

The Right to Information: Zambia's situation vis-à-vis International Human Rights

Standards

By

CHIPASHA, CHANDA

(29001676)

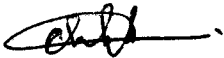
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A dissertation submitted to the University of Zambia in partial fulfilment of the requirements
of Bachelor of Laws degree (LLB)

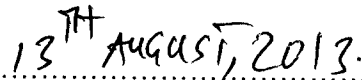
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ABSTRACT

The need for a platform where people will be able to collect information and voice their opinions about important national matters has been in existence for as long as Zambia has been a republic. The quest for independence in Zambia came with the very purpose of wanting to be free to express one's word without impediment. Today, forty-nine years after Zambia's independence in 1964, we do not see this abating.

The cries from many media and non-media houses involved in the dissemination and collection of information have been on re-focussing the driving direction by those involved in framing legislation as well as to re-think policy formulation. There have been concerns by large institutions such as Media Institute of Southern Africa Zambia on the need that countries should formulate legislation that promote access to information. Zambia has not been spared in this quest. It has been noticed that the lack of participation in important national matters by the citizens could be attributable to lack of information to contribute positively towards the same.

The Zambia Constitution guarantees freedom of expression and the press. This has given hope to many people in Zambia but has not gone a long way insofar as affording a Zambian people the guaranteed freedom under the Constitution. There has been blatant disregard of the provision of the supreme law of the land, the Constitution. This is evidenced in many court cases as well as some provisions of subsidiary legislation. In some cases however, there have been strides by the courts to pronounce such subsidiary legislative enactments null and void for not being in conformity with the Constitution. However, the real fact of the situation on the ground is that there is a steady development to disregard people's rights to pass and receive information at important gatherings.

Despite what is happening at the moment, the hope is that there are promises being made by the government of the republic of Zambia to enact a law that will enable the collection and dissemination of information to the intended entities. This has been termed the Freedom of Information Bill of 2002. Although it was promised to be enacted by the Patriotic Front Government by mid-2013, we have now passed that period. However, there are still hopes that it shall come to pass.

This dissertation is an audit on some of the laws that impede the exercise of freedom of expression and press in Zambia. It endeavours to show the importance that lies in the freedom of information in order that it demonstrates to what extent the laws that impede free speech and press may be re-visited. Also, it is acknowledged that Zambia does not guarantee the freedom of information. Therefore, it discusses the importance that looking into or considering the provision of such law may bring in Zambia.

ACKNOWLEDGEMENT

It would not have been easy to manage to finish my work without the help of the almighty God. Therefore, I thank God for the health that enabled me to finish my dissertation. I thank my father and mother for the love and care they showed me throughout this research.

To my brothers Mutale, Bwalya, Lawrence, Sampa and Mulenga, it was not easy to carry on with too much school work on my hands. But you were always around to lighten my moments. Thank you. My sisters, Patience, Mumbi, Kaluba, Natasha and Bwalya, your music was awesome as I typed this work. Thank you so much for the constant entertainment you supplied.

My further gratitude goes to the supervisor, Ms Ella Siang'andu. I did not understand why she could always send electronic mails demanding the submission of every chapter that was due. Now, I understand that it was for my own benefit. She worked tirelessly and always responded to my chapters on the same day that I sent them. It is rare to have as good a supervisor as you madam. I thank you for every step of the way.

Furthermore, I wish to extend a tender appreciation to a close friend Morris Lungu with whom I was selected into the School of Law from David Kaunda National High School. Your courage to forge ahead despite the predicament you are currently facing strengthens me to see any challenges that come my way as a greater opportunity to overcome.

I also acknowledge my friends Moses, Shibwashi, Richard Chimfwembe, Timothy Filongwe as well as all others that directly and indirectly impacted my life both positively and negatively. That groomed into a better person. Thank you all.

DEDICATION

To mum and dad, Mildred Chipasha and John Chanda Chipasha respectively, for the financial and moral support rendered to me during the research.

TABLE OF STATUTES AND CONVENTIONS

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William Steven Banda v The Attorney General (1992)/HP/1005

Whitney v California 274 U.S 357 (1927)

LIST OF ACRONYMS

MISA	Media Institute of Southern Africa
ZNBC	Zambia National Broadcasting Corporations
ZEMMP	Zambia Elections Media Monitoring Project
APA	African Platform on Access to Information

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CHAPTER ONE

CHAPTER INTRODUCTION

Basically, the chapter is an introduction to the entire dissertation. Chapter one of the dissertations gives a general overview of the document by giving the introduction to freedom of information, statement of the problem, the purpose of the study and the research methodology. Chapter two introduces the law on the freedom of information in Zambia and the exceptions that lie under the freedom of expression. Chapter three is about examining how freedom of expression vis-à-vis public officials is dealt with in other jurisdictions. Especially, this chapter compares some Zambian cases with those dealt with by international courts. Chapter four is an endeavour to demonstrate the importance of the right to information and consequently, justify why it is needed in Zambia. The final chapter being chapter five will give a general conclusion and then make some recommendations based on the literature in the entire dissertation.

GENERAL INTRODUCTION

The freedom of information is recognised both in Zambia as well as by International Human Rights Courts. In Zambia, the Constitution protects the freedom of expression and press.¹ Outside Zambia, for example, the African Charter on Human Rights states that every individual has the right to receive information and to disseminate his opinions within the law.² Further, the European Convention on Human Rights also promotes freedom of expression.³ In some cases such as that decided by the European Court of Human Rights called *Wille v Liechtenstein*⁴, the court has referred to freedom of expression as the right to freedom of expression. This is also

¹ Chapter 1 of the Laws of Zambia, Article 20

² Article 9 of the African Charter on Human and Peoples' Rights

³ Article 10 of the European Convention on Human Rights

⁴ 28th October, (1999) ECHR Publication: 1999-VII

evident in Zambia where the Constitution is the supreme law of the country. The Constitution has placed upon Zambian citizens the right to express their views subject to some limitations.⁵ This limitation is also reflected under the African Charter on Human and People's Rights to which Zambia is a party.⁶

In Zambia, the Constitution is the supreme law of the land. This means that if any other law is inconsistent with the Constitution, that other law shall, to the extent of the inconsistency be void.⁷ Furthermore, the Constitution states that Zambia is a unitary, indivisible, multi-party and democratic sovereign state and that all power resides in the people who shall exercise their sovereignty through the democratic institutions of the state in accordance with this Constitution.⁸

The constitutional provisions above suggest the importance of the constitution. This is because it is intended to reflect and respect the wishes of the people. Therefore, the insertion of the provision on freedom of expression and press in the constitution, essentially, is clear testimony of the importance attached to free expression in Zambia.⁹ In the case of *William Steven Banda v The Attorney General*¹⁰, the court stated that freedom of expression is a very fundamental right. It is indispensable for the development of one's own individuality and for the success of parliamentary democracy. The court further said that in a democracy, the right to free expression is not only the right of an individual but rather a right of the community to hear and be informed.

⁵ Constitution of Zambia, Chapter 1 of the Laws of Zambia, Article 20 (3) (a) (b) (c)

⁶ Article 9 of the African Charter on Human and Peoples' Rights

⁷ Constitution of Zambia, Chapter 1 of the Laws of Zambia, Article 1 (3)

⁸ Constitution of Zambia, Chapter 1 of the Laws of Zambia, Article 1 (1) (2)

⁹ Constitution of Zambia, Chapter 1 of the Laws of Zambia, Article 20

¹⁰ (1992) /HP/1005

The court went further and quoted from the Indian case of *Romesh Thappar v State of Madras* *Air*¹¹, in which case the Indian court observed thus:

Freedom of speech and of the press lay at the foundation of all democratic organizations for without free political discussion, no public education so essential for the proper functioning of the process of popular government is possible.

The guaranteeing of press freedom under the constitution is testimony of the importance government attaches to the concept of freedom of information. For this reason, there are moves to pass the Access to Information Bill by the Zambian government this year, 2013.¹²

In discussing the right to speech and press, it should be remembered that although these rights are guaranteed under the constitution, they are not absolute. They are subject to limitations. The limitations are designed to ensure that the enjoyment of the said rights and freedoms by individuals do not prejudice the rights and freedoms of others or public interest. Alfred W Chanda has commented that freedom of expression, just as other rights, is not absolute. Society is entitled to place some legitimate restrictions on the exercise of freedom of expression in order to prevent its abuse. The author notes that even international human rights instruments recognise the need for restrictions.¹³

On a different footing, however, the author notes that it is quite evident that there is a very wide derogation clause under the Zambian constitution which, if broadly construed, completely emasculates the protection of freedom of expression and the press contained in clauses one and two of the constitution.¹⁴ The author asserts that this wide derogation could enable a timid judge ability to uphold all restrictions imposed by the State by giving a broad interpretation to this

¹¹ 1950 2 SEC 121 at 126

¹² <http://www.lusakatimes.com/2013/03/21/> Time Posted: 2:55 pm

¹³ Alfred W Chanda, "Freedom of Expression and the Law in Zambia," 30 ZAMBIA LAW JOURNAL 123-145 (1998): p.5.

¹⁴ Constitution of Zambia, Chapter 1 of the Laws of Zambia, Article 20

clause. This has happened in a number of cases in Zambia, for example, the case of *Michael Chilufya Sata v Post Newspapers Limited and Printpak Zambia Limited*.¹⁵ The author attributes this to the fact that what amounts to public interest, public safety or defence have been expressed in very broad and vague terms.

In some developing countries such as Togo or Zambia, although the freedom of the press is guaranteed under the country's constitution, what is the actual may appear to be contrary to such provisions. For example, Togo has rejected amendments to repressive press laws and the new law now makes it easier to impose sanctions on the media without recourse to the judicial processes as was the practice under the previous law in Togo.¹⁶

In Zambia, specific press laws may be enacted that are repressive of, for example, press freedom. Where no such laws are enacted, government tend to invoke other measures that restrict the press freedom. According to Alfred W Chanda, the courts have an important role to play in protecting journalists and the people against persecution from the state for merely exercising the human right to freedom of expression. He has further added that Zambian courts must take a leaf from the valiant efforts of both national and international courts to broaden the frontiers of liberty by construing restrictions on fundamental rights as narrowly as possible.¹⁷

In part, this is an endeavour to suggest that it is not so much the laws that are a constraint on the freedom of expression or the right to information. However, it may also be the fear by journalists of political reprisals which may tend to interfere with their work. Conclusively, therefore, this aims at coming up with measures intended to reach a compromise on the laws on the freedom of

¹⁵ HCZ Judgment No. 1 of 1995

¹⁶ Media Foundation for West Africa 28 February, 2013 (MFWA/IFEX) "Togo: Free Expression and the Law" [http://www.ifex.org/togo/2013/02/28media regulation/](http://www.ifex.org/togo/2013/02/28media%20regulation/)

¹⁷ Alfred W Chanda, "Freedom of Expression and the Law in Zambia," P.30

information. To this end, a comparative study on previous International Law cases and how International Courts have addressed issues on laws on the right to information shall be looked at while focus shall also fall on how the Zambian courts have dealt with cases on the right to information. It will review some of Zambia's laws and cases on the right to information in a bid to ascertain its adherence to international human rights standards.

