



# Decriminalisation of Laws Limiting Freedom of Expression in Africa: Zambia Country Report

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## Preface

Across the world, there exist numerous criminal laws which restrict the enjoyment of the right to freedom of expression, as guaranteed by numerous international and regional human rights treaties as well as national constitutions. These laws which are generally relics of colonial times, have nevertheless continued to be used, and in some cases further strengthened by post-colonial governments. In Africa, offences such as sedition, criminal defamation, criminal libel, publication of false news and insult remain on the statute books of most countries. In recent times, anti-terrorism laws are increasingly being utilised to 'criminalise' free speech.

While many governments justify the continued maintenance of these laws on grounds such as protecting national security and the right to privacy, in reality, this is rarely the motivation for their use. Rather, these laws are routinely utilised to stifle public debate and legitimate criticism on issues of national interest such as corruption, lack of respect for the rule of law and poor service delivery. For some, the mere knowledge of the existence of these laws induces self-censorship. For others who remain undeterred, their eventual arrest, charge, conviction or sentencing and the attendant consequences on their professional and personal lives, becomes their lived reality. Inevitably, the existence and use of these laws creates an unfavourable climate for the promotion and protection of all human rights, limits the accountability of elected officials, hinders the effectiveness of democratic institutions and ultimately stunts democratic governance.

The African Commission on Human and Peoples' Rights (African Commission) recognising the important role of freedom of expression in the realisation of other human rights has continuously reiterated that these criminal laws constitute a violation of the right of freedom of expression. Thus, the Declaration of Principles on Freedom of Expression in Africa, adopted by the African Commission in October 2002, in principle 12 states that individuals should not be 'liable for true statements, opinions or statements regarding public figures, which it was reasonable to make in the circumstances'; requires public figures to 'tolerate a greater degree of criticism; and prohibits the imposition of sanctions which are 'so severe as to inhibit the right to freedom of expression'.

Furthermore, in a communication submitted to the African Commission by Kenneth Good against the Republic of Botswana, the African Commission reiterating principle 12 of the Declaration stated that a high level of tolerance is expected when political views are expressed and 'an even higher threshold is required when it is directed towards the government and government officials'. Again, in November 2010, the African Commission adopted a resolution, ACHPR/Res169 (XLVIII) 2010: Resolution on Repealing Criminal Defamation Laws in Africa. This resolution called on states parties to the African Charter to repeal criminal defamation and insult laws and to 'refrain from imposing general restrictions that are in violation of the right to freedom of expression'.

On my part, I have consistently appealed to Member States of the African Union to decriminalise media offences through my Activity Reports, presented to each Ordinary Session of the African Commission, as well as through numerous letters of appeal sent to heads of states, expressing concern about the application of these laws. It was with this in mind that during the 52<sup>nd</sup> Ordinary Session of the African Commission held in October 2012 in Cote d'Ivoire, I announced the launch of a pan-African campaign for the decriminalisation of laws that restrict freedom of expression, to be implemented under my leadership.

It was thus as part of this this campaign, that a multi-country research into the use and impact effect of laws criminalising freedom of expression in Benin, Burundi, Lesotho, Tanzania, Zambia and Zimbabwe, was commissioned in September 2013, with the principal objective of providing a solid evidence base of the effects of these laws on freedom of expression.

This report on Lesotho, as with all the other 5 country reports, provides empirical evidence of the use and impact of laws criminalising freedom of expression in Lesotho. The findings of this research will most certainly be useful in future engagements by the African Commission and my mandate with the government of the Republic of Lesotho in encouraging the decriminalisation of these laws. It is also my earnest hope that freedom of expression activists in Lesotho and beyond, will find the information provided in this research useful, in championing the cause for the repeal of the relevant criminal laws in Lesotho.

A handwritten signature in black ink, reading "P. Tlakula". The signature is written in a cursive, flowing style.

Pansy Tlakula

Special Rapporteur on Freedom of Expression and Access to Information in Africa

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## Acronyms and abbreviations

CSO:	Civil Society Organisations
ECZ:	Electoral Commission of Zambia
FDD:	Forum for Democracy and Development
FODEP:	Foundation for Democratic Process
FOI:	Freedom of Information
IBA:	Independent Broadcasting Authority
MECOZ:	Media Council of Zambia
MIBL:	Ministry of Information, Broadcasting and Labour
MIBS:	Ministry of Information and Broadcasting Services
MISA:	Media Institute of Southern Africa
MMD:	Movement for Multiparty Democracy
NGO:	Non Governmental Organisation
OSISA:	Open Society Initiatives for Southern Africa
PAZA:	Press Association of Zambia
PF:	Patriotic Front
PSAf:	Panos Institute Southern Africa
SACCORD:	Southern African Centre for the Constructive Resolution of Disputes
UNESCO:	United Nations Educational Scientific and Cultural Organisation
UNIP:	United National Independence Party
UPND:	United Party for National Development
ZAMEC:	Zambia Media Council
ZAMWA:	Zambia Media Women Association
ZANIS:	Zambia News and Information Services
ZDLC:	Zambia Law Development Commission
ZIALE:	Zambia Institute of Advanced Legal Education
ZIMA:	Zambia Independent Media Association
ZNBC:	Zambia National Broadcasting Corporation

## Introduction

In 1991 Zambia attracted a lot of attention at both sub-regional and continental level after peaceful elections and transition from one party state to multiparty politics. The country attained its independence from Britain in October 1964 and up until 1972 enjoyed plural politics. The constitution was in 1973 amended and that constitution turned the country into a one-party participatory democracy under the United National Independence Party (UNIP). The country under the new constitution underwent a turbulent period of mixed fortunes until 1990 and when elections were held in 1991 a newly formed Movement for Multiparty Democracy (MMD) easily won the elections in October 1991.

Zambia has a population of 13,092,666<sup>1</sup> more than half of whom are found in the urban area. The country is divided into ten provinces and although there are 73 Zambian languages or dialects, seven of them are recognised as the national languages, while English remains the official language. Minerals, mainly copper and non-traditional exports are the main foreign exchange earners for Zambia, even though tourism has in recent years also contributed considerably.

The advent of multiparty politics under liberalisation of the market economy spread over to the media industry where the airwaves were opened up for a host of privately owned radio and television stations and many privately owned newspapers were allowed, alongside government owned electronic and print media.

Since 1991 Zambia has held four presidential, parliamentary and local government elections in 1996, 2001, 2006 and 2011, but a presidential by-election was held in September 2008 after the incumbent president died in office in August 2008. The elections of 1996, 2001, 2006 and 2008 resulted in continued rule under the MMD, while in the September 2011 presidential, parliamentary elections, Mr. Michael Sata, president of the Patriotic Front (PF) won the elections and his party came into power.

The foregoing therefore provides the backdrop of the pilot study on the experience of the freedom of expression and access to information in Zambia. In this regard there are a number of existing laws that impede to the extent of criminalising freedom of expression. Whereas it would have been expecting too much for Zambia under one-party rule of UNIP to improve the legislative environment to improve the freedom of expression, nothing much was done during the 20-year era of the MMD as it vacillated in its policies, while the country has, under the PF and its promising<sup>2</sup>, been despatched to a 'wait-and-see' bay as talk about an Access to Information Bill is continually being refined by the office of the attorney general in readiness for possible public preview before tabling it in parliament in 2013.

## Section One: Background and context

### 1.1 International and constitutional legislative framework

This section gives a broad background to existing legal instruments that have a bearing on freedom of expression, starting with international and regional ones that Zambia has ratified. The section also gives a brief outline of the constitutional process, judicial system and law reform process before outlining a broad overview of the media landscape in Zambia.

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<sup>1</sup> Republic of Zambia, CSO 2010 Census of Population and Housing Population Summary Report, March 2012

<sup>2</sup> Patriotic Front Manifesto 2011-2016 49



### 1.1.1 International, African Union and sub-regional legal instruments

Zambia has ratified the following international, continental and sub-regional legal instruments relating to freedom of expression:

	Treaty Title	Signature date	Ratification Date	Deposit Date	Reservations
1	International Covenant on Civil and Political Rights (1966)	10.04.1984 (accession)			None
2	First Option Protocol to the International Covenant on Civil and Political Rights (1966)	10.04.1984 (accession)			None
3	International Convention on the Elimination of all Forms of Racial Discrimination (1966)	04.02.1972			None
4	Convention on the Rights of the Child (1989)	06.12.1991			None
5	African Charter on Human and People's Rights (1981)	10.01.1984			None
6	Constitutive Act of the African Union (2000)	12.07.2000	21.02.2001	01.03.2001	
7	Declaration of Principles on Freedom of Expression in Africa (2002)				
8	African Charter on Democracy, Elections and Governance	31.01.2010	31.05.2011	08.07.2011	
9	Declaration on Democracy, Political, Economic and Corporate Governance (2002)				
10	Universal Declaration of Human Rights	01.12.1964			
11	The Windhoek Declaration on Promoting an Independent and Pluralistic African Press (1991)	Via UNESCO 1991			
12	Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights	09.06.1998			
13	Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa	03.08.2005			
14	Protocol on the Amendments to the Constitutive Act of the African Union	03.08.2005			

It is imperative that any international treaty or declaration is domesticated through an act of the Zambian Parliament for it to have legal effect; otherwise it remains a useful guideline of how to handle certain situations in conformity with international or regional standard. Therefore, strictly speaking an international treaty has no legal binding on Zambia. An exception to this position is that Zambia has incorporated provisions for the civil and political rights in Part III of the current constitution.

In the case of *Standard Chartered Bank Zambia Limited v. Peter Zulu and 118 others*, on 13 November 1997 the Supreme Court of Zambia, 'having concluded that international law could be a source of law for interpreting the Constitution, dismissed the applicant's argument concerning

reference to international law.’ Standard Chartered Bank Zambia Limited instituted proceedings before the Court which had to decide, among other issues, on the legality of reference to international conventions with reference to Article 14(2) of the Zambian Constitution, Zambia having ratified some of them.<sup>3</sup>

The Supreme Court adjudged an appeal where employment contracts were transferred from one company to another without seeking the employees’ consent thereby constituting ‘forced labour’. The court held that the transfer of that nature contravened Article 14(2) of the Zambian Constitution, which prohibited forced labour, as well as the International Labour Organisation Conventions No. 105 of 1957, No. 122 of 1964 and No. 158 of 1982 which Zambia had ratified.

Notwithstanding the fact that Zambia observes a dualist legal system, judges in Zambia have taken judicial notice of the import of international law and conventions, as illustrated by *Sara Longwe v Intercontinental Hotels*, *Edith Nawakwi v Attorney General* and *Sata v Post Newspapers Ltd and Another*<sup>4</sup>.

In the case of *Sara Longwe v Intercontinental Hotels*, Ms Longwe, a human rights and gender activist petitioned the High Court against the Intercontinental Hotels for refusing her access to the hotel on account of being unaccompanied by a male partner. She viewed such policy of the hotel as being contrary to article 23 of the constitution. In her petition Ms Longwe made reference to the provisions of the Convention on the Elimination of all forms of Discrimination against Women (CEDAW) and to the African Charter on Human and Peoples Rights.

High Court Justice Claver Musumali in ruling in Ms Longwe’s favour said:

It is my considered view that ratification of such documents by a nation state without reservation is a clear testimony of willingness of the State to be bound by the provisions of such a document. Since there is willingness, if an issue comes before court by which would not be covered by local legislation but would be covered by such international document, I would take judicial notice of that treaty or Convention in my resolution of the dispute.

In the case of *Edith Nawakwi v Attorney General*, Ms Nawakwi petitioned the High Court against the chief passport officer who had disqualified Ms Nawakwi from including her children in her passport without consent from their biological father. Such consent was not demanded of a male parent, but only from a female parent.

Ms Nawakwi sought redress against discrimination citing the provisions of article 23 of the constitution and the provisions of CEDAW to be granted her wish.

When Chief Justice Matthew Ngulube gave judgment on behalf of the bench in the case of *Sata v Post Newspapers Limited and Another* he made reference to the First and Fourteenth Amendments to the US Constitution, to Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms, namely the European Convention which guarantees freedom of expression, to Article 19 of the ICCPR, and to Article 9 of the African Charter on Human and Peoples Rights.

The foregoing references to international treaties and conventions by the Zambian judges is indicative of the value and relevance found in these treaties. Such reference by one branch of government should motivate the other two branches of government to take measures to

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<sup>3</sup> *Use of International Law by Domestic Courts – Compendium of Court Decisions*, December 2007, International Training Centre ILO 152.

<sup>4</sup> M Hansungule ‘Domestication of international human rights in Zambia’ in M Killander (ed) *International law and domestic human rights litigation in Africa* (2010) 74-78 [www.academia.edu/928630/chapter](http://www.academia.edu/928630/chapter) in international law and domestic human rights litigation in Africa. Accessed on 22 May 2013

domesticate various international treaties and conventions that Zambia has already ratified and those to be ratified.

It has been observed elsewhere that the absence of guidelines on domestication of international instruments impeded the “ability of citizens and others to use the law to compel the Zambian government to meet its international obligations, including those recommendations of international treaty bodies.”<sup>5</sup>

As part of a national campaign, it was proposed that lawyers need to be encouraged to cite provisions in international human rights instruments in their submissions to courts in relevant cases. This will compel courts to begin to make reference to the instruments and thereby, contribute to the infusion of international standards in Zambian jurisprudence.<sup>6</sup>

Mr. Enoch Mulembe<sup>7</sup> explained that Zambia observes the dualist legal system which means that international treaties or conventions are not automatically applicable in Zambia. He said there was no provision in the constitution for the direct application of international treaties and therefore the national law takes precedence over all international treaties.

The net effect of the foregoing is that the various treaties ratified by Zambia are not enforceable in the Zambian courts in the event that there is some infringement to any of them. It is pertinent to acknowledge also that article 28 of the constitution does provide for individuals to seek recourse to the Zambian High Court in the event that any of the fundamental rights and freedoms contained in articles 11-26 of Part III of the constitution has been infringed.

### **1.1.2 Constitution**

When Zambia attained its political independence on 24 October 1964 under the Independence Constitution of May 1964 it ushered what is known as the First Republic. The Independence Constitution provided for a representative parliamentary government partly modelled on the British Westminster style, although the presidency of Zambia was an executive one. The Independence Act was followed by a series of minor amendments intended essentially to fulfil constitutional requirements such as increasing the number of cabinet ministers, of constituencies and removing any limitation on the number of ministers.

The country’s independence constitution of 1964 required votes of not less than two-thirds of all members of the national assembly to effect a constitutional amendment, while any change to the provisions of fundamental rights and freedoms of the individual required a national referendum. A first national referendum was held on 17 June 1969. The referendum was a precursor to an imminent major change three years later.

On 25 February 1972, the first republican president, and president at the time of the ruling United National Independence Party (UNIP) Kenneth D Kaunda appointed a 19-member national commission, led by the then vice president, Mr. Mainza Chona, on the establishment of a one-party participatory democracy in Zambia. The commission’s final report presented on 15 October 1972 recommended transforming Zambia from a multiparty state into a one-party state. The constitutional change was formally made in December 1972 when the constitution was amended to enable Zambia become a one-party state. Members elected to parliament on the ticket of African National Congress, an opposition party, in the earlier elections of 19 December 1968, however,

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<sup>5</sup> *Zambia – Justice Sector and the Rule of Law*, March 2013, Open Society Foundations 4

<sup>6</sup> n 5 above 4

<sup>7</sup> interview on 24 January 2013. Mr. Enoch Mulembe is former Director, Human Rights Commission and currently Director of the Zambia Institute of Advanced Legal Education

remained members of parliament until new elections held on the new constitution took place. The new one-party constitution did not come into effect until 25 August 1973 through Act No. 27 of 1973, which officially marked the start of the Second Republic and provided for 125 elected MPs and 10 nominated MPs.<sup>8</sup> Prominent in the new constitution was inclusion of Article 4 (1) which stated

There shall be one and only one political party or organisation in Zambia namely, the United National Independence Party (in this constitution referred to as “The Party”)<sup>9</sup>

During the ensuing period between 1973 and 1990 there was growing discontent as the one-party era was becoming intolerable as a result of the arresting powers that police assumed and detentions of persons perceived to be political rivals. During this period too, the country experienced unprecedented food riots and coup attempts in 1980 and 1990. These events coupled with the fall of socio-political changes in Eastern Europe and the fall of communism in Russia prompted trade union leaders, church leaders, human rights activists, students, civil societies and concerned political leaders to agitate for political change in the country.

In response to the growing unrest in the nation, President Kaunda on 8 October 1990 appointed a constitutional review commission led by a lawyer and at the time solicitor-general, Prof Patrick Mvunga. Although the commission started its work and visits to various parts of the country to gather views of the people on 18 October 1990, political tension accelerated a major constitutional amendment on 17 December 1990 which repealed Article 4 (1) of the constitution. The repeal heralded the return to multiparty politics in Zambia. This marked the third major change in the country’s constitution. As a result the Movement for Multiparty Democracy (MMD) was in January 1991<sup>10</sup> registered finally as a political party. By October 1991, in addition to the MMD and UNIP there were nine other political parties.<sup>11</sup> The Mvunga-lead constitutional review commission completed its work and submitted its report to government on 25 April 1991. The resultant 1991 constitution was enacted on 2 August 1991 and given presidential assent on 29 August 1991.

The 1991 Constitution as Act No. 1 of 1991 provided for 150 elected members of parliament, eight nominated members of parliament and led to multiparty elections held on 31 October 1991. In these elections both UNIP and the MMD contested and the latter successfully secured 125 seats out of the 150 parliamentary seats contested for. Thus President Kaunda lost elections to a trade unionist leader, Frederick Chiluba of the MMD.

The fourth major constitutional change came when on 22 November 1993 President Frederick Chiluba appointed a constitutional review commission led by another lawyer and state counsel, Mr John M Mwanakatwe, hence the commission being known as the ‘Mwanakatwe Constitutional Review Commission’. The commission, like the Mvunga Commission, visited various parts of Zambia to collect people’s views, prepared its report and a draft constitution which contained a number of progressive provisions. On the other hand, in a White Paper No. 1 of 1995 the government rejected most of the recommendations by the Mwanakatwe Commission.

The new constitution was finally enacted and given presidential assent at a public state house ceremony on 28 May 1996. It contained a number of new features such as, for the first time, declaring Zambia as ‘a Christian nation’; a presidential candidate being elected by simple majority and not requiring 50 percent of voters as previously provided; creation of the Electoral Commission of Zambia as an autonomous body, setting up a permanent Human Rights Commission; and banning

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<sup>8</sup> Republic of Zambia, Final Report of the Electoral Reform Technical Committee (ERTC) appointed to Review the Electoral System in Zambia – Summary of Public/Stakeholders Comments on the Interim Report, August 2005 17.

<sup>9</sup> JM Mwanakatwe *End of Kaunda era* (1994) 207.

<sup>10</sup> NM Chibesakunda *The Parliament of Zambia* (2001) 49.

<sup>11</sup> n 6 above 20.

traditional chiefs from partisan politics, which meant therefore aspiring to elective parliamentary seats.

On 17 April 2003 the third republican president Levy P Mwanawasa appointed a fourth constitution review commission chaired by a lawyer, Mr Willa Mung'omba. The 'Mung'omba Constitutional Review Commission', like the previous commissions undertook nation-wide tours to obtain views of the people and submitted its report and draft constitution to government in December 2005. As a result of the commission's recommendations, a National Constitutional Conference was established, by an act of parliament.

There were some reservations from some sectors of the public with the way the conference conducted its work and proceedings. As a result the draft constitution bill that was eventually tabled before parliament failed to receive the requisite two-thirds support from the members of parliament. So the draft constitutional bill was rejected, suggesting introspection by the government and a new long haul in constitutional review.

