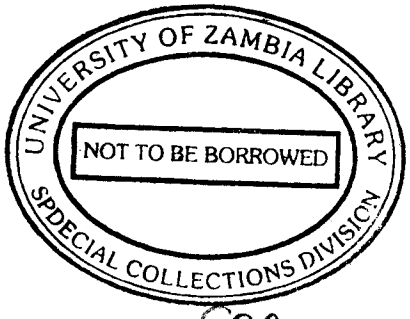
THE LEGAL PROTECTION OF THE REPUTATION OF PUBLIC OFFICIALS



BY

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A directed research essay submitted to the School of Law of the University of Zambia in partial fulfillment of the requirement for the award of the Degree of Bachelor of Laws (LLB)

School of Law
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UNIVERSITY OF ZAMBIA

SCHOOL OF LAW

I recommend that the directed research prepared under my supervision by Kims Banda, entitled:

THE LEGAL PROTECTION OF THE REPUTATION OF PUBLIC OFFICIALS

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

.....

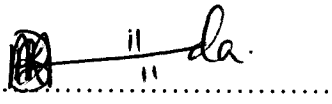
DR. PATRICK MATIBINI
(SUPERVISOR)

5th FEBRUARY 2008

DATE

DECLARATION

I, **BANDA KIMS**, do hereby declare that this research paper represents my own work, and where other people's work has been used, due acknowledgements have been made. This paper has not been submitted for any academic awards to the best of my knowledge.



05/02/08

BANDA KIMS **DATE**

DEDICATIONS

To my late mother, **Mrs. Lonah Moonga Banda** (1964-14th March, 2005) whose love and care was endless. I run out of words whenever I want to describe the kind of person you were. Mom, without you, I would not be where I am today and for that I am forever indebted to you.

You may be gone, but your love and care will forever remain in me. I know you are in the safe hands of the Lord and that you guide me each day of my life. I love and miss you each day. Till we meet again, rest in eternal peace.

To my beloved dad **(Mr. John Banda)**, I surely would not have reached this far without your love and support. You were there for me from the start to the end and I can never thank you enough for that. I believe that your rewards are in the kingdom of the Lord who keeps us alive each day of our lives.

To my son **(Ethan Banda)** and his mother **(Delshane Mubi Mufwambi)**, you are the source of my inspiration. My son, I pray that you grow up to be a responsible and God fearing child. I love you guys.

To my beloved brothers, **Owen, Chris, Fair, Gift, Collins, Curtis** and **Anthony** for all the love and care you give me. You are the greatest brothers and I love you all.

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Special thanks go to my Supervisor, Dr. Patrick Matibini, for guiding me throughout this work.

I extend my thanks to my friends Mutale Mukuka (Muta), Moses Kaunjika (Big Moze), Cletus Mufalo, Mwape Moono, Paul Chavula Laurah Malao, and Simon Tembo for all the encouragement and criticisms (positive ones!) during my study at the University. Guys, you made school life easier whenever we shared data and jokes. I am forever indebted to you all.

I thank all those who may not have been mentioned who helped me in one way or another. I would not have done this without you all.

Lastly, but not the least, I thank my Almighty God who has always been with me in both good and bad times. I love you my Lord and I believe that this is a work of your hand.

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ABSTRACT

The paper examines the "Legal Protection of the Reputation of Public Officials". It shows that the legal protection accorded to public officials in Zambia poses a serious fetter on the enjoyment of freedom of expression and freedom of the press. This undermines the very fundamental concept of democracy which our country purports to uphold. The paper consists of five chapters. The first chapter *inter alia*, considers the context and statement of the problem and shows clearly that there is reluctance in the Zambian judiciary to accord a lower standard of protection of the reputation of public officials while maintaining a higher standard of protection of the reputation of private persons so as to enhance the enjoyment of freedom of expression and freedom of the press. The chapter also discusses the rationale for the research and submits that freedom of expression and of the press are a critical ingredient of any democratic state and therefore should be guarded jealously. The justification as well as the objectives of the research are also set out in this chapter. In addition, the chapter defines defamation and discusses the Constitutional protection of reputation of people generally. A distinction between a private and public official is considered. The second chapter deals with the critique of the Constitutional protection of freedom of expression and of the press in Zambia. Different pieces of legislation which have a chilling effect on the enjoyment of freedom of expression and freedom of the press are considered. The pieces of legislation considered include the Penal Code and the Defamation Act. The third chapter deals with the effects of the pieces of legislation cited in chapter two which have a chilling effect on freedom of expression and freedom of the press *viz a viz* development, fight against corruption, transparency and accountability. The chapter shows that there is a link between development, fight against corruption, transparency and accountability and a free press. The chapter argues that Zambia has no free press and that this has undermined development, fight against corruption, transparency and accountability. The fourth chapter examines the derogations permitted under the Zambian legal system and those permitted under various international instruments in greater detail. The chapter considers the derogations permitted by the Universal Declaration on Human Rights (UDHR), the African Charter on Human and Peoples Rights (ACHPR), derogations permitted under the International Covenant on Civil and Political Rights (ICCPR) and those permitted under the American Convention on Human Rights (ACHR). It is shown in this chapter that the derogations permitted under the Zambian law does not satisfy the international standards as set out in the international instruments mentioned above. The fifth and final chapter contains conclusions and recommendations.

LIST OF ACRONYMS

UDHR	Universal Declaration of Human Rights
ACHPR	African Charter on Human and Peoples Rights
ICCPR	International Covenant on Civil and Political Rights
ACHR	American Convention of Human Rights
UN	United Nations
ZIMA	Zambia Independent Media Association
FOIA	Freedom of Information Act
IBA	Independent Broadcasting Act
ZNBCA	Zambia National Broadcasting Corporation Act
ZUJ	Zambia Union of Journalists

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CHAPTER ONE

1.0 INTRODUCTION

The paper examines the right to reputation of public officials in Zambia. It is shown in the paper that the legal protection of public officials in Zambia has had a chilling effect on the enjoyment of freedom of the press. The paper argues that the protection that should be afforded to public officials' reputation should not be equivalent to that afforded to private individuals. Public officials should be more tolerant when it comes to criticisms from the public on matters related to their public function. The fact that the decisions and actions that are undertaken by public officials affect the lives of all people under their jurisdiction; justifies peoples' actions of probing and inquiring on the manner in which public officials perform their public function. This would necessarily mean criticisms which if directed to a private individual would amount to defamation and other related civil causes of action. The paper shows how different pieces of legislation aimed at protecting public officials have undermined the enjoyment of freedom of expression and press freedom in Zambia. A comparison is also made as to what legal protection public officials enjoy in other jurisdictions. At the end of the research conclusions are made and recommendations proposed.

1.1 CONTEXT AND STATEMENT OF THE PROBLEM

In today's world where every country aims at embracing and upholding the fundamentals of democracy, it is imperative that domestic law is drafted in such a way that it ensures adequate public participation in public matters. This entails close scrutiny of public officials by members of the public in order to ensure that there is transparency and

accountability in the performance of their duties. This necessarily means limiting a public official's opportunities or circumstances under which he/she should sue for defamation of character or for the infringement of his/her reputation. In so doing, freedom of the press would be encouraged as journalists and members of the public would not be hindered by the law to exercise it.

Despite it being settled law that in a democracy the reputation of individuals should be guarded jealously, it is important to make a clear distinction between the protection to be accorded to a private individual and that to be accorded to a public official. Some jurisdictions (such as the American) have made a clear distinction between the legal protection of reputation of public officials and private individuals.

In *New York Times v Sullivan*[1], the Supreme Court held that public officials, in order to sustain an action for defamation, must prove the falsity of the alleged 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*[2] and *Associated Press v Walker*[3], the Supreme Court extended the Sullivan rule to apply to all "public figures", reasoning 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.

[1] 376 U.S. 254 (1964)
[2] 388 U.S. 130 (1967)
[3] 389 U.S. 28 (1967)

Zambian courts have unfortunately failed to apply the principle in the Sullivan case. In *Sata v The Post Newspapers Limited*[4], the court opted to follow the Australian view which in effect maintained the common law position which allows a public official to maintain an action for damages for defamation of his character. Chief Justice Ngulube, while accepting some of the principles enunciated in Sullivan, rejected others. He stated that Article 20 of the Constitution recognises both the freedom of the press and the right to reputation. A balance has to be struck but he did not consider that a good balance can be struck by shifting the burden or standard of proof; nor by straining to discover a new qualified privilege; nor by immunising falsehoods to any greater extent than the Defamation Act already provides. Chief Justice Ngulube went on to say that:

> "I would reject 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."