STATEMENT OF THE PROBLEM

Article 20 of the Zambian Constitution protects the freedom of expression.¹⁸ In other terms, this provision may be read as guaranteeing the right to information. This is because the provision states that a person shall not be hindered in the enjoyment of his freedom of expression, that is to say, freedom to hold opinions without interference, freedom to receive ideas and information without interference, freedom to impart and communicate ideas and information without interference, whether the communication be to the public generally or to any person or class of persons, and freedom from interference with his correspondence.¹⁹ This is reinforced in the case of *William Steven Banda v The Attorney General*²⁰ where the court stated that the freedom of expression rests on the assumption that the widest possible dissemination of information from divergent and antagonistic sources is essential to the welfare of the public.... In this case, therefore, it was noted how freedom of expression plays a huge role in promoting access to information in a nation such as Zambia.

However, what still exists as the problem is how to reconcile how one may exercise the right to information espoused in the supreme law of the land, the Constitution, amidst laws such as those

¹⁸ Chapter 1 of the Laws of Zambia

¹⁹ The Constitution, Chapter 1 of the Laws of Zambia, Article 20(1)

²⁰ (1992)/HP/1005

on defamation²¹, penal laws²² as well as other impeding factors such as policy. The problem is exacerbated when a scrutiny is under-taken of both the International Human Rights cases or laws and the Zambian standard in comparison. There seem to be a gap between the two.

PURPOSE/OBJECTIVES OF THE STUDY

- To unpack the contents of freedom of information and identify and demonstrate how some Zambian laws or policy may impede access to information
- To justify the need to re-look the right to information in Zambia
- To make a comparison between Zambia and other jurisdictions on some of the ways in which the laws on the right to information have been or are being handled

SIGNIFICANCE OF THE STUDY

The significance of this study is such that it demonstrates how some current laws; cases or policy on the right to information may affect the free access to information in Zambia. Freedom of information is important as it enables people to exchange information on matters that affect them. This, in turn, empowers those who need the information in question to make free, independent and informed decisions.

The essay shall demonstrate why the current encumbrances on freedom of information may be undesirable in a democratic state like Zambia. The study is also cardinal in that it will audit and document the extent to which Zambia adheres to the international human rights standards of freedom of information.

²¹ The Defamation Act, Chapter 68 of the Laws of Zambia

²² The Penal Code, Chapter 87 of the Laws of Zambia

RESEARCH METHODOLOGY

This study shall be conducted based on both primary and secondary information. The primary source of information shall include statutes, judicial decisions as well as other law reports. The secondary sources of information shall include textbooks, articles, journals or reports.

CONCLUSION

This chapter was basically an introduction to the entire dissertation. It highlighted few points on the freedom of information which is the subject of this report. It has explained the statement of the problem, the purpose of the report and the research methodology that will be used in the report.

CHAPTER TWO

CHAPTER INTRODUCTION

This chapter provides a basic outlook on the right to information in Zambia. It shall focus on the right to information in Zambia, proceed to looking at the exceptions on the right to freedom of expression permitted under the Zambian laws and consider the judicial applications of the exceptions permitted on the freedom of expression and its impact on the free exercise of the freedom of information. Finally, an opinion conclusion shall be drawn anchoring on the discussion in this chapter.

INTRODUCTION TO THE FREEDOM OF INFORMATION IN ZAMBIA

Freedom of information legislation is rules that guarantee access to data held by the state. They establish a right to know.²³ Freedom of information laws allow access by the general public to data held by national governments. They establish a right to know legal process by which requests may be made for government-held information, to be received freely or at minimal cost, barring standards exceptions. In many countries, there are constitutional guarantees for the right of access to information, but usually these are unused if specific support legislation does not exist.²⁴

In Zambia, under the Freedom of Information Bill, there is what is defined as information and there is also personal information. Information means any material which communicates facts,

²³ Wikipedia Answers.com visited at 00:18 am 5/22/2013

²⁴ Freedom of Information Laws by country – Wikipedia, the free encyclopedia
http://en.m.wikipedia.org/wiki/Freedom_of_information_laws_by_country 00:18 am 5/22/2013

opinions, data or any other matter relating to the management, administration, operation or decisions of a public authority, regardless of its form, characteristics or when it was created. Personal information on the other hand refers to 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.²⁵

Outside Zambia, the United States of America and the United Kingdom are examples of countries that have the Freedom of Information Acts. But because Zambia follows English Law in many of its laws, this shall focus on the English system. The Freedom of Information Act of the United Kingdom is an Act for the disclosure of information held by public authorities or by persons providing services for them and ... and for connected purposes. It is an Act of Parliament of the Parliament of the United Kingdom that creates a public "right of access" to information held by public authorities. It is the implementation of freedom of information legislation in the United Kingdom on a national level. The Act implements a manifesto commitment of the Labour Party in the 1997 general election, developed by David Clark as a 1997 White Paper.²⁶

In Zambia, the Freedom of Information Bill is defined as an Act to establish the Public Information Commission and define its functions. It is also intended to provide for the right to information; to set out the scope of public information under the control of public authorities to be made available to the public in order to facilitate more effective participation in good governance of Zambia; to promote transparency and accountability of public officers and to

²⁵ The Freedom of Information Bill of Zambia, Section 2, 2002

²⁶ Freedom of Information Act 2000: Parliament of the United Kingdom http://en.wikipedia.org/wiki/freedom_of_information_act_2000#mw-navigation. (6/20/2013 1:46 AM)

provide for matters connected with or incidental to the foregoing.²⁷ Coincidentally, just like the Freedom of Information Act of the United Kingdom was a creation of an opposition party, in Zambia, intense debate about the enactment of the already existing freedom of information bill came with the opposition party.²⁸

Some of the objectives of the Freedom of Information Bill of Zambia include to establish the public information commission and define its function; provide for the right of access to information; set out the scope of public information under the control of public authorities to be made available to the public in order to facilitate more effective participation in the good governance of Zambia and to promote transparency and accountability of public officers.²⁹

Under part III of the Freedom of Information Bill, focussing on the right of access to information, the bill states that every person shall have the right of access to information which is under the control of the public authority.³⁰ Furthermore, the bill mandates a private body upon request, to make available, information which it holds on the person requesting the information if reasonable evidence is shown regarding the purpose of the request.³¹ This is opposed to section 10 (2).³² This is because the provision states that a person who requests for information in pursuance of collection of information by citizen from a public authority, such a person need not give any reason or justification for that person's interest in the information being requested.

The Freedom of Information Act of the United Kingdom applies in such a way that it creates a statutory right for access to information in relation to bodies that exercise functions of a public

²⁷ The Freedom of Information Bill of Zambia, 2002

²⁸ The Patriotic Front Party which is now in government as of the year 2011 which also promises to enact the bill into law by June, 2013

²⁹ The Freedom of Information Act, 2002

³⁰ The Freedom of Information Bill of Zambia, Section 10(1) (a), 2002

³¹ The Freedom of Information Bill of Zambia, Section 10 (d), 2002

³² The Freedom of Information Bill of Zambia, 2002

nature. However, a few government departments are expressly excluded from the scope of the act, principally Intelligence services. Nevertheless, a public authority is not obliged to comply with a request for information if the request is vexatious. According to the Information Act,³³ a request is considered vexatious if it is ‘obsessive or manifestly unreasonable,’ harasses the authority or causes distress to its staff, imposes a significant burden, or if the request lacks any serious value.

In Zambia, the notion espoused in the United Kingdom Information Act also applies. However, it falls under the ambit of exemptions. This implies that where the information includes personal information and the privacy interests of a third party, such information is not given out.³⁴ At the same time, where information would jeopardize the security of Zambia, or is reasonably expected to cause damage to the security of Zambia, such information cannot be given out by the Commission. Further, information that hinges on the security of a foreign government communicated to Zambia in confidence is not subject to disclosure.³⁵ All this shows what strides the Zambia Parliament has taken to ensure that the bill once enacted contains provisions that shall focus on providing the necessary information to the citizens of Zambia.

Apart from the creation of the Commissions under the Bill that would ensure that all the necessary information is given to the general public, once the Commission rules that information cannot be given to a citizen, there is also provision for the citizen to appeal to the High court for Zambia to decide whether such information may be given to such a citizen.³⁶ This is a good provision because it allows citizens to have a different avenue apart from the Commission to

³³ The Freedom of Information Act of the United Kingdom, Section 14(1), 2002

³⁴ The Freedom of Information Bill of Zambia, Section 13, 2002

³⁵ The Freedom of Information Bill of Zambia, Section 14(a), 2002

³⁶ The Freedom of Information Bill of Zambia, Section 31(1), 2002

decide on the matter or information that may be on demand. The only problem with this provision is that not all the citizens of Zambia may afford the costs at the courts of law but the advantage of ensuring transparency is guaranteed.

This provision in the Zambia Information Bill may be compared with the United Kingdom government's decision to establish the Access to Information Central Clearing House in order to ensure consistency across Central Government in the way requests are handled.³⁷

Still on the Zambia Information Bill, section 17 (1)³⁸ allows an employee to disclose information concerning wrong doing by a fellow employee. This is good because it could help curb corruption in the country. Above all, it may be viewed as a way to help encourage transparency in all aspects of transactions in business perspectives.