It should be noted that the national commission for the establishment of a one-party participatory democracy in Zambia, Mvunga Constitutional Commission and the Mwanakatwe Constitutional Commission were appointed under The Inquiries Act, Cap 181 of the Laws of Zambia. Review of the Zambian Constitution under the Inquiries Act has been limited by Clause 5 which stipulates:

It shall be the duty of the commissioners, or where a single commissioner is appointed, of that commissioner, to make a full, faithful and impartial inquiry in accordance with the terms of the commission concerned and to report the result of the inquiry to the President.

From the foregoing series of constitutional review commissions, it was evident that the search for a republican constitution that would 'stand the test of time' had so eluded the country that within two months of becoming the fifth republican president, Mr Michael C Sata decided to embark afresh on a major constitutional review. The review this time around entailed another look at the work and reports of all previous constitutional commissions. And so on 16 November 2011 President Sata appointed a 'technical committee on drafting the Zambian Constitution' comprising 18 persons, headed by a retired Chief Justice Annel Silungwe. Work of the technical committee is currently in progress. On the other hand, by May 2012 the committee managed to produce a first draft constitution for review and debate by the public and in June 2012 produced a report which provided detailed information along with the rationale for each and every article contained in the draft constitution. Almost one year later, in April 2013 a national convention was held in Lusaka to comprehensively review and adopt or reject various clauses of the draft constitution. All members of parliament in fact participated in the deliberations of the national convention. At the end of the convention, the technical committee proceeded to writing what could be termed as the final draft constitution for onward submission, by 30 June 2013, to the president and thereafter for parliament to consider and enact.

### ***Equality of all before the law***

There is no express mention of or provision for the right of equality of all before the law in the Zambian Constitution. However, there are some provisions in respect of criminal proceedings under Article 18(1) and 18(2) of the constitution. Article 18(1) stipulates:

If any person is charged with a criminal offence, then, unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law

Article 18(2) provides, in part, that ‘Every person who is charged with a criminal offence shall be presumed to be innocent until he is proved or has pleaded guilty.’

In addition, Article 23 contains provisions against any discrimination on grounds of race, tribe, sex, place of origin, marital status, political opinions, colour or creed thus:

23(1) Subject to clause (4), (5) and (7), a law shall not make any provision that is discriminatory either of itself or in its effect.

(2) Subject to clauses (6), (7) and (8), a person shall not be treated in a discriminatory manner by any person acting by virtue of any written law or in the performance of the functions of any public office or any public authority.

The provisions of the article are limited by clause (4) where the effect of other laws that respectively provide for such aspects as appropriation of the general revenues of the country; persons that are not citizens of Zambia; and adoption, marriage, divorce, burial, devolution of property on death are concerned.

### ***Right to freedom of expression and the media***

Protection of freedom of expression and by extension, freedom of the media, is provided for in Articles 20(1) and 20(2) of the constitution. The two articles stipulate as follows:

20(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 20(2) Subject to the provisions of this Constitution a law shall not make any provision that derogates from freedom of the press.

This freedom is however, limited by Article 20(3), which protects among other the ‘interests of defence, public, safety, public order, public morality or public health’ as well as imposing restriction upon public officers. These interests appear in many clauses of other articles, for instance, 17(2) (a), 18(11) (b), 19(5) (a), 20(3) (a), 21(2) (a) and 22(3) (a). On the other hand, both the current constitution, and the proposed draft constitution by the technical committee does not provide any definition of the ‘interests of defence, public, safety, public order, public morality or public health’ as given in Article 20(3). Without clear and unambiguous definition the interpretation remains open as in *Kachasu v Attorney General (1967) ZR 145*; *Patel v. Attorney General (1968) ZR 99*; and *the People v. (Fred) M’membe and Bright Mwape*.<sup>12</sup>

The limitations fail to comply with relevant provisions of Principle 1 of the Declaration of Principles of Freedom of Expression; Article 19(3) of the International Covenant on Civil and Political Rights (ICCPR) to which Zambia acceded in 1984; Principles 1 and 2 of the Johannesburg Principles and the Siracusa Principles. Essentially the limitations in Article 20(3) are too broad and vague: any restriction must be provided by law and reasonably required<sup>13</sup> in any of the interests enumerated in Article 20(3). In addition, the term ‘a democratic society’ should be defined to provide a common guide to a judge hearing a case related to the Article.

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<sup>12</sup> The three cases cited brought to the fore issues of precise interpretation of the charges in relation to the provisions of the constitution and assessing whether these charges were in conflict with the constitution. In the case *Kachasu v Attorney General* raised the issue that the practice of conscientious objection in the meaning of Article 18 of the constitution did not exist in Zambia. In respect of *Patel v Attorney General* the argument was that the Zambian exchange control regulations infringed the Zambian right to property because they were not ‘necessary or expedient’. In the case of *The People v (Fred) M’membe and Bright Mwape* the issue was whether criminal defamation in Section 69 of the Penal Code was in conflict with Article s 20 and 23 of the constitution.

<sup>13</sup> AW Chanda, ‘Freedom of Expression and the Law in Zambia’ in *Zambia Law Journal* Vol. 30 (1998) 128.

The many restrictions on freedom of expression could be attributed to the fact that the provision is a colonial legislation intended to suppress the African struggle for independence, but which the successive nationalist governments, despite multiparty dispensation, have maintained without repealing to prevent criticisms from rival political parties.<sup>14</sup>

### ***Judicial independence***

Article 91(3) of the constitution provides for a judiciary<sup>15</sup> that is 'autonomous and shall be administered in accordance with the provision of an act or Parliament'. In this regard the appointment of judges is protected by the involvement of parliament which ratifies the appointments and the tenure of office of judges is guaranteed by provisions of Articles 96 and 98(1), (2) and (3). The independence and autonomy of the judiciary is further collectively enhanced by the provisions of the (Judicial) Judicature Administration Act No. 42, the Judges Conditions of Service Act No. 14 of 1996 and Judges (Salaries and Conditions of Service) Regulations, 1996<sup>16</sup> which spell out what could be termed, within the Zambian context, unparalleled favourable conditions of service for judges. It should be noted that the said acts and regulations are progressively revised as conditions in the legislature and executive are adjusted upwards.

The judiciary is one of the three branches of the state, the others being the executive and the legislature. Whereas the doctrine of separation of powers is widely espoused in many democratic states in the Commonwealth on the understanding that the legislature makes laws, the judiciary adjudicates and interprets the laws and the executive formulates and implements government policy, absolute separation of powers is non-existent in Zambia because of the need for checks and balances with each branch depending on the other for support.<sup>17</sup> Thus currently ministers, as part of the executive are also members of the legislature while appointments of judges are ratified by the legislature.

The constitutionality of any law and international law in Zambia is assessed by the High Court and an appeal can then be heard by the Supreme Court. The enforcement of protective provisions for the fundamental rights and freedoms of the individual in Part III of the constitution is provided for under Article 28(1). This article empowers any person to seek redress for any contravention of the fundamental rights and freedoms to the High Court, while Article 28(2)(b) provides for any person aggrieved by any determination of the High Court to appeal to the Supreme Court. For instance, in the matter of *Zambia Democratic Congress v The Attorney General* (SCZ Appeal No: 135/1996), the Supreme Court was petitioned to declare the then proposed amendments to the Constitution unconstitutional in that the amendments contained in Articles 34(3)(b) and 35(2) of the Constitution (Amendment) Act bar persons qualified to stand for election as president of the republic under the 1991 Constitution, and deny them the right to participate fully without hindrance in the affairs of government and shaping the destiny of the country and undermine democracy and free and fair elections which are the basic features of the Constitution of 1991<sup>18</sup>.

### **1.1.3 Judicial system**

The judicial system of Zambia is provided for in Part VI of the constitution as outlined in Article 91(1). This article states various divisions and strata that make up the judiciary. These divisions include the

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<sup>14</sup> n 11 above

<sup>15</sup> The Zambian Constitution uses the word 'judicature' to refer to the "judiciary"

<sup>16</sup> G Kunda, 'Zambian Judiciary in the 21<sup>st</sup> Century' in *Zambia Law Journal* Vol. 30 (1998) 42.

<sup>17</sup> BJ Phiri et al *Protecting the Reputation and Standing of the Institution of Parliament and Parliamentarians: A Study of Perceptions, Realities and Reforms in Zambia* (2004) 15-16

<sup>18</sup> [www1.umn.edu/humanrts/Africa/comcases/211-98.html](http://www1.umn.edu/humanrts/Africa/comcases/211-98.html) accessed 18 January 2013

Supreme Court, the High Court, the Industrial Relations Court, the Subordinate Courts, and Local Courts, as well as any other lower courts that may be prescribed by an act of parliament. In addition, there is established under Chapter 47 the Small Claims Courts.

The Supreme Court as provided for in Article 92(1) is the 'final; court of appeal for the Republic and shall have jurisdiction and powers as may be conferred on it by the Constitution or any other law.' The Court is made up of the Chief Justice, Deputy Chief Justice and at least seven other Supreme Court judges. The Supreme Court is also provided for separately under Chapter 25 of the Laws of Zambia.

The High Court is provided for in Article 94(1) and has 'unlimited and original jurisdiction to hear and determine any civil or criminal proceedings under any law and such jurisdiction and powers as may be conferred on it by the Constitution or any other law.' The High Court is also separately provided for under Chapter 27 of the Laws of Zambia. Its jurisdiction does not, however, include proceedings of the Industrial Relations Court.

In terms of Clause (7) of Article 94 the High Court has 'jurisdiction to supervise any civil or criminal proceedings before any subordinate court or any court-martial and make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of ensuring that justice is duly administered by any such court.'

Article 94 (1) provides for the Industrial Relations Court, whose operations are guided separately by the Industrial and Labour Relations Act, and is mandated to adjudicate over all industrial and labour relations matters. The proceedings of this court are presided over by a person, qualified for appointment as a judge with at least ten years of professional legal experience and who enjoys security of tenure similar to any judge. The Industrial Relations Court is a semi-judicial tribunal.

The Subordinate Courts, and Local Courts, under Chapter 28 and 29 of the Laws of Zambia, respectively, have jurisdiction to hear and determine matters referred to them under any law. On the other hand, Local Courts are authorised to apply and enforce customary law mainly in matrimonial and inheritance cases. They can hear and determine criminal and common assaults, but lawyers have no right of audience.

The Small Claims Courts, established under Chapter 47 of the Laws of Zambia handle civil cases from any member of the public, except incorporated entity. The Small Claims Courts resolve disputes through arbitration.

According to Mr. Mulembe<sup>19</sup>, matters or cases affecting freedom of expression are considered as constitutional issues and can be handled only at the High Court level on first hearing and the Supreme Court on the subsequent hearing, never at any of the lower courts.

There is no provision in the constitution for specialised courts or tribunals to adjudicate on or monitor human rights issues. Article 26 of the constitution, however, provides for appointment by the Chief Justice of an ad hoc tribunal to consider matters relating to restrictions and detentions of individuals.

The Human Rights Commission established by Article 125 of the constitution and by an act of parliament, Chapter 48 of the Laws of Zambia, is mandated to monitor and investigate human rights violations or maladministration of justice pertaining to human rights. In addition, the Commission for Investigation, under the Investigator General, also established by an act of parliament, monitors and adjudicates issues of any unfair or discriminatory treatment in the public sector of the country.

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<sup>19</sup> n 3 above



There have been no recent reforms in the judicial system, but changes may be effected, with the establishment of a constitutional court with equal judicial powers and precedence to the Supreme Court, and the setting up of a court of appeal to hear appeals from High Court and from other courts or quasi-judicial bodies, as proposed in the draft constitution.<sup>20</sup>

#### 1.1.4 Law reform process

The power to legislate or make laws in Zambia, as probably elsewhere in the Commonwealth countries, is vested with parliament, as provided for in Article 78 of the country's constitution. The process of making a new law or an amendment can be initiated by either the executive through a government bill presented in parliament as a government bill; by a member of parliament as a private member's bill; or an interested person or body through a member of the back bench of parliament as a private bill. Any bill so presented should procedurally first be introduced during the first reading, then pass through the second reading, committee stage, report stage, and finally the third reading before it is finally presented to the republican president for assent as law.<sup>21</sup> Notwithstanding the foregoing, Article 81 of the constitution restricts members of parliament, except on recommendation of the president through the vice president or a minister, from introducing or presenting any bills that would trigger off financial consequences such as affecting the levels of taxation, revenues, payments and debts.

While parliament legislates, among other major functions, the Zambia Law Development Commission (ZLDC) under the Ministry of Justice is charged with the responsibility of revising and reforming existing laws, in order to meet the socio-political needs of the Zambian society. The ZLDC also responsible for codifying unwritten laws; reviewing and considering proposals for law reform referred to it by the minister of justice or members of the public, translating any piece of legislation into Zambian languages and holding seminars and conferences on legal issues.

According to Mr. Sam Mwapela<sup>22</sup> the commission undertakes research before making recommendations to the minister of justice. He cited an example where the ZLDC developed new legislation in response to public demand and felt need in respect to gender-based violence. He said the Anti-Gender Based Violence Act was developed through a consultative process and various key stakeholders, including non-governmental organisations, were involved. The work of the ZLDC in adopting laws entails receiving submissions from the public for initial assessment and opinion as to the merit for the next stage; receiving directives from the minister of justice; and receiving requests from government departments or ministries that need certain legislation to be worked on. The ZLDC initiates its own work.

Mr. Mwapela explained that the ZLDC held more than three consultative workshops with stakeholders in Kitwe, Lusaka and Livingstone during most of 2012 for the purposes of comprehensively reviewing the Penal Code and the Criminal Procedure Code. The review considered punishment, offences against publications, offences against tranquillity, sexual offences and offences related to marriage.<sup>23</sup> Of particular interest to this Zambia Pilot Study is the fact that the consultative workshops addressed concerns surrounding Section 53 (Prohibited Publications),

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<sup>20</sup> First Draft Constitution of the Republic of Zambia, 23 April 2012.

<sup>21</sup> Republic of Zambia, The Parliament of Zambia – Public Parliamentary Handbook of the Eleventh National Assembly of Zambia 2011-2016 6-7

<sup>22</sup> interview on 31 December 2012. Mr Sam Mwapela is a senior research officer at ZLDC

<sup>23</sup> Review of the Penal Code and Criminal Procedure Code Report, ZLDC August 2012. It is pertinent to record that the author attended the consultative workshop in Livingstone in October 2012 and represented Media Institute of Southern Africa, Zambia Chapter (MISA Zambia). He also utilised the workshop to draw the attention of ZLDC and various stakeholders to various reports and publications that provided rationale and recommendations for media law reforms in Zambia. Since the Livingstone workshop, MISA Zambia has been recognised as a major stakeholder in the work of ZLDC and the author continues to officially represent the media association.

Section 57 (Offences in respect of seditious practices) and Section 69 (Defamation of President) and Section 70 (Expressing or showing hatred, ridicule or contempt for persons) of the Penal Code.<sup>24</sup>

The ZLDC invites stakeholders to meetings to comprehensively debate research findings of any aspect that needs new or amended legislation. Deliberations of various stakeholders country-wide are widely reviewed and collectively validated before a draft bill is finally prepared for submission to the ministry of justice. The bills are also advertised in newspapers or on the website [www.zlhc.org](http://www.zlhc.org) for any additional comments and submissions. After the consultative process is completed, the ministry of justice proceeds with preparing and circulating a cabinet memorandum for various ministries to comment and offer suggestions to enhance the bill before tabling it before parliament.

## 1.2 Media landscape

### 1.2.1 Overview of media landscape

The re-introduction of multiparty politics in 1990, with the Movement for Multiparty Democracy (MMD) coming to government in 1991, also witnessed Zambia embracing wholesale market liberalisation. The media industry was positively affected in that there was a proliferation of privately-owned newspapers, radio stations and television stations. This was a sharp contrast to both the First and Second Republic eras. The rapid emergence of privately-owned newspapers was unfortunately accompanied by sudden closures of some on account of challenges of sustainability. The following tables contain the main newspapers, but excluding magazines, radio stations and television stations in Zambia.

#### Newspapers

	Name	Ownership	Language	Circulation	Orientation
1	<i>Times of Zambia</i> **	Public/Government	English	20 000	General/development
2	<i>Sunday Times of Zambia</i> *	Public/Government	English	20 000	General/development
3	<i>Zambia Daily Mail</i> **	Public/Government	English	15 000	General/development
4	<i>Sunday Mail</i> *	Public/Government	English	15 000	General/development
5	<i>The Post</i> **	Private	English	47 000	General/political
6	<i>Sunday Post</i> *	Private	English	47 000	General/political
7	<i>Daily Nation</i> **	Private	English	1 000	General/political
8	<i>The Moon</i> *	Private	English	1 000	General/ political
9	<i>New Vision</i> **	Private	English	15 000	General/political
10	<i>NBC News</i> *	Private	English	2 000	Construction/business
11	<i>Agri-Coop News</i> ^	Private	English	10 000	Agricultural
12	<i>Supreme Times</i> *	Private/Supreme Times Limited	English	1 000	General/political
13	<i>The Church</i> *	Private	English	1 000	Religious
14	<i>National Voice</i> *	Private	English	1 000	General/political
15	<i>Pulse Health</i>	Private	English		Health
16	<i>The Citizen Gazette</i> *	Private	English	900	Business/general

NB: \*Weekly \*\*Daily ^Monthly

It is important to note that there is no Audit Bureau of Circulation (ABC) in Zambia, so the figures that were obtained directly from various companies were without external independent verification of the information given. Further, other than *The Post*, *Zambia Daily Mail*, *Times of Zambia* and *Daily Nation* newspapers, most of the other newspapers publication is more erratic than predictably weekly.