Chief Justice Ngulube endorsed the rejection of the principle laid down in *New York Times v Sullivan*[5]; in the Australian case of *Theophanus v The Herald and Weekly Times Limited and Another*[6], in which the High Court of Australia stated, inter alia, that the law of defamation, whether common law or statute law, must conform to the implication of freedom, even if conformity means that plaintiffs experience greater difficulty in protecting their reputations. The interests of the individual must give way to the requirements of the Constitution. At the same time, the protection of free communication

[4] (1992) HP/1395 Unreported
[5] 376 U.S. 254 (1964)
[6] (1994) 182 CLR 104

does not necessitate such a subordination of the protection of individual reputation as appears to have occurred in the United States.

1.2 RATIONALE FOR THE RESEARCH

Freedom of the press is a critical ingredient of any democratic state and Zambia is no exception. It is for this reason that the exercise of this freedom should be adequately protected by the law of any country that claims to be democratic. As clearly observed by the learned author Prof. Abernathy[7]:

> "Freedom of the press occupies a peculiar position relative to the democratic process and to restrict substantially the right of the press is to cut the arteries that feed the heart of the democratic model."

The rationale behind this study is that some statutory laws in Zambia have had the effect of giving wide protection to the reputation of public officials which greatly undermines the enjoyment of press freedom. Journalists and other persons who may want to criticise public officials may fear to do so as they may face legal suits. Zambia is a democratic country and should therefore be seen to enact laws that foster freedom of the press. For without freedom of the press, democracy would be illusionary.

Press freedom is guaranteed in several international and regional instruments. Among such instruments are:

> "Universal Declaration of Human Rights (Article 19), the International Covenant on Civil and Political Rights

[7]Abernathy, (1970) Civil Liberties Under the Constitution p.330

> (Article 19), and the African Charter on Human and Peoples Rights (Article 19)."[8]

Article 19 (1) of the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights provides that everyone shall have the right to hold opinions without interference.[9] At the municipal level, in the United States for instance, the 1st Amendment to the U.S. Constitution in Bill of Rights says that:

> "Congress shall make no law...abridging (limiting) the freedom of speech, or of the press..."[10]

It is unfortunate to learn of the wide derogation clause placed in the Zambian Constitution which is the supreme law of the land with regard to exercise of freedom of the press. Such derogations as will be shown in the research in effect take away freedom of the press. The press has been on many occasions hindered to fully exercise this constitutionally guaranteed freedom based on this derogation which is ambiguous and drawn in broad terms. Many scholars have actually argued as will be shown in the research that the derogation clause can be used to justify the taking away of the guaranteed freedom under any circumstance(s).

The Penal Code has also brought a chilling effect on the enjoyment of the guaranteed freedom of the press. The criminalisation of defamation of the President in the Penal Code derogates from the freedom of the press. Many journalists and other members of the press have been, as will be shown in the research, victimised by arms of government

[8] Afronet (2000) Zambia Human Rights Report 2000, (Lusaka, Afronet) p.24
[9] Ibid.
[10] Poor, (1977) You and the Law pp. 54-55

owing to the existence of such a law as anything critical written about the President is deemed to be defamatory. The Penal Code also makes provisions in relation to prohibited publications under which the President is given wide powers to ban certain publications. Section 53 (1)[11] provides as follows:

> "If the President is of the opinion that there is in any publication or series of publications published within or without Zambia by any person or association of persons matter which is contrary to the public interest, he may, in his absolute discretion, by order published in the Gazette and in such local newspapers as he may consider necessary, declare that that particular publication or series of publications, or all publications or any class of publication specified in the order published by that person or association of persons, shall be a prohibited publication or prohibited publications, as the case may be."

The law of defamation also has a chilling effect on the exercise of freedom of the press especially as it relates to public officials in the exercise of their public function. It is for this reason that the law has to strike a fair balance between the right to reputation of a public official and freedom of the press. The position at common law which allowed a public official to recover damages for defamatory publications needs to be altered. It is argued by some scholars as will be shown in the research that the right to freedom of the press should be enhanced and afforded more protection than should the right to reputation of public officials. It is argued that it is not enough to strike a balance between the two rights; the other should be more protected.

[11] The Penal Code (Chapter 87 of the Laws of Zambia)

1.3 JUSTIFICATION FOR THE RESEARCH

This study is justified on the ground that the law as it stands in Zambia in relation to the protection of the reputation of public officials is not conducive as it fails to meet the international standard as set in various international instruments. Different pieces of legislation need immediate attention as they provide unnecessary wide protection of public officials' reputation. The law relating to sedition, publication of false news, banning of publications as well as criminal defamation are among such laws. These laws have had the effect of undermining serious scrutiny by journalists and members of the public on the conduct of public officials. A democracy requires that people who manage public affairs are put on inquiry on their conduct by any interested member of the public without facing any hardships and any legislation that in effect defeats this democratic requirement in essence takes away freedom of the press.

The importance of freedom of the press cannot be over emphasised. Some scholars such as Prof. Chanda[12] observed that:

> "The Constitution by prohibiting the legislature from passing laws that may derogate from the freedom of the press underscores the indispensable role the press plays in the realisation of freedom of expression. Without a free press, freedom of expression will just be an illusion."

In addition, press freedom has a bearing on the development of any given country as a properly informed citizenry makes informed and well reasoned decisions. Public officials

[12] Prof. Alfred Chanda, Article on Freedom of Expression in Zambia (www.zamlii.zm) visited on 25th of August, 2006

are put on alert as every illegal or underhand dealings are likely to be reported by the press once it comes to their attention. This makes public officials to work in a more transparent and open manner thereby reducing the escalating levels of abuse of public resources in the country.

1.4 OBJECTIVES OF THE STUDY

The main objective of the study is to show how the law as it relates to the protection of the reputation of public officials in Zambia hinders or curtails the enjoyment of press freedom. This objective will be achieved by reference to different pieces of legislation that have had the effect of unreasonably protecting the reputation of public officials while undermining press freedom. The other objective of this research is to reduce or eliminate government control or interference with operations of the media so that freedom of the press is seen to manifest in everyday life of modern Zambia.

1.5 ORGANISATION OF THE RESEARCH

The first chapter will deal with the meaning of the law of defamation and the constitutional protection of the reputation of individuals generally. The chapter will *inter alia;* make a distinction between a private individual and a public official. The chapter will also seek to justify why this distinction is necessary in a democratic country. The second chapter is going to deal with the constitutional protection of press freedom in Zambia and how this freedom has been prejudiced or curtailed by different pieces of legislation in the effort of protecting the reputation of public officials. The third chapter is going to deal with the effects of the pieces of legislation cited in chapter two which have

a chilling effect on freedom of expression and freedom of the press *viz a viz* development, corruption, transparency and accountability. It is contended in this chapter that restricting freedom of expression and freedom of the press is one thing, while the effect of restricting such freedom is another.

The fourth chapter will deal with International Instruments on the topic. Some of the instruments which will be consulted will include the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the African Charter on Human and Peoples Rights. This will inform the research on how Zambia is fairing at the regional and international levels with regard to the topic under consideration. The fifth chapter will conclude the research by making conclusions and offering some recommendations in the effort of reforming the law as it stands with respect to press freedom and defamation of public officials.

1.6 **MEANING OF DEFAMATION**

Prof. Chanda[13] defines defamation in the following terms:

> "Defamation is the publication of a statement which reflects on a person's reputation and tends to lower him in the estimation of right thinking members of society generally or tends to make them shun or avoid him. The defamatory meaning of the communication may be apparent on its face or it may arise from extrinsic circumstances, which the plaintiff is then required to prove."

Lord Atkin in *Sim v Stretch*[14] said that:

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[13] Prof. Alfred Chanda, Article on Freedom of Expression in Zambia (www.zamlii.zm) visited on 25th of August, 2006

> "Defamatory words were words which tend to lower the plaintiff in the estimation of right thinking members of society generally. The statement may lower the plaintiff in the estimation of right thinking people by exposing him to hatred, contempt or ridicule."