Alfred W Chanda has also defined freedom of the press as the right to receive and impart ideas and information without interference.³⁹ However, with regard to the International Covenant on Civil and Political Rights, Nowak asserts that it is more difficult to assess whether the right to seek information obligates the states parties in certain cases to guarantee with positive measures access to state or private information or to make information available themselves.⁴⁰ Despite the foregoing, placing regard on ICCPR, Nowak concludes that the development of modern

³⁷ "Freedom of Information Act 2000: Parliament of the United Kingdom" http://en.wikipedia.org/wiki/freedom_of_information_act_2000#mw-navigation. visited on 6/20/2013 1:46 AM

³⁸ The Freedom of Information Bill of Zambia, 2002

³⁹ Alfred W Chanda, "Freedom of Expression and the Law in Zambia," 30 ZAMBIA LAW JOURNAL 123-145 (1998): p.1

⁴⁰ M Nowak UN Covenant on Civil and Political Rights. in KEHL, NP. ENGEL. (EDS). CCPR COMMENTARY 341 (1993) P. 344

communications and information technology will increase pressure on states to take positive steps in this sense.⁴¹

According to R Clapp,⁴² focussing on the European Court of Human Rights, the two cases of Leander and Gaskin, (1987 and 1989 respectively) demonstrate the comparative weakness of the European Court of Human Rights in protecting the states' positive obligation to impart information in its possession to the citizen. In the Leander case,⁴³ the applicant, a Swedish national, requested information about the contents of Swedish government's file on him, after having been denied a public appointment on grounds of security. The government however denied his request, and the court upheld the government's position, affirming that 'Article 10 does not, in circumstances such as those of this case confer on the individual a right of access to a register containing information on his personal position, nor does it embody an obligation on the government to impart such information to the individual.'

In a more recent case, the court's conservative approach to the state's obligation to furnish information has been further demonstrated. This happened in the case of Guerra and Other v Italy.⁴⁴ In finding that article 10 was not applicable to the case; the court came out against a positive obligation on the state to provide information under this type of circumstance. The court held that 'Freedom to receive information, referred to in paragraph 2 of Article 10 of the Convention, basically prohibits a government from restricting a person from receiving information that others may be willing to impart to him. That freedom cannot be construed as

⁴¹ R. Clapp, "Challenging the Traditional Conception of Human Rights: Positive Obligations of the State under Freedom of Expression," *The Zambia law Journal*, Vol. 33. (2001): p.57

⁴² R. Clapp, "Challenging the Traditional Conception of Human Rights: Positive Obligations of the State under Freedom of Expression," *The Zambia law Journal*, Vol. 33. (2001)

⁴³ European Court of Human Rights, Leander judgment of 26 March 1987, series A No. 116

⁴⁴ European Court of Human Rights, Guerra and Others v Italy, 19 February 1998, Application No. 14967/89

imposing upon a state, in circumstances such as those of the present case, positive obligations to collect and disseminate information of its own motion.⁴⁵

There is even a further argument that despite the approach of the court in the cases such as those of *Leander*⁴⁶, *Gaskin*⁴⁷ and *Guerra*,⁴⁸ some commentators argue that it is still not clear whether, and to what extent, the freedom to receive information in Article 10 of the ECHR entails an obligation on the part of the authorities to impart information.⁴⁹ Van Dijk and Van Hoof, however, point out that the considerations of the court in the cases above were explicitly based on the specific circumstances of each case. Even more important is their suggested submission that a resolution of the Parliamentary Assembly of the Council of Europe, which stipulates a duty on the part of the authorities to impart information of public interest, may indicate a trend in the legal opinion of the contracting states that will ultimately impact the court's approach is a very good move.⁵⁰

It is clear that the European Court of Human Rights has not shown very timid signs of moving in the direction of stronger emphasis on the states' positive obligation to furnish information in the public interest. Nevertheless, such limited progress pales in comparison to the more progressive case law of the American Commission and Court. This is because the United States of America has gone as far as having the Freedom of Information Act passed by Congress of the United States in 1966 and amended in 1974. This could equally have been made to similar legislation in other jurisdictions. But the pressure is building to recognise a positive obligation on states to

⁴⁵ The European Court of Human Rights, *Guerra and Others v Italy*, 19 February 1998, Application No. 14967/89

⁴⁶ European Court of Human Rights, *Leander* judgment of 26 March 1987, series A No. 116

⁴⁷ 1989

⁴⁸ European Court of Human Rights, *Guerra and Others v Italy*, 19 February 1998, Application No. 14967/89

⁴⁹ P VAN DIJK AND G.J.H VAN HOOF, *THEORY AND PRACTICE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 565, 3rd ed. (1997)

⁵⁰ R. Clapp, "Challenging the Traditional Conception of Human Rights: Positive Obligations of the State under Freedom of Expression," *The Zambia Law Journal*, Vol. 33. (2001): P. 57-58

impart certain types of information in their possession. According to R, Clapp, it is likely that this will eventually come to affect the decisions of the European Court.⁵¹

In Zambia, freedom of expression has been defined in the constitution under the realm of its protection. The constitution avers that no person shall be hindered in the enjoyment of his freedom of expression, that is to say, freedom to hold opinion without interference, freedom to impart and communicate ideas and information without interference, whether the communication be to the public generally or to any person or class of persons, and freedom from interference with his correspondence.⁵²

In other jurisdictions such as America, the importance of free speech has also been recognised. Justice Brandeis in an American case of *Whitney v California*,⁵³ stated that those who won the independence of the United States ... believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of truth; that without free speech and assembly, discussion would be futile; that, with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; (and) that the greatest menace to freedom is an inert people.... Only an emergency justifies repression.

The other important notion that invites a lot of talk is what is referred to as press freedom. In Zambia, this is recognised in our constitution.⁵⁴ Alfred W Chanda has defined freedom of the press as the right to receive and impart ideas and information without interference. The author refers to the term interference with freedom of the press as the legislative constraint and

⁵¹ R. Clapp, "Challenging the Traditional Conception of Human Rights: Positive Obligations of the State under Freedom of Expression," *The Zambia Law Journal*, Vol. 33. (2001): p.58

⁵² Constitution of Zambia, Chapter 1 of the Laws of Zambia, Article 20 (1)

⁵³ 274 U.S. 357 (1927)

⁵⁴ Constitution of Zambia, Chapter 1 of the Laws of Zambia, Article 20 (2)

executive control.⁵⁵ Quoting from Nowak, R. Clapp writes that states parties to the ICCPR have an obligation to take positive action against excessive concentration of the media, for example, through state funding.⁵⁶ The Human Rights Committee in its General Comment No. 10 on Article 19 of the ICCR has also stressed that ‘effective measures are necessary to prevent such control of the media as would interfere with the right of everyone to freedom of expression in a way that is not provided for in paragraph 3.’⁵⁷ According to R. Clapp, Nowak points out that this not only implies interference such as state censorship, but also the danger represented by private financial interests and media monopolies.⁵⁸

As stated in the initial remarks, in many countries such as is the case in Zambia, there are constitutional guarantees for the right of access to information.⁵⁹ However, usually, these are unused if support legislation does not exist. In Zambia, there is no legislation to support the freedom of information promoted in the Zambian constitution. This has mainly been because of delays to present the Freedom of Information Bill to parliament by the government of Zambia. MISA Zambia is now also concerned that the government had not yet presented the Freedom of Information Bill to Parliament although promises were that it will be presented to Parliament in June, 2013. This was according to the minister of information and broadcasting and chief

⁵⁵ Alfred W Chanda, “Freedom of Expression and the Press,” 30 ZAMBIA LAW JOURNAL 123-145 (1998): p.1

⁵⁶ M Nowak, UN Covenant on Civil and Political Rights. in KEHL. N.P. ENGEL. (EDS.). CCPR COMMENTARY 341 (1993) p.351, R. Clapp, “Challenging the Traditional Conception of Human Rights: Positive Obligations of the State under Freedom of Expression,” The Zambia Law Journal, Vol. 33. (2001): p.59

⁵⁷ Committee of Ministers of the Council of Europe, Recommendation No. R(99) 1 on measures to promote Media Pluralism

⁵⁸ R. Clapp, “Challenging the Traditional Conception of Human Rights: Positive Obligations of the State under Freedom of Expression,” The Zambia law Journal, Vol. 33. (2001): P.59

⁵⁹ Constitution of Zambia, Chapter 1 of the Laws of Zambia, Article 20

government spokes-person, Kennedy Sakeni.⁶⁰ What is important to note is that the Zambian constitution allows the exchange of information.⁶¹

The recognition of the press freedom in the constitution is a key factor in realising how far Zambia can develop the freedom of information as this is enshrined in supreme law of the land.⁶²

Alfred W Chanda further argues that the recognition of press freedom is one example of the importance Zambia attaches to the tenets of good democratic process.⁶³ Inserting such a provision in the constitution is a cardinal step but as is public knowledge, the constitution only acts as a skeleton that needs other supporting legislation to re-enforce the provision on free expression, press as well as access to information which are guaranteed.⁶⁴ There is therefore, need for the enactment of the freedom of information law.

Alfred W Chanda furthermore stresses that as guaranteed in the constitution, the provisions on protection of freedom of expression and of the press are couched in broad and very vague terms. For example, the author states that Article 23 (3) of the Zambia Constitution is a very wide derogation clause, which, if broadly construed, completely emasculates the protection of freedom of expression, and the press contained in clauses 1 and 2 respectively. In his book, it is further noted that the constitution under Article 20 does not define public safety, public order or defence. The author asserts that almost any restriction on freedom of expression can be justified on the basis of public safety, public order or defence.⁶⁵

⁶⁰ "Zambia Again Delays Introduction of Freedom of Information Bill" www.FreedomInfor.org 27th February, 2013. Also www.lusakatimes.com.>Home>2013>February>27 Time Posted: February 27, 2013 8:02am

⁶¹ Constitution of Zambia, Chapter 1 of the Laws of Zambia, Article 20

⁶² Constitution of Zambia, Chapter 1 of the Laws of Zambia

⁶³ Alfred W Chanda, HUMAN RIGHTS LAW IN ZAMBIA: CASES AND MATERIALS (Lusaka: UNZA PRESS, 2011), p.62

⁶⁴ Constitution of Zambia, Chapter 1 of the Laws of Zambia, Article 20

⁶⁵ Alfred W Chanda, HUMAN RIGHTS LAW IN ZAMBIA: CASES AND MATERIALS (Lusaka: UNZA PRESS, 2011), p.66

The Media Institute of Southern Africa, MISA Zambia chairperson, Daniel Sikazwe has noted that the Freedom of Information Bill was viewed as something meant to promote the media at the expense of the ruling government. It was perceived that the media would yield much power that could possibly affect government and the ruling party operations. It is not the case now. The chairperson called on the media to bring on board the grass roots, civil society and members of parliament through massive sensitisation that the Freedom of Information is meant to facilitate access to information held by public and private bodies to all citizens before this law is tabled before parliament. MISA Zambia said this is important as it will ensure that the Freedom of Information is seen as a ‘public need’ for all citizens and not just a ‘tool’ the media will use to access information from the government.⁶⁶

The chairperson averred that the manner in which the media covered topical issues in the year 2011, for example, was characterised with a distinct watershed, dictated by the pre-election and post-election era syndrome. He explains that during the pre-election era, there was a clear divide between the private and state owned media with the state media being turned into political megaphones for the ruling party. He added that other institutions like the Law Association Zambia (LAZ) stated that ZNBC were contravening the ZNBC Act which mandated them to give balanced coverage of national issues.⁶⁷