#### Radio stations

<sup>24</sup> n above 17

	<b>Name</b>	<b>Ownership</b>	<b>Language</b>	<b>Coverage</b>	<b>Orientation</b>
1	Radio Phoenix	Private/commercial	English	Line of rail	General
2	Radio Christian Voice	Private/Christian Vision, England	English	Country-wide and region	Religious
3	Radio Icengelo	Private/Catholic Church	English/Bemba	Copperbelt	Religious
4	ZNBC Radio 1	Public/Government	Seven Zambian languages	Country-wide	General
5	Yatsani Radio	Private/Catholic Church	English/Nyanja	Lusaka	Religious
6	ZNBC Radio 1	Public/Government	English	Country-wide	General
7	ZNBC Radio 1	Public/Government	English	Country-wide	General
8	Oblates Liseli	Private/Catholic Church	English/Lozi	Mongu	Religious
9	Musi-o-Tunya	Private/Catholic Church	English/Toka/Lozi	Livingstone	Religious
10	Yangeni	Private/Catholic Church	English/Bemba	Mansa	Religious
11	Chikuni	Private/Catholic Church	English/Tonga	Monze	Religious
12	Kabangabanga	Private/Catholic Church	English/Kaonde	Solwezi	Religious
13	Radio Maria	Private/Catholic Church	English/Nyanja	Chipata/Eastern Province	Religious
14	Radio Maranatha	Private/Seventh Day Adventist	English/Lenje	Kabwe	Religious
15	Radio FCC		English/Kaonde	Solwezi	Religious
16	Salvation Army Radio	Private/Salvation Army	English/Tonga	Chikankata	Religious
17	Namwianga	Private/Brethren in Christ Church	English/Tonga	Kalomo	Religious
18	Lumba Radio	Private/Lumba Christian Ministry	English/Kaonde	Kasempa	Religious
19	Q-FM	Private/commercial	English	Lusaka	General
20	Sky FM	Private/commercial	English/Tonga	Lusaka - Livingstone	General
21	BBC FM	Public (Britain)	English	Country-wide	General
22	Radio Chikaya	Community	English/Tumbuka/Nyanja	Lundazi	General
23	Radio Lyambai	Community	English/Lozi	Mongu	General
24	Radio Mano	Community	English/Bemba	Kasama	General
25	Radio Breeze	Private/commercial	English/Nyanja	Chipata	General
26	5FM	Private/commercial	English	Lusaka	General
27	Hone FM	Public/educational	English	Lusaka	General
28	Hot FM	Private/commercial	English	Lusaka	General
29	Mkushi FM	Community	English/Swaka/Lala	Mkushi	General
30	Petauke Explorers	Private/commercial	English/Nsenga/Nyanja	Petauke	General
31	Zambezi FM	Private/commercial	English	Livingstone	General
32	UNZA Radio	Public/educational	English	Lusaka	General
33	Radio France International	Public (France)	French/English	Lusaka	General
34	Pasme Radio	Community	English/Nsenga/Nyanja	Petauke	General
35	Yar FM	Private/commercial	English	Kitwe	General
36	Flava FM	Private/commercial	English	Kitwe	General
37	Isoka	Community	English/Namwanga	Isoka	General
38	Luapula Radio	Community	English	Lusaka	General
39	Mwinilunga	Community	English/Kaonde/Lunda	Mwinilunga	General
40	Joy FM	Private/commercial	English	Lusaka	General
41	Itezhi-Tezhi	Community	English/Ila/Tonga	Itezhi-Tezhi	General
42	Mphangwe	Community	English/Nyanja	Katete	General
43	Vision Macha	Community	English/Tonga	Choma	General
44	Feel Free FM	Private/commercial	English/Nyanja	Chipata	General
45	Kariba FM	Private/Commercial	English/Tonga	Siavonga	General
46	Kafue FM	Community	English/	Kafue	General
47	Mpika FM	Community	English/Bemba	Mpika	General
48	Comet FM	Private/commercial	English	Lusaka	General
49	Ama Radio	Private/commercial	English	Lusaka	General
50	Pan Africa	Private/commercial	English	Lusaka	General
51	Millennium FM	Private/commercial	English	Lusaka	General
52	Falls FM	Private/commercial	English	Lusaka	General

53	Komboni FM	Private/commercial	English	Lusaka	General
54	Lutanda	Private/Church	English/Bemba	Kasama	Religious
55	Mazabuka	Community	English/Tonga	Mazabuka	General
56	Solwezi	Community	English/Kaonde	Solwezi	General
57	Chongwe	Community	English/Soli/Nyanja	Chongwe	General
58	Nchelenge	Community	English/Ushi/Bemba	Nchelenge	General
59	Hope	Church community	English/Nyanja	Lusaka	Religious
60	Radio Choice (Defunct)	Private/commercial	English	Lusaka	General
61	Chinwano FM	Community	English/Nyanja	Mfuwe	General
62	Power FM	Private/commercial	English	Lusaka	General
63	Mungu FM	Private/commercial	English/Lozi	Mongu	General
64	Radio Mabiya	Private/commercial	English	Kabwe	General
65	Suwilanjani FM	Community	English/Mambwe	Nakonde	General
66	Lukulu	Community	English/Lozi	Lukulu	General
67	Chimwemwe	Private/commercial	English	Ndola	General
68	Rise Radio	Private/commercial	English	Lusaka	General
69	United Voice	Private/commercial	English	Chingola	General
70	I-Wave Radio	Private/commercial	English	Chingola	General
71	Independent Faith Baptist Mission of Central Africa	Private/church	English/Bemba	Kitwe	Religious

Source: Ministry of Information and Broadcasting Services and MISA Zambia

### Television stations

	Name	Ownership	Language	Coverage	Orientation
1	Multi-Choice	Private/commercial	English	Country-wide	General
2	Trinity Broadcasting Network	Church	English	Line of rail	Religious
3	Muvi	Private/commercial	English	Country-wide	General
4	Mobi International	Private/commercial	English	Limited	General
5	Strong technologies	Private/commercial	English	Free-to-air	General
6	Central Broadcasting Company	Private/commercial	English	Limited	General
7	Copperbelt Broadcasting System	Private/commercial	English	Limited (Copperbelt)	General
8	Prime Television	Private/commercial	English	Lusaka	General
9	EcoNet	Private/commercial	English	Lusaka	General
10	City Channel Cable	Private/commercial	English	Lusaka	General
11	Chipata Television	Private/commercial	English	Chipata	General
12	Go-TV	Private/commercial	English	Free-to-air	General
13	ZNBC 1	Public	English	Country-wide	General
14	ZNBC TV2	Public	English	Line of rail	General
15	North-Western	Private/commercial	English	Solwezi	General

Source: Ministry of Information and Broadcasting Services and MISA Zambia

### News agencies

According to the *Media Directory 2012/13* published by the Ministry of Information and Labour (later renamed Ministry of Information and Broadcasting Services) in 2012, there are two main news agencies, namely the Zambia News and Information Services (ZANIS) and the China News Agency (Xinhua).

ZANIS is the official news agency of the Zambian Government responsible for the distribution of local, regional and international news as well as photo-services to local and international media organisations and individuals.

Xinhua on the other hand, is a Chinese news agency for the People’s Democratic Republic of China.

There are also correspondents of other media agencies such as the Agence France Presse (AFP), Reuters and British Broadcasting Corporation (BBC).

### ***Online newspapers and bloggers***

Internet has provided a valuable platform for online newspapers, which have proved to be very popular with dissemination of news on current events and information on Zambia. The list of these online newspapers or bloggers keeps growing. The following are some of the online newspapers:

- zambianwatchdog.com
- lusakatimes.com
- helozambia.com
- zibanzambia.wordpress.com
- tumfweko.com
- zambianstar.com
- zambia.co.zm
- nkani.com
- nipeze.com
- izambia.com.zm
- zambianguardian
- the zambian
- zambia24
- zambia-weekly.com
- zambianeye.com
- kachepa360
- lusakavoice.com
- mwebantu.com

On account of growing interest in blogging, a Zambian Bloggers Network was established, with the support of Hivos, at the initiative of Ms Brenda Zulu, a journalist/media consultant who runs Africa Interactive Media. The Network has more than 30 members, mainly those based in the country’s capital, Lusaka, who meet once every month to exchange ideas and information as well as encourage training for trainee journalists so that they acquaint themselves with this medium of communication. Some of the bloggers focus attention on technological science, social and gender while others are into social networking through twitter and facebook. Live blogging with spot news dissemination has also taken root among the members of the Network.

### **1.2.2 Internet access**

	<b>Particular</b>	<b>Total</b>
<b>1</b>	Number of mobile phone service providers	3
<b>2</b>	Total internet service providers	23
<b>3</b>	Total subscribers to the internet service providers	92 642

4	Number of fixed telephone lines	82 542
5	Estimated number of fixed telephones per 100 persons	0.6
6	Estimated number of radio sets per 1000 persons	179 <sup>25</sup>
7	Estimated number of television sets per 1000 persons	51 <sup>26</sup>
8	Total number of mobile-cellular phones	10 542 676
9	Estimated number of mobile-cellular phones per 100 persons	80.81
10	Total mobile broadband subscribers	28 992

Information as at 31 December 2012<sup>27</sup>

### 1.2.3 Media Standards/Codes of ethics

The issue of media standards/code of ethics has for a long time in Zambia generated a great deal of interest and concern among media houses, media practitioners and the government. In this regard the latter has insisted on statutory regulation while the media sector has opted for voluntary and self-regulation. Two media organisations, Press Association of Zambia (PAZA) and the Media Institute of Southern Africa Zambia Chapter (MISA Zambia) whose membership is drawn from media practitioners serving in the public media and privately-owned media houses, respectively, formulated separate codes of conduct and media ethics to guide their respective members. Experience is a worthy teacher, and so with the passage of time in 2002, PAZA and MISA Zambia consolidated their codes and ethics and decided to establish one organisation, Media Council of Zambia (MECOZ), and mandated it to monitor compliance with the code of conduct and media ethics and to adjudicate complaints.

The record of MECOZ showed that it was ineffective in its work and moreover, not all media practitioners and media houses belonged to MECOZ or subscribed to its ideals. The structure and constitution were comprehensively reviewed and after considerable groundwork, debates and a series of meetings of key stakeholders comprising media organisations and media practitioners, MECOZ was dissolved and replaced by Zambia Media Council (ZAMEC). The initial constitution of ZAMEC was formally approved on 2 May 2010 and ZAMEC was on 10 November 2010 registered as a company limited by guarantee, governed by articles of association, under the Patents and Companies Registration Agency (PACRA). A number of contentious issues and differences, however, delayed ZAMEC becoming fully operational.

Through the Media Liaison Committee (MLC) comprising PAZA, MISA Zambia, Zambia Media Women Association (ZAMWA), Zambia Union of Journalists (ZUJ), Press Freedom Committee of the Post Newspaper, Zambia Union of Broadcasters and Information Disseminators (ZUBID), Catholic Media Services (CMS), Panos Institute Southern Africa (PSAf) also chairing MLC up to March 2013, and the United Nations Information Centre (UNIC), ZAMEC was progressively restructured, its constitution was further revised for review and formal approval by the members. Unlike MECOZ, whose membership included individual media practitioners, membership of ZAMEC is limited to producers and disseminators of news, meaning institutions, such as radio and television stations and newspapers. The constitution leaves membership of ZAMEC optional rather than compulsory as provided in Article 8 (a) of the constitution, 'Membership of ZAMEC shall comprise the members as appear in the third schedule and all media operating in Zambia as may from time to time be registered or as may be determined by the governing council.' For the time being internet and magazines providers are not included for ZAMEC membership.

According to the constitution ZAMEC will be led by an eleven-member governing council representing different sections of the media, civil societies. The constitution also provides for a full-

<sup>25</sup> Zambia Worldmark Encyclopaedia of Nations, <http://www.encyclopaedia.com> accessed 1 February, 2013

<sup>26</sup> n 23 above

<sup>27</sup> [www.zicta.zm/index.php?option=com\\_content&view=article&id=126&Itemid=56](http://www.zicta.zm/index.php?option=com_content&view=article&id=126&Itemid=56) and [www.zicta.zm/index.php?option=com\\_content&view=article&id=62internet-service-provider&Itemid=111](http://www.zicta.zm/index.php?option=com_content&view=article&id=62internet-service-provider&Itemid=111) Accessed on 14 November 2013

time ombudsman to head the secretariat and a deputy ombudsman. In addition, ZAMEC will have the ethics and complaints, research and publications, finance and administration and appointments committees. The constitution also provides for brief explanatory sections on what is expected in respect of the code of ethics; for the practice of journalism; freedom of expression; reporting of news; discrimination and hate speech, advocacy; comment; payment for articles; violence; access to the journalism profession; editorial independence; and conscience.

ZAMEC's complaints procedure will entail an aggrieved person lodging a written complaint along with any supporting materials, with the ombudsman, who within seven days of receipt should notify the party against whom the complaint has been made. The ombudsman shall request the party against whom the complaint has been made to respond to the complaint within ten working days. Upon receipt of the response the ombudsman shall forward the same to the complainant with the aim of resolving the matter within seven days or assign a date of hearing of the complaint. On the basis of the merit or otherwise of the submission and supporting materials, the ombudsman is mandated to adjudicate and determine the appropriate resolution of the complaint. The ombudsman will communicate the decision to the parties concerned within seven days of reaching the decision, but the party that is not satisfied with the final decision will be at liberty to appeal to the ethics and complaints committee.

The ZAMEC constitution was amended and formally adopted during the annual general meeting on 28 March 2013. And following the annual general meeting, a ten-member national governing council was appointed. It is led by a medical practitioner and consists of media practitioners, civil society organisation leaders and one eminent lawyer.

The national governing council of ZAMEC underwent its orientation on 20 June 2013 and should have become operational. It has, however, not become operational because the original articles of association deposited with the Patents and Companies Registration Agency provides for a board of directors and not a national governing council. So a resolution has to be passed to authorise the change. Furthermore, ZAMEC does not have any premises to operate from or funds to facilitate smooth operations, recruitment of the ombudsman, with supporting staff and to procure requisite equipment and materials.

Insofar as ZAMEC is effectively not operational yet it means that it would be too early to state whether the council will be effective and efficacious.

## **Section Two: Overview of legislation that criminalises expression**

### **2.1 Overview of laws in place**

Freedom of expression in Zambia is criminalised by a number of laws that have been in force since the country attained its political independence. Some of these laws have undergone some minor amendments, while other new laws were enacted long after independence. On account of the nature of their work, media practitioners are more adversely affected by these laws than other professionals. It should also be acknowledged that members of the public are also restricted by these laws. For media practitioners it is normal to obtain news or information for publication from various sources whose identity must be kept confidential. But most of these laws either require at one point or another that the identity be divulged and so the work of practitioners is thereby impeded by the laws. Among these laws are the following:

#### **2.1.1 The Penal Code, Chapter 87 (1 November 1931)**

The act provides for the establishment of a code of criminal law. It contains a number of criminal offences and provides various attendant penalties for any offenders.

The Penal Code contains detailed sections that greatly impact on freedom of expression in Zambia. These sections include:

- a) Prohibited publications
- b) Offences in respect of seditious practices
- c) Publication of false news with intent to cause fear and alarm
- d) Defamation of the president
- e) Defamation of foreign princes
- f) Defamation

#### **2.1.2 State Security Act, Chapter 111 (23 October 1969)**

The act is intended to make better provision relating to state security; to deal with espionage, sabotage and other activities prejudicial to the interests of the state; and for purposes incidental to or connected therewith.

#### **2.1.3 National Assembly (Powers and Privileges) Act, Chapter 12 (28 September 1956)**

This is an act to declare and define certain powers, privileges and immunities of the national assembly and of the members and officers of such assembly; to secure freedom of speech in the national assembly; to regulate admittance to the precincts of the national assembly; to give protection to the persons employed in the publication of the reports and other papers of the national assembly; and to provide for matters incidental to or connected with the foregoing.

#### **2.1.4 National Archives Act, Chapter 175 (14 November 1969)**

The act provides for the preservation, custody, control and disposal of public archives, including public records of Zambia; and for matters incidental to or connected with the foregoing.

#### **2.1.5 Public Order Act, Chapter 113 (19 August 1955)**

An act to prohibit the wearing of uniforms in connection with political objects and the maintenance by private persons of associations of military or similar character; and to make further provision for the preservation of public order.

#### **2.1.6 Preservation of Public Security Act, Chapter 112 (4 March 1960)**

The act makes provision for the preservation of public security; and for matters incidental thereto.

#### **2.1.7 Printed Publications Act, Chapter 161 (1 March 1964)**

The act provides for the registration of newspapers; to provide for the printing and publications of books and the preservation of printed works published in Zambia; and to provide for matters incidental to or connected with the foregoing.

#### **2.1.8 Parliamentary and Ministerial Code of Conduct Act, Chapter 16 (21 October 1994)**

The act provides for establishing a code of conduct for ministers and deputy ministers for the purposes of Article 52 of the Constitution; a code of conduct for members of the national assembly for the purposes of Article 71 of the Constitution; and for matters connected with or incidental to the foregoing.



### **2.1.9 Contempt of Court (Miscellaneous Provisions) Act, Chapter 38 (4 June 1965)**

An act to amend the law relating to contempt of court and to restrict the publication of the details of certain proceedings and for purpose connected therewith.

## **2.2 Detailed description of each law and whether and how they have been used**

### **2.2.1 Penal Code**

This is an act to establish a code of criminal law. The Penal Code outlines various criminal offences and their respective penalties. In respect of freedom of expression in Zambia the following sections of the Penal Code are relevant.

#### **2.2.1(A) *Prohibited publications***

Section 53(1) of the Penal Code provides for the prohibition of publications. The section states:

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.

(2) If an order made under the provisions of subsection (1) specifies by name a publication which is a periodical publication, such order shall, unless a contrary intention be expressed therein, have effect:-

(a) with respect to all subsequent issues of such publication; and

(b) not only with respect to any publication under that name, but also with respect to any publication published under any other name if the publishing thereof is in any respect a continuation of, or in substitution for, the publishing of the publication named in the order.

(3) If an order made under the provisions of subsection (1) declares that all publications published by a specified person or association of persons shall be prohibited publications, such order shall, unless a contrary intention be expressed therein, have effect not only with respect to all publications published by that person or association of persons before the date of the order but also with respect to all publications so published on or after such date.

(4) An order made under the provisions of subsection (1) shall, unless a contrary intention is expressed therein, apply to any translation into any language whatsoever of the publication specified in the order.

(5) Where an order has been made under subsection (1) declaring any series of publications or all or any class of publications published by any person or association of persons to be prohibited publications or specifying by name a publication which is a periodical publication, any person who wishes to import into Zambia any particular publication affected by such order may apply to the competent authority for a permit in that behalf and, unless the competent authority is satisfied that the publication contains matter which is contrary to the public interest, he shall grant such a permit and the order shall thereupon cease to have effect with respect to that publication.

(6) Any person whose application to the competent authority under subsection (5) has been refused may appeal in writing against such refusal to the President whose decision thereon shall be final.

(7) For the purpose of this section and of any prosecution in respect of a prohibited publication, any publication which purports to be printed or published outside Zambia by any person or association of

persons shall, unless and until the contrary is proved, be deemed to be published outside Zambia by such person or persons.

Section 53 gives the president absolute discretion to prohibit any publication. This is, however, contrary to the provision of Article 20(1) of the Constitution that guarantees freedom of expression, while Article 20(2) stipulates that 'a law shall not make any provision that derogates from freedom of the press.' Article 20 of the Constitution as part of the supreme law of the country should ordinarily make provisions of the Penal Code responsive to the former. According to the Zambia Law Development Commission, 'the provision requires only the President to make a prohibition of publications that are thought not to be in the public interest based on his *personal* opinion (emphasis is the author's). This subjective opinion is not subject to scrutiny. This could lead to a lot of error and abuse of the provision by prohibiting pro-opposition publications. Such prohibition is clearly not acceptable in an open democratic society based on human dignity, equality and freedom.'<sup>28</sup> Thus the provision, being subjective, fails to pass the test of legitimate interest and necessity in a democratic society. Moreover, the term 'public interest' is also not defined in the Penal Code, leaving the interpretation open to abuse.

Section 53(6) further exacerbates that situation by expecting an aggrieved person to 'appeal in writing against such refusal to the President whose decision thereon shall be final.' This is because the president in this instance is an interested party and it would be difficult for him to be impartial in a decision he already made. If any publications have to be prohibited at all, the ideal situation would be to subject them before an independent judicial tribunal whose terms of reference would have been formulated prior to the tribunal's appointment.

In addition, sections 54(1) and 54(2) prohibit the importation, reproduction, distribution and any sale of any prohibited publications. Any person who conducts any of these transactions is guilty of an offence thus:

54. (1) Any person who imports, publishes, sells, offers for sale, distributes, or reproduces any prohibited publication or any extract therefrom, is guilty of an offence and is liable for a first offence to imprisonment for two years or to a fine not exceeding three thousand penalty units or to both, and for a subsequent offence to imprisonment for three years; and such publication or extract therefrom shall be forfeited to the President on behalf of the Government.

(2) Any person who, without lawful excuse, has in his possession any prohibited publication or any extract therefrom, is guilty of an offence and is liable for a first offence to imprisonment for one year or to a fine not exceeding one thousand and five hundred penalty units or to both, and for subsequent offence to imprisonment for two years; and such publication or extract therefrom shall be forfeited to the President on behalf of the Government.

The law also requires that any person who receives any prohibited publication should surrender it to the police or face prosecution for failure to surrender the prohibited publication as provided for in section 55 of the Penal Code.

55. (1) Any person to whom any prohibited publication or any extract therefrom is sent without his knowledge or privity or in response to a request made before the publication was declared to be a prohibited publication, or who has in his possession any prohibited publication or extract therefrom at the date when the publication is declared to be a prohibited publication, shall forthwith if or as soon as the nature of the contents thereof have become known to him, or in the case of a publication or extract therefrom which is in the possession of such person before an order declaring it to be a prohibited publication has been made, forthwith upon the making of such an order, deliver such publication or extract therefrom at the nearest police station of which an officer of or above the rank of Sub Inspector

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<sup>28</sup> n 17 above 15.

is in charge or to the nearest Administrative Officer, and in default thereof he is guilty of an offence and is liable on conviction to a fine not exceeding one thousand and five hundred penalty units or to imprisonment for a period not exceeding one year, or to both, and such publication or extract therefrom shall be forfeited.

### **2.2.1(b) Offences in respect of seditious practices**

Section 57(1) of the Penal Code outlines offences relating to seditious practices and penalties for persons that commit the offences that include conspiring, uttering of seditious words, and printing, publishing, selling, distributing, importing and reproducing seditious publications.

57. (1) any person who-

(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; is guilty of an offence and is liable for a first offence to imprisonment for seven years or to a fine not exceeding six thousand penalty units or to both; and any seditious publication shall be forfeited.

(2) Any person who, without lawful excuse, has in his possession any seditious publication is guilty of an offence and is liable for a first offence to imprisonment for two years or to a fine not exceeding three thousand penalty units or to both, and for a subsequent offence to imprisonment for five years; and such publication shall be forfeited.

Section 60 of the Penal Code does not define the word 'seditious', but merely gives some indication of what constitutes a seditious intention as follows:

60. (1) A seditious intention is an intention-

(a) to advocate the desirability of overthrowing by unlawful means the Government as by law established; or

(b) to bring into hatred or contempt or to excite disaffection against the Government as by law established; 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 as by law established; 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 communities or different parts of a community; or

(g) to promote feelings of ill will or hostility between different classes of the population of 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 violence or any offence prejudicial to public order or in disturbance of the public peace; or

(j) to incite resistance, either active or passive, or disobedience to any law or the administration thereof:

The foregoing definition of seditious intention excludes the following under the same section of the Penal Code:

- (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 as by law established 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 as by law established; or
- (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.

The import of the foregoing, however, is made ineffective by section 60(2) that follows which stipulates:

(2) 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.

As provided for in section 61(1), in prosecuting for publishing a seditious publication the editor, assistant editor or author of the publication, office-bearers of the group responsible for the publications or any person who is proved to have published the publication shall be held responsible. There is, however, some exemption from prosecution because section 61(2) provides that 'it shall be sufficient defence if he proves to the satisfaction of the court and that the seditious publication was published without his consent and that the publication of the seditious publication did not arise from want of due care or caution on his part.' Such an exemption, on the other hand, implies that the supervisor disowns the work of the subordinate or failure to be held responsible for the overall work of the publishing or media house.

The fact that the word 'seditious' is not defined leaves room for possible inconsistencies in interpretation, but what is interesting is that on 10 July 2009 the Ministry of Justice decided to remove seditious libel as well as criminal defamation. The reasoning was that these laws infringed on the right to freedom of expression.<sup>29</sup>

It is generally held that sedition is an overt political offence and as such the likelihood of a judge presiding over a hearing of sedition siding with the government in power is very high. Moreover, section 58 provides that a person shall not be prosecuted for an offence under section 57 without the written consent of the Director of Public Prosecutions, which may further tilt the charge to favour and protect the government in power.

### **2.2.1(c) Publication of false news with intent to cause fear and alarm to the public**

Publication of false news with intent to cause fear and alarm is prohibited by law in Zambia under section 67 of the Penal Code which stipulates that:

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<sup>29</sup> <http://humanrightshouse.org/Articles/11311.html>

(1) 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 reason to believe that such statement, rumour or report is false, is guilty of a misdemeanour and is liable to imprisonment for three years.

(2) It shall be no defence to a charge under subsection (1) that he did not know or did not have reason to believe that the statement, rumour or report was false, unless he proves that, prior to publication; he took reasonable measures to verify the accuracy of such statement, rumour or report.

This section can be considered unfair and a hindrance to media freedom, when it is noted that there is no legal obligation on the part of those who hold public offices to provide information or confirm any information that is sought by media practitioners. There may be people in media houses that may be capable of fabricating false news which can cause alarm and fear, but as professionals, journalists hold high the ethos of truth, accuracy, objectivity and balance, where these apply for every news item. The demands for all media houses are on checking and counter checking facts, and expressions at every point of an article's development from sourcing by the journalist through to final publication. This is because they know that in the final analysis any falsity in the article can have a telling effect on media freedom and on the media practitioners. In an environment where news is a highly perishable product, allegations or rumours occasionally serve as tips of an iceberg. This provision interferes with freedom of expression and access to information. The demand in section 67(2) of proving prior to publication is not always tenable and the penalty is considered excessive.

### **2.2.1(d) Defamation of the president**

Defamation of the republican president of Zambia is protected under the provisions of section 69 of the Penal Code which states 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.

Section 69 was introduced, alongside section 68 which makes it an offence to insult the national anthem and section 70 which makes expressing or showing hatred, ridicule or contempt for persons because of race, tribe, place of origin or colour an offence, by an act of parliament No. 6 of 1965. These sections were thus introduced one year after Zambia attained political independence. It would appear that both sections 68 and 70 were intended to promote national unity for the newly-independent young nation.

It is worth noting that section 69 of the Penal Code does not define what constitutes 'insulting matter', and who determines that the matter is insulting. As a result, the media is left to censor itself to avoid falling into the trap. This amounts to stifling the media and a fetter on free media. Section 69 has since 1965 been effectively used to harass the media that seems critical of the president. It can be argued that section 69 is not good law as it is too general and ambiguous and so, it can catch and criminalise even legitimate expressions against the president. This is against the fact that citizens have the right to criticise their president.

With the passage of time, there have been arguments<sup>30</sup> that there should be a distinction between the office of the president and the person occupying the office and section 69 seeks to protect the person instead of the institution. It was further observed that the constitutional arrangement since independence allows for competition to the office of president, which may entail criticism and scrutiny of personal character of the office holder. With such criticism and scrutiny the incumbent could be brought into ridicule or contempt. Moreover, in a competitive electoral process,

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<sup>30</sup> Report of the Task Force on Media Law Reform, January 2000 36.

the incumbent president and challengers, in trying to convince the electorate, are likely to make statements that may bring into contempt or ridicule for any of the candidates.

In an open democratic society, criticism of the president may, on the other hand, help to keep his conduct within the law and compel him to be sensitive to the moods of the people and use his authority wisely.<sup>31</sup> As the provision in section 69 stands now 'the section may be prone to abuse as it can be used against the perceived enemies of the president and also exempt the President from public scrutiny'.<sup>32</sup> It was further argued that since the president is immune from law suits, as provided for in Article 43 of the Constitution, he should not be seen to be suing others.<sup>33</sup> Section 69 of the Penal Code does not therefore serve a legitimate interest and is not necessary in a democratic society where the right of freedom of expression is cardinal.

### **2.2.1(e) Defamation of foreign princes**

Defamation of foreign princes is an offence under section 71 of the Penal Code which states:

71. Any person who, without such justification or excuse as would be sufficient in the case of the defamation of a private person, publishes anything intended to be read, or any sign or visible representation, tending to degrade, revile or expose to hatred or contempt any foreign prince, potentate, ambassador or other foreign dignitary with intent to disturb peace and friendship between Zambia and the country to which such prince, potentate, ambassador or dignitary belongs, is guilty of a misdemeanour.

Section 71 was introduced by a statutory instrument No. 63 of 1964 to protect peace and friendship between Zambia and other countries represented by princes, potentates, ambassadors or other dignitaries. It can be observed that maintenance of peace and cordial relations between foreign countries and the newly-independent Zambia was not only critical but necessary as the nation weaved new and delicate international relations. On the other hand, the section does not serve any legitimate interest nor is it necessary in a democratic society. As each country observes certain internationally agreed privileges and immunities for ambassadors and diplomats, there is no reason for providing special protection against defamation under section 71. It can further be observed that actions of the princes, potentates, ambassadors or other foreign dignitaries, like those of the country's president, are open to scrutiny and criticisms by the public for the benefit of promoting good governance and democratic principles. It should be possible to use under legal instruments to resolve any considered misdemeanour.

### **2.2.1(f) Defamation**

Sections 191-198 of the Penal Code constitute Chapter XVIII on defamation. The sections itemise libel, definition of defamatory matter, definition of publication, definition of unlawful publication, cases in which publication of defamatory matter is absolutely privileged and cases in which publication of defamatory matter is conditionally privileged and premises for presuming as to good faith. Sections 191 and 192 stipulate the offence of libel and defamatory matter, respectively, thus:

191. 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 concerning another person, with intent to defame that other person, is guilty of the misdemeanour termed "libel".

192. Defamatory matter is matter likely to injure the reputation of any person by exposing him to hatred, contempt or ridicule, or likely to damage any person in his profession or trade by an injury to his

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<sup>31</sup> n 24 above 36.

<sup>32</sup> n 17 above 19.

<sup>33</sup> n 17 above 19.

reputation. It is immaterial whether at the time of the publication of the defamatory matter the person concerning whom such matter is published is living or dead:

provided that no prosecution for the publication of defamatory matter concerning a dead person shall be instituted without the consent of the Director of Public Prosecutions.

Sections 191-198 essentially constitute criminal defamation. Currently 'the law on civil defamation (Cap 68 of the laws of Zambia) 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 like Zambia.'<sup>34</sup>

### **2.2.2 State Security Act**

This is an act to make better provision relating to State security; to deal with espionage, sabotage and other activities prejudicial to the interests of the State; and to provide for purposes incidental to or connected therewith.

This act replaced the Official Secrets Act of 1967, which was based on the Official Secrets Acts of 1911, 1920 and 1939 of the United Kingdom<sup>35</sup> Sections 3, 4 and 5 outline the nature of offences a person is likely to commit and the accompanying penalties for the offences under this act stated as follows:

3. Any person who, for any purpose prejudicial to the safety or interests of the Republic-

(a) approaches, inspects, passes over, is in the vicinity of or enters any protected place;

(b) makes any sketch, plan, model or note or in any manner whatsoever makes a record of or relating to anything which might be or is intended to be directly or indirectly useful to a foreign power or disaffected person;

(c) obtains, collects, records, publishes or communicates to any person any code, password, sketch, plan, model, note or other document, article or information which might be or is intended to be directly or indirectly useful to a foreign power or disaffected person; or

(d) without lawful excuse damages, hinders or interferes with, or does any act which is likely to damage, hinder or interfere with, any necessary service or the carrying on thereof;

shall be guilty of an offence and liable on conviction to imprisonment for a period of not less than twenty years but not exceeding thirty years.

4. (1) Any person who has in his possession or under his control any code, password, sketch, plan, model, note or other document, article or information, which relates to or is used in a protected place or anything in such a place, or which has been made or obtained in contravention of this Act, or which has been entrusted in confidence to him by any person holding office under the Government, or which he has obtained or to which he has had access owing to his position as a person who holds or has held such office or as a person who is or was a party to a contract with the Government or a contract the performance of which in whole or in part is carried out in a protected place, or as a person who is or has been employed by or under a person who holds or has held such an office or is or was a party to such a contract, and who-

(a) uses the same in any manner or for any purpose prejudicial to the safety or interests of the Republic;

(b) communicates the same to any person other than a person to fails to take proper care of, or so conducts himself as to endanger the safety of, the same; or

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<sup>34</sup> AW Chanda "Freedom of expression and the law in Zambia" in *Zambia Law Journal* Volume 30, 1998 ISSN 1027-7862 143.

<sup>35</sup> AW Chanda and Liswaniso, M *Handbook of media laws in Zambia* (1999) 74.

(c) fails to take proper care of, or so conducts himself as to endanger the safety of, the same; or

(d) retains the sketch, plan, model, note, document or article in his possession or under his control when he has no right or when it is contrary to his duty so to do, or fails to comply with any lawful directions with regard to the return or disposal thereof; shall be guilty of an offence and liable on conviction to imprisonment for a term of not less than fifteen years but not exceeding twenty-five years.

(2) Any person who has in his possession or under his control any sketch, plan, model, note or other document, article or information, relating to munitions of war and who communicates it directly or indirectly to any person in any manner for any purpose prejudicial to the safety or interests of the Republic

shall be guilty of an offence and liable on conviction to imprisonment for a term of not less than fifteen years but not exceeding twenty-five years.

(3) Any person who receives any code, password, sketch, plan, model, note or other document, article or information, knowing or having reasonable grounds to believe at the time when he receives it that the same is communicated to him in contravention of the provisions of this Act, shall, unless he proves that the communication thereof to him was against his wish, be guilty of an offence and liable on conviction to the penalty prescribed in subsection (1).

(4) Any person who communicates to any person, other than a person to whom he is authorised by an authorised officer to communicate it or to whom it is in the interests of the Republic his duty to communicate it, any information relating to the defence or security of the Republic

shall be guilty of an offence and liable on conviction to imprisonment for a term of not less than fifteen years but not exceeding twenty-five years.

5. (1) Any person who communicates any classified matter to any person other than a person to whom he is authorised to communicate it or to whom it is in the interests of the Republic his duty to communicate it shall be guilty of an offence and liable on conviction to imprisonment for a term of not less than fifteen years but not exceeding twenty-five years.

(2) In a prosecution for a contravention of subsection (1) it shall be no defence for the accused person to prove that when he communicated the matter he did not know and could not reasonably have known that it was classified matter.

The act provides an interpretation of a "protected place" to include:

(a) any place or area declared by the President, by statutory instrument, to be a protected place for the purposes of this Act;

(b) any premises declared to be a protected place under the provisions of section *five* of the Protected Places and Areas Act; or

(c) any area declared to be a protected area under the provisions of section *six* of the Protected Places and Areas Act;

The country's obligation to guarantee the nation's security is provided for under many articles of the Constitution for instance Articles 19(5) (a), 20(3) (a) and Article 21(2) (a), where interest of defence are repeatedly mentioned. The interpretation of protected places add another dimension which opens a can of worms in justifying the provisions of sections 4 and 5 of the act. Chanda and Liswaniso argue that sections 4 and 5 are not compatible with Article 20 of the Constitution and with international standards such as the Johannesburg Principles and the Declaration of Principles on Freedom of Expression in Africa. The restriction on the freedom of expression should be prescribed by law in being accessible, unambiguous, and drawn narrowly and with precision so as to enable



individuals to foresee whether a particular action is unlawful. The law should also provide for adequate safeguards against abuser, including prompt, full and effective judicial scrutiny of the restriction by an independent court or tribunal. The act, in particular, sections 4 and 5 do not serve a legitimate national security interest nor is their existence necessary in a democratic society, where information and knowledge is critical for people to make informed decisions, based on factual data.

On the strength of the provisions of sections 4 and 5 it becomes a crime to obtain vital information about the country's economy, foreign debt and other specialised data from civil servants for fear of committing an offence under the act. Similarly, the over-classification under the Protected Places and Areas Act of 1960, of 'protected' places, such as military barracks, Luangwa Bridge, Kafue Road and Rail Bridges, Ndola Oil Refinery, Mines, Emerald Mineralisation, Ndola Precious Metals Plant and Tazama Pipeline Central Pumping Station and Storage Tank area in Ndola, make it impossible for access to information and freedom of expression even in genuine situations and, any person in possession of any document or sketch about any of these places is liable to prosecution.

On account of ambiguity in such its definition as 'classified document' an ambiguity that could be used to criminalise and punish legitimate investigative journalism and suppress discussion of public issues.

### **2.2.3 National Assembly (Powers and Privileges) Act**

This is an act to declare and define certain powers, privileges and immunities of the national assembly and of the members and officers of such Assembly; to secure freedom of speech in the national Assembly; to regulate admittance to the precincts of the national assembly; to give protection to the persons employed in the publication of the reports and other papers of the national assembly; and to provide for matters incidental to or connected with the foregoing.

The act provides considerable privileges, immunities and powers as well safeguards for members of parliament and members of staff of the national assembly to discharge their respective functions with maximum freedom particularly during meetings and work at parliament, as stipulated in sections 3,4 and 5 of the act:

3. There shall be freedom of speech and debate in the Assembly. Such freedom of speech and debate shall not be liable to be questioned in any court or place outside the Assembly.
4. No civil or criminal proceedings may be instituted against any member for words spoken before, or written in a report to, the Assembly or to a committee thereof or by reason of any matter or thing brought by him therein by petition, Bill, resolution, motion or otherwise.
5. For the duration of a meeting members shall enjoy freedom from arrest for any civil debt except a debt the contraction of which constitutes a criminal offence.

Section 25 of the act focuses to a great extent aspects of the freedom of expression as it deals with perils of publishing and printing of unauthorised information or libellous information involving the work, and actions of national assembly and its members. In this regard, section 25 stipulates:

Any person who-

- (a) publishes, save by the general or special leave of the Assembly, a report of any proceedings of the Assembly or any committee when such proceedings have not been held in public; or
- (b) publishes any false or scandalous libel on the Assembly or any report which wilfully misrepresents in any way any proceedings of the Assembly or any committee; or

(c) publishes, save by the general or special leave of the Assembly, any paper, report or other document prepared expressly for submission to the Assembly before the same has been laid on the Table of the Assembly; or

(d) prints or causes to be printed a copy of any Act now or hereafter in force, or a copy of any report, paper or votes and proceedings of the Assembly as purporting to have been printed by the Government Printer, or by or under the authority of the Assembly, or of the Speaker, and the same is not so printed; or

(e) tenders in evidence any such copy as purporting to be so printed knowing that the same was not so printed; or

(f) creates or joins in any disturbance which interrupts or is likely to interrupt the proceedings of the Assembly while it is sitting; or

(g) publishes or prints any libels on any member concerning his character or conduct as a member and with regard to actions performed or words uttered by him in the course of the transaction of the business of the Assembly;

shall be guilty of an offence and shall be liable on conviction to a fine not exceeding five thousand penalty units or to imprisonment with or without hard labour for a term not exceeding twelve months, or to both.

Notwithstanding the jurisdiction of the national assembly and the speaker as provided for in section 34 of the act, it does provide for some safeguard against the national assembly usurping powers of prosecution, which lie with the judiciary through section 27. The powers vested in the national assembly and the speaker are applied through the provisions of section 28(3). The three sections state as follows:

27. No prosecution shall be instituted for an offence under this Act except by the Director of Public Prosecutions upon information given to him in writing by the Speaker.

28. (3) If any person not being a member commits a contempt, whether specified in section *nineteen* or otherwise, the Assembly may, by resolution, direct that the Speaker shall order such person to appear before the Assembly and that he shall, upon such attendance, reprimand him at the Bar of the Assembly.

34. Neither the Assembly, the Speaker nor any officer shall be subject to the jurisdiction of any court in respect of the exercise of any power conferred on or vested in the Assembly, the Speaker or such officer by or under the Constitution, the Standing Orders and this Act.

The foregoing provisions of the act are intended to uphold the status of the legislature as the third branch of the state that should be protected, respected as in being dignified and not interfered with by 'outsiders' or in parliamentary parlance, strangers. The provisions of the act make it crystal clear that the national assembly deserves to be treated as an institution apart that should not easily be criticised or shows disrespect as in section 19.

On the other hand, it can be argued that members and officers of the national assembly are human beings susceptible to err and belong to the community. There should be some acceptable mechanism of enabling the public to express views that serve to correct any shortcomings of the national assembly and the members. This should not necessarily constitute offences under section 19. This mechanism would also enhance the provisions of Article 20(1) of the Constitution. The provisions of the act fail the litmus test of promoting the legitimate interest and necessity in a democratic society as enshrined in the Declaration of Principles on Freedom of Expression in Africa.

#### 2.2.4 National Archives Act, Cap 175

An act to provide for the preservation, custody, control and disposal of public archives, including public records of Zambia; and to provide for matters incidental to or connected with the foregoing

It is imperative that every nation should carefully preserve and ensure safe custody of public records from government, corporations, societies, associations and institutions or organisations because they constitute the memory and history of the country for subsequent reference and posterity. The act, however, contains some provisions and restrictions, subject to the minister's interventions or intervention of the director of the national archives, that interfere with the rights of freedom of expression and access to information as espoused in the Declaration of Principles of Freedom of Expression in Africa as stipulated in sections 8, 11(2) and 12(1) of the National Archives Act:

8. Where there are transferred to the National Archives or any place of deposit any public records containing information the disclosure of which is, by written law, prohibited or limited to certain purposes, the Director, the custodian of the public archives in such place and every member of the staff of the National Archives or such place who has access to such records shall take such oath or make such declaration relating to secrecy, with such modifications as the circumstances require, as is required by the relevant written law to be taken or made by persons having access to such records prior to their transfer; and every person who takes such oath or makes such declaration shall, for the purposes of any provisions of such written law making punishable any disclosure in contravention of the written law, be deemed to be a person employed in carrying out the provisions of the relevant written law.

11. (2) Notwithstanding the provisions of subsection (1), the Minister may, in respect of any public archives or any category thereof certified to him by the person by whom, or in charge of the office from which, the records concerned were transferred to the National Archives order that-

(a) such public archives or category thereof ought not to be made available for public inspection, or order that such public archives or category thereof shall not be made available for public inspection until the expiration of such further period as may be specified in that or any subsequent order; or

(b) such public archives or category thereof may be made available for public inspection notwithstanding that such public archives have not been in existence for at least twenty years, or order that any such public archives or category thereof be made available for public inspection.

(3) The Minister may delegate to the Director his powers under subsection (2) to afford, restrict or withhold access to public archives.

(4) Nothing in this section shall be construed-

(a) as limiting any right of inspection of any records to which members of the public had access before their transfer to the National Archives; or

(b) save to the extent provided by any such written law as is referred to in subsection (1), as precluding the Minister from permitting any person authorised by him to have access to any public archives or category thereof.

12. (1) Without the written authority of the Director, no person who is not an officer of the National Archives may inspect any public archives which-

(a) have been transferred to the National Archives; and

(b) (i) have been the subject of an order made by the Minister under the provisions of paragraph (a) of subsection (2) of section *eleven*; or

(ii) have not been in existence for at least twenty years, unless they are the subject of an order made by the Minister under the provisions of paragraph (b) of subsection (2) of section *eleven*.

Section 18 of the act prohibits publication or reproduction of public archives or records that have been transferred to the national archives. In effect this restricts research or investigative work that requires documentary evidence. There is also a penalty for any offence committed under these provisions. The section stipulates:

18. (1) Subject to the provisions of subsection (2), no person may publish or reproduce the whole or any part of the contents of any public archives or records which have been transferred to the National Archives except

(a) in the case of public archives mentioned in paragraph (a) of the definition of "public archives", with the written permission of the Director and in accordance with such conditions as the Director may impose;

(b) in the case of public archives mentioned in paragraph (b) of the definition of "public archives", with the written authority of the person from whom such archives were acquired.

(2) The provisions of subsection (1) shall not apply in relation to judicial records.

(3) Any person who contravenes the provisions of subsection (1) or fails to comply with any conditions therein referred to shall be guilty of an offence and shall be liable on conviction to a fine not exceeding six thousand penalty units or to imprisonment for a period not exceeding twelve months, or to both.

The foregoing provisions make access to public records or archives wholly dependent on the decision of the minister or the director of the national archives, who are mere custodians of the public information. The absence of the Freedom of Information or Access to Information laws in the country means that the right of access to information contained in public records is further made impossible.

### **2.2.5 Public Order Act**

An act to prohibit the wearing of uniforms in connection with political objects and the maintenance by private persons of associations of military or similar character; and to make further provision for the preservation of public order.

In effect and practice the act is basically intended to regulate public assemblies, demonstrations and processions by notifying the police and involving them to ensure that there is peace and order at such events. The requirements by the police are outlined in various sections of the act thus:

(4) Every person who intends to assemble or convene a public meeting, procession or demonstration shall give police at least seven days notice of that person's intention to assemble or convene such a meeting, procession or demonstration.

(5) Without prejudice to the generality of the provisions of the preceding subsection, the conditions which may be imposed under the provisions of the said subsection may relate to all or any of the following matters:

(a) the date upon which and the place and time at which the assembly, public meeting or procession is authorised to take place;

(b) the maximum duration of the assembly, public meeting or procession;

(c) in the case of an assembly or public meeting the persons who may or may not be permitted to address such assembly or public meeting and the matters which may not be discussed at such assembly or public meeting;

(d) the granting of adequate facilities for the recording of the proceedings of such assembly or public meeting in such manner and by such person or class of person as the regulating officer may specify:

Provided that such conditions may not require the convener of the assembly or public meeting to provide equipment; and

(e) any other matter designed to preserve public peace and order.

The foregoing requirements do not apply in case of any meeting convened or organised to be addressed by the republican president, vice president, any cabinet or junior minister of the speaker or deputy speaker of the national assembly, as provided for in sub-section 5(6).

There are penalties for failing to comply with the police requirements as stipulated in sub-section 5(7), as follows:

7. Any assembly, meeting or procession-

(a) for which a permit is required under subsection (4) of section *five* and which takes place without the issue of such permit; or

(b) in which three or more persons taking part neglect or refuse to obey any direction or order given under subsection (3) or (7) of section *five*; shall be deemed to be an unauthorised assembly, and all persons taking part in such assembly, meeting or procession and, in the case of an assembly, meeting or procession for which no permit has been issued, all persons taking part in convening, calling or directing such assembly, meeting or procession may be arrested without a warrant and shall on conviction be liable to a fine not exceeding one thousand five hundred penalty units or to imprisonment for a period not exceeding six months, or to both.

Whereas the provisions of the Public Order Act seem to ensure law and order at public assemblies, demonstrations and processions, the application has serious implications on the freedoms of expression, assembly and association. The act gives the police absolute discretion to decide who should be given chance to exercise their fundamental rights of expression, assembly and association as provided for in Articles 11, 20(1) and 21(1) of the Constitution. The police are also at liberty to offer any lame reason, in the book, for advising the conveners against holding the public rally or procession. Although the emphasis is on 'giving seven days' notice to the police', the police, from experience, are free to interpret this to mean conveners require applying for a 'permit'. The fact that as stipulated in sub-section (5)(c), the conveners are expected to indicate persons that would address the public rally and what they would talk about implies need for prior clearance and therefore a threat on expression of views that are divergent from those in power.

From the perspective of the terms and spirit of the Declaration of Principles on Freedom of Expression in Africa, the provisions of the Public Order Act may be ideal for dictatorships, or one-party states, but not for multiparty democracies like Zambia. They provisions do not serve a legitimate interest and are not necessary in a democratic society. Furthermore, the requirement of seven days' notice to the police does not take into account any emergency need for the public rally.

### **2.2.6 Preservation of Public Security Act**

This is an act to make provision for the preservation of public security; and to provide for matters incidental thereto

The law was enacted on 4 March 1960, when nationalists were fighting for political independence. The context of the act was therefore intended to with nationalist uprising against the colonial government. The act continues, unintentionally, to include a declaration signed on 27 July 1964 by the last governor of the then Northern Rhodesia, Evelyn D Hone. The act contains detailed

preservation of public security regulations and particular ones to regulate detained persons, prohibition of certain activities, the railways, air services, and control of waterways, employers and employees, and the movement of vehicles during the time of a declaration. Penalties for any infractions are given under each particular regulation.

According to section 2 of the act, the 'public security' has not been defined but expressed in terms of activities and issues that are encompassed under the term, such as 'the securing of the safety of persons and property, the maintenance of supplies and services essential to the life of the community, the prevention and suppression of violence, intimidation, disorder and crime, the prevention and suppression of mutiny, rebellion and concerted defiance of, and disobedience to, the law and lawful authority, and the maintenance of the administration of justice.'

Section 3(1) specifies that some provisions of the act take effect during any period when a declaration is made under Article 29 of the Constitution, which provides for the declaration of war. Thus:

(2) The President may, for the preservation of public security, by regulation -

(a) make provision for the prohibition of the publication and dissemination of matter prejudicial to public security, and, to the extent necessary for that purpose, for the regulation and control of the production, publishing, sale, supply, distribution and possession of publications;

(b) make provision for the prohibition, restriction and control of assemblies;

(c) make provision for the prohibition, restriction and control of residence, movement and transport of persons, the possession, acquisition, use and transport of movable property, and the entry to, egress from, occupation and use of immovable property;

(d) make provision for the regulation, control and maintenance of supplies and services; or

(e) make provision for, and authorise the doing of, such other things as appear to him to be strictly required by the exigencies of the situation in Zambia.

In addition to the foregoing provisions, the president is empowered under section 3(3) to detain or restrict people without trial for an indefinite period. Article 25 of the Constitution provides for the derogation from fundamental rights and detention when the country is at war or when there is a declaration of public emergency as provided for in Article 30 of the Constitution.

Chanda and Liswaniso contend that, 'The absence of a clear legislative definition of public security has created problems for the courts, especially with regard to economic crimes.'<sup>36</sup>

The net effect of invoking the Preservation of Public Security Act is that individual human rights that include freedom of expression, access to information, freedom of assembly and association, as provided for under Part III of the Constitution are adversely affected. Insofar as there is no provision for the courts to review an emergency declaration, the act remains an imminent threat to freedom of expression. It is only Article 30 of the Constitution that provides some control mechanism, through consultations with the cabinet and use of the national assembly, against the president abusing the provisions of this act. Whereas Article 25 provides for derogation from fundamental rights and detention in case war or emergency, there is no definition of what constitutes war or emergency. Article 29(3) of the Constitution states that an act of parliament would provide for the condition and circumstances under which a declaration may be made.

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<sup>36</sup> n 29 above 88.

Zambia has been independent for nearly 50 years and has during the period experienced political and governance challenges of different kind and dimension, such that time is ripe for civic and political leaders to review and enhance good legislation while discarding legislation whose relevance is gone. There are aspects of the Preservation of Public Security Act that served its legitimate interest, meaning safeguarding Zambians during the liberation struggle pursuit for democratisation in the southern African region, when Zambia as a frontier country needed some form of central control of managing emergency situations through this act. The position has changed as the region is basically free from wars. In addition, the country has enjoyed considerable political stability to qualify to be considered a democratic society and therefore making the act in its present form unnecessary.

### **2.2.7 Printed Publications Act**

The act provides for the registration of newspapers; to provide for the printing and publications of books and the preservation of printed works published in Zambia; and to provide for matters incidental to or connected with the foregoing.

Section 3(1) of the act stipulates:

Every book printed and published in Zambia shall bear an imprint in legible type showing-

- (a) the full and correct name of the printer and the place where the book was printed;
- (b) the full and correct name of the publisher and his place of business; and
- (c) the year of publication

(2) Any person who knowingly and wilfully prints or publishes, or causes to be printed or published, any book not containing the particulars required by this section shall be guilty of an offence and liable to a fine not exceeding six hundred penalty units, and, in default of payment of such fine, to imprisonment not exceeding one month. [*Author: One penalty unit is a measure of payment equivalent to K180 or US\$0.30*]

(3) The minister may by statutory instrument, make rules excepting from the provisions of this section such classes of printed matter used for the purposes of the government, of courts of justice, of public authorities and of trade and business as may be specified in such rules.

The requirement for information about the publisher and the printer is clear, but the practice has shown that the publisher normally provides detailed information about the contact postal address, while the printer provides skeleton information about his location, in terms of town or country only. This is to be expected because the key person in the publication of the book is the publisher rather than the printer, who basically processes the publication.

The act provides for the depository in a central place of all books published in Zambia as stipulated in section 4(1) thus:

The publisher of every book published in Zambia shall, within two months of the publication, deliver at his own expense a copy of the book to the Director at Lusaka, who shall give a written receipt for every copy received by him.

(3) If any publisher fails to comply with the provisions of this section, he shall be guilty of an offence and liable to a fine not exceeding six hundred penalty units. When any person is convicted of such offence, the court may, in addition to imposing a penalty, order the person so convicted to comply with the provisions of this section by delivering a copy of the book to the authority to which delivery ought to have been made. The court may, instead of making such order, impose a further fine not exceeding the amount of the published price of the book.

Where a subsequent edition of the book is published without additions or changes, there is no need to deliver another copy to the director. Materials of trade, promotional or advertising nature do not need to be delivered to the director. For the benefit of posterity and cultural, social and economic history of Zambia publications published in the country, it is imperative to preserve as public records every copy in a central depository.

Article II of the Declaration of Principles on Freedom of Expression in Africa calls for governments to refrain from arbitrary interference with citizens' freedom of expression, but the requirement for mandatory registration inhibits freedom of expression for people to publish newspapers. The act in its present form is not clear as its necessity in a democratic society nor does it serve any legitimate interest.

### **2.2.8 Parliamentary and Ministerial (Code of Conduct) Act**

This is an act to establish a code of conduct for ministers and deputy ministers for the purposes of Article 52 of the Constitution; to establish a code of conduct for members of the national assembly for the purposes of Article 71 of the Constitution; and to provide for matters connected with or incidental to the foregoing.

The act provides guidelines on how ministers and deputy ministers should conduct themselves in ensuring that there is collective responsibility among them.

The act also provides for some mechanism for dealing with any perceived breach of conduct as stipulated in section 13:

13. (1) An allegation that a Member has breached Part II may be made to the Chief Justice by any person, in writing giving particulars of the breaches or breaches alleged, signed by the complainant and giving the complainant's name and address.

(2) Where a Member considers that a statement made in the press or through the other public media alleges, directly or by implication, that he has breached Part II, he may report the particulars of the breach or breaches alleged, in writing, to the Chief Justice and request that the matter be referred to a tribunal.

(3) The Chief Justice shall notify the President and the Speaker of the allegation and shall appoint a tribunal in accordance with section *fourteen* to investigate the allegation.

(4) The tribunal shall, within forty-five days after its being appointed, submit a report on its findings to the President and to the Speaker and shall furnish a copy to the Member concerned.

(5) The Speaker shall, not later than seven sitting days after the first sitting of the National Assembly next after receiving the report, cause a copy of the report to be laid before the National Assembly.

The foregoing provision of appointing a tribunal to investigate and submit a report has the advantage over the regular judicial proceedings of speeding up the process and resolving the reported breach of conduct. It is most probable in section 13(2) that the tribunal might summon the journalist responsible for the press report to appear before it and give evidence or reveal his or her source of information. The Sangwa Report noted that section 13(2) that, 'The provisions impose an obligation upon the media to be accurate in their reporting and not publish sensational and unsubstantiated allegations.'<sup>37</sup>

The penalty for making a false allegation, if convicted, is provided for in section 17 of the act, thus:

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<sup>37</sup> n 24 above 62.



17. A person who makes an allegation under section *thirteen* or *sixteen* knowing it to be false, shall be guilty of an offence and shall be liable on conviction to a term of imprisonment not exceeding one year.

### **2.2.9 Contempt of Court (Miscellaneous Provisions) Act**

This is an act to amend the law relating to contempt of court and to restrict the publication of the details of certain proceedings and for purpose connected therewith.

The act imposes some restriction on publication of information relating to court proceedings and to matrimonial proceedings as provided for in sections 3(1) and in section 4(1).

Section 3(1) imposes restriction in the publication of information the following circumstances:

- (a) Where the proceedings relate to the wardship or adoption of an infant or wholly or mainly to the guardianship, custody, maintenance or upbringing of an infant, or rights of access to an infant;
- (b) Where the proceedings are brought under the law for the time being in force in Zambia with respect to the control, care or detention of, or to the estates and property of, mentally disordered or defective persons;
- (c) Where the court sits in private for reasons of national security during that part of the proceedings about which the information in question is published;
- (d) Where the information relates to a secret process discovery or invention which is in issue in the proceedings;
- (e) Where the court (having power to do so) expressly prohibits the publication of all information relating to the proceedings or of information of the description which is published;
- (f) Where the proceedings are an appeal under the law with respect to income tax.

Section 4(1) imposes restriction in the publication of information relating to matrimonial proceedings thus

4(1) It shall not be lawful to print or publish or cause or procure to be printed or published-

- (a) In relation to any judicial proceedings, any indecent matter or indecent medical, surgical or physiological details being matter or details the publication of which would be calculated to injure public morals;
- (b) In relation to any judicial proceedings for dissolution of marriage, for nullity of marriage, or for judicial separation, or for restitution of conjugal rights, any particulars

As provided for by section 4(2) any person who contravenes any provision of subsection (1) shall be guilty of an offence and liable on conviction to imprisonment for six months or to a fine not exceeding fifteen thousand penalty units or to both imprisonment and fine. This penalty, however, is targeted specifically at the proprietor, editor, master printer or publisher of the publication.

Much therefore as the act serves a specific legitimate interest and is necessary in a democratic society in that it facilitates a procedure of dealing with contempt of court, the application should be objectively done to rather than exclusively leaving this in the hands of the courts. The act, if not properly administered could negatively affect the right of freedom of expression or access to information.

## 2.3 Use of laws

The following review of implementation of laws criminalising expression covers the period of the last five years and any examples cited for an earlier period suggests that the affected law has not been applied in recent times.

### 2.3.1 The Penal Code

#### 2.3.1(a) *Prohibited publications (Section 53(1) of Penal Code)*

The object of this section of the Penal Code is essentially to bar any publication or a series of publications, whose content, in the opinion of the republican president, is considered to be contrary to the public interest. The section is also a very safe insulation for the president against any perceived attacks or criticisms from suspected enemies.

The opinion of the president is subjective. There is no provision for an independent body of special advisors to examine the content of the publication in the section. The provision of the current section is therefore liable to be abused by an enthusiastic president who may want to frustrate opponents who may wish to write any expose about the public affairs of the nation or about shortcomings of the president or the party in power.

An attempt was made in *Shamwana v Attorney General* to challenge the president's authority under section 53(1).<sup>38</sup> Two political detainees, Mr Edward Shamwana and Mr Valentine Musakanya set a petition to the national assembly requesting it to review the state of emergency which had existed since independence. But in March 1981, President Kenneth D Kaunda banned the petition. Mr Shamwana then sought an order from the High Court declaring the ban on the petition 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.

The presiding judge, Justice Florence Mumba held that the president was within the powers conferred upon him by section 53 of the Penal Code and that the president's opinion could not be impugned.

It was observed that in this case the judge opted for an easy way to resolve the issue of the petition because she did not take into account that discretionary power could be challenged and the courts have power to check abuse of discretionary where it is exercised unreasonably, in bad faith or where the person concerned takes into account irrelevant considerations or other relevant considerations.<sup>39</sup> It can be observed that section 53 is not compatible with democracy as the existence of a free media is entirely dependent on the goodwill of the president. The excessive powers of the president ought to be curtailed to truly promote democratic ideals. This section therefore fails to meet the legitimacy interest test and the necessity in a democratic society.

Furthermore, on 5 February 1996, President Frederick Chiluba banned edition No. 401 of *The Post* newspaper. The paper's offices were searched by the police, causing major disruptions in production on the following day's edition of the paper. Residential houses of senior staff were also searched late into the night. This could have been a strategy of blocking access to information of public concern and to forestall political dissent. Furthermore, *The Post* newspaper's managing director, Mr Fred M'membe, special projects editor, Mr Masautso Phiri and managing editor, Mr Bright Mwape were arrested and detained for nearly 48 hours. On 7 February 1996 the three were

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<sup>38</sup> *Times of Zambia* 5 March 1986 1.

<sup>39</sup> n 29 above 132-133

formally charged with retaining a classified document and in possession of a prohibited publication,<sup>40</sup> under section 55(1), but were released on bail. The reason for banning the paper's edition was that it had published a plan by government for constitutional reform and a referendum.<sup>41</sup>

It was appreciated that the banned edition No. 401 of *The Post* in fact contained vital information of public interest which affected the future of the entire nation. It would have been a disservice if the public was kept uninformed about the imminent constitutional changes.

### **2.3.1(b) Offences in respect of seditious practices (Section 57(1) of Penal Code)**

The provisions of this section extend to section 61 as it deals in detail with issues of legal proceedings in section 58, evidence in section 59, seditious intention in section 60 and persons deemed to have published a seditious publication in section 61.

An intention to achieve any of the results mentioned in the provisions can always have symptoms of sedition and so, those in power can always find reason to prohibit what is allowed by the provisos. The proviso gives, while the section takes away. For example, it is not clear what happens where citizens advocate for changes as per proviso but those in power do not heed. It must be noted that, some international well known and positive revolutions, for example, the French and American revolutions were as a result of defying legal prohibitions.

Subsection 60(2), makes it clear 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. This is a perfect example of taking and giving at the same time. Human beings naturally do not condone doing the same thing the same way always and hope to obtain different results. If for example, they have peacefully expressed or demonstrated against the Public Order Act and its administration by correspondence or by roundtable discussions but those in authority do not heed, one day, the affected may choose to defy the law. The consequence will be accused of procuring changes of the law by unlawful means.

In *The Queen v. Chona R & N 344*, the accused, who was the National Secretary of the United National Independence Party (UNIP), the leading nationalist party, issued a press statement describing the evils of colonialism. The statement alleged that there was no justice whatever under colonial rule anywhere in the world. It stated in part:

Those of you who have attended the courts while trying your political colleagues must have got the same impression as myself, i.e. that the courts are here to rubber-stamp oppression and to administer mock justice. As for the Native Courts, all of you must have got the impression that they have been re-organised to jail any African that the Government Administrative officials want to be jailed, whether he committed an offence or not.

Chona argued that the words above were not seditious and were published merely to identify the errors or defects in the government or constitution of the territory or in the administration of justice, and to try and persuade inhabitants of the territory to procure by lawful means the alteration of the matters complained of. The High Court held that the statement was a seditious publication because it intended to bring into hatred or contempt, and to excite disaffection against the administration of justice in the territory, for the purpose of promoting UNIP's policy of making the territory ungovernable. Chief Justice Conroy stated, *inter alia*.

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<sup>40</sup> CH Chirwa Press freedom in Zambia (1997) 65

<sup>41</sup> n 29 above 77

Even if the accused were telling the truth in this matter I consider that under the sections of the Penal Code he would have been guilty of the offence charged. As I read the Penal Code, the offence is not 'with a seditious intention publishing written or printed matter' it is 'publishing written or printed matter, which matter has a seditious intention.' In other words, if a person publishes a document which is a seditious publication because it has a seditious intention, then he does so at his peril... the intention with which a seditious document is published is immaterial. If the legislature had intended to make the intention of the person publishing the document an ingredient of the offence, then the legislature would have to have used express words to that effect, such as "advisedly", or "with a seditious intention" or "knowingly". The evil which the legislature was seeking to prevent was the effect which seditious publications have upon the minds of the persons to whom they were published. The criterion which the legislature adopted ... was not the intention of the publisher but the intention contained in the document, which can only be estimated by the effect which it must have upon the reasonable reader in the circumstances of the publication.

As can be seen, this Penal Code provision originates from colonial rule and its content has not changed while, some Commonwealth countries have over the years narrowed the application of the offence to an intention to incite violence or resistance or defiance for the purpose of disturbing constituted authority. In Zambia, the Chona case continues to be a precedent on sedition cases to date.

As for the seditious intent to bring into hatred or contempt or to excite disaffection against the government as by law established; in a multiparty democracy, it is normal for politicians from the opposition trying to wrestle power from the ruling party to create disaffection in the minds of citizens about the performance of the ruling party. Citizens are not so gullible as to believe every claim of under performance against the ruling party published by the opposition. Criminalising the legitimate role of the opposition is doing harm to democracy. As aptly stated by Dr Badala Tachilisa Balule, Mr Kaitira Kandjii and Mr Raymond Louw<sup>42</sup>, 'what makes the provision highly objectionable is not only the prohibition of peaceful opposition to the government, but the fact that truth is not a defence to a charge for sedition.'

In any prosecution for publishing a seditious publication, persons that shall be deemed to have published such publication include society office bearers, editor, assistant editor or author of such publication and publisher.

In July 2013, two journalists, Mr Thomas Zyambo, a freelance practitioner and Mr Clayson Hamasaka, former lecturer at Evelyn Hone College in Lusaka were both arrested and charged in connection with seditious practices under the provisions of sections 57 and 60 of the Penal Code.<sup>43</sup> By mid-November 2013 the court proceedings had not been concluded.

### **2.3.1(c) Publication of false news with intent to cause fear and alarm to the public (Section 67 of Penal Code)**

The object of this section of the Penal Code is to prohibit publication of any false news that is intended to cause fear and alarm to the public. This is basically a safety valve against false alarm or persons that *deliberately* [author's emphasis] wish to cause fear or alarm because, ordinarily, no person would wish to do so to one's community. In this regard it is most probable that the initial break of news that is published might be based on a rumour, a tip or a concern over some incident that has potential for far-reaching consequences. It can be surmised that publication of such information may genuinely be intended to forestall such consequences.

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<sup>42</sup> BT Balule et al *Undue Restriction* (2004)

<sup>43</sup> *Times of Zambia*, 10 July 2013 2 and *Zambia Daily Mail* 12 July 2013 2

In Zambia application of the provisions of Section 67 of the Penal Code can variously be illustrated by the following cases.

**(a) *The People v. Hakainde Hichilema***

In the case, on 13 August 2012 president of the United Party for National Development, Mr Hakainde Hichilema was arrested and charged with publication of false news with intent to cause fear and alarm to the public contrary to Section 67(1) (2) of the Penal Code Chapter 87 of the Laws of Zambia.

He was arrested when he appeared for questioning at Lusaka Central Police in connection with allegedly orally publishing statements on 11 June 2012 in which he said among others issues:

PF (Patriotic Front) had signed an arrangement for the Militia in Sudan to train PF youths. Prepare for trouble. Do you know what is going on in Darfur? Do you know what is going on in Abyei? Do you know what is going on there? Killings!

The statement was considered likely to cause fear and alarm to the people. He appeared in court for mention on 13 September 2012 and pleaded not guilty. The matter was adjourned to October 2012 for trial. He was granted a K30 million (US\$6 000) cash bail by chief resident magistrate Joshua Banda.

On a preliminary matter, Mr Hichilema asked the chief resident magistrate, Joshua Banda to refer the case to the High Court for determination on contraventions of Article 18 and Article 20 of the Constitution of Zambia.

Mr Hichilema submitted through his lawyers that, 'The charge against me should be quashed because it is outdated, unconstitutional and anchored on an outdated law of Act number 38 of 1938 as amended by number 7 of 1958. In its current state, it is discriminatory, disproportionate, unreasonable and liable to abuse as it contravened Articles 18, 20 and 23 of the current Constitution of Zambia'. His lawyers said the provisions of 1938 called for a subjective test as opposed to an objective test and endeavoured to criminalise free speech unconstitutionally and not reasonably justifiable in a democratic and open society. His lawyers submitted that, in its present form, section 67 (2) was against the general values of delivering fair justice where people would be found guilty for them to explain their side of story and remaining silent would mean failure to give a satisfactory explanation.<sup>44</sup>

However, the magistrate rejected the application prompting the defence lawyers to make another application seeking leave for their client to appeal to the High Court over his decision. Mr Banda reserved ruling to the following day, his lawyers filed a notice of appeal to the High Court.

In his subsequent ruling, Mr Banda noted that he could not grant the application because there was no provision in the Criminal Procedure Code and Subordinate Court Act that backed interlocutory appeals in criminal matters. He set 14 January 2013 as a date for commencement of trial.

On 25 January 2013 the High Court rejected Mr Hichilema's application to raise constitutional issues on the protection of freedom of expression and discrimination. High Court Judge Christine Phiri ruled that the magistrate was on firm grounds to decline the application as there were no constitutional issues to refer this matter for determination.

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<sup>44</sup> *Times of Zambia*, 2 October, 2012

On resumption of the court proceedings at magistrate court level, on 27 May 2013 Mr Hichilema took a fresh plea of not guilty and the matter was adjourned to 27 August 2013. The case has since been re-allocated to principal resident magistrate Aridah Chulu.<sup>45</sup>

When the matter came up for hearing on 27 August 2013, the case was postponed to 21 and 22 November 2013 because the state was having difficulties in taking witnesses to court.<sup>46</sup>

The strange thing in this case is that, the media that published the 'false and alarming' statement is not party to the criminal charge. This is sharp contrast with what happened in the case of *The People v. Augustine Phiri* given in the following second example.

**(b) *The People v Naphy Nyalugwe and Josias Mbuzi***

This is a case in which two journalists were charged for publishing false news with intent to cause fear and alarm to the public. On 19 February 1982, the *Times of Zambia* published a report about a truckload of arms that allegedly went missing from Arakan Barracks in Lusaka. This was a front page lead story. The reporter, Mr Josias Mbuzi and the Editor-in-Chief, Mr Naphy Nyalugwe were both arrested. Both were found guilty and fined K500 each (at the time this was equivalent to US\$660).<sup>47</sup>

**(c) *The People v. Augustine Phiri***

On 5 February 1988 Mr Augustine Phiri, reporter with the Zambia News Agency (later restructured and renamed ZANIS) was detained by the police after a story he wrote which was published in the *Times of Zambia* edition of the same day. In the story, Mr Phiri wrote that a child had been trampled upon to death as the mother was struggling to buy mealie meal that was at the time very scarce. On 9 November 1988, nine months later, Mr Phiri was acquitted on technicality, as the magistrate ruled that while Mr Phiri originated the story, he was not the publisher.<sup>48</sup>

It is evident that the provision of section 67 of the Penal Code has a frightening consequence on the freedom of the press as journalists publish stories at their peril. 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<sup>49</sup>. It would be a severe obstacle to the freedom of the press if those who printed or distributed matter reflecting critically on public authorities could do so only if, they could first verify the accuracy of *all statements of fact* on which the criticism was based. It must be remembered that, news, may be that which somebody does not want to be published by the press.

**2.3.1(d) *Defamation of the president (Section 69 of Penal Code)***

This section of the Penal Code like Articles 43(1) and 43(2) of the constitution provides for the protection of the president against civil and criminal proceedings. Further, Article 43 can be said to be discriminatory to the extent that it does not stop the president from suing others while he cannot be sued by them on the same ground. This gives the president unmatched advantage of 'attacking without being vulnerable to attack.' This provision immunises the president from the embarrassment of standing trial before his own 'subordinates'. Section 69 of the Penal Code, on the other hand, provides additional protection for the president: this time against being defamed. These

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<sup>45</sup> *Times of Zambia*, 28 May 2013 1

<sup>46</sup> *The Post*, 28 August 2013 7

<sup>47</sup> Unpublished: G Malama 'The Press and Democracy: A Case Study of Media Reforms in Zambia' unpublished MA thesis, University of Wales, Cardiff, 1994 68

<sup>48</sup> n 40 above 67-68. See also personal experience in Section 3.1.8 of this report

<sup>49</sup> *Thorgeirson v. Iceland* ECHR ( 25 June 1992) Ser A 239

provisions do not by themselves guarantee exemplary personal conduct by the president. For example, nothing stops the president from defaming his sworn enemies, i.e. the opposition party leaders, while, they cannot defame him.

Both Article 43 of the constitution and section 69 of the Penal Code elevate the president above everyone else instead of being the servant of the people. Since the president is elected to serve the electorates, his conduct should be transparent and subject to public scrutiny. It is also against the internationally accepted principle of the law that, no-one is above the law. Ideally, a good reputation of the president is earned by his good conduct before and during his term of office and does not need to be legislated.

A poignant illustration of the foregoing disparity between the public expectation of a responsible elected leader and his upright personal conduct came to the fore in July 2001 when Ms Edith Nawakwi, Mr Dipak Patel, both members of the Forum for Democracy and Development (FDD) and former ministers under the Frederick Chiluba government, and *The Post* newspaper Managing Director, Mr Fred M'membe were jointly charged for defaming President Chiluba for calling him 'a thief'. President Chiluba's tenure as president expired at the end of 2001 and was replaced by Mr Levy Mwanawasa. As court proceedings continued into the new year 2002, on request to the court from Ms Nawakwi, Mr Patel and Mr M'membe, the new president allowed the three accused access to documents that exposed the high level of economic plunder to both Zambian and the world at large and dragged on until later in May 2002 when it was discontinued through a nolle prosequi.

It was partly the 'thief' story that could have contributed to Dr Chiluba's successor, President Mwanawasa to address parliament on 11 July 2002 and to request parliament to lift the immunity of Dr Chiluba for further investigations and possible prosecution. In the end the defamation of the president brought out critical information about the criminal conduct of an elected leader and issues of public interest. Among allegations President Mwanawasa levelled against Dr Chiluba that required further investigations were unaccounted for revenue of US\$47 million from the sales of the Roan Antelope Mining Company that had been privatised; payment of US\$20.5 million for procurement of military equipment to a supplier in Europe, but the equipment was never delivered; usage of US\$1.1 million state funds for the purchase of personal clothes and shoes from one Boutique Basile of Belgium; use of US\$800 000 state funds for the purchase of Black Velvet property in Lusaka; unaccounted for delivery of fuel by 67 tankers; and suspected misapplication of millions of US dollars withdrawn from the state ZAMTROP account to pay several unauthorised individuals.

Court records are replete with suits against defamation of the president, but in almost all instances the protection of the president is affirmed. For instance in the cases, *The People v. Bright Mwape & Fred M'membe*<sup>50</sup>, *Fred M'membe & Bright Mwape v. The People* and *Fred M'membe, Masautso Phiri & Goliath Mungonge v. The People*<sup>51</sup> both the High Court and the Supreme Court upheld the constitutionality of section 69 of the Penal Code. The three cases involved cases of 'defamation of the president' and although they were referred to the Supreme Court for determination of constitutionality, they were invariably sent back to the magistrate's courts. On account of frequent adjournments for one reason or another as well as arguments from the defence counsels, however, the cases ended in nolle prosequi or merely discontinued, and none of the accused was found guilty or imprisoned.

It is not just the media practitioners of political leaders that fall into the trap of defaming the president: people from all walks of life are also punished. For instance, on 15 May 2012, Mr. Patrick

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<sup>50</sup> HPR/36/94

<sup>51</sup> SCZ Appeals No 87 and No 107 of 1995

Mubanga, a district culture officer who is a civil servant in Kasama in the Northern Province was sentenced to three months' imprisonment with hard labour for defaming Republican President Sata.

In passing sentence, Magistrate Monica Mwamulima said the offence committed by Mubanga was serious and required a stiffer (sic) punishment to deter would-be offenders. The magistrate further said Mubanga deserves a jail sentence for him to learn lessons that defaming the head of state is an unacceptable act in the Zambian society.<sup>52</sup>

On 6 August 2012 Mr Peter Mweete of Kalomo district in the Southern Province was sentenced to six months imprisonment by Magistrate Litungi Litungi for defaming the Republican President.<sup>53</sup>

### ***President Michael Sata v Hakainde Hichilema, Lloyd Himaambo and Richard Sakala***

In an on-going case in which the President Sata has sued Mr Hakainde Hichilema, Mr. Lloyd Himaambo (*Zambian Watchdog* proprietor) and Mr Richard Sakala (*Daily Nation* editor) (first, second and third respondents, respectively); Mr Hichilema asked the Lusaka High Court to grant him waiver of immunity for President Michael Sata in a defamation suit the head of state brought to court. Mr Hichilema said that there would be no level playing field if the case where President Sata sued him for defamation proceeded without a waiver of his immunity. Mr Hichilema issued a statement through the two media accusing President Sata of awarding a contract to the finance minister and his alleged uncle Alexander Chikwanda to renovate state house. Mr Hichilema stated that he wished to put up a counterclaim against President Sata but that he was unable to do so because the latter had not waived his immunity. He stated that his right to equal protection under the law was under threat due to President Sata's immunity under the law.

Mr Hichilema added that he needed assurances that he would not be hampered in presenting his defence to the courts of law as a result of President Sata's immunity. He asked that proceedings be stayed until further order or until President Sata waived his immunity in respect of his action. Mr Hichilema submitted that President Sata could not be charged for perjury due to the immunity he enjoyed thereby prejudicing him from getting a fair trial. Mr Hichilema also argued that in an event that President Sata lost the matter and costs were awarded to him, he would not be able to enforce an order to recover costs from the President due to his immunity.

During a Lusaka High Court hearing in the case of *President Michael Sata v Hakainde Hichilema, Lloyd Himaambo and Richard Sakala* on 14 February 2013 Deputy Registrar in charge of Subordinate Courts, Mr Charles Kafunda reiterated that the constitution immunises the president from civil and criminal liability to 'insulate his office from possible suits which arise from his unmatched visibility circumstances that make him a target for suits.' Mr Kafunda ruled that President Sata has the right to sue.<sup>54</sup>

On 9 April 2013 the state finally entered a nolle prosequi against Mr Hichilema and Lusaka magistrate Boniface Mwiinga closed the case.<sup>55</sup>

Mr George Mwenya on 19 May 2012 expressed the view that President Sata could be inhibiting his opponents by suing them for defamation. For instance, Mr Sata sued an independent newspaper, *Daily Nation* claiming US\$400,000 in damages; a University of Zambia lecturer, Dr Choolwe Beyani

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<sup>52</sup>[www.zambianwatchdog.com/draconian-and-barbaric-man-jailed-for-defaming-sata/comment](http://www.zambianwatchdog.com/draconian-and-barbaric-man-jailed-for-defaming-sata/comment) accessed on 20 February 2013

<sup>53</sup>[www.lusakatimes.com/2012/08/06kalomo-man-sentenced-6months-imprisonment](http://www.lusakatimes.com/2012/08/06kalomo-man-sentenced-6months-imprisonment) accessed on 20 February 2013. In the case of both Mr Patrick Mubanga and Mr Peter Mweete actual derogatory words uttered were not given or repeated in the court.

<sup>54</sup> *Zambia Daily Mail*, 15 February 2013 1.

<sup>55</sup> *Zambia Daily Mail* 10 April 2013 2



for the story in *Daily Nation* and claiming US\$100,000 in damages; and Mr Hakainde Hichilema for a story in the *Daily Nation* and claiming US\$220,000 in damages.<sup>56</sup>

### ***The People v Sydney Chisanga***

On 19 June 2012, *The Post* reported that the police in Mkushi opened a docket against Mr Sydney Chisanga, (Mkushi South) MMD member of parliament for allegedly insulting the President. The allegation against Mr Chisanga was that he had been going round while distributing assorted goods, telling people that the president was unwell, that he was not in good health and so on.

The police forwarded the matter to the Director of Public Prosecution (DPP) in accordance with section 70 of the Penal Code for certification and instructions on how to proceed with the matter. The matter was never presented before the courts of law and has since been withdrawn.

It is pertinent to observe that even before Mr. Sata became the Republican President, he exercised his right as a citizen to seek redress in court each time someone uttered defamatory remarks against him. In a majority of instances Mr Sata complaints were found to be legitimate and therefore cases were ruled in his favour and so he was awarded damages. Prior to the 2011 Presidential, Parliamentary and Local Government Elections, Mr Sata successfully sued Chanda Chimba III, Zambia National Broadcasting Corporation, Muvi TV Limited and Mobi TV International Limited jointly in the case<sup>57</sup>

In dismissing a stay of action by the four accused, High Court Judge Dr Patrick Matibini on 1 September 2011 said:

It will be recalled that in my Ruling of 2<sup>nd</sup> August, 2011, I reached the conclusion that on the basis of the material before me, the defences of justification, fair comment, and privilege, were not likely to succeed at trial. More importantly, I also concluded that the conduct of the defendants fell short of the standard of ‘*responsible journalism.*’ Put quite plainly, I held in effect that the defendants did not behave fairly, reasonably, and responsibly. In view of the foregoing, it cannot therefore be in the public interest to stay the injunction, and resume the broadcasting of ‘*Stand up for Zambia,*’ pending the trial of the action. Thus I have no hesitation in holding that in the circumstances, and on authority, the application for a stay of the interim injunction, must, therefore, be refused.

Perhaps it was on account of President Sata’s immunity under Article 43, that he decided on 19 February 2013 during a swearing ceremony at State House, to distribute a dossier on UPND President Hakainde Hichilema’s various bank accounts, assets and their geographical location in Zambia, South Africa and England.

Considering that Mr Sata has been president of Zambia for less than two years, while his three predecessors were in office for at least three years, it can be stated that comparatively, President Sata has sued more individuals and institutions during his tenure of office than his predecessors.

Criticism and ultimately defamation of the president under the Penal Code appears to be a common offence. On 22 July 2013 two members of the MMD election campaign team, Mr Sinoya Mwale and Mr Jealous Phiri, pleaded not guilty to a charge of defamation of the president. The two were alleged to have issued a statement to the effect that President Sata was “a Satanist who would

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<sup>56</sup>Zambiareports.com/2012/05/19/sata-seeks-millions-from-opponents-in-defamation-suits accessed on 20 February 2013. All the cases are still pending.

<sup>57</sup> *Sata v Chimba and Others (2010/HP/1282) 2011 ZMHC/74 (2 September 2011)*. Mr M Sata sued the three institutions and one individual jointly for general and exemplary damages for defamation of character in the broadcast by the defendants of television programmes entitled ‘Stand up for Zambia – the venom of the cobra’ and ‘Stand up for Zambia – the unholy alliance’

use blood as fuel to ferry people from Kagunda health post to his rally in Chipata.”<sup>58</sup> The matter has not yet been concluded by the courts.

On 6 September 2013 a Lusaka magistrate Lameck Mwale sentenced Mr Sanford Mwale, a businessman of Kalingalinga, Lusaka to six months’ imprisonment with hard, but suspended for one year for defaming President Michael Sata.

It was alleged that Mr Mwale on 30 May 2013 in Lusaka with intent to bring the president into hatred and ridicule, uttered words which in their nature were defamatory against President Sata. The actual words used were “President Sata *ni satana, akangiwa kuteka calo*” [meaning President Sata is a satan who has failed to govern the country].<sup>59</sup>

On 16 September 2013 police in Serenje district arrested a 67-year old man, Mr Rogers Mushya for allegedly defaming President Michael Sata. He was reported to have used demeaning language against the head of state, by the road side where he hurled insults at the president. Mr Mushya was actually apprehended and handed over to the police by members of the public.<sup>60</sup>

For criticising President Sata and his style of governing and running the affairs of the country, during a Platform programme on Joy FM Radio station on 20 September 2013, Dr Nevers Mumba president on the MMD was arrested for allegedly defaming the president under Section 69 of the Penal Code.<sup>61</sup>

### **2.3.1(e) Defamation of foreign princes (Section 71 of Penal Code)**

Section 71 of the Penal Code protects foreign princes and other foreign dignitaries such as ambassadors and representatives from being defamed. This piece of legislation was passed shortly after Zambia attained its political independence. Since then other legal instruments to protect foreign dignitaries as well as ordinary foreigners, on even level are in place.

In spite of its existence in the statutes of Zambia, there is no court record of any person having been charged under its provision. Moreover, there is no need to have a special law, in addition to the existing law on defamation to specifically protect foreigners.

### **2.3.1(f) Defamation (Sections 191-198 of the Penal Code)**

This section of the Penal Code outlines the definition and the process of criminal defamation. In view of the fact that there already exists the Defamation Act, Chapter 68 of the Laws of Zambia there is no need for this section in the Penal Code.

A number of aggrieved people have invoked its use in its present form to sue persons for criminal defamation either to silence them on account of deterrent damages awarded or the tedious long litigation process. The net effect of these suits, using criminal defamation, is that it curtails freedom of expression. The list of defamation suits, some of which have been concluded in courts or hearing postponed or else still outstanding is long and the claims demanded for damages are far excessive. For instance, in June 2012 the Minister of Defence, Mr Geoffrey Mwamba sued *Daily Nation* newspaper Editor-in-Chief, Mr Richard Sakala for alleged defamation and claimed K500 million (US\$100,000);<sup>62</sup> Mr Fred M’membe and Mr Mutembo Nchito, separately sued the Zambia Daily Mail Limited and its Managing Director, Mr Leonard Kantumoya, for defamation and each claimed K4

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<sup>58</sup> *The Post* 23 July 2013 2

<sup>59</sup> *Times of Zambia* 7 September 2013 2 and *The Post* 7 September 2013 5

<sup>60</sup> *Times of Zambia* 18 September 2013 2

<sup>61</sup> *Zambia Daily Mail* 24 September 2013 1 and *Daily Nation* 22 September 2013 1

<sup>62</sup> *Zambia Daily Mail* 11 June 2012 1

billion (US\$800 000) for an article published in the *Zambia Daily Mail* newspaper of 4 January 2010 headlined 'Kunda must go campaign: History repeats self';<sup>63</sup> and in June 2012, Chief Registrar of Societies, Mr Clement Andeleki sued Mr Richard Sakala and the *Daily Nation* over two articles headlined 'Andeleki exposed' And 'Fire, probe Andeleki' and claimed K2 billion (US\$400,000) in damages<sup>64</sup>.

The foregoing pending cases are indicative of it has been possible for people to use the provisions of criminal defamation, which have the potential of silencing a perceived enemy, as opposed to the civil defamation.

### **2.3.2 State Security Act**

The State Security Act makes better provision for state security, and deals with espionage, sabotage and activities prejudicial to the interests of the country.

Matters of state security have a special place in any nation and there are accordingly legal provisions to safeguard this aspect of governance. It is equally critical that the provisions and administration of the State Security Act are formulated in clear and unambiguous manner to avoid arbitrary actions and measures by the state. The State Security Act is perhaps not intended to or should not be used to target at individuals but at a system that endangers the security of the country. As much as possible the act should not interfere with individual fundamental freedoms.

The banning of issue No. 401 of *The Post* newspaper on 5 February 1996 referred to in section 2.3.1 a) resulted in three newspaper staff, Mr Fred M'membe, Mr Masautso Phiri and Mr Bright Mwape being charged under the State Security Act<sup>65</sup> for publishing a classified document. On account of the firm grounds that the three accused had, it was easy in court, for the defence to make submissions of no case to answer.

It was held that for one to be held criminally liable the information received must be classified and that he must receive the information with knowledge or reasonable grounds to believe at the time when he receives the information that the same information has been communicated to him in contravention of the State Security Act. Further, it was held that, the matters to be classified for the purposes of the State Security Act must be those which the legislature intended to be covered by the State Security Act. The act provides more restrictions than those allowed by Article 19 of the CCPR and the African Charter on Human and Peoples Rights to suppress journalists' peaceful freedom of expression.

The state eventually dropped all charges against Mr Fred M'membe, Mr Masautso Phiri and Mr Bright Mwape. In passing judgment on 22 May 1997, High Court Judge Peter Chitengi said:

The accused have no case to answer. The ingredient knowledge or reasonable ground for belief that the information is covered by the State Security Act has not been proved. It has been proved that the contents of the documents Ex P1 or indeed also those of Ex P3 are matters of State Security. Accordingly I dismiss the charges against the accused. Each accused is acquitted and should be set at liberty.

In another instance, on 9 March 1999 *The Post* newspaper edition No. 1183 carried a report headlined 'Angola worries Zambia Army, ZAF.' The article showed that militarily, Zambia was not sufficiently equipped to withstand any attacks from Angola.

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<sup>63</sup>interview on 22 May 2013 with Mr Isaac Chipampe, Managing Director, Zambia Daily Mail Limited

<sup>64</sup> *Saturday Post* 30 June 2012 3

<sup>65</sup> HP/38/1996 (unreported).

The article was considered as sensitive as it exposed Zambia's weak security system that it became a subject of point of order in the Zambian Parliament. It did not take long before the government and the police moved in to arrest 13 members of staff of *The Post* newspaper that included the editor-in-chief Mr Fred M'membe, news editor Ms Mukalya Nampito, journalists Mr Amos Malupenga, Mr Joe Kaunda, Mr Douglas Hampande, Mr Reuben Phiri, Mr Macpherson Muyumba, Mr Brighton Phiri, Mr Lubasi Katundu, Ms Liseli Kayumba, Mr Goodson Machona, Mr Kelvin Shimo and Mr Dickson Jere. They were all charged for espionage under the State Security Act.

Mr M'membe, as the lead defendant, provided the court with evidence of magazines and internet as the sources of information that appeared in *The Post* newspaper. He informed the court that the motive of the paper was to inform the public rather than spy for Angola.

In explaining the rationale for publishing the article, Mr M'membe said:

We published the story because we believed that government was giving the public false assurances. Zambia does not have the military capacity to defend itself against a country like Angola. The material about Zambia's arsenal is not a secret. All the information we used is publicly available on the Internet. If it is confidential, then something is very wrong because it shows that those in the military are not doing their work. They should find out what is written about us. They should find out what others have. It's all on the Internet. Jane's Military Report on the Internet publishes the military capacity of every country.<sup>66</sup>

The court proceedings were lengthy but in the end, all the accused were progressively acquitted by High Court Judge Elizabeth Muyovwe, with Mr Fred M'membe being the last one on 21 December 2000. In making the ruling, Judge Muyovwe said:

I find no evidence to show that the accused was spying for Angola or any other foreign power or that indeed in publishing the article it was to benefit Angola. Mere publication of the story in question does not show that it was for purposes prejudicial to the Republic nor does it establish the offence of espionage.

### **2.3.3 National Assembly (Powers and Privileges) Act**

The National Assembly (Powers and Privileges) Act contains provisions that are intended to protect the members of parliament in order that they discharge their functions and obligations as law makers without constraints or restraints. It is through free expression of views and ideas during parliamentary debates that the quality of laws enacted, oversight functions over government, and approval of the national budget are enhanced. In this regard, the act is imperative and legitimate in the country.

There are, however, certain provisions in the act that insulate the members of parliament to an extent that there are beyond criticism and distanced from the community that elects them. At this point, the national assembly seems to cease being composed of people's representatives, mindful of the fact they, too, should be amenable to constructive criticism and advice.

On 22 February 1996 the Zambian Parliament made an historic and unprecedented decision of sentencing to prison for an indefinite period *The Post* managing director, Mr Fred M'membe, managing editor, Mr Bright Mwape and columnist, Mrs Lucy Sichone. This sentence was recommended by the Parliamentary Standing Orders Committee after the newspaper published a number of articles which, in the opinion of parliamentarians, lowered the dignity of the House. In order to ensure speedy arrest of the three accused, the government even offered an award of

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<sup>66</sup> E Djokotoe 'Journalism ethics case study – Zambia' in C Ukpabi (ed) *Handbook on journalism ethics – African case studies* (2001) 221.

K2million (US\$400) for information leading to the whereabouts of the three who had gone into hiding.

A week later Messrs M'membe and Mwape decided to surrender themselves and were subsequently detained until 27 March 1996. They were then released as a result of a High Court judgment by Justice Kabazo Chanda, who ruled that parliament was wrong to put them on trial and sentence them in absentia. Justice Chanda said that 'Indefinite jail terms are incompatible with our legal system and unorthodox disciplinary procedures cannot be allowed.'

Moreover, the conviction, sentence and imprisonment without a fair trial before an independent tribunal are also guaranteed by Article 14 of the ICCPR and Articles 7 and 26 of the African Charter on Human and People's Rights (ACHPR). The action of the speaker was not consistent with international standards. In addition, section 27 of the act clearly stipulates thus:

No prosecution shall be instituted for an offence under this Act except by the Director of Public Prosecutions upon information given in writing by the speaker.

#### **2.3.4 National Archives Act**

The act provides for the preservation, custody, control and disposal of public archives. This is cardinal for the systematic management of the memory of the country and for posterity. It is equally important that just as public records are deposited with the national archives, access to these should not be unduly encumbered, as evidenced by some of the provisions of the act.

There is no significant case record under this legislation of any person that was charged under its provision. This may mean either fewer people or institutions than imagined actually make full use of the national archives or else the restrictions contained in the National Archives Act are relaxed. In case of the latter, this could help promote access to the records and thereby facilitate freedom of expression and access to information.

#### **2.3.5 Public Order Act**

The Public Order Act provides for the preservation of orderly conduct of persons and groups in the public sphere or environment, particularly at public rallies, meetings, processions and demonstrations.

The Public Order Act, with minor amendments, has since independence been widely used by successive governments. The act falls under the category of offences against public tranquillity. The act, in its present state has in-built advantages for any ruling party because the requirements for holding a public rally, meeting, procession or demonstration are somewhat more relaxed. In the case of opposition parties this is not so because they always have to give notice to the police. And if the police indicate its inability to provide security for the public event, no such event can be held. The police have generally used this piece of legislation, as was the case during pre-independence days, to block groups such as 'opposing' political parties from holding public meetings on security reasons.

In the case of *Christine Mulundika & 7 Others v. The People* the appellants had challenged the constitutionality of certain provisions of the Public Order Act, especially section 5(4). The challenge was premised on the fundamental freedoms and rights guaranteed by Articles 20 and 21 of the Constitution. The Supreme Court held that section 5(4) of the Public Order Act contravened Articles 20 and 21 of the Constitution, was null and void and therefore invalid for unconstitutionality. The Court further ruled that the invalidity and the constitutional guarantee of the rights of assembly and expression precluded the prosecution of persons and criminalisation of gatherings in contravention of the subsection pronounced against it. The appeal was allowed.

Whereas the Constitution protects the right to freedom of expression, freedom of assembly and association, the Public Order Act, by its provisions takes away these protections. The Supreme Court of Zambia in the case *Christine Mulundika & 7 Others v. The People*<sup>67</sup> found the requirement for a police permit in the Public Order Act to be unconstitutional. The Supreme Court ruling has to-date remained a major precedent.

In the case of *Resident Doctors Association of Zambia and Others v. The Attorney- General*<sup>68</sup> there was an appeal by the petitioners against the decision of the High Court which decided that they had breached section 6 (7) of the Public Order Act. The petitioners argued that the effect of the section prohibited the holding of public meetings, processions or demonstrations, where the police notify the conveners that they cannot adequately police such events and that the denial by the High Court to award them damages after having found that the police had violated the Act.

It was held by the Supreme Court that the rights to free speech and freedom to assemble are not only fundamental, but central to the concept and ideal of democracy. Further, it was held that there is need for courts as final arbiters, when interpreting the constitution and the laws made thereunder which confer the freedoms, to adopt an interpretation which does not negate the rights. Most jurisdictions adopt a generous and purposive construction of human rights instruments so as to confer on a person the full measure in the enjoyment of the rights; and the police flagrantly violated the Public Order Act and consequently, infringed the petitioners' rights as enshrined in Articles 20 and 21 of the Constitution. The Supreme Court allowed the appeal and ruled as follows:

The petitioners complied with the law and duly notified the Police within the time allowed by law. The regulating officer had a duty to inform the petitioners in writing at least five days before the event, if they were unable to police the march and propose alternative days. The petitioners' right to assemble and march therefore accrued at this stage. The regulating officer's endorsement of a purported rejection of the march, a day before the event for reasons that the demonstration would cause a breach of the peace, was not a valid exercise of power under the Act. Section 5(7), which prohibits the holding of the event after the police have indicated in writing their inability to police the event can only be invoked when there has been a valid notification to that effect. The learned trial Judge therefore fell into error to have invoked this clause and find that the Petitioners were in breach of the law. In our view, the learned trial judge completely negated the petitioner's rights of expression and assembly when he held that the Petitioners had breached the provisions of the act. As we stated in the case of *Mulundika and others v the People*, '... invalidity and constitutional guarantee of the rights of assembly and expression preclude the prosecution of persons and the criminalisation of gatherings in contravention of the subsection pronounced against'. We therefore, allow the first ground of appeal and find that the learned trial judge misdirected himself in law and fact to have held that the petitioners were in breach of the Public Order Act when they proceeded with their march on 27 April 2000.

In the second ground of appeal, the petitioners contend that the court below ought to have awarded them damages after having held that the petitioners' freedoms as guaranteed by Articles 20 and 21 had been violated. They pray that these damages should reflect three heads: compensation, aggravated and exemplary. The petitioners brought this action under article 28 of the Constitution. In enforcing the protective provisions of the Constitution, the High Court is empowered '... to make such orders, issue such writs, and give such directives as it may consider appropriate for the purpose of enforcing, or securing the enforcement of the fundamental rights and freedoms in Part III'.

In their petition to the court below, the petitioners sought a declaration that, the Police action and conduct violated their freedoms as contained in Articles 20 and 21 of the Constitution. In his judgment, the learned trial Judge held that the police action and conduct in this case breached the Public Order

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<sup>67</sup> 1995/SCZ/25 (unreported) (SCZ Judgment No. 25 of 1995).

<sup>68</sup> SCZ Judgment No. 12 of 2003 [2003] ZMSC 31 (28 October 2003).

Act and also violated the petitioners' freedoms of expression and assembly and association as guaranteed by Articles 20 and 21 of the Constitution.

The petitioners also claimed general damages for false imprisonment, humiliation and inconvenience; and exemplary damages for the oppressive manner in which the agents of the state conducted themselves. This prayer for damages appears to have been made in tort. It would appear that for the affront to their freedoms, the petitioners were satisfied with a declaration. In the way Article 28 of the Constitution is couched, the High Court is at large to make any order, including an order for compensation against anybody for breach of the provisions contained in Articles 11 to 26, of the Constitution. An aggrieved party is also at liberty to seek remedies for tortuous injuries arising from such breach.

It is on record that the petitioners were bundled on to a truck and held at Lusaka Central Police Station where they were released late in the night. Having been illegally curtailed from completing their march, they were subsequently incarcerated in police cells. There is no doubt that they were falsely imprisoned and no doubt suffered humiliation and inconvenience. They are entitled to damages. The petitioners also sought exemplary or aggravated damages for the oppressive conduct of the police. Such damages are usually awarded to express indignation by the court at the conduct of the defendant, which inflicted the injury on the plaintiff. It calls for a more generous, rather than a moderate award to provide an adequate solarium.

We have anxiously considered the circumstances of this case. State action which impedes the citizen's enjoyment of their constitutional freedoms should not be condoned. In showing our indignation, we award a figure of K500,000.00 (US\$100) to each petitioner in respect of both general and exemplary damages, to be paid with interest, at the average short term deposit rate from the date of filing of the petition up to-date and hereafter, at the average bank lending rate up to the date of payment. We award costs to the petitioners in this court and in the court below, to be taxed in default of agreement.

In response to growing public concerns over the unsatisfactory and discriminatory administration of the provisions of the Public Order Act, the Law Association of Zambia (LAZ) on 29 November 2012 filed a petition in the Lusaka High Court to seek a declaration that sections 5, 6 and 7 of the act as unconstitutional, null and legally ineffectual. The petition by LAZ stated that the Public Order Act in its application 'infringes on the public's freedom of association, expression and speech as guaranteed under the Constitution.'<sup>69</sup>

The petition also alluded to the fact that on 5 October 2012, President Michael Sata had made a statement that he now saw nothing wrong with the Public Order Act which he saw when he was in the opposition and then regarded it as repressive.

LAZ said that the continued unreasonableness exhibited by the government through the police to prevent citizens from holding public gatherings was a source of great concern. LAZ President, James Banda stated, 'No person or government authority has the right to violate these constitutional rights of citizens, unless under compelling and clearly deserving circumstances.' He said that it was clear that the Public Order Act as it stands today is subject to manipulation and has been arbitrarily used to stifle freedom of assembly and cannot be allowed to grace the country's statute books.

When the case was heard on 23 October 2013 Lusaka High Court judge Evans Hamaundu dismissed the LAZ petition on the constitutionality of the Public Order Act. In passing his ruling, Judge Hamaundu stated:

In my view, I do not find the public order Act to be in contravention of Articles 20 and 21 of the Constitution. Therefore, the petition fails and since the matter was in public interest, I order that each party bears its own costs.

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<sup>69</sup> *The Post* 30 November 2012 4.

He said that under the Administrative Grievance Procedure that was provided for under the amended Public order Act by the Supreme Court, in an event that a person was not happy with the response of the police, he or she had the right to appeal to the minister of home affairs and later on to the High Court.

Judge Hamaundu said that LAZ was supposed to commence the legal actions as an appeal not as a petition or judicial review. He said that when such a matter was taken to court as a grievance it gave the court enough jurisdiction to determine the case because the court would be part of the grievance.<sup>70</sup>

Following the high Court ruling LAZ decided to appeal in the Supreme Court against the High Court ruling.

The Minister of Information and Broadcasting Services, Mr Kennedy Sakeni, on the other hand, in a press statement on 30 November 2012 advised critics of the Public Order Act to study the current English Public Order Act and he opined that, 'Our law has been fashioned in keeping with international best practices. Public Order Acts in particular are designed to help authorities to keep law and order.'<sup>71</sup>

### **2.3.6 Preservation of Public Security Act**

The object of the Preservation of Public Security Act is broadly to provide for the preservation of public security in the country. It also provides for such measures as prohibition of publications that may be considered inimical or prejudicial to public security, prohibition of assembly and other restrictions, breaches of which include detention.

The act does not, however, define what constitutes 'public security' as a result implementation of some of the provisions of the act is left open to the enforcement agencies of the government.

Since the Preservation of Public Security Act was first enacted in 1960, there is very little evidence to show that it has undergone any major amendments or that sections have been repealed since 1968. It is thus a pre-independence piece of legislation that may have been used to quell imminent political unrest. The act is mainly invoked alongside the Emergency Powers Act, Chapter 108. The ruling party then, the United National Independence Party (UNIP), from 1964 until 1991, used the provisions of this act to declare curfews, detentions of persons, particularly political opponents, and restrictions on certain movements. The return to multiparty politics in 1991 minimised use of this act.

As the interpretation of the act is broad, there were court cases that exemplify its inordinate use and implementation which relate even to what was termed as 'economic crimes', as in *Kaira v Attorney General*<sup>72</sup> and *Bhagvatilal Rao v The Attorney General*.<sup>73</sup>

Mr. Mike Waluza Kaira was on 20 August 1979 detained under a presidential order of detention using the provisions of the Preservation of Public Security Act on the charge of externalizing funds, an act considered prejudicial to 'public security.' He petitioned the High Court to seek redress and on 8 August 1980 appeared before Justice Brendan Cullinan. The issues before the court were the determination of the meaning of 'public security', whether the grounds of detention had any relation to the preservation of 'public security' and relation and the illegality of externalization of funds being prejudicial to 'public security'.

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<sup>70</sup>Zambia Daily Mail 24 October 2013 2, *Times of Zambia* 24 October 2013 1 and *The Post* 24 October 2013 4

<sup>71</sup>Zambia Daily Mail 1 December 2012 1-2.

<sup>72</sup>1978/HP/No. 172 (1980) ZR 65.

<sup>73</sup>Supreme Court of Zambia Judgement No. 30 of 1987, Appeal No. 24 of 1987.



Justice Cullinan recalled that in the act,

the expression 'public security' includes the securing of the safety of persons and property, the maintenance of supplies and services essential to the life of the community, the prevention and suppression of violence, intimidation, disorder and crime, the prevention and suppression of mutiny, rebellion and concerted defiance of and disobedience to the law and lawful authority, and the maintenance of the administration of justice.

He said that he had experienced much difficulty in ascertaining the interpretation to be placed on the given definition, which to his mind could well have been couched in terms more readily understandable. The judge dismissed the state's argument that economic crime of externalizing funds should fall under the act.

In passing his ruling, Justice Cullinan said:

In all the circumstances therefore, in the exercise of my discretion, I am of the view that the applicant should have his declaration. I accordingly declare that the applicant's detention was invalid *ab initio* and in any event became invalid after 23 October, 1979.

In the case of (Bhagvatilal) *Rao v The Attorney General* Mr Bhagvatilal Dabyabhai Rao had, in the High Court, been found guilty of illegal trafficking in and smuggling of precious and semi-precious stones, elephant tusks, rhino horns, cobalt and illegal externalization of foreign exchange over many years. He was therefore detained. On appeal to the Supreme Court, a majority of four judges re-affirmed the decision of the High Court, but one judge dissented because of the charge did not fall under the purview of the Preservation of Public Security Act as an offence that threatened 'public security'.

The foregoing demonstrate a need to minimize vagueness in legislation by giving clearer definition of terms and identifying with the laws exactly how the offences or crimes fit in. More importantly, however, is the need to review the legislation within the context of present-day democratic dispensation and the need to minimize interference with individual liberties by enacting laws that are unambiguous.

### **2.3.7 Printed Publications Act, Cap 161 of the Laws of Zambia**

The essence of the Printed Publications Act is to provide for the registration of all newspapers, magazines and books published and printed in Zambia; and for the preservation of printed works published in Zambia. The act requires that every edition of the newspaper published should be deposited with the director of national archives. In addition, any change in the holder of the editor needs to be registered. Such mandatory requirements may in some instances encumber freedom of expression.

There is little evidence that implementation of the Printed Publications Act has been closely monitored for compliance because there are no records of any prosecutions. However, pursuant to requirement of section 5(1) of the act, Mr Davies Mataka, former deputy managing director of the *Zambia Daily Mail* and Mr Ngande Mwanajiti were on 10 January 2013 charged in a Lusaka magistrate's court for jointly causing to be printed and published a newspaper. Messrs Mataka and Mwanajiti published the newspaper called *The Zambian* without registering it with the director of the national archives between 9 June 2011 and 26 September 2011. This was during the run up to the 2011 presidential, parliamentary and local government elections.<sup>74</sup> It is clear that in launching the new publication there was need to comply with the laid down procedure and requirements as per existing legislation.

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<sup>74</sup> *Zambia Daily Mail*, 11 January 2013.

The case is currently in court and it is probably the first case of its kind that should set both a deterrent and a valuable precedent.

The Printed Publications Act has the potential of being used by a government to deny perceived enemies from registering a newspaper that would give an alternative outlet for more sympathetic political news and information.

### **2.3.8 Parliamentary and Ministerial (Code of Conduct) Act**

The object of the Parliamentary and Ministerial (Code of Conduct) Act is to provide some code of conduct for ministers, deputy ministers and members of parliament in line with some articles in the Zambian Constitution. Cabinet ministers, deputy ministers and members of parliament are public officers and their conduct or activities may affect the society at large. Their interaction with the public makes this act relevant insofar as decorum, sense of responsibility and behaviour expected of a public officer are concerned.

Under the provisions of Parliamentary and Ministerial Code of Conduct Act, three tribunals were appointed by the chief justice and held in mid-1990s. Former Minister of Agriculture, Food and Fisheries, Dr Guy Scott sought redress from the tribunal in respect of an allegation published in the *Zambia Crime News* edition of 21-27 February 1995 that he had embezzled a total of US\$1.5 million donated to Lint Company of Zambia. On 27 March 1995, the *Zambia Crime News* reporter, Elias Kamanga, owned up before the tribunal that the story was false.<sup>75</sup>

A story written in the *Zambia Crime News* about the then Copperbelt Deputy Minister, Mr. Kangwa Nsuluka that he had attempted to smuggle maize was dismissed as 'frivolous and malicious' by a tribunal on 11 May 1995. It was established that Mr Nsuluka was innocent and he was therefore given the liberty to seek legal redress against the newspaper.<sup>76</sup>

In the third instance, *The Chronicle* newspaper issue of 12-18 April 1996 and *The Post* newspaper edition of the same day published articles about the Legal Affairs Minister, Dr. Remmy Mushota with his colleague, Mr Patrick Katyoka, a member of parliament, who wanted cash a government cheque in the sum of K210 million (or US\$42 000 at the exchange of US\$1=K5 000) at the Bank of Zambia. During the tribunal's cross examination held between 6 June and 20 June 1996, four journalists, Bright Mwape and Chilombo Mwendela from *The Post* newspaper and Nkonkomalimba Kafunda and Anthony Mukwita from *The Chronicle* refused to disclose their source of information. Both Dr Mushota and Mr Katyoka were found wanting in their conduct and removed from offices.<sup>77</sup>

It was significant in the third instance that disclosure of the source of information was cardinal as Dr Mushota during the cross-examination insisted, 'You have to help me so that I receive justice . . . and if you refuse to reveal the source are you convinced that justice will be done?'<sup>78</sup>

From the proceedings the author argues that it was evident that, 'If for some reason justice in the tribunal depends entirely on the source and the reliability of the source, the tribunal may compel the journalist to disclose the source of information. It is the disclosure which is a recipe for shattering the source's confidentiality and trust, because good journalism very largely hinges on this confidentiality and trust between journalists and their sources.'<sup>79</sup>

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<sup>75</sup> n 35 above 22

<sup>76</sup> n 57 above 23

<sup>77</sup> n 57 above 23

<sup>78</sup> n 57 above 24

<sup>79</sup> n 57 above 24

The need for a code of conduct, in respect of various official situations, among ministers and deputy ministers is unquestionable and this act helps to ensure conduct above board. The act therefore serves a legitimate interest and the provisions of the act are necessary for a democratic society such as Zambia. The demand for counter-checking facts prior to publishing an allegation in the media is justifiable and forms the core value of any media practitioner who is expected ensure accurate reportage.

Southern African journalists from neighbouring countries Botswana, Malawi, Zimbabwe, Mozambique, South Africa and Zambia in October 1994 hailed the act as excellent legislation to fight corruption, but on the other hand, considered it an infringement of freedom of the press and expression.<sup>80</sup>

### 2.3.9 Contempt of Court (Miscellaneous Provisions) Act

Courts are institutions known to be particular about how legal procedure should be conducted. Persons associated with the courts have no problem with obliging with the dictates of the courts. The act provides for protecting the court and its officers by way of enumerating contempt of court and restricting publication of details of certain court proceedings.

The courts have inherent jurisdiction to punish for contempt, and this act helps to provide clarity and inform the people well in advance as to the conduct which amount to contempt.<sup>81</sup>

On the other hand and notwithstanding the foregoing, it is important to note that the provisions of the act are premised on the probability that the media might influence the outcome of court cases even though the limitations of the media are broadly defined in the contempt of court. According to Richard Mukelabai<sup>82</sup> contempt of the court is exercised in two ways, in the 'face of the court' and 'away from the court'. In case of contempt committed in the face of the court, an erring person may be sentenced immediately without trial. In case of contempt committed away from the court, the spoken word or act done to lower the dignity is punishable. But the interpretation of the act is subjective.

The Supreme Court in *Sebastian S Zulu v. The People*, SCZ Judgment No. 7 of 1991 settled the law as follows:

HELD there is no needs to conduct a trial; for contempt of court 'committed in the face' of the court.

(2) this power of summary punishment is a great power, but it is necessary power. It is given so as to maintain the dignity and authority of the Judge and to ensure a fair trial. It is to be exercised by the Judge of his own motion only when it is urgent and imperative to act immediately – so as to maintain the authority of the Court – to prevent disorder – to enable witnesses to be free from fear – and Jurors from being improperly influenced – and the like. It is, of course, to be exercised with scrupulous care, and only when the case is clear and beyond reasonable doubt.<sup>83</sup>

In the event of contempt committed away from the court, the law on the subject is 'mystified' because although section 4(3) provides that:

No prosecution for an offence under this section shall be commenced by any person without the written consent of the Director of Public Prosecutions.

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<sup>80</sup> n 57 above 22.

<sup>81</sup> n 24 above 64.

<sup>82</sup> Press law and ethics in Zambia: Discussion papers, CPU-Zambia and ZAMCOM 11-22 August 1997 33.

<sup>83</sup> n 64 above

the practice and conduct of some of the judges and magistrate(s) pointed to the contrary for example in the case of *Masautso Phiri of The Post* newspapers.<sup>84</sup> Mr Masautso Phiri, special projects editor of *The Post* newspaper was on 11 February 1997 found guilty and sentenced to prison for three months on a charge of contempt of court for lying against the Supreme Court. Phiri used to write a regular column headed 'Post Card'. In one of the column articles headlined 'Praising God loudly' published in *The Post* newspaper edition of 11 December 1996, he alleged that seven judges of the Supreme Court had been promised K14 billion (US\$2,800,000) to rule in favour of President Frederick Chiluba. He also said a down payment of K1 billion (US\$200,000) had already been made to the judges.<sup>85</sup> The judges concerned were Chief Justice Matthew Ngulube, Deputy Chief Justice Bonaventure Bweupe, Justices Ernest Sakala, Matthew Chaila, Denis Chirwa, Weston Muzyamba and David Lewanika. On behalf of the full bench, Justice Bweupe said,

We have considered the fact that the accused is a first offender and he is a bread winner. However, our view is that a fine would be inappropriate because the allegations levelled against us were most contemptuous.

We believe that a prison term of three months would send shock waves through the accused and others who may be thinking of writing like him.<sup>86</sup>

Mr. Bweupe further described the allegations as 'most serious and scandalous' adding that it could bring the highest office in the land into ridicule.<sup>87</sup>

After being sentenced, Phiri sought to apply for three of the judges (Bweupe, Chaila and Lewanika) to recuse themselves on account of his earlier altercations with them, but the application was dismissed because it was not procedurally permissible.

Later, on 18 March 1997, in a statement of appeal to the Supreme Court to review the contempt case, Phiri, who was the first Zambian journalist to be imprisoned by the full bench of the Supreme Court, said in part:

It is important for both this court as the Supreme Court of this land and the press, to realise that both of us have a role to play in maintaining democracy and good governance.

Both of us must realise the need for each other. What transpired on February 10 was a primitive attempt to silence the media by the highest court of the land. From the transcript of the proceedings it is obvious that the intention of the Supreme Court amounted to censorship of free speech and the right of people to receive information. It is my prayer that the three judges will see the necessity to recuse themselves. This will give chance to the other judges to revisit the decision of February 11. Your Lordships, I would like to have on record today that I apologised not because I was guilty. I apologised to save the integrity of the institution of the Supreme Court. For me the institution of the Supreme Court is very important to myself, to the independent media and therefore, to the people of Zambia. I did not want to be part of the destruction of the Supreme Court. I, therefore henceforth withdraw my apology.

It is in the interest of the judiciary and the independent media, both subjects of attacks by politicians, to coexist. I and my colleagues only attack the judiciary when it is necessary to do so and especially when a spate of judgments and actions of the courts appear not to follow the rule of law and natural justice.

I would also want this court to record the fact that had I on February 10 been asked to take a plea, I would have pleaded not guilty.<sup>88</sup>

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<sup>84</sup> n 64 above 33.

<sup>85</sup> *The Post* newspaper, *Times of Zambia* and *Zambia Daily Mail* 12 February 1997 1.

<sup>86</sup> *Zambia Daily Mail* 12 February 1997 1.

<sup>87</sup> *Zambia Daily Mail* 12 February 1997 1.

Mukelabai declares his belief in a time-honoured maxim of law that, *Nemo debet esse judex in propria* (No one should sit in judgment in his/her own complaint) as illustrated by parliament to give power to the director of public prosecutions to approve prosecutions for contempt of court committed away from the court.<sup>89</sup>

Monitoring of contempt of court infractions involves some alertness. On 10 November 2010 Supreme Court judge, Justice Gregory Phiri, sitting as High Court judge ordered an arrest of *Zambia Watchdog* editor and an author of two articles considered ‘contemptuous’ which appeared on the online publication between 22 October and 2 November 2010 on some evidence given by a murder suspect Matthew Mohan, following an application by a defence lawyer, Mr Bonaventure Mutale.

In the application the lawyer, Mr Mutale said, ‘Our application is that the author of those two articles together with the editor of that online should be cited for contempt of court, as the allegations in the two articles are a serious onslaught not only on the Judiciary but on administration of the justice system in the country.’

In granting the application, Justice Phiri said:

The State, through the Director of public prosecutions, all security wings, and all apparatus involved in information technology, including the Zambia Information Communication Technology Authority, is hereby ordered to carry out thorough investigations into the author and the publisher.

Once the relevant person or persons are identified, the police must arrest and bring them forthwith to this court so that they formally purge this contempt.<sup>90</sup>

## 2.4 Analysis of proportionality of sentences/fines

Courts in Zambia mete out sentences or fines in terms of penalty units or imprisonment term or both. One penalty unit is equivalent to K180 or US\$0.30. The measure of penalty unit is not permanent as it could vary according to the director of public prosecutions. There are certain offences where there is no option for a fine and this means that a person that has been convicted has to serve a jail term as prescribed by the specific act and penalty for infraction.

In respect of freedom of expression, the more common offence would be defamation or libel under either civil defamation, Chapter 68 of the laws of Zambia or under criminal defamation in Chapter XVIII of the Penal Code. Over the years most charges of defamation that are preferred against print and electronic media under defamation are targeted at mainly the institution which would then be expected to pay awards for any damage so adjudged. Even when an individual is also sued and found guilty, it is normally incumbent upon the employer institution that takes up the responsibility to settle the awarded damages. This approach takes into account the fact that the individual committed the offence of defamation in the course of his or her official duties and represented the institution. The following table gives a summary of the imprisonment terms and fines under different laws:

Legal basis	Fine	Imprisonment	Additional option
Printed Publications Act	600 penalty units	One month	Nil
State Security Act	Nil	15-25 years	Nil
Parliamentary and Ministerial Code of Conduct Act	Nil	Up to one year	Nil
Contempt of Court	15 000 penalty units	Six months	Or both

<sup>88</sup> n 64 above 41.

<sup>89</sup> n 64 above 41.

<sup>90</sup> *Zambia Daily Mail* newspaper 11 November 2010 2.

(Miscellaneous Provisions)			
Act			
Public Order Act	1 000 penalty units	Six months	Or both
National Archives Act	6 000 penalty units	Twelve months	Or both
Prohibited publications	500 penalty units	One year	Or both
Seditious intentions	6 000 penalty units	Seven years	Or both
	3 000 penalty units	Two years	
Publication of false news with intent to cause fear and alarm	Nil	Three years	Nil
Defamation of president	Nil	Up to three years	Nil
Defamation of foreign princes			
Defamation	Compensatory and exemplary damages		

## 2.5 Conclusion

Zambia has ratified a number of international treaties and has subscribed to regional and international declarations which should be found valuable in promoting freedom of expression and access to information. Because the country has dualist legal system, however, it is not possible to effectively utilise provisions in some of these international treaties unless they are domesticated into Zambian laws. This is evident in the gaps or failure by some of the Zambian laws to conform to the requirements of the Declaration of Principles on Freedom of Expression in Africa and to other international standards.

The country's long journey in formulating a constitution that provides for good and satisfactory governance of the people has not yet yielded results. A number of proposals for improving protection of freedom of expression and the media have been made during various national constitutional review commissions. There is a clear need to synthesise these proposals and incorporate them in the new constitution.

It is noted from the analysis of six sections of the Penal Code that most of the provisions in the sections limit freedom of expression. The section on prohibited publications showed that it was the republican president's opinion, which might be subjective, not that of a group of advisors or that mattered in banning a publication. Such powers have the potential for abuse. The section on offences in respect of seditious practices brought to the fore the need to be clear with what is termed seditious. The provision of blanket prohibition of what might be considered as 'false news with intent to cause alarm and fear' needs careful review to avoid 'killing' vital information that can be sparked by a rumour or a casual tip. In a democratic society such as Zambia, there is a growing need for openness, accountability and conduct deserving of offices occupied. There is therefore a clear distinction between the institution of presