parliament in the following session of Parliament. She further stated that Government was committed to media law reforms, but that caution should be taken so as to avoid pitfalls.⁸⁵

On 16th January 2008, then Minister of Information and Broadcasting Services Mike Mulongoti assured the Zambian public that the contents of the FOI Bill would be made public. He said that the government had nothing to hide and that, since the Bill was about transparency, its enactment would be equally transparent. He said there was no need for concern among the public and reaffirmed the government's commitment to enact the Bill.⁸⁶ In July 2008, the Media Institute of Southern Africa (MISA- Zambia) disclosed that the then Minister of Information and Broadcasting services, Mike Mulongoti would avail the Freedom of Information (FOI) Bill to members of the public before presenting it to Parliament.

Zambian society needs an all inclusive Freedom of Information Act. Even the best legislation anywhere in the world needs to be both accepted and supported, and careless approaches always prove to be hindrances. The MMD Government has continued to commit itself in guaranteeing freedom of information, as a centre piece for the democratic principles on which it was formed. However, the Bill which was withdrawn from Parliament provided blanket exemptions for the security wings in Zambia. Government's argument to withdraw the Bill based on the September 11, 2001 terror attack on the United States were misplaced. The United States which was affected by the terrorist attacks did not withdraw or tamper with its Freedom of Information Act,

⁸⁵ Zambia Daily Mail. 30th December 2002. "Freedom of Information to be tabled in Parliament Soon."

⁸⁶ Media Institute of Southern Africa (MISA). Government commits to passing freedom of information bill. 21st January 2008. <http://www.misa.org/>

but took other measures. It is worrying that Government claimed that it was still consulting yet the consultations were kept hidden from the public and other stakeholders.

Furthermore, it is folly for the Government to withdraw the Bill from Parliament and charge that it first wanted to monitor the implementation of the Independent Broadcasting Authority (IBA) and Zambia National Broadcasting Corporation (ZNBC) Acts. The Freedom of Information Act, once in place, should have been the cornerstone on which the two broadcasting Acts would have operated. The FOI Act should have been in place first, because it is the very cornerstone of how the IBA and ZNBC Acts are to operate. In as much as national security is cardinal for any country and cannot be compromised, there is need to guarantee the right to information in a democratic society. Zambia has been lagging behind in enacting a freedom of information law.

4.3 The case for enactment of freedom of information law in Zambia

It has been illustrated in the preceding chapters of this paper that enactment of a Freedom of Information Act would ultimately benefit everyone in some way or another. Whether it is what people are allowed to see on television or in person, they would be more informed than ever about their government. In countries with freedom of information laws, there has been an increase in the number of scandals involving public officials. The Freedom of Information laws have changed this, making Governments accountable for their actions. The Freedom of Information Act would substantially aid in making state and local Government truly a government of, for, and by the people, as our democratic ideals dictate.

An ill-informed public just like an ill-informed leadership could be a threat to national security. The quest for freedom of information is like a virus and everyone is affected. Any society that thrives, when information is vigorously stifled and distorted, would expectedly experience stagnancy in its socio-economic development.⁸⁷ Imaginations and fictions effortlessly develop to myths in societies where access to information is disturbed and impaired. One of the factors that influence the impairment to information flow is the law of defamation.⁸⁸ Defamation constitutes an injury to the reputation or character of an individual as a result of the false statements or actions of another. It could be in the forms of libel or slander.

4.4 Conclusion

In spite of the numerous challenges facing them, the media in Zambia constantly strive to fulfill the libertarian principles which legitimize their operations and make them relevant in the long journey towards building an ideal environment for the thriving of democratic values on the continent.⁸⁹ In terms of surveillance of the environment in which they operate, Zambian media has tried to highlight and bring into focus some of those issues that could have direct impact on the struggle for development in the country. Key socio-economic, political and cultural issues have been brought into focus, and in the process, global attention have been attracted to some salient issues such as poverty, diseases, lack of accountability among leadership, conflicts among various groups, all of which had impeded efforts towards developmental goals on the country.⁹⁰ Naturally, leaders in government would not want this law because of its implication on their excesses and lack of transparency in governing process. The case of South Africa clearly shows

⁸⁷ Michele Pickover and Verne Harris. South African History Archive. May 2001. School of Information News Archive. <http://www.news-detail.htm>

⁸⁸ Id.

⁸⁹ <http://www.misa.org/>

⁹⁰ Id.

that freedom of information law is applicable in Africa and that it is a necessary tool for development. The security of South Africa is in no greater danger today than it was before the POIA was enacted. The POIA has indeed promoted transparency and thereby enhanced good governance. Freedom of information law is, therefore, beneficial in a developing democracy like Zambia.

CHAPTER FIVE

CONCLUSIONS AND RECOMMENDATIONS

6.0 Conclusions

This paper has demonstrated the importance of protecting the right to information through a freedom of information Act, and that the right to information and the need to safeguard national security are not mutually exclusive interests, but are co-dependent and are attainable in a democratic society. The object of the research was to investigate whether the enactment of freedom of information law is a threat to national security. Thus the following are the findings of the research.

Chapter one introduced the subject and discussed the importance of enacting freedom of information law in a democratic society. It further considered the events leading up to the drafting of the Bill and its consequential withdrawal from Parliament amid various reasons, amongst them the eminent threat to national security. The principles of freedom of access to information and freedom of expression are fundamental human rights as endorsed by the United Nations.

Chapter two discussed what constituted State Security and also discussed the provisions of the State Security Act. There is need, in a democratic society, to strike a balance between freedom of information and State Security interests. It cannot be overemphasized that it is the solemn duty of every government to safeguard the security interests of its citizens

Chapter three looked at the interplay between national security and freedom of information and how Government can balance these two competing interests. Furthermore it took into account the

response of the Zambian judiciary in interpreting the State Security Act in seeking to safeguard national security interests whilst ensuring fundamental freedoms are protected from arbitrary abuse by the Government in the name of national security. Freedom of information legislation is a key component in the global flow of information. It serves as a crucial counterbalance to national security legislation and related attempts to restrict the flow of information.

Chapter four carried out a case study on freedom of information in South Africa which already has in place an Act. Thereafter, it discussed the challenges faced in implementing the Act, especially. It further discussed the road towards enactment of freedom of information law in Zambia. The chapter demonstrated the importance of freedom of information in a democratic nation. Furthermore it has shown that citizens' access to information is vital in enhancing national security. An informed citizenry is better placed to protect the country in many ways like reporting any suspicious thing or person to authorities, unlike citizens that were not informed. Contrary to fears that access to information could jeopardize national security, it is only when people have access to information that national security is enhanced. When the public is empowered with information, they can use the information to alert the Government on anything they suspect is threatening the security of the country. Clearly, there is no need to panic over national security because despite giving the public access to information, there are still exemptions that are made to the interest of the nation. Furthermore, it is a misconception to view access to information as being only relevant to journalists as it is in fact used mostly by members of the public in research and learning.

Chapter five discussed suggestions on how the law could be enacted and implemented in Zambia and how the duty to safeguard the security interests of the State could be balanced with the need to ensure the right to information is protected.

6.1 Recommendations

The following recommendations are therefore made:

6.1.1 Enactment of Freedom of Information Law

The Government should proceed to enact the Freedom of Information Bill as it has so often promised in the past. The FOI Bill provides a good framework on which the right to information can be established and protected. However, before enacting the Act, Government should ensure that other stakeholders are consulted and have an input in what finally goes to Parliament. Enacting a freedom of information Act should not be preconditioned on ethics and regulations because journalists know how to use information in a responsible way. The fear of threatening security interests is not a valid excuse as access to information enhances national security in that it promotes the democratic principles upon which the ideals of the nation stand. Availing the public information on contracts involving public bodies ensures that there is transparency in the public sector. This promotes responsible leadership and ensures that the interests of the State are not subverted by corrupt public officials. The Government should strive to protect the rights of all citizens. Democracy demands rule of the people by the people for the people. Therefore, the Zambian Government should encompass the right to access information in its statute books as this would actually enhance national security. There is no apparent threat to national security by enacting a freedom of information law and therefore there should be no delay in enacting the Bill.

6.1.2 Justifiable restrictions on the right to information

In as much as there is a need to protect the right to information, it is important that the Government does not compromise its national security safeguards. It is the duty of every sovereign nation to safeguard its national security interests. In so doing, some rights and freedoms may have to be circumscribed. Among these is the right to information. However, there must be legal safeguards in ensuring that the right to information is only circumscribed under legitimate national security concerns. It is not justifiable to circumscribe the right merely to avoid embarrassment or save face in the light of information that the public has a right to know about. In drafting a freedom of information law, care should be had as to how these derogations and limitations can be applied. There should be provision for judicial review as this would provide a check on the executive in using excess power and influence to arbitrarily disadvantage individuals.

6.1.3 The need to amend drawn-out sections of the State Security Act

Although some of the provisions of the State Security Act serve legitimate security purposes, there are nevertheless some provisions that undermine the pillars of democracy. Namely, accountability, transparency, good governance, freedom of expression and freedom of information. Of particular import are sections 4 and 5 of the Act. It has been shown that these two sections are broad and often vague. This leads to easy abuse by Government officials as it is easy to claim an offence has been committed under these two sections. Usually Government comes up with frivolous claims of espionage or other offences under the Act merely to safeguard their personal images and avoid public embarrassment at the release or publication of information that implicates them in any corrupt activities. This easily creates a leeway for the

Government of the day to intimidate the media by arresting outspoken journalists on frivolous grounds of threatening the security of the nation or engaging in espionage. This denies the right of the public to be informed on the affairs of the Government and how public funds are utilized. State Security law should, therefore, be amended so as to ensure that principles of accountability and transparency are not circumvented by the broad usage of the State Security Act.

6.1.3 Implementing national security reforms

The Constitution of Zambia⁹¹ establishes the Zambia National Defence Forces. This forms the embodiment of the concept of national security in Zambia. Because Zambia gained independence when most neighboring countries were still colonies, its concept of national security was effectively defined by that geopolitical environment. However, contemporary discourse on defence demands that resource management and transparency of defence planning and budgeting must be the basic tools for building confidence in defence policy during democratisation. This is essential for improving the quality of policy formulation and implementation regarding democratic processes. It leads to better policy targeting, thereby enhancing a closer fit between the needs and demands of both the civilian population and the military. It further allows for better conformity between policy intent and outcomes, thereby harmonising civil and military relations.

6.1.4 Advocacy towards enactment of FOI law

There is need for continuous lobbying for the freedom of information Bill to be taken back to Parliament with the necessary input from all major stakeholders. Furthermore, there should be a fair balance struck in ensuring the right to information whilst safeguarding the interests of the

⁹¹ Cap 1 of the laws of Zambia

State. The right to information is not absolute and is therefore subject to limitations. However, these derogations should not be so wide as to effectively render the right to information a futile quest.

6.1.5 Constitutional safeguards to guarantee the right to information

Finally, it is believed the answer to this problem may very well lie in the Constitution. As it is the supreme law of the land, the Constitution should contain a specific provision safeguarding the right to information as a fundamental freedom under the bill of rights. In this respect, therefore, the right to information provided under Article 52(1) of the Mungomba Constitutional Review Commission's Draft Constitution must be protected as a justiciable right. This should therefore be taken into account by the NCC.

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