On the other hand, the private media received continued threats of closure and revocation of licences by the government for giving coverage to the opposition and being critical of government. For example, he states that a Lusaka-based radio Station HOT FM was threatened

⁶⁶ “MISA Zambia Foresees An Improved Media Environment.” Developed by E Zambia.com, 2012
<http://www.misaZambia.org.zm/index.php?option=com>. (12:52 pm Saturday 08/06/2013)

⁶⁷ “MISA Zambia Foresees An Improved Media Environment.” Developed by E Zambia.com, 2012
<http://www.misaZambia.org.zm/index.php?option=com>. (12:52 pm Saturday 08/06/2013)

with closure for airing a live morning breakfast show that had political rallies of the opposition Patriotic Front. The other radio stations in Eastern province allegedly instructed by a minister not to host party leaders from the Patriotic Front were Petauke Explorers and Pasmé. Post-election, coverage by media and state media has improved. This is based on the media monitoring exercise carried by the Zambia Elections Media Monitoring Project (ZEMMP) (coordinated by MISA-Zambia and the Press Association of Zambia) that established that the media content and coverage was no longer dictated by political whims.⁶⁸

According to Daniel Sikazwe, Zambia currently is one of the leading examples when it comes to willingness to promote freedom of the media and access to information because of the government's commitment to enact the Freedom of Information Bill, to operationalize the Independent Broadcasting Act (IBA) and the Zambia National Broadcasting (ZNBC) Act in addition to allowing the media to self-regulate. According to Sikazwe, the new commitment by the government is timely as it collides with the newly launched African Platform on Access to Information (APAI), declaration whose principles among others includes mandating African countries to enact laws that promote access to information.⁶⁹

From several submissions above, it is clear that there have been a lot of challenges insofar as freedom of information is concerned. So far, there have been commitments from both the government and media houses such as Media Institute of Southern Africa, MISA Zambia to see what can be done to improve access to information in Zambia. According to the British High Commissioner to Zambia, James Thornton, the passing of the Access to Information Bill in

⁶⁸ "MISA Zambia Foresees An Improved Media Environment." Developed by E Zambia.com, 2012
<http://www.misaZambia.org.zm/index.php?option=com>. (12:52 pm Saturday 08/06/2013)

⁶⁹ "MISA Zambia Foresees An Improved Media Environment." Developed by E Zambia.com, 2012
<http://www.misaZambia.org.zm/index.php?option=com>. (12:52 pm Saturday 08/06/2013)

Parliament this year, (2013) will demonstrate the Patriotic Front's seriousness of governing the country in a more open and transparent manner.⁷⁰

Thornton noted that the passing of the bill would also bring Zambia a step closer to becoming a member of the multilateral initiative, the Open Government Partnership whose aim is to secure concrete commitments from governments to promote transparency and fight corruption. The British High Commissioner to Zambia also observed that in order for the media to fulfil the mandate of providing information to the public, there is need for the creation of an environment in which the media can operate without undue restriction or hindrance.⁷¹

THE EXCEPTIONS ON THE FREEDOM OF EXPRESSION PERMITTED

UNDER THE ZAMBIAN LAWS

The Zambian Constitution protects the freedom of expression and of the press.⁷² The Constitution provides that a person shall not, except with his own consent, be hindered in enjoyment of his freedom of expression, hold opinions, impart and communicate ideas whether to a person, class of persons and no one is to be interfered with his correspondence.⁷³

According to Alfred W Chanda, the protection of the freedom of the press is in the following terms as enshrined in the constitution of Zambia; 'Subject to the provisions of this constitution, a law shall not make any provisions that derogates from freedom of the press.'⁷⁴ The other

⁷⁰ "Passing the Access to Information Bill will show how serious Patriotic Front is about transparency"
[http://www.lusakatimes.com/\(2013/03/21,2:55pm\)](http://www.lusakatimes.com/(2013/03/21,2:55pm))

⁷¹ "Passing the Access to Information Bill will show how serious Patriotic Front is about transparency"
[http://www.lusakatimes.com/\(2013/03/21,2:55pm\)](http://www.lusakatimes.com/(2013/03/21,2:55pm))

⁷² Constitution, Chapter 1 of the Laws of Zambia, Article 20

⁷³ Constitution of Zambia, Chapter 1 of the Laws of Zambia, Article 20(1)

⁷⁴ Constitution of Zambia, Chapter 1 of the Laws of Zambia, Article 20(2)

exception that is enshrined in the *Zambian constitution* falling under the same provision of the constitution as the exceptions above is described in the following manner:

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

- a) That is reasonably required in the interests of defence, public safety, public order, public morality or public health;
- b) That is reasonably required for the purpose of protecting the reputations, rights and freedoms of other persons or ... preventing the disclosure of information received in confidence, ...the registration of, or regulating the technical administration or the technical operation of, newspapers and other publications, telephony, telegraphy, posts, wireless broadcasting or television;

And except so far as that provision or, the thing done under the authority thereof as the case may be, is shown not to be reasonably justifiable in a democratic society.⁷⁵

Alfred W Chanda has noted that Article 20(1)⁷⁶ reflects, in large measure, the International Covenant on Civil and Political Rights, and the Universal Declaration of Human Rights 1948 as well as the European Convention of Fundamental Rights and Freedoms.⁷⁷ The author has further written that on the face of it, the guarantee afforded by the constitution⁷⁸ seems very broad. He has thus defined freedom of expression as the right to hold opinions without interference, the right to receive ideas and information without interference and freedom from interference with one's correspondence.⁷⁹

⁷⁵ Constitution of Zambia, Chapter 1 of the Laws of Zambia, Article 20 (3) (a) (b) (c)

⁷⁶ Constitution of Zambia, Chapter 1 of the Laws of Zambia

⁷⁷ Article 19, The International Covenant on Civil and Political Rights, 1966,

Article 10, The European Convention of Fundamental Rights and Freedoms

⁷⁸ Constitution of Zambia, Chapter 1 of the Laws of Zambia, Article 20(1)

⁷⁹ Alfred W Chanda, "Freedom of Expression and the Law in Zambia," 30 ZAMBIA LAW JOURNAL 123-145 (1998): p.7

Importantly, Alfred W Chanda points out that by providing for freedom of expression so broadly, the constitution has recognised the important role that freedom of expression plays in the democratic process. Similarly, the author states further that by prohibiting the legislature from passing laws that may derogate from the freedom of the press, the constitution underscores the indispensable role the press plays in the realisation of the freedom of expression. He furthermore avers that without a free press, freedom of expression will just be an illusion.⁸⁰

JUDICIAL APPLICATION OF THE EXCEPTIONS PERMITTED ON THE FREEDOM OF
EXPRESSION AND ITS IMPACT ON THE FREE EXERCISE OF THE FREEDOM OF
INFORMATION OR FREEDOM OF EXPRESSION IN ZAMBIA

There is a plethora of case law on the subject concerned with free expression of opinion enshrined in the constitution. One such authority is the case of *William Steven Banda v The Attorney General*.⁸¹ This was a case in which the petitioner alleged in his petition that his fundamental right enshrined in Article 20 of the constitution had been violated by stopping him from addressing public meetings organised by the United National Independence Party. In referring to Article 20 (1) of the constitution, the court stated:

This is a very important fundamental right. It is indispensable for the development of one's own individuality and for the success of parliamentary democracy. It is said that in a democracy the right to free expression is not only the right of an individual but rather a right of the community to hear and be informed.

The court in the same case went on to state thus:

The freedom of expression rests on the assumption that the widest possible dissemination of information from divergent and antagonistic sources is essential to the

⁸⁰ Alfred W Chanda, "Freedom of Expression and the Law in Zambia," 30 ZAMBIA LAW JOURNAL 123-145 (1998): p.7-8

⁸¹ William Steven Banda v The Attorney General (1992)/HP/1005

welfare of the public. Such freedom is the foundation of a government of a free people. The purpose of such a guarantee is to prevent public authorities from assuming the public mind. The fundamental right enshrined in Article 20 of the constitution is essential for political liberty and proper functioning of democracy.⁸²

It is important to mention that absolute individual rights cannot be guaranteed by modern states. There cannot be any such thing as absolute or uncontrolled liberty wholly free from restraint for that could lead to anarchy and disorder. The possession and enjoyment of all rights are subject to such reasonable conditions as may be deemed to the governing authority of the country to be essential to the safety, health, peace, general order and morals of the community. Ordinarily, every man has the liberty to order his life as he pleases, to say what he will, to go where he will, to follow any trade, occupation or calling at his pleasure and to do any other thing which he can lawfully do without let or hindrance by any other person. On the other hand, for the very protection of these liberties the society must arm itself with certain powers.⁸³

What the constitution therefore attempts to do in declaring the rights of the people is to strike a balance between individual liberty and social control. In our constitution, the principles of derogation are on the whole common to all rights. All rights and freedoms are guaranteed subject to the respect for the rights of others and for the public interests and subject to any specific limitations in the individual provisions.⁸⁴

Alfred W Chanda has also stated that just as other rights, freedom of expression is not absolute. The author has argued that society needs to place some legitimate restrictions on the exercise of

⁸² William Steven Banda v The Attorney General (1992)/HP/1005

⁸³ William Steven Banda v The Attorney General (1992)/HP/1005, and Constitution of Zambia, Chapter 1 of the Laws of Zambia, Article 11

⁸⁴ William Steven Banda v The Attorney General (1992)/HP/1005, and Constitution of Zambia, Chapter 1 of the Laws of Zambia, Article 11

freedom of expression in order to prevent its abuse. He has further noted that even international human rights instruments recognise the need for restrictions. Such restrictions must, however, meet a three-part test in order to be valid. First, any restriction must be provided by law. Second, any restriction must serve one of the legitimate purposes expressly enumerated in the text. Lastly, any restriction must be shown to be necessary.⁸⁵

In the case of *William Steven Banda v The Attorney General*,⁸⁶ the court was of the view that the second derogation that the constitution allows on the freedom of expression is that such a derogation must be justifiable in a democratic society. The court in this case stated that the reasons for putting limitations on the enjoyment of fundamental rights has been dealt with exhaustively by the courts in the United States of America and India where they are incorporated in the constitution bills or rights similar to ours contained in Part III of the constitution. The court in this case gave two cases, as examples, to explain its position. The first case was that of *Gillow v New York*.⁸⁷ In this case, the supreme court of the United States of America stated:

It is a fundamental principle, long established, that the freedom of speech and of the press which is secured by the constitution, does not confer an absolute right to speak or publish without responsibility whatever one may choose unrestricted or unbridled licence that gives to every possible use of language and prevents the punishment of those who abuse the freedom.

The other case quoted by the court is that of *Cox v New Hampshire*.⁸⁸ In this case, Chief Justice Charles Evan Hughes said:

⁸⁵ Alfred W Chanda, "Freedom of Expression and the Law in Zambia," 30 ZAMBIA LAW JOURNAL 123-145 (1998):P.3

⁸⁶ (1992)/HP/1005

⁸⁷ (1925) 268 US 652

⁸⁸ (1941) 312 US 569 at p.574

Civil liberties as guaranteed by the constitution imply the existence of an organized society maintaining order without which liberty itself would be lost in the excesses of unrestrained abuses.

On freedom of expression and the press, Alfred W Chanda has noted that there is a very wide derogation clause which if broadly construed, completely emasculates the protection of freedom of expression and the press contained in clauses one and two, respectively. According to the constitution,⁸⁹ in order for a restriction on freedom of expression and of the press to be valid, it must meet the following criteria. First, it must be provided by law. Second, it must be reasonably required in any of the interests enumerated in clauses (a) to (c).⁹⁰

In Alfred W Chanda's observation, these "interests", especially those in clause (a), are expressed in very broad and vague terms. There is no definition of 'public safety', 'public order' or 'defence'. He has further noted that almost any restriction can be justified on any of these grounds. In the author's opinion, a timid judge will uphold all restrictions imposed by the state by giving a broad interpretation to this clause.⁹¹

In another *Zambian* case of *Transparency International Zambia v Chanda Chimba III and Zambia National Broadcasting Corporation*⁹² which concerned itself with defamation, had also hinged on the freedom of information. In this case, the court quoted from Lord Denning in the case of *Fraser v Evans*⁹³ where he stated:

The court will not restrain the publication of an article, even though it is defamatory, when the defendant says he intends to justify it, or to make a fair comment on a matter

⁸⁹ Constitution of Zambia, Chapter 1 of the Laws of Zambia, Article 20(3)

⁹⁰ Constitution of Zambia, Chapter 1 of the Laws of Zambia, Article 20(3)

⁹¹ Constitution of Zambia, Chapter 1 of the Laws of Zambia, Article 20(3) (a)

⁹² (2010)/HP/1176

⁹³ [1969] 1 ALL E.R. 8 At P. 360

of public interest. This has been established for many years since the case of *Bonnard v Perryman*.⁹⁴ A better reason given for this is the importance in the public interest that truth should out.

As the court said in that case:

The right of free speech is one which it is for the public interest that individuals should possess, and, indeed, that they should exercise without impediment so long as no wrongful act is done. There is no wrong done if it is true, or if it is a fair comment on a matter of public interest.

CONCLUSION

The freedom of information is one of the biggest and fundamental elements in any democratic society. This is so because the information itself is the foundation upon which each and every person in any society shall derive knowledge from which to make good and informed decisions as well as to develop their society. In Zambia, this is not an exception. This is so because the constitution of Zambia provides for freedom of expression and press.⁹⁵ Further, there are moves by the government to put in place the freedom of information bill that shall further allow members of the public to access information.⁹⁶ This shows the importance that government attaches to the freedom of information.

⁹⁴ [1981] 2 Ch. D. 26

⁹⁵ Constitution, Chapter 1 of the Laws of Zambia, Article 20

⁹⁶ "Zambia Again Delays Introduction of Freedom of Information Bill" www.FreedomInfor.org 27th February, 2013

CHAPTER THREE

CHAPTER INTRODUCTION

This chapter aims at discussing how comment on public figures or officials in light of freedom of expression or right to information is dealt in jurisdictions such as Europe or America. Further, it shall make an analysis for freedom of expression and the way it has been handled by some international human rights instruments and/or by some international courts. This shall be viewed in light of the *Zambian standard*.

FREEDOM OF EXPRESSION UNDER THE EUROPEAN OR AMERICAN SYSTEMS VIS- À-VIS THE LAW OR PRACTICE ON THE RIGHT TO INFORMATION IN ZAMBIA

The freedom of expression is recognized in international and regional human rights instruments, such as the Universal Declaration of Human Rights 1948, the International Covenant on Civil and Political Rights 1966 and the African Charter on Human and Peoples Rights, 1981.⁹⁷ Alfred W Chanda has noted that Article 20(1) of the *Zambian constitution* reflects in large measure, Article 19 of the International Covenant on Civil and Political Rights, 1966⁹⁸ and the Universal Declaration of Human Rights, 1948⁹⁹, as well as Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950.¹⁰⁰

Alfred W Chanda writes that freedom of expression serves four broad purposes. First, it helps an individual to attain self-fulfillment. This is because the rational individual requires information and an opportunity to express his or her own ideas if he or she is to grow.¹⁰¹ Second, it assists in

⁹⁷ Alfred W Chanda, *HUMAN RIGHTS LAW IN ZAMBIA: CASES AND MATERIALS* (Lusaka: UNZA PRESS, 2011), P.61

⁹⁸ Article 19 Of the International Covenant on Civil and Political Rights

⁹⁹ Article 19 of the Universal Declaration of Human Rights

¹⁰⁰ Alfred W Chanda, *HUMAN RIGHTS LAW IN ZAMBIA: CASES AND MATERIALS* (Lusaka: UNZA PRESS, 2011), p.62

¹⁰¹ Redish, "The Value of Free Speech," 130 U.PENN.L.REV.593 (1982)

the discovery of truth. In the American case of *Abrams v US*¹⁰² Justice Holmes stated that the best test of truth is the power of the thought to get itself accepted in the competition of the market.

The author has further mentioned that the government must not interfere with dialogue no matter how unpleasant it is. Only when the social order is drastically threatened is government allowed to punish a speaker. In yet another American case of *Whitney v California*,¹⁰³ Justice Brandeis wrote on the importance of free expression as follows:

Those who won the independence of the United States...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 without free speech and assembly, discussion would be futile; that, with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; (and) that the greatest menace to freedom is an inert people.... Only an emergency justifies repression.

Thirdly, freedom of expression enhances the capacity of an individual to participate in a democratic society. According to Alfred W Chanda, Alexander Meiklejohn, a renowned jurist, argues that free expression is essential not only to individual choice and development of a person's rational faculties, but also to effective government, the proclaimed ideal of democracy.¹⁰⁴

The last reason the author gives is that freedom of expression provides a mechanism by which to establish a reasonable balance between stability and social change.¹⁰⁵ A good reason why government should not suppress speech is that free speech is a safety valve. ... modern governments should take cognizance of the fact that forbidding people to discuss certain topics does not encourage public stability, as it only creates martyrs. Moreover, far from discouraging

¹⁰² 250 U.S. 616, 630 (1919)

¹⁰³ 274 U.S. 357 (1927)

¹⁰⁴ A. Meiklejohn, *Political Freedom*, in Vol. 1 of *POLITICAL RIGHTS IN THE UNITED STATES*, 4th ed., (Boston: Little, Brown, 1976), p.9

¹⁰⁵ *India Expression Newspapers (Bombay) v Union of India*, AIR (1986) Sc515

the speech, punishing people for speech only drives it underground and encourages conspiracy. According to Alfred W Chanda, it must be recognized that in the battle for public order, free speech is the ally, not the enemy.¹⁰⁶

It has been noted so far that freedom of expression plays a huge role insofar as promotion of dissemination of information may demand. This is considered at great length in a number of conventions such as the European Convention for the Protection of Human Rights and Fundamental Freedoms and others mentioned in the earlier paragraphs of this chapter's text. However, what is cardinal to note is that despite the emphasis on free speech in an endeavor to promote the exchange of information, even more important are the restrictions these international conventions place on free speech. This is proper as the Zambian constitution also recognizes restrictions on freedom of expression.

The restrictions on freedom of expression must meet a three-part test in order to be valid. First, any restriction must be provided by law. Second, any restriction must serve one of the legitimate purposes expressly enumerated in the text. Lastly, any restriction must be shown to be necessary.¹⁰⁷ According to the European Court of Human Rights, in order for a restriction to be prescribed by law, it must be adequately accessible and foreseeable, that is, formulated with sufficient precision to enable the citizen to regulate his conduct.¹⁰⁸ To have a legitimate aim, a restriction must be in furtherance of, and genuinely aimed at, protecting one of the permissible

¹⁰⁶ JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW, 5th ed. (St. Paul, Minn: West Publishing Company, 1995), p.992-993

¹⁰⁷ Alfred W Chanda, HUMAN RIGHTS LAW IN ZAMBIA: CASES AND MATERIALS (Lusaka: UNZA PRESS, 2011), p.64

¹⁰⁸ The Sunday Times v United Kingdom, Judgment of 26 April 1979, Series A no 30, par. 49

grounds listed in Article 10 (2). Alfred W Chanda has argued that the court mostly checks that there has been no abuse of power by the state.¹⁰⁹

In the case of *Pumbun and Another v Attorney and Another*,¹¹⁰ the Tanzanian Court of Appeal held that a law which seeks to limit or derogate from the basic rights of the individual on grounds of public interest will be saved by Article 30 (2) of the Constitution only if it satisfies two essential requirements. First, such a law must be lawful by which it must not be arbitrary. It should make adequate safeguards against arbitrary decisions, and provide effective controls against abuse by those in authority when using the law. Secondly, the limitation imposed by such law must not be more than is reasonably necessary to achieve the legitimate object. This is what is known as the principle of proportionality. The principle requires that such law must not be drafted too widely so as to net everyone including even the untargeted members of society. ... And any law that seeks to limit fundamental rights of the individual must be construed strictly to make sure that it conforms to these requirements, otherwise the guaranteed rights under the constitution may easily be rendered meaningless by the use of the derogative or claw-back clauses of that very same constitution.