Defamation is made up of two torts, i.e. libel and slander. McKendrick[15] observes that libel is defamatory statement contained in a permanent form. The commonest way in which libel is committed is by writing. However, it may be committed in other ways as long as it is in a permanent form. Thus in *Monson v Tussauds Limited*[16], the defendants were held to have committed a libel against the plaintiff in displaying a wax-work effigy of him near the 'Chamber of Horrors' in their wax-works. It was held that a wax work could be a libel as it was in a permanent form. Lopes LJ stated that:

> "Although libels are generally in writing or printing ... this is not necessary; the defamatory matter may be conveyed in some other permanent form. For instance, a statue, a caricature, an effigy, chalk marks on a wall, signs, or pictures may constitute a libel."

Slander, on the other hand, is defamatory statement which is not in a permanent form, such as spoken statement.[17]

It is important to appreciate that there is civil and criminal defamation. Civil defamation in Zambia is regulated by the Defamation Act[18], while criminal defamation is provided

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[14] (1936) 2 All ER 1237
[15] Mckendrick, (1991) LLB Tort Textbook p.196
[16] (1894) 1 QB 671
[17] Mckendrick, (1991) LLB Tort Textbook p.196
[18] Chapter 68 of The Laws of Zambia

for in the Penal Code.[19] Substantive provisions of these pieces of legislation will be considered later in the work.

1.7 THE CONSTITUTIONAL PROTECTION OF THE REPUTATION OF INDIVIDUALS

It is important to note that the Zambian Constitution guarantees freedom of expression as well as protecting the reputation of an individual. The two are important in every democracy and a proper balance has to be struck to ensure that the enjoyment of one does not prejudice the enjoyment of the other.

Article 20 (1)[20] provides that:

> "Except with his own consent, a person shall not be hindered in the enjoyment of his freedom of expression, that is to say, freedom to hold opinions without interference, freedom to receive ideas and information without interference, 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
> (2) Subject to the provisions of this Constitution, a law shall not make any provision that derogates from freedom of the press.
>
> (b) that is reasonably required for the purpose of protecting the reputations, rights and freedoms of other persons or the private lives of persons concerned in legal proceedings, preventing the disclosure of information received in confidence, maintaining the authority and independence of the courts, regulating educational institutions in the interests of persons receiving instruction therein, or the registration of, or regulating the technical administration or the technical

[19] Chapter 87 of the Laws of Zambia
[20] The Constitution of Zambia (Chapter 1 of the Laws of Zambia)

> operation of, newspapers and other publications, telephony, telegraphy, posts, wireless broadcasting or television."

The inclusion in the Zambian Bill of Rights of the freedom of expression and protection of reputations shows the importance attached to the two. However, a rigorous protection of the reputation of persons has a chilling effect on the enjoyment of freedom of expression as well as freedom of the press. The situation is made worse if the reputation so protected is that of a public official. There should be wider protection of freedom of expression and of the press in relation to public officials whose function affects public welfare. McKendrick[21] observes that:

> "The tort of defamation seeks to protect the interest of an individual in his reputation. Where a defendant makes an untrue statement about the plaintiff, the plaintiff will have a right of action against the defendant unless the defendant can establish one of the many defences available in defamation action. The courts are required to balance the interest of the individual in the protection of his reputation against the freedom of speech of the person who makes the allegedly defamatory statement. Some of the statements which are alleged to be defamatory are statements which are critical of the government or statements on matters of public interest. Thus a person who is in fear of being sued in a defamation action will be discouraged from citicising the government or from making statements on matters of public interest and a fundamental principle of democracy will be undermined."

[21] Mckendrick, (1991) LLB Tort Textbook p.195

1.8 DISTINCTION BETWEEN A PRIVATE PERSON AND A PUBLIC OFFICIAL-THE JUSTIFICATION

A public official holds a position that attracts him/her to the arena of critical scrutiny by the public. This is so because of the fact that a public official's function and decisions affect the lives of people in society or a country and thus people feel they have something at stake. Some jurisdictions (such as the American) have made a clear distinction between the legal protection of reputation of public officials and private individuals.

In *New York Times v Sullivan*[22], 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*[23], and *Associated Press v Walker*[24], the Supreme Court extended the Sullivan rule to apply to all "public figures", reasoning 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.

Zambian courts have unfortunately failed to apply the principle in the Sullivan case. In *Sata v The Post Newspapers Limited*[25], the court opted to follow the Australian view which in effect maintained the common law position which allows a public official to maintain an action for damages for defamation of his character. Chief Justice Ngulube,

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[22] 376 U.S. 254 (1964)
[23] 388 U.S. 130 (1967)
[24] 389 U.S. 28 (1967)
[25] (1992) HP/1395 Unreported

while accepting some of the principles enunciated in Sullivan, rejected others. He stated that Article 20 of the Constitution recognises both the freedom of the press and the right to reputation. A balance has to be struck but he did not consider that a good balance can be struck by shifting the burden or standard of proof; nor by straining to discover a new qualified privilege; nor by immunising falsehoods to any greater extent than the Defamation Act already provides. Chief Justice Ngulube went on to say that:

> "I would reject 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."

Chief Justice Ngulube endorsed the rejection of the principle laid down in *New York Times v Sullivan*[26]; in the Australian case of *Theophanus v The Herald and Weekly Times Limited and Another*[27], in which the High Court of Australia stated, inter alia, the law of defamation, whether common law or statute law, must conform to the implication of freedom, even if conformity means that plaintiffs experience greater difficulty in protecting their reputations. The interests of the individual must give way to the requirements of the Constitution. At the same time, the protection of free communication does not necessitate such a subordination of the protection of individual reputation as appears to have occurred in the United States.

The effect of failing to fully appreciate the distinction in the legal protection to be accorded to public officials and private persons is considered in the succeeding chapter.

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[26] 376 U.S. 254 (1964)
[27] (1994) 182 CLR 104

CHAPTER TWO

2.0 CONSTITUTIONAL PROTECTION OF REPUTATION AND WEAKNESSES

The second chapter deals with the critique of the Constitutional protection of freedom of expression and of the press in Zambia. Other pieces of legislation that have a chilling effect on the enjoyment of freedom of expression and of the press are also considered. Further, the chapter compares the derogations permitted under the Zambian Constitution and those that are permitted under international instruments on the enjoyment of freedom of expression and of the press. As already mentioned in the previous chapter, the Republican Constitution of Zambia guarantees freedom of expression as well as that of the press. Article 20[28] provides that:

> "(1) Except with his own consent, a person shall not be hindered in the enjoyment of his freedom of expression, that is to say, freedom to hold opinions without interference, freedom to receive ideas and information without interference, 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.
>
> (2) Subject to the provisions of this Constitution, a law shall not make any provision that derogates from freedom of the press.
>
> (3) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this Article to the extent that it is shown that the law in question makes provision-
>
> (a) That is reasonably required in the interests of defence, public safety, public order, public morality or public health; or

[28] The Constitution of Zambia (Chapter 1 of the Laws of Zambia)

(b) That is reasonably required for the purpose of protecting the reputations, rights and freedoms of other persons or the private lives of persons concerned in legal proceedings, preventing the disclosure of information received in confidence, maintaining the authority and independence of the courts, regulating educational institutions in the interests of persons receiving instruction therein, or the registration of, or regulating the technical administration or the technical operation of, newspapers and other publications, telephony, telegraphy, posts, wireless broadcasting or television; or

(c) That imposes restrictions upon public officers; 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."

It is clear from the above provision that freedom of expression and of the press is not absolute. There are restrictions that are placed on the exercise of this freedom. Derogations are necessary in order to strike a balance between the enjoyment of this freedom and the rights of other persons who may suffer injury if others were let to enjoy freedom of expression and freedom of the press without a limit. However, such derogations must be provided for by law. In addition, any of the restrictions must serve one of the legitimate purposes or aims contained in the text. Finally, a restriction must be shown to be necessary.

It is submitted, therefore, that as much as the law should recognise freedom of expression and of the press it should also put a limit on the enjoyment of these freedoms to avoid their abuse. Without limitations to freedom of expression and freedom of the press, peoples' reputations would be destroyed without any recourse to the law. This would be

an unfortunate development in a country that upholds long founded tenets of democracy. The important question that we should address our minds to is, 'what sort of restrictions or derogations should be permitted in the enjoyment of freedom of expression and freedom of the press?'

Various international instruments are instructive on this issue. The European Convention on Human Rights (ECHR) for example, provides in Article 10 that:

> "(1) Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
>
> (2) The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or the rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

In the case of *Ibrahim Incal v Turkey*[29], the European Court of Human Rights stated that in order to find a violation of Article 10, the applicant must establish that there has been an "interference" with his or her rights. Where there has been such an interference, the burden of proof is upon the government to show that the interference was "prescribed by

[29] Case No. 41/1997/825/1031

law", that it was "pursuant to a legitimate aim", and finally, that it was "necessary in a democratic society" in order to achieve that aim.

The European Court of Human Rights held in *Sunday Times v the United Kingdom*[30], that in order to be prescribed by law, a restriction must be "formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able - if need be with appropriate advice - to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail." The test of prescribed by law thus requires both that the law in question is drafted with precision and that the conduct in question foreseeably falls within the ambit of that law.

Accessibility of a restriction is indeed an important aspect to look into when considering whether such restriction is prescribed by law. Many provisions in our statutes are drafted in what may be referred to as 'lawyers' language', which may not be understood by an ordinary person. The language used is generally not easy to understand by a layperson. Law should not be a preserve of lawyers alone but every person or individual who may be subject to it.

On a restriction having a legitimate aim, Prof. Chanda[31] argued that such a restriction must be in furtherance of and genuinely aimed at protecting one of the permissible

[30] 26th April, 1979, Series A, No. 30, para. 49
[31] Prof. Alfred Chanda, Article on Freedom of Expression in Zambia (www.zamlii.zm) visited on 25th of August, 2006

grounds in the Convention. He added that a restriction was only necessary if it was reasonable or desirable. There should be a display of a pressing social need.

Further, in *Lingens v Austria*[32], the European Court of Human Rights observed that:

> "The limits of acceptable criticisms are accordingly wider as regards a politician than as regards a private individual. Unlike the latter, the former inevitably and knowingly lays himself open to close scrutiny of every word and deed by both journalists and the public at large and must consequently display a greater degree of tolerance."

In *Hector v Attorney General of Antigua and Barbuda*[33], the Judicial Committee of the Privy Council considered the compatibility of a public order law provision with the Constitutional guarantee of free expression, a guarantee which, it should be noted, mirrors the terms of Article 10 of the European Court of Human Rights. The provision at issue made it an offence to publish statements "likely to cause fear or alarm in or to the public, or to disturb the public peace, or to undermine public confidence in the conduct of public affairs." In that seminal judgment the Privy Council struck down the law, holding:

> "In a free and democratic society it is almost too obvious to need stating that those who hold public office in government and who are responsible for the public administration must always be open to criticism. Any attempt to stifle such criticism amounts to political censorship of the most insidious and objectionable kind."

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[32] (1986) 8 EHRR 425
[33] (1990) 2 AC 312 at p. 315

It is clear from the decisions of the European Court of Human Rights that freedom of expression and of the press should be guarded jealously and the state should not be seen to have an easy way in imposing restrictions or derogations. Public officials who manage public affairs should be more tolerant to criticisms otherwise transparency and accountability which are among the tenets of a democracy would seriously be prejudiced.

2.1 DEROGATIONS PERMITTED UNDER THE ZAMBIAN CONSTITUTION

The important question to ask is, 'how do the derogations permitted under the Zambian Constitution compare with the international standards indicated above?' The lack of definition of the grounds on which a derogation is permitted under the Zambian Constitution makes it difficult for a person to regulate his or her conduct so as to appreciate instances when the derogations would be justified. Indeed, despite the protection accorded to freedom of expression and freedom of the press in the Constitution, the manner in which the derogation clause is drafted in effect takes away the freedom so guaranteed. Some scholars have argued that the manner in which the Constitution guarantees freedom of expression and that of the press is in such a way that the freedom can be taken away at any time for whatever reason. The learned author Prof. Chanda[34] observed that:

> "It is quite evident that this 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. 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

[34] Prof. Alfred Chanda, Article on Freedom of Expression in Zambia (www.zamlii.zm) visited on 25th of August, 2006

> restrictions imposed by the State by giving a broad interpretation to this clause. This has happened in a number of cases in Zambia. 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 Convention, Article 19 of the International Covenant on Civil and Political Rights and the Universal Declaration of Human Rights."

As clearly shown, the standard imposed under the Zambian legal system is less stringent when it comes to justifying a derogation under Article 20 (3) of the Constitution than it is in international instruments because all that has to be shown is that the restriction is merely "reasonable" or "desirable". A pressing social need need not be demonstrated by the authorities imposing the derogation. Therefore, the Zambian legal system should endeavour to fashion its laws in conformity with the standard set at international level otherwise democracy will continue being elusive in our country.

Further, for a derogation to be valid under the Zambian Constitution, it must be reasonably justifiable in a democratic society. However, the Constitution does not define what constitutes a democratic society. This in effect gives a lot of discretion to judges to determine what may constitute any of the undefined grounds of justifying derogations under Article 20 (3) of the Constitution.

The necessity of restrictions imposed upon freedom of expression, particularly political expression, for the purpose of safeguarding public order in a democratic society should be premised on tolerance, pluralism and open-mindedness. These factors are intrinsic in a democratic society. The European Court of Human Rights envisages a democratic society

as an evolutionary society founded upon freedom of expression. Political speech, even provocative political speech, is afforded special protection because of its unique role as guarantor of democracy. This bedrock principle of free expression has been recognised eloquently in landmark judgments by the European Court of Human Rights which has stated:

> "Freedom of political debate is at the very core of the concept of a democratic society...."[35]

National courts have also recognised the key importance of freedom of expression. In a landmark decision, the U.S. Supreme Court held:

> "The framers of the Constitution recognised the risks to which all human institutions are subject. But they knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones. Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law- the argument of force in its worst form. Recognising the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed."[36]

It is clear from the above exposition that the American Constitution was amended in order to pave way to freedom of expression and of the press so that tolerance, pluralism and open-mindedness which are intrinsic in democratic society are guaranteed in debates.

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[35] Lingens v Austria, 8th July 1986, Series A, No. 103, para. 42
[36] New York Times v Sullivan (1964) 376 U.S. 254 at p. 270

There are many laws that have impeded the enjoyment of freedom of expression in Zambia. Many of such laws were imposed by our former colonial power (Britain) in order to hinder the indigenous citizens from freely expressing themselves in matters that affected them. However, the repressive laws were not repealed at independence. Some of the laws that have had a chilling effect on the enjoyment of freedom of expression and of the press are considered below.

2.2 **DEFAMATION**

The law of defamation is important as it is aims at protecting the reputations of persons. Both the Constitution of Zambia, in Article 20(3)(b), and international and regional instruments, recognise the need to protect reputations. Therefore, it needs to be borne in mind that freedom of expression is not a license for destroying the reputations of other persons. 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 fear to publish certain information for fear of legal suits. This would be an unfortunate development in a democratic society as the voice of the media and of the people would be taken away. Members of the public may be reluctant to provide information to the press or the authorities for the same reason. Public debate of national issues may thus be hindered by defamation law.[37]

[37] Prof. Alfred Chanda, Article on Freedom of Expression in Zambia (www.zamlii.zm) visited on 25th of August, 2006

To achieve an optimum balance between the conflicting interests, it is important that the supreme law (Constitution) makes a distinction between the protection of the reputation of a public official and that of a private individual. It was argued in the previous chapter that the law should allow more scrutiny on public officials as opposed to private persons as their actions are purely of public interest. Important also is the need to strike a fair balance between the two conflicting freedoms i.e. the right to ones' reputation and freedom of expression and of the press. If this is not done, the enjoyment of one of the said freedoms would prejudice the other.

In addition to civil defamation, the Penal Code[38] provides in Section 69 for criminal defamation i.e. (defamation of the President). Section 69 of the Penal Code provides that:

> "Any person who, with intent to bring the President into hatred, ridicule or contempt, publishes any defamatory or insulting matter, whether by writing, print, word of mouth or in any other manner, is guilty of an offence and is liable on conviction to imprisonment for a period not exceeding three years."

Such laws as defamation of the President are retrogressive on the enjoyment of freedom of expression and of the press. There is no definition of what constitutes insulting matter and the Penal Code does not give an option for a fine if a person is convicted. The Supreme Court in *Fred M'membe, Bright Mwape v The People and Fred M'membe, Matsautso Phiri and Goliath Mungonge v The People*[39], failed to render the contentious

[38] Chapter 87 of the Laws of Zambia
[39] (1996) S.J. S.C.Z. Judgment No. 4 of 1996

Section 69 inconsistent with the Republican Constitution. The Court stated *inter alia,* that Section 69 was neither overbroad nor vague and the appellants contention that the section did not amount to 'law' as it was overboard and vague failed. The Court further stated on the question of whether Section 69 was reasonably justifiable in a democratic society that it was of the opinion that it would not be authority for the non-criminalisation of defamation of the President just because there may be other measures to counter-act attacks to him. There was no pervasive threat inherent in Section 69 which endangered the freedom of expression.

This is indeed unfortunate as the Supreme Court should have held in favour of the appellants as Section 69 of the Penal Code is clearly a fetter to the enjoyment of freedom of expression and freedom of the press.

2.3 **SEDITION**

Section 57(1) of the Penal Code[40] prohibits sedition. Any person who does any of the following is guilty of an offence and is liable for a first offence to imprisonment for seven years.

> "(a) does or attempts to do, or makes any preparation to do, or conspires with any person to do, any act with a seditious intention;
>
> (b) utters any seditious words;
>
> (c) prints, publishes, sells, offers for sale, distributes or reproduces any seditious publication;
>
> (d) imports any seditious publication, unless he has no reason to believe that it is seditious."[41]

[40] Ibid.

Section 60(1) defines a seditious intention as an intention -

> "(a) to advocate the desirability of overthrowing the government by unlawful means...; or
>
> (b) to bring into hatred or contempt or to excite disaffection against the government ...; or
>
> (c) to excite the people of Zambia to attempt to procure the alteration, otherwise than by lawful means, of any other matter in Zambia...; or
>
> (d) to bring into hatred or contempt or to excite disaffection against the administration of justice in Zambia; or
>
> (e) to raise discontent or disaffection among the people of Zambia; or (f) to promote feelings of ill-will or hostility between different parts of the community; or
>
> (g) to promote feelings of ill-will or hostility between different classes of the population in Zambia; or
>
> (h) to advocate the desirability of any part of Zambia becoming an independent state or otherwise seceding from the Republic; or
>
> (i) to incite resistance, either active or passive, or disobedience to any law or the administration thereof."

The proviso to this section says that an intention shall not be taken to be seditious if it is an intention:

> "(i) to show that the government have been misled or mistaken in any of their measures; or
>
> (ii) to point out errors or defects in the government or Constitution or in legislation or in the administration of justice, with a view to the reformation of such errors or defects; or
>
> (iii) to persuade the people of Zambia to attempt to procure by lawful means the alteration of any matter in Zambia; or

[41] Section 57 of the Penal Code (Chapter 87 of the Laws of Zambia)

(iv) to point out, with a view to their removal, any matters which are producing or have a tendency to produce feelings of ill-will or hostility between different classes of the population of Zambia."[42]

It is sad to note that the value of these defenses is diluted by section 60(2), which stipulates that in determining whether the intention with which any act was done, any words were spoken, or any document was published, was or was not seditious, every person shall be deemed to intend the consequences which would naturally follow from his conduct at the time and under the circumstances in which he so conducted himself. Such provisions are clearly a fetter on press freedom and freedom of speech generally. Prof. Chanda[43] argued that in a democratic society many of the activities prohibited by section 60(1) are normal and therefore need not be prohibited. Opposition parties, for example, work day and night to create disaffection against the government so that they can be elected at the next elections. The section is more pernicious owing to the fact that even truth is no defence.

Indeed, the law of sedition definitely has a chilling effect on the enjoyment of freedom of expression and freedom of the press. Such laws undermine democracy as they take away the voice of the opposition political parties. A government that lacks popularity is likely to use such laws to weaken its opponents and when that happens, the situation degenerates into a dictatorship.

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[42] Ibid.
[43] Prof. Alfred Chanda, Article on Freedom of Expression in Zambia (www.zamlii.zm) visited on 25th of August, 2006

2.4 POWER TO BAN PUBLICATIONS

Section 53(1) of the Penal Code[44] grants the President absolute discretion to prohibit any publication or series of publications published within or outside Zambia, that he considers to be contrary to the public interest. What constitutes the public interest is within his sole discretion. The section provides that any person who imports, publishes, sells, offers for 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 *Shamwana v Attorney General*[45]. 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.

It is clear that the Judge in this case took the easy way out. The learned justice sought to protect the President's powers under Section 53 of the Penal Code. It is the opinion of the

[44] Chapter 87 of the Laws of Zambia
[45] (1981) ZR 221 (HC)

author that this case shows just how much loyalty some judges attach to the President. There is no such thing as unchallengeable discretionary power. The courts have power to check abuse of discretionary power where the said power is exercised unreasonably, or in bad faith or where the person concerned takes into account irrelevant considerations or fails to take into account relevant considerations, or acts under dictation. Section 53 is clearly incompatible with democracy, as the existence of a free press is entirely dependent on the goodwill of the President. As long as we have timid judges who are reluctant to review the President's actions this power will continue to be abused.[46]

Judges have had the tendency of shielding or protecting the executive branch of government especially the President as they feel that they owe their loyalty to the same. This is an unfortunate development as it leads to loss of confidence in the judiciary and once this happens the whole legal system is susceptible to collapse. It is therefore submitted that judges should be made more independent and neutral for democracy to make some significant growth.

2.5 PUBLICATION OF FALSE NEWS

Section 67(1) of the Penal Code[47] stipulates that any person who publishes, whether orally or in writing or otherwise, any statement, rumour or report which is likely to cause fear and alarm to the public or to disturb the public peace, knowing or having to believe that such statement, rumour or report is false, is guilty of an offence and is liable to

[46] Prof. Alfred Chanda, Article on Freedom of Expression in Zambia (www.zamlii.zm) visited on 25th of August, 2006

[47] Chapter 87 of the Laws of Zambia

imprisonment for up to three years. This provision has a chilling effect on the freedom of the press as journalists publish stories at their own risk. In the case of *Thorgeirson v Iceland*[48], 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 factual support for the allegations is clearly stated. In this case, a journalist alleged that police brutality was on the increase and called for measures to ensure better police oversight. He made various factual allegations but was excused from having to prove their truth because he had made clear that they were based in part on public opinion, rumours and stories.

The third chapter is going to deal with the effects of the laws cited above which broadly protect the reputations of public officials *viz a viz* development, corruption, transparency and accountability.

[48] Application No. 13778/88 of 1992

CHAPTER THREE

3.0 THE EFFECTS OF THE VARIOUS PIECES OF LEGISLATION CITED IN CHAPTER TWO

The third chapter examines the effects of the pieces of legislation cited above which have a chilling effect on freedom of expression and freedom of the press *viz a viz* development, corruption, transparency and accountability. It is contended in this chapter that restricting freedom of expression and freedom of the press is one thing, while the effect of restricting such freedom is another.

It is clear that the success of a nation depends to a large extent on the caliber of public officials undertaking or performing various roles of a public nature. However, the service delivery by public officials depends on a number of issues. If a public official knows that the media is weak, it would be very unlikely for him/her to deliver to expectation as there almost nobody independent to watch over him/her. A free and independent media is therefore an essential requirement in this regard.

As was argued in the previous chapter; certain laws are retrogressive on the enjoyment of freedom of expression and freedom of the press. The effects of such laws are felt in every aspect of life as the public officials who benefit from the enforcement of such laws manage affairs that affect every person who is subject to their authority. The paper will however, narrow down to four areas of interest that are disadvantaged owing to such retrogressive laws which were discussed in the previous chapter and these are effects on development, corruption, transparency and accountability.

3.1 EFFECTS ON DEVELOPMENT

Every country aims at achieving development in order to improve the lives of its people. Even developed countries desire to add more development to their already existing development. The task of development is actually huger for a developing country like Zambia. With laws drafted in the manner as shown in the previous chapter on civil and criminal defamation; publication of false news; sedition and power to ban publications; it is evident that public officials are somewhat shielded by the law as they are able to control the flow of information and make the enjoyment of freedom of expression and freedom of the press under their control. Such a development is very undemocratic as it takes away the essential voice of the citizenry. In such a scenario, there will obviously be a negative impact on the development of a nation as there is an inhibited media and scrutiny of public officials is almost non-existent. It was observed by Carrington and Nelson[49] that:

> "The existence of a free and functioning media, long associated with any successful democracy, turns out to have equally strong links with market economies capable of growth, job creation, and poverty alleviation. The link of a functioning media to economic progress has lifted questions of media freedom and viability out of a purely political sphere of discussion. If a flourishing press seems to go hand-in-hand with better economic outcomes including measures such as lower child mortality then institutions like the World Bank and the United Nations Development Program must begin to support media development as one of the contributing elements in a broader economic and social development."

[49] www.usinfo.state.gov/ifpri.org-visited on the 2nd of October, 2007

The independence of the media has to be appreciated in a broader sense; it should not be merely seen as a fist fighting those in government, but rather as a forum under which development can be fostered. The appreciation of the media in driving an economy forward should not only be an issue to be addressed by international organisations such as the World Bank, but rather an issue to be addressed by each and every country and Zambia is no exception.

The important link between the media and development was clearly noted by Dr. Fundanga[50] who stated that:

> "We in the Bank believe that an effective or indeed a well informed media is key in the country's development efforts..."

The words of the Governor of The Bank of Zambia sums everything up. The effectiveness of the media is certainly a crucial ingredient of development. The only question to be addressed is 'how effective is the Zambian media?' The answer to this question was given in the previous chapter when it was argued that laws on civil and criminal defamation; publication of false news; sedition and power to ban publications make the Zambian media to underscore on effectiveness as there is lack of independence created by such laws. Because of lack of a free media in Zambia, government can afford to spend resources meant for development carelessly or on unnecessary things at the

[50] Speech by Dr Caleb M Fundanga, Governor of the Bank of Zambia, at the official opening of the Bank of Zambia 12th Media Seminar, Ndola, 5 October 2007 (http://www.bis.org)- visited on 2nd of November, 2007

expense of the Zambian tax payer. According to the Zambian Auditor-General's report over a 20 year period, it is estimated that about K348, 244 billion worth of public money is either misappropriated, stolen or grossly mismanaged every year in Zambia. That translates to K6, 964 trillion between 1984 and 2004, based on the average of misappropriated monies, revenue and expenditure losses.[51] With such huge sums of government money going to waste, one only wonders how Zambia is going to have meaningful development.

3.2 EFFECTS ON THE FIGHT AGAINST CORRUPTION

Corruption levels in Zambia are still very high. Despite there being some effort to fight the scourge, less or little seems to be achieved. Corruption retards the economic growth of any country. The fight against corruption in Zambia needs everyone's participation especially the media so that scandals bordering on the same are put to light. To fully equip the media in fighting corruption, laws should be more protective of them as against a public official. The situation that is created by retrogressive laws on freedom of expression and freedom of the press is one where the media has to expose corruption cases at their own peril or risk. The arms of government are quick to respond and with laws such as power to ban publications vested in the Republican President, one wonders how free information flow is in Zambia. Public officials who may be involved in corruption have so much power vested within themselves by the law which can ultimately help in concealing their corrupt practices or activities.

[51]http://www.transparency.org/pulications/newsletter/2007- visited on the 5th of October, 2007

Christine Munalula[52]; the former Executive Director of Transparency International Zambia observed that:

> "The media has a strategic role to play in informing and educating society on the dangers and evils of corruption. Investigative reporting by the media is necessary to expose corruption. Currently, there are many laws, particularly certain sections of the Penal Code relating to sedition, publication of false alarm, defamation and libel that hinder reporting on corruption. The State Security Act, National Assembly Powers and Privileges Act and the Parliamentary and Ministerial Code of Conduct Act, also place serious constraints on the ability of the media to report corruption. It is to be observed that most of these media laws have their origins in the colonial era and are at variance with the current democratic dispensation. Government ownership of the media and interference has a stifling effect on reporting on corruption. Private media, however also suffers from ownership, interference and editorial policy impediments."

The former Executive Director further submits that:

> "The fight against corruption will be strengthened by enacting laws which protect sources of information (whistle blowers)."[53]

It is regrettable to note that the media in Zambia has faced many arrests and harassments when it covers subject matter which is not in the interest of government especially on bordering on corruption exposition of public officials. This clearly retards the fight against corruption. Common sense clearly shows that a country cannot claim to be

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[52]Communique Issued at The End of The Transparency International Zambia/ZIMA Media Training Workshop on The Theme "The Role of the Media in Combating Corruption" on the 5th of September, 2001 (http://www.tikenya.org)- visited on the 8th of October, 2007

[53] Ibid.

democratic without freedom of information. Needless to mention that secrecy impedes the political education of a community and a political climate is generated in which the citizen views government not with responsibility and trust, but with malevolence and distrust. Notable instances of government interference on the media includes the arrest of Post Newspaper Managing Editor Fred M'membe and the closure of Radio Phoenix. Munalula[54] stated that:

> "We are concerned about the manner in which the arrest of Fred M'membe has been carried out. The whole process has been characterised by a lot of intimidation and abuse of authority. We particularly condemn the harassment of his innocent children and the police brutality administered to his workers. We expect a government that prides itself as being transparent and accountable to be slow to harass institutions through which people can access and give out information and thus confirming the view that while the media has a special role to play it has a particular vulnerability when it comes to countering corruption as governments are more likely to intimidate, arrest and close down to suppress flow of information. The more open and transparent a society is, the more information becomes available within the public."

Radio Phoenix was closed in August 2001, a few weeks before the 2001 parliamentary and presidential elections. The then Information Minister, Vernon Mwaanga, stated that government had closed Radio Phoenix due to failure to renew their operating license.[55] It was however evident that the closure was more of a political move than as was claimed by the Minister. The Post in their Editorial[56] stated that:

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[54] Transparency International Zambia: "Press Statement on the Closure of Radio Phoenix and Arrest of Post Managing Editor Fred M'membe".
[55] The Post, Monday 20th August, 2001, p. 1
[56] The Post, Wednesday 22nd August, 2001, p. 12

> "Vernon Mwaanga's argument that Radio Phoenix has been closed because they have not paid their license renewal fees is a cheap excuse. The obvious and well known fact is that the MMD government was not pleased with Radio Phoenix political programmes which gave many of our people a chance to comment on our leaders' corruption and failure to adhere to tenets of good governance."

On the closure of Radio Phoenix, Sakwiba Sikota[57] put it in these words:

> "The closure of Radio Phoenix and the manner it was executed shows that the government was hell bent on muzzling the independence press."

3.3 EFFECTS ON TRANSPANRENCY AND ACCOUNTABLITY

Transparency and accountability are among the basic tenets of a democracy and a government that runs short of the same is doomed to fail. A free and independent media plays an important role in enhancing transparency and accountability. The concepts of transparency and accountability have been identified by the UN countries, collectively and individually, as part of the founding principles of public administration. As such, these principles need to be espoused and seen to be practiced by the leadership within the UN System and in all member countries.[58] Transparency refers to unfettered access by the public to timely and reliable information on decisions and performance in the public sector. On the other hand accountability refers to the obligation on the part of public

[57] The Post, Monday 20th August, 2001, p. 1

[58] The UN Charter in Article 101 states: "The paramount consideration in the employment of the (UN) staff shall be the necessity of securing the highest standards of efficiency, competence and integrity." In addition, many Member States identify integrity, transparency and accountability among core values or founding principles for their public administrations in their constitutions and relevant laws not limited to probity, impartiality, fairness, honesty and truthfulness."

officials to report on the usage of public resources and answerability for failing to meet stated performance objectives.[59]

There have been instances in which the Zambian Government acted in a manner that displays a high level of lack of transparency and accountability by resorting to shutting the media in their work of providing information to the public. The government has been able to do this by resorting to retrogressive laws that have a chilling effect on the enjoyment of freedom of expression and freedom of the press. For example, the Zambian police arrested three "Post" editors and banned edition 401 before it was distributed in February 1996. The censored report revealed that the government was secretly planning to hold a constitutional referendum without allowing the public time to prepare. The online edition was also banned, becoming the first instance of internet censorship in Africa, and remains banned today.[60]

Further, the Chiluba government when confronted with a series of articles questioning the integrity of then Vice President Godfrey Miyanda, the speaker of parliament, Robinson Nabulyato, declared on 27th February, 1996, that editor-in-chief of The "Post" Fred M'membe, Managing Editor Bright Mwape and Columnist Lucy Sichone had been 'in contempt of parliament.' He imposed a fine of 1,000 kwacha on the journalists and ordered them imprisoned until they apologised. Opposition parties said the incident

[59] http://unpan.un.org- visited on the 20th of November, 2007

[60] web.missouri.edu- visited on 13th of September, 2007

showed that the ruling Movement for Multi-Party Democracy, was no better than the one-party regime it replaced.[61]

With such undemocratic tendencies that have been displayed by the government in Zambia in the past, one sees clearly how much control is being exercised on the media by the government. Sadly though, is the fact that transparency and accountability is highly undermined if the media is controlled and harassed in the manner in which the government has in the past done.

It has also been observed that the other areas where the government shows a poor record are opposition parties' access to the media, incompetence of the National Electoral Commission, and harassment of journalists critical of the government (press freedom in Zambia is rated as not free by Freedom House).[62]

The fourth chapter is going to examine the derogations permitted under the Zambian Legal System and those permitted under various international instruments in greater detail.

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[61] The African Observer, 29th February- 13th March 1996 at p. 2

[62]Freedom House, a non-profit, nonpartisan organisation, is a clear voice for democracy and freedom around the world. Through a vast array of international programs and publications, Freedom House is working to advance the remarkable worldwide expansion of political and economic freedom. (http://www.demcoalition.org/pdf/K_Zambia.pdf)- visited on the 10th of November, 2007

CHAPTER FOUR

4.0 COMPARISON OF THE DEROGATIONS PERMITTED UNDER THE ZAMBIAN CONSTITUTION AND THOSE PERMITTED UNDER REGIONAL AND INTERNATIONAL INSTRUMENTS

The fourth chapter compares the derogations permitted in Zambia and those permitted under various regional and international instruments on the enjoyment of freedom of expression and freedom of the press in greater detail. The chapter shows that the derogations under the Zambian Constitution undermines or have a chilling effect on the enjoyment of freedom of expression and of the press. The laws that derogate from freedom of expression and freedom of the press in Zambia clearly give more protection on the reputation of public officials at the expense of a private individual's reputation.

The paper considers the derogations permitted under the Universal Declaration on Human Rights (UDHR), the African Charter on Human and Peoples Rights (ACHPR), derogations permitted under the International Covenant on Civil and Political Rights (ICCPR) and those permitted under the American Convention on Human Rights (ACHR).

The Zambian Constitution guarantees and limits freedom of expression and freedom of the press in Article 20. Despite this protection of freedom of expression and freedom of the press in the Constitution, the derogations imposed therein, as was clearly argued in chapter two are drawn in broad terms. It is submitted that the two fundamental freedoms

that are guaranteed in Article 20 of the Constitution are actually taken away by the derogation clause.

4.1 DEROGATIONS PERMITTED UNDER THE AFRICAN CHARTER ON HUMAN AND PEOPLES RIGHTS

The African Charter on Human and Peoples Rights to which Zambia is a party recognises freedom of expression and freedom of the press. Article 9 of the Charter[63] reads:

> "(1) Every individual shall have the right to receive information.
>
> (2) Every individual shall have the right to express and disseminate his opinions within the law."

The African Commission on Human and Peoples Rights has had an opportunity of interpreting the above provision of the Charter. According to the Commission:

> "Article 9 reflects the fact that freedom of expression is a basic human right, vital to an individual's personal development, his political consciousness, and participation in the public affairs of his country."[64]

The Commission adds that:

> "Article 9 does not seem to permit derogation, no matter what the subject of the information or opinions and no matter the political situation of a country. The failure to provide individuals with reasons for, for example, their deportation, constitutes a violation of article 9 (1)."[65]

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[63] The African Charter on Human and Peoples Rights
[64] Ankumah, (1996) The African Commission on Human and Peoples Rights, Practice and Procedures p.129
[65] Ibid p. 16 and 24

Since the Charter does not seem to provide for limitations on the right to express one's opinions, the limitations contained in the Zambian Constitution are not clearly permitted under it. This of course is not to suggest that derogations are not necessary, they are, but they should be drawn in clear terms. The only legitimate reasons for limitations on the rights and freedoms of the African Charter can be found in Article 27(2). Article 27(2)[66] stipulates that:

> "The rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interest"

The African Commission on Human and Peoples' Rights stated inter alia in the case of *Constitutional Rights Project, Civil Liberties Organisation and Media Rights Agenda v Nigeria,*[67] that national law can not set aside the right to express one's opinions guaranteed at the international level. The Commission further stated that prohibition of a publication without giving the writer the opportunity to defend himself and without the clarity that the publication is a threat to national security or public order, constituted a violation of Article 9 (2) of the African Charter. Harassment of the press not only has the effect of hindering certain persons in disseminating their opinions, but also poses a risk that journalists and writers will subject themselves to self-censorship in order to be allowed to carry on their work.[68] It is a well known fact that public officials in Zambia just rush to ban publications without requesting for an explanation as contended by the African Commission on Human and People's Rights.

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[66] The African Charter on Human and Peoples' Rights
[67] Communications 140/94, 141/94, 145/95 (1999)
[68] Ibid.

4.2 DEROGATIONS PERMITTED UNDER THE UNIVERSAL DECLARATION ON HUMAN RIGHTS

Freedom of expression is guaranteed by the Universal Declaration of Human Rights (UDHR) under Article 19 which provides that:

> "Everyone has the right to freedom of opinion and expression; this right includes the right to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers."[69]

Although the UDHR is not binding on states because it has been adopted as a General Assembly Resolution, it is considered applicable customary law by a number of domestic systems.[70] The UDHR does not provide for any derogations on the enjoyment of freedom of expression and freedom of the press.

4.3 PERMITTED DEROGATIONS UNDER THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

Zambia is a party to the International Convention on Civil and Political Rights (ICCPR) following its accession on April 10, 1984.[71] The International Covenant on Civil and Political Rights (ICCPR) [72] provides that:

> "Everyone shall have the right to freedom of expression; this right shall include freedom to seek,

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[69] Universal Declaration of Human Rights (UDHR), adopted December 10, 1948, G.A. Res. 217A(III), U.N. Doc. A/810 at 71 (1948).

[70] http://www.thecommonwealth.org- visited on the 28th of September, 2007

[71] www.ohchr.org/english/bodies/hrc/docs/ngos/LGBTShadow_Zambia.pdf- visited on the 28th of September, 2007

[72] International Covenant on Civil and Political Rights (Article 19)

> receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art or through any other media of his choice."

It should further be noted that Article 19 (3) of the ICCPR declares that a state may restrict freedom of expression to protect the rights and reputations of others, safeguard national security and public order, and protect public health or morals. The importance of free media in a democratic society has been highlighted by the UN Human Rights Committee:

> "The free communication of information and ideas about public and political issues between citizens, candidates and elected representatives is essential. This implies a free press and other media able to comment on public issues without censorship or restraint and to inform public opinion."[73]

All instruments recognise that freedom of expression has to be subjected to limitations in the interests of the rights of others and of larger society. However, there is need to ensure that the limitations regime is not abused. There should therefore be 'limitations' on 'limitations'. The law in Zambia does not seem to put limitations on limitations, the powers vested in the authorities are so enormous that derogating from the exercise of freedom of expression and freedom of the press can be justified on any grounds.

[73] Human Rights Committee, General Comment 25, The Right to Participate in Public Affairs, Voting Rights and the Right of Equal Access to Public Service, U.N. Doc. CCPR/C/21/Rev.1/Add.7 (1996), para. 25.

4.4 PERMITTED DEROGATIONS UNDER THE AMERICAN CONVENTION ON HUMAN RIGHTS

Article 13 of the American Convention on Human Rights provides that:

> "(1) Everyone has the right to freedom of thought and expression. This right includes freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one's choice.
>
> (2) The exercise of the right provided for in the foregoing paragraph shall not be subject to prior censorship but shall be subject to subsequent imposition of liability, which shall be expressly established by law to the extent necessary to ensure:
>
> (a) respect for the rights or reputations of others; or
>
> (b) the protection of national security, public order, or public health or morals.
>
> (3) The right of expression may not be restricted by indirect methods or means, such as the abuse of government or private controls over newsprint, radio broadcasting frequencies, or equipment used in the dissemination of information, or by any other means tending to impede the communication and circulation of ideas and opinions."

As has been shown in the regional and international instruments, there should be clarity and certainty in the drafting of a derogation clause so that citizens fully understand and appreciate what the clause aims at achieving. In other words, the derogation clause should not be absurd.

The next chapter will conclude and propose recommendations.

CHAPTER FIVE

5.0 CONCLUSIONS AND RECOMMENDATIONS

It has been established in the previous chapters that the Zambian legal system is very restrictive in the enjoyment of freedom of expression and freedom of the press. It does not conform to the international standards as set by international and regional instruments that have been considered in this research. The first chapter dealt with the meaning of the law of defamation and the Constitutional protection of the reputation of individuals generally. The chapter inter alia, made a distinction between a private individual and a public official and justified why such distinction is necessary in a democratic country in the protection of reputation. The second chapter dealt with the Constitutional protection of freedom of expression and freedom of the press in Zambia and how this freedom has been prejudiced or curtailed by different pieces of legislation in the effort of protecting the reputation of public officials. The third chapter considered the effects of broadly protecting the reputations of public officials in the light of development; fight against corruption; transparency and accountability. It was observed in that chapter that a media that lacks independence impacts negatively on development, fight against corruption, on transparency and accountability. The fourth chapter looked at some of the international and regional instruments on the topic and compared them with the standard set by Zambia. The instruments which were consulted included the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR), the African Charter on Human and Peoples Rights (ACHPR) and the American Convention on Human Rights (ACHR). It was seen that Zambian laws on civil and criminal defamation, sedition, publication of false news as well as power to ban

publications had a serious chilling effect on the enjoyment of freedom of expression and freedom of the press. It was shown that Zambia has a lot of home work to do in order to meet the standard set at both regional and international level on the permitted grounds of derogating from these two freedoms. Important to remember though, is the fact that, not all is lost for Zambia on this topic as there is always room for improvement. Conclusions and recommendations are considered in this chapter.

CONCLUSIONS

In conclusion it can be stated that the importance of freedom of expression and freedom of the press in a democracy can not be over emphasised. It is said to be the life blood of a democracy.[74] As was demonstrated in the work, the importance of freedom of expression and freedom of the press triggered the first amendment to the United States Constitution (Bill of Rights). This clearly demonstrates how important this freedom is in the advancement of democracy. Freedom of expression and freedom of the press are basic rights, so basic that they are to be considered synonymous with democracy.[75]

Having seen how important freedom of expression is in a democracy, it is important to see in what ways the same can be enhanced under the Zambian Legal System so that the law is not ambiguously or unnecessarily drafted for the sole purpose of safeguarding the reputation of public officials at the expense of private individuals' reputation. It is important that government levels the play ground so as to accommodate all stake holders

[74] Prof. Chanda, Article on Freedom of Expression in Zambia (www.zamlii.zm)- visited on the 25th of August, 2006

[75] Prof. Kasoma, (1992) Report Presented to ACCE Conference "Press Freedom and African Charter of Human Rights

in the enjoyment of freedom of expression and freedom of the press. There should be cultivated a culture in our leaders that will make them understand that the media is not a political tool to be used in the bid of prolonging their stay in power. Freedom of expression and freedom of the press should be viewed as an important tool of airing concerns of both those in government and the governed.

RECOMMENDATIONS

5.1 ENHANCING THE CONSTITUTIONAL PROTECTION OF FREEDOM OF EXPRESSION AND FREEDOM OF THE PRESS

There is need for the Constitution to guarantee freedom of expression and freedom of the press in very clear and precise terms. As was observed:

> "Any restriction on freedom of the press and other media must be prescribed by law. That law must be accessible, unambiguous, drawn narrowly and with precision so as to enable the individuals to foresee whether particular action is unlawful."[76]

The Constitution of Zambia which is the supreme law of the land should also make a distinction between the protection of the reputation of a public official and the protection of the reputation of private individuals. As was shown in the paper, the public officials should be more susceptible to criticisms for democracy to flourish than should private individuals.

[76] Report of The Task Force on Media Law Reform, January, 2000 p.24

5.2 NEED FOR ENACTMENT OF FREEDOM OF INFORMATION LAW

There should also be, in addition, a freedom of Information Bill passed into law. An attempt to enact such a law in Zambia was blocked when the bill was withdrawn from parliament. As was observed, the Zambian government thwarted attempts by the Zambia Independent Media Association (ZIMA) and six opposition members to table three bills to ensure greater freedom of the press, deciding to introduce its own media freedom bills instead. The campaign had hoped to introduce three bills - the Freedom of Information Act (FOIA), Independent Broadcasting Act (IBA) and the Zambia National Broadcasting Corporation Act (ZNBCA) to address difficulties faced by the media in Zambia, where media freedom is not enshrined in the Constitution. The speaker of parliament, Amussa Mwanamwambwa said on that the bills could not be allowed to go through because they would require the government to spend money on creating the new institutions proposed in them and approval was first needed for this from the finance ministry. "I therefore will not allow the bills to be tabled in their form [without government consent]. The law is clear on such matters," Mwanamwambwa said.[77] This clearly shows how unwilling some public officials are in enacting new media laws in Zambia that will seek to protect freedom of expression and freedom of the press.

Scores of journalists from various media organisations both private and public were joined by several non-governmental organizations to commemorate World Press Freedom Day in Lusaka May, 2007. Minister of Information Mike Mulongoti was also present at the commemoration and was commended by the former Zambia Union of Journalists (ZUJ) president Isabel Chimangeni for being the first Minister of Information

[77] www.foi.missouri.edu/foiintelligence/presidentlevy.html- visited on the 13th September, 2007

to grace the occasion since the celebrations started 15 years ago. She urged journalists to adhere to their professional ethics in order to win in their quest for the freedom of information (FOI) bill. On the freedom of information bill, Mulongoti said government's concern was on the consequences of the information that was accessed. To date, the Freedom of Information Bill which was withdrawn from parliament has not yet gone back to parliament to re-table its enactment. The question that remains unanswered is, 'why is government against the enactment of freedom of information law'? Is it that they do not want the public to have access to public documents? And if so how come South Africa, for instance, has managed to enact a similar law. There is no justification for stopping the bill to pass into law.

5.3 NEED TO REPEAL CERTAIN PROVISIONS OF THE PENAL CODE

The Penal Code should be amended so that it does away with provisions that hinder or restrict the enjoyment of freedom of expression and freedom of the press. Laws such as Defamation of the President, sedition, Publication of False News and Power to Ban Publications should be repealed. These laws were enacted by our colonial masters who made sure that the indigenous peoples' voices were not heard in their quest of attaining independence. Surely should such laws be retained in democratic Zambia after four decades of independence? Zambia is a free country and freedom of expression should be guaranteed as set by international and regional instruments.

5.4 NEED FOR A MORE IMPARTIAL JUDICIARY

In addition, the judiciary should have impartial judges who will not serve the interest of the executive arm of government which has been the tendency in most cases involving the executive especially the president on violation of freedom of expression and freedom of the press. This biasness was clearly seen in the case of *Shamwana v Attorney General*[78], where Justice Florence Mumba held that the President had acted within powers conferred on him by section 53 of the Penal Code (power to ban publications) and that the President's opinion was not open to question and that his decision following upon such an opinion could not be impugned. This is unfortunate as it is trite law that there is no such thing as unfettered discretion.

5.5 THE NEED TO CHANGE THE MINDSET OF PUBLIC OFFICIALS

There is also need for public officials to change their mind set so that they view freedom of expression and freedom of the press as being a tool for achieving development, enhancing of transparency and accountability as well as enhancing the fight against corruption. Politicising freedom of expression will not help our country achieve significantly in any sphere of life. Laws therefore, should be formulated that will create a free and independent media in Zambia and this will only be done if there is political will in our public officials.

If these recommendations are implemented, the future of freedom of expression and freedom of the press in Zambia is very promising.

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[78] (1981) ZR 221 (HC)

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