According to the European Court of Human Rights, to be 'necessary', a restriction does not have to be indispensable but it must be more than merely reasonable or desirable. A pressing social need must be demonstrated, the restriction must be proportionate to the legitimate aim pursued, and the reasons given to justify the restriction must be relevant and sufficient. The Court went on to state that in order to assess whether an interference is justified by sufficient reasons, the court must consider any public interest aspect of the case. Where the information subject to restriction involves a matter of undisputed public concern, the information may be restricted only if it

¹⁰⁹ Alfred W Chanda, HUMAN RIGHTS LAW IN ZAMBIA: CASES AND MATERIALS (Lusaka: UNZA PRESS, 2011), P.64

¹¹⁰ 1993 TLR 159

appears absolutely certain that its dissemination would have the adverse consequence legitimately feared by the state.¹¹¹

Another argument Alfred W Chanda forwards is the breadth of the restriction. The author has argued that an absolute restriction (such as the prohibition of disclosure of all information concerning all pending cases) is clearly not accepted; a court may sanction an interference with expression only when it is “satisfied that the interference was necessary having regard to the facts and circumstances prevailing in the specific case before it.”¹¹² Another factor, it is observed, to consider in assessing a restriction’s necessity is the practice of other contracting states.¹¹³ The contracting states have a certain margin of appreciation in determining the necessity of a restriction, but this margin “goes hand in hand with a European supervision”.¹¹⁴ It is observed that this supervision must be strict and is not limited to ascertaining whether the government has exercised its discretion reasonably, carefully and in good faith; rather, the necessity for any restriction “must be convincingly established.”¹¹⁵

In Zambia, the restrictions as enunciated in international instruments also exist. However, Alfred W Chanda has stated that from reading Article 20 (3) of the Zambian constitution, it is quite evident that this is a very wide derogation clause which if broadly construed completely emasculate the protection of freedom of expression, and the press contained in clauses 1 and 2.¹¹⁶

¹¹¹ Alfred W Chanda, *HUMAN RIGHTS LAW IN ZAMBIA: CASES AND MATERIALS* (Lusaka: UNZA PRESS, 2011), p.65

¹¹² *The Observer and Guardian v UK (Sky-catcher case)*, Judgment of 26 November 1991, Series A, no. 216, par. 65

¹¹³ For example, *Mark v Belgium*, Judgment of 13 June 1979, Series A, no. 32; and *Dudgeon v UK*, Judgment of 22 October 1981, Series A, no. 45

¹¹⁴ *The Sunday Times v UK*, Judgment of April 1979, Series A no 30, par. 49

¹¹⁵ *The Observer v United Kingdom (Sky-catcher case)*, Judgment of 26 November 1991, Series A, no. 216, par. 65t

¹¹⁶ The Constitution, Chapter 1 of the Laws of Zambia, Article 20.

Further, the author notes; according to Article 20 (3),¹¹⁷ in order for a restriction on freedom of expression or the *pro* to be valid, it must meet the following criteria:

First, it must be provided for by law. Second, it must reasonably be required in any of the interests enumerated in clauses (a) to (c). These interests, especially those in clause (a), are expressed in very broad and vague terms. There is no definition of public safety, public order or defence. Almost any restriction can be justified on any of these grounds. A timid judge will uphold all restrictions imposed by the State by giving a broad interpretation this clause. This has happened in a number of cases in Zambia.¹¹⁸ Furthermore, the restriction need only be reasonably required to protect the listed interests as opposed to being necessary as under Article 10 of the European Human Rights Convention, Article 19 of the International Covenant on civil and Political Rights and the Universal Declaration of Human Rights. The author has noted that the Zambian standard is less stringent than that in international instruments as all that has to be shown is that the restriction is merely reasonable or desirable. This means that it is not necessary to demonstrate a pressing social need or to give relevant and sufficient reasons for the restriction.¹¹⁹

From the provisions in the constitution discussed in the preceding paragraph, it comes out that the Zambia Constitution has a very broad interpretation of its derogation clauses. This has led to the courts in Zambia applying the derogations very widely thereby attributing any act by the State as excusable purely on grounds of public interest, public safety, public order or defense. This is demonstrated in a number of cases which shall be discussed under the heading below.

¹¹⁷ The Constitution, Chapter 1 of the Laws of Zambia

¹¹⁸ For example, *Kachasu v Attorney-General* (1967) Z.R. 145; *Patel v Attorney-General* (1968) Z.R. 99; *The People v M'membe and Bright Mwape*, HPR/36/94

¹¹⁹ Alfred W Chanda, *HUMAN RIGHTS LAW IN ZAMBIA: CASES AND MATERIALS* (Lusaka: UNZA PRESS, 2011), P.66

AN ANALYSIS ON THE FREEDOM OF EXPRESSION AND HOW IT HAS BEEN
HANDLED BY SOME INTERNATIONAL COURTS AND HUMAN RIGHTS
INSTRUMENTS; A COMPARISON WITH SOME ZAMBIAN CASES

In Zambia, there is case law on the derogations under freedom of expression allowed under the Constitution that may run in conflict with international cases. However, there are yet some cases that have endeavored to explain the importance that these derogations must not be applied too widely. An example of the latter is the case of *Christine Mulundika*.¹²⁰ In this case, the court explained that there must be adequate guidelines so that the exercise of a discretion by the competent authorities should have the scope indicated and the manner of its exercise set out in the affected law with sufficient clarity; there must be effective controls on the exercise of the power to restrict the right in question and there must be a procedure to allow the aggrieved person to challenge the decision.

The court further held that such a procedure must be reasonable, fair and just; the fundamental constitutional rights should not be denied to a citizen by any law which permits arbitrariness and is couched in wide and broad terms; and the principles of fairness are principles in their own right and ought to be allowed to pervade all open and just societies.¹²¹

A third restriction advanced in support of the derogations is that such a restriction must be reasonably justifiable in a democratic society. However, Alfred W Chanda has noted that what amounts to a democratic society is not defined by the Constitution. This therefore depends on the social philosophy of the Judge hearing the case and the scale of value he places on public

¹²⁰ 1995/SCZ/25

¹²¹ *Christine Mulundika and 7 Others v The Attorney General* 1995/SCZ/25

interests.¹²² Unlike Zambia, the European Court of Human Rights has laid down standards for evaluating what constitutes a democratic society. The court has indicated that tolerance, pluralism and open-mindedness are intrinsic to a democratic society. It has envisaged a democratic society as an evolutionary society founded upon freedom of expression.¹²³

Although there are no established standards used when identifying what amounts to a democratic in Zambia, the Supreme Court in the case of *Christine Mulundika*¹²⁴ identified a number of features of a democratic society which it identified as a minimum attributes in any democracy: the availability of a Government that reflects the will of the majority of the people expressed at periodic and genuine elections; the power of the state should reside in the people and where this is exercised on their behalf, the mandatory is accountable; apart from the free and informed consent and maximum participation of the governed, it is also common to expect that the people have and actually enjoy basic rights and freedoms and these are available to the majority as well as to any minority.

The Supreme Court of Zambia in the case of *Mulundika* cited with approval the case of *Handyside v UK*.¹²⁵ In this case, the European Court of Human rights placed high value on the freedom of expression. The important portion on freedom of expression and information stated was as follows:

The Court's supervisory function obliges it to pay the utmost attention to the principles characterising a democratic society. Freedom of expression constitutes one of the essential foundations of such a society, one of the basic conditions for its progress and for the development of every man ... it is applicable not only to information or ideas

¹²² Alfred W Chanda, HUMAN RIGHTS LAW IN ZAMBIA: CASES AND MATERIALS (Lusaka: UNZA PRESS, 2011), P.67

¹²³ The Right to Freedom of Opinion and Expression-Current Problems of its Realisation and Measures Necessary for its Strengthening and Promotion, Update of the Preliminary Report prepared by D. Turk and L. Joint, Special Rapporteurs (UN Doc E/CN 4/Sub.2/1991/9) at par. 111

¹²⁴ 1995/SCZ/25

¹²⁵ (1976) IEHRR 737 or (Application 5493/72) ECHR 5 (7December, 1976)

that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those which offend, shock, or disturb the state or any other sector of the population. Such are the demands of pluralism, tolerance and broadmindedness without which there is no democratic society.

Today, in the year 2013, the Public Order Act is again in operation. It is being used to prevent Opposition Political Parties from holding rallies where the people are informed on many important matters of public concern.¹²⁶ This is the position in Zambia despite the holding in the case of *Christine Mulundika*.¹²⁷ The court in this case stated that the requirement of prior permission to gather and to speak, which permission can be denied sometimes for good and at other times for bad cause not contemplated by the constitutional derogation, directly affects the guaranteed freedoms of speech and assembly. A derogation which is so broad as to cover restrictions both within and without the limits of constitutionality cannot be upheld.

The court further held that the right to assemble and to speak freely is so important that the Supreme Court of India was constrained to observe in the case of *Rangarajan v Jagivran Ram and Others*¹²⁸ thus:

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.

As noted in the earlier paragraphs of this chapter, freedom of expression means being able to speak or publish as you will. Only an emergency justifies repression.¹²⁹ However, in Zambia, publication of false news, it seems, is punishable. According to section 67 of the Penal Code, any person who publishes, whether orally or in writing or otherwise, any statement, rumour or report

¹²⁶ The Public Order Act www.postzambia.com/post-read_article.php?articled=29864 Time visited: Monday 15th July 2013, 17:38pm Posted on Friday 14 December, 2012, 13:00 CAT

¹²⁷ 1995/SCZ/25

¹²⁸ Judgment of the Supreme Court of India of 30th March, 1989

¹²⁹ *Whitney v California* 274 U.S 357 (1927)

that is likely to cause fear and alarm to the public or to disturb the public peace, knowing or having reason to believe that such statement, rumour or report is false, is guilty of an offence and liable to imprisonment for up to three years.¹³⁰ According to Alfred W Chanda, this provision has a chilling effect on the freedom of the press as journalists publish stories at their own risk.¹³¹

In the case of *Thorgeirson v Iceland*,¹³² the European Court of Human Rights suggested that a person should not be held liable for publishing allegations, especially regarding matters of serious public concern, that are based on public opinion, “rumours”, “stories” or the statements of others, so long as the nature of the factual support for the allegations is clearly stated.

In another case called *Hector v Attorney-General of Antigua and Bermuda*,¹³³ the Judicial Committee of the Privy Council held that a criminal law provision violated the Constitution of Antigua and Bermuda to the extent that it made the printing or distribution of any false statement which was likely to “undermine public confidence in the conduct of public affairs” a criminal offence. The court reasoned that it would be a grave impediment to the freedom of the press if those who printed or distributed matter reflecting critically on public authorities could do so with impunity only if they could first verify the accuracy of all statements of fact on which the criticism was based.

A different observation may also be advanced when light is cast on the law of defamation in Zambia and how it relates to freedom of expression and the press. The law of defamation is important as it is or aims at protecting the reputations of other persons. Both the Constitution of Zambia, in Article 20(3) (b), and International and regional instruments, recognise the need to

¹³⁰ Chapter 87 of the Laws of Zambia

¹³¹ Alfred W Chanda, *HUMAN RIGHTS LAW IN ZAMBIA: CASES AND MATERIALS* (Lusaka: UNZA PRESS, 2011), p.91

¹³² Judgment of 25 June 1992, Series A, no. 239

¹³³ (1990) 2 AC 313

protect reputations. Freedom of expression is not a license for destroying the reputations of other persons.¹³⁴

However, a rigorous implementation of defamation law may have a chilling effect on freedom of expression. It may also undermine good governance, transparency and accountability, as the press, for example, may not publish certain information for fear of legal suits. Similarly, members of the public may be reluctant to provide information to the press or the authorities for the same reason. Defamation may thus hinder public debate of national issues. The author has therefore observed that the challenge in a democracy is therefore, to strike an optimum balance between the legitimate interests of individuals not to have their reputations besmirched and the interest of the public to have access to relevant information and to have unhindered debate of public issues. This is especially important with regard to public figures.¹³⁵

The European Court of Human Rights distinguishes between private individuals and public figures, especially politicians. In the case of *Lingens v Austria*,¹³⁶ the court ruled that the limits of acceptable criticism are...wider as regards a politician as such than as regards a private individual. The reason why politicians must have a greater tolerance for criticism is because freedom of the press affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of political leaders. More generally, freedom of political debate is at the very core of the concept of a democratic society....”

In *Oberschlick v Austria*,¹³⁷ the European Court in rationalising the different level of scrutiny between politicians and private individuals reasoned that:

¹³⁴ Alfred W Chanda, *HUMAN RIGHTS LAW IN ZAMBIA: CASES AND MATERIALS* (Lusaka: UNZA PRESS, 2011), p.92

¹³⁵ Alfred W Chanda, *HUMAN RIGHTS LAW IN ZAMBIA: CASES AND MATERIALS* (Lusaka: UNZA PRESS, 2011), p.93

¹³⁶ Judgment of 8 July 1986, Series A, no. 103

¹³⁷ Judgment of 23rd May 1991, Series A, no. 204, at par. 63.7

The politician inevitably and knowingly lays himself open to close scrutiny of his every word and deed by both journalists and the public at large, and he must display a greater degree of tolerance, especially when he himself makes public statements that are susceptible to criticism.

In the United States, a similar approach is followed in cases of defamation. For example, in the case of *New York Times v Sullivan*,¹³⁸ the Supreme Court held that public officials, in order to sustain an action for defamation, must prove the falsity of the allegedly defamatory statement as well as actual malice, that is that the defendant published a falsehood with knowledge that it was false or with reckless disregard of its truth or falsity. In *Curtis Publishing Company v Butts and Associated Press v Walker*,¹³⁹ the Supreme Court extended the Sullivan rule to apply to all public figures. The court reasoned that public figures have access to the media to counteract false statements and, at least to some degree, invite the comment to which they are exposed.

According to Alfred W Chanda, the Courts in Zambia can learn valuable lessons from the decisions of the European Court as well as the American Courts. The author has observed that these decisions are very protective of the freedom of the press and go a long way in promoting public debate and scrutiny of public officials and public figures. Additionally, it is noted that the Zambian courts have not gone as far as the European Court and American courts.¹⁴⁰ For example, in the Zambian case of *Michael Chilufya Sata v Post Newspapers Limited and Printpak Zambia Limited*,¹⁴¹ the High Court had to consider whether the law of defamation as currently applied derogates from, inter alia, the freedom of the press guaranteed by Article 20 of the Constitution and if so, what modifications would reasonably be required to be imported or imposed in order to give effect to the intention of the Constitution.

¹³⁸ 376 U.S. 254 (1964)

¹³⁹ 388 U.S. 130 (1967)

¹⁴⁰ Alfred W Chanda, HUMAN RIGHTS LAW IN ZAMBIA: CASES AND MATERIALS (Lusaka: UNZA PRESS, 2011) P.94

¹⁴¹ 1993/HP/1395 and 1804 and 1993/HP/1823

The facts of the case were that the plaintiff, who at all times a politician and public official holding a Ministerial appointment commenced three separate suits for defamation against the defendants for publishing in their newspaper, The Post, various articles and a cartoon. The defendants pleaded justification and fair comment on matters of public interest. The defendants submitted that because Article 20 of the Constitution specifically recognises, among others, the principle of the freedom of the press, time had come to modify the common law principles of the law of defamation in their application to plaintiffs who are public officials as to their right of action, the burden and the standard of proof, and the latitude the press should be permitted to subject public officials to criticism and scrutiny.¹⁴²

They argued that that because of the similarity between the provision in the Zambian Constitution and that of the United States of America, the court should follow the line taken by the American courts rather than the one followed by the courts in England. In this regard, they urged the court to apply the case of *New York Times v L.B Sullivan*¹⁴³ in which the Supreme Court of the United States laid down some principles grounded in the First and Fourteenth Amendments to fetter libel actions by public officials in order to advance free speech and press freedom.¹⁴⁴

Chief Justice *Ngulube*, while accepting some of the principles enunciated in *Sullivan*, rejected others. He stated that Article 20 of the Constitution recognise both freedom of the press and the right to reputation. A balance has to be struck but he did not consider that a good balance has to be struck by shifting the burden or standard of proof; nor by straining to discover a new qualified

¹⁴² Michael Chilufya Sata v Post Newspapers Limited and Printpak Zambia Limited 1993/HP/1395 and 1804 and 1993/HP/1823

¹⁴³ 376 U.S. 254 (1964)

¹⁴⁴ Michael Chilufya Sata v Post Newspapers Limited and Printpak Zambia Limited 1993/HP/1395 and 1804 and 1993/HP/182

privilege; nor by immunising falsehoods to any greater extent than the Defamation Act already provides. The Chief Justice however, endorsed the view that some recognition ought to be given to the constitutional provisions in Article 20. He also accepted that impersonal criticism of public conduct leading to injury to official reputation should generally not attract liability where there is no actual malice. Nevertheless, he rejected the proposition in *Sullivan* to the extent that it sought to legalise character assassination of public officials or to shift the burden of proof so that knowledge or falsity or recklessness should be proved by the plaintiff and to a degree of convincing clarity.

CONCLUSION

It was noted that whereas Zambia, just like the European and the American systems, recognises the importance of free speech and the press insofar as making information available to the citizen may demand, Zambian laws are less stringent when compared to international instruments. This is evident when regard is placed on the restrictions the Zambian Constitution places on freedom of expression. Further, it was observed that cases from the American system that promote press freedom have not been adopted in Zambian courts despite intention existing to extend the frontiers of press freedom in Zambia. An example is that of *New York Times v Sullivan* which could not be followed in *Michael Chilufya Sata v Printpak Zambia and The Post Newspaper*. However, it is encouraging that currently, there are on-going debates surrounding the enactment of the Freedom of Information Bill that may assist journalists or media houses to be able to disseminate and collect information needed to inform the general public.

CHAPTER FOUR

CHAPTER INTRODUCTION

This chapter endeavours to highlight the key laws in Zambia that have a direct impact on freedom of the press and expression. Its emphasis is on justifying the re-looking at the laws that have a tendency to impede access to information or people's right to free speech. The chapter shall also later explain to what extent the laws impeding free exercise of free speech or press may be re-visited.

JUSTIFICATION FOR RE-LOOKING THE LAWS OR PRACTICES THAT MAY CONFLICT WITH FREEDOM OF EXPRESSION OR PRESS IN ZAMBIA

Freedom of information law legislation springs from one of the most essential principles; a democracy works best when the people have all the information that the security of the nation permits. No one should be able to pull the curtains of secrecy around decisions which can be revealed without injury to the public interest.¹⁴⁵ But before going into great depth of discussion, clarity should be highlighted on the nexus that exist between freedom of expression and the freedom of information. This shall make it possible to follow the discussion in this chapter. It will also show why the existence of freedom of expression in our Constitution should be key in helping the reshaping of our laws to fall in line with the Freedom of Information Bill currently under discussion in Zambia.

¹⁴⁵ Statement by President Lyndon Johnson of the United States of America when he signed the Freedom of Information Act in 1966

According to Mason, the concept of freedom of information is said to be imprecise and uninformative.¹⁴⁶ The author has however noted that despite the imprecise nature of the concept, freedom of information is generally understood to convey the notion that there is a right to access information held by government. Although the concept of freedom of expression is imprecise, in practice, freedom of information is closely tied to freedom of expression. It is for this reason that freedom of expression and freedom of information are often mentioned in the same breath. For instance, guarantees of freedom of expression in constitutions and international instruments expressly or impliedly include certain aspects of freedom of information and freedom of expression, VIZ, the right to seek and impart information.¹⁴⁷

The impression that the two freedoms are closely interconnected is also fostered by modern international instruments, such as, the United Nations Covenant on Civil and Political Rights (ICCPR), the European Convention on Human Rights and Fundamental Freedoms (the European Convention) and the American Convention on Human Rights (the American Convention).¹⁴⁸ Although the African Charter on Human and People's Rights (the African Charter) does not guarantee the right to access information, nonetheless, it protects the right to receive information.¹⁴⁹ The two freedoms are understandably perceived to be closely connected because, subject to some qualifications, the covenant and the conventions all treat freedom of expression as including freedom of information.¹⁵⁰

¹⁴⁶ Mason A, "The Relationship between Freedom of Expression and Freedom of Information" In Beatson J and Cripps Y (eds) "Freedom of Expression and Freedom of Information" (2000): p.233

¹⁴⁷ Mason A "The relationship between Freedom of Expression and Freedom of Information" p.225

¹⁴⁸ Mason A "The relationship between Freedom of Expression and Freedom of Information" p.225

¹⁴⁹ Article 9(1) of the African Charter on Human and People's Rights

¹⁵⁰ Matibini, Patrick "The Quest for Freedom of Information Law – The Zambian Experience," LAW, DEMOCRACY & DEVELOPMENT, Journal of the Faculty of Law. Volume 13(1) (2009): p.90

So far, it has been shown why inevitably, there is normally mention of freedom of expression whenever mention of freedom of information is at play. This part shall now demonstrate why some statutory restrictions are unjustifiable of sustainability in a democracy with freedom of expression at play.

According to Alfred W Chanda, the Zambian legal system imposes many restrictions on freedom of expression. Almost all the laws, which seriously impede freedom of expression, were enacted during the colonial days.¹⁵¹ The main purpose of this colonial legislation was to suppress the African struggle for independence. However, the repressive laws were not repealed at independence. Instead, they were either retained in their original form or reinforced by the United Nation Independence Party regime.¹⁵² The dawn of the political pluralism in 1991 has not led to the repeal of the repressive legislation. This has been made possible by the wide derogation contained in the Constitution, and the lack of political commitment to individual rights on the part of Government leaders.

A number of laws in Zambia could be discussed that need urgent attention insofar as the promotion of freedom of information may demand. One such falls under the power to ban Publications. This is under section 53(1) of the Penal Code.¹⁵³ This provision grants the President absolute discretion to prohibit any publication or series of publications published within or outside Zambia, which he considers to be contrary to the public interest. What constitutes the public interest is within his sole discretion. Any person who imports, publishes, sells, offers for

¹⁵¹ For example, the Penal Code and the Preservation of Public Security Act were enacted in the colonial days

¹⁵² The Zambia Independence Order, 1964 provided for the continued operation of all colonial legislation in the post-independence period. The UNIP government in 1965 amended the Penal Code to create the offence of defamation of the President. In 1968, it enacted the State Security Act, CAP. 111 to further restrict access to information as well as to stiffen the penalties for offences against the Act

¹⁵³ Chapter 87 of the Laws of Zambia

sale, distributes, or reproduces any prohibited publication is liable to imprisonment for up to three years.

An attempt to challenge the President's power under this section failed in the case of *Edward Jack Shamwana v Attorney General*.¹⁵⁴ In this case, two political detainees, Edward Shamwana and Valentine Musakanya, sent a petition to the National Assembly, requesting the Assembly to review the state of emergency, which had been in existence since independence. In March 1981, President Kaunda banned the said petition. Shamwana sought an order from the High Court declaring that the President's decision to ban the petition was wrongful, unlawful and unconstitutional. He contended that a petition to the National Assembly could not be prejudicial to the public interest and that by proscribing the document the President was negating his oath of office to uphold the Constitution. Justice Florence Mumba held that the President had acted within powers conferred on him by section 53 of the Penal Code and that the President's opinion was not open to question and that his decision following upon such an opinion could not be impugned.

On appeal in the Supreme Court, the decision of the High Court was upheld. Alfred W Chanda has commented on this case. The author writes that freedom of the press and other publications are essential components of a thriving democracy. Section 53 of the Penal Code is clearly incompatible with democracy because the President could decide at any time to ban any publications and the exercise of those powers will not be questioned. Publications that are likely to be banned are those published in the print media. This will affect freedom of the press and information. This is because section 53 of the Penal Code makes the existence of a free press entirely on the good will of the President. The public will also not benefit from important

¹⁵⁴ (1988-1989) Z.R 44

information capable of affecting their lives if publications are banned at any time.¹⁵⁵ For example, in 1996, the President banned edition 401 of the Post Newspaper because it prematurely disclosed a plan by the government to organise a referendum over the Constitution.¹⁵⁶ Chanda has reminded that it is important to note that the Judiciary plays a pivotal role in checking the exercise of the powers by authorities.¹⁵⁷

The law on criminal defamation has also been viewed as being incompatible with freedom of information or the press. This law is created under Chapter XVIII of the Penal Code.¹⁵⁸ Section 191 provides that any person who, by print, writing, painting, effigy, or by any means otherwise than solely by gestures, spoken words, or other sounds, unlawfully publishes any defamatory matter containing another person, with intent to defame that other person, is guilty of libel. Publication of the defamatory matter is unlawful unless: the matter is true and it was for the public benefit that it should be published; and it is privileged.

Since the law on civil defamation is sufficient to protect the right to reputation, there is no reason why the offence of criminal defamation should be maintained in a democratic country. In practice, prosecution for criminal libel have been instituted against those who have allegedly defamed politicians of the ruling party as well as members of their families, the President's wife and children and senior government officials.¹⁵⁹

This section of the chapter has been able to demonstrate that indeed laws do exist that have a tendency to impede access to information or freedom of the press or expression. The section hereunder shall discuss the extent to which a re-look on some laws may be justified.

¹⁵⁵ Alfred W Chanda, HUMAN RIGHTS LAW IN ZAMBIA: CASES AND MATERIALS (Lusaka: UNZA PRESS, 2011), P.91

¹⁵⁶ The People v Fred M'membe, Masauso Phiri and Bright Mwape HP/38/1996 (unreported)

¹⁵⁷ Alfred W Chanda, HUMAN RIGHTS LAW IN ZAMBIA: CASES AND MATERIALS (Lusaka: UNZA PRESS, 2011), P.91

¹⁵⁸ Chapter 87 of the Laws of Zambia

¹⁵⁹ Times of Zambia, 28 February 1996

TO WHAT EXTENT SHOULD THE LAWS OR PRACTICES CONFLICTING WITH THE
*FREEDOM OF INFORMATION IN ZAMBIA BE RE-VISITED

In Zambia, the Constitution is the supreme law of the land and if any other law is inconsistent with this Constitution, that other law shall, to the extent of the inconsistent, be void.¹⁶⁰ Further, the Constitution binds all persons in the Republic of Zambia and all Legislative, Executive and Judicial organs of the State at all levels.¹⁶¹ These provisions are self-explanatory and clearly indicate the sanctity of the Constitution in Zambia. Further, it is in the same Constitution that the freedom of expression and the press are enshrined.¹⁶² This is a proper indication of how much importance, expression and press freedoms demand in Zambia.

On 28th November, 2002, the Minister of Information and Broadcasting Services presented the Freedom of Information Bill for the second reading. During the second reading, the Minister pointed out that the right to access information facilitates more effective participation in the governance of any country as it promotes transparency and accountability of public officers. Borrowing from John Stuart Milton, the Minister advanced that among the strong statements in support of the right to know was that the backbone of representative government is the direct participation by the people in the affairs of government.¹⁶³ To this end, the Minister informed the House that the Constitution of Zambia, the supreme law of the land, approves:¹⁶⁴

- a) The recognition of equal worth of men and women in their right to participate in, and freely determine and maintain, a political, economic and social system of their own free choice

¹⁶⁰ The Constitution, Chapter 1 of the Laws of Zambia, Article 1(3)

¹⁶¹ The Constitution, Chapter 1 of the Laws of Zambia, Article 1(4)

¹⁶² The Constitution, Chapter 1 of the Laws of Zambia, Article 20

¹⁶³ Daily Parliamentary Debates, Thursday 28th November, 2002 xii

¹⁶⁴ Daily Parliamentary Debates, Thursday 28th November, 2002 xiii

- b) That all power resides in the people who shall exercise their sovereignty through the democratic institutions of the state in accordance with the Constitution; and
- c) That, except with his own consent, a person shall not be hindered in the enjoyment of his freedom to hold opinions without interference, freedom to receive ideas and information without interference, and freedom to impart and communicate ideas and information without interference.

Accordingly, the Minister concluded by advising the House that the government viewed information as a national resource which should be made public for the benefit of public debate and understanding.

Going forward, it should be stated that freedom of information is vital to the proper functioning of a modern government; it enhances the notion of deliberative or even participatory democracy. In this regard, just as freedom of expression is considered to be an indispensable affiliate of modern democracy, so also is freedom of information. 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 working government.¹⁶⁵

A question could often be asked: 'What is the rationale advanced to support the imposition on government of a statutory obligation to make information available to the public?' This is answered by a plethora of authority.

¹⁶⁵ Mason A "The relationship between Freedom of Expression and Freedom of Information" p.230

First, government must be open to public scrutiny so as to be accountable and exposed to the judgment and evaluation of the citizens.¹⁶⁶ Secondly, the provision of adequate information leads to higher levels of public participation in the process of policy making and government.¹⁶⁷ Without information, citizens are unable to exercise their rights and responsibilities effectively.¹⁶⁸ Thirdly, Mason has advanced that access to information must be a pre-requisite for the proper and effective functioning of a healthy democratic society.¹⁶⁹ Fourthly, the Executive is not sufficiently responsible to Parliament.¹⁷⁰ The work of Select Committees, the efficacy of Parliament questions, the effectiveness of opposition parties and pressure groups, all depend on the availability of, and accessibility to information. Lastly, everyone has a right to know what information is held by government about him or her personally.¹⁷¹

CONCLUSION

As a conclusion, it may be stated that freedom of information has been demonstrated as a key concept in ensuring that the people have the necessary information in a nation. For this reason, the government has and is making strides to ensure that the Freedom of Information Bill is enacted into law. Further, the media as well as the non-media houses are on their toes to ensure that the government brings the Bill into law. All this demonstrate the importance that is attached to the freedom of information in a democratic state such as is Zambia. In this regard, to a large extent, the laws or policy on freedom of information should be revisited.

¹⁶⁶ Freedom of Information, Report by the Australian Senate Standing Committee on Constitutional and Legal Affairs on the Freedom of Information Bill 1978 and Aspects of the Archives Bill 1978 para 3.4

¹⁶⁷ Freedom of Information, Report by the Australian Senate Standing Committee on Constitutional and Legal Affairs on the Freedom of Information Bill 1978 and Aspects of the Archives Bill 1978 para 3.5

¹⁶⁸ Mason A "The relationship between Freedom of Expression and Freedom of Information" p.253

¹⁶⁹ Mason A "The relationship between Freedom of Expression and Freedom of Information"

¹⁷⁰ Mason A "The relationship between Freedom of Expression and Freedom of Information" p.253

¹⁷¹ Freedom of Information, Report by the Australian Senate Standing Committee on Constitutional and Legal Affairs on the Freedom of Information Bill 1978 and Aspects of the Archives Bill 1978 para. 3.3

CHAPTER FIVE

CHAPTER INTRODUCTION

In this chapter, emphasis is mainly on making some personal recommendations on the right to information looking at Zambia and international human rights standards outlined in chapters one, two, three and four of this report. It is also a chapter that marks the conclusion of the entire report. In concluding this chapter, personal opinions on the concept of the freedom of information and how plausible in a setting like Zambia shall be advanced.

GENERAL CONCLUSION

In Zambia, there are a lot of pending issues that need to be addressed regarding freedom of expression and the press. Particularly, freedom of expression and press must be looked at in light of the freedom of information bill currently under discussion in Zambia. The laws that impede the exercise of these two freedoms need to be re-visited in order that they may reflect the current international human rights standards. The observation that Zambia does not currently observe the purpose of the guarantee of freedom of expression and press in relation to media and non-media houses need urgent practical steps in order to be redressed. This will, therefore, require concerted efforts from all important bodies involved in policy formulation, legislation enactment or law enforcement. This will enable Zambia have some necessary measures to ensure that we establish a threshold in comparison with international human rights standards.

RECOMMENDATIONS

- That Zambia enacts the Freedom of Information Bill into law as this will ensure that current fetters on free exercise of press freedom is given its intended role as enshrined in the Constitution of Zambia
- Zambia should re-visit its laws in order to bring them in line with the freedom of the press and expression enshrined in the Constitution. These are mainly penal laws looking at criminal libel, power to ban publications, the criminalization of publication of false news, the laws under the Public Order Act
- There is need to fit the Zambian legal framework to a limited adherence to International Human rights standards
- There is need for an enabling law that shall guarantee the right to information in Zambia. Currently, it is difficult to point exactly where such freedom obtains its authority because of various interpretations of the Constitutional guarantee of both speech and press freedoms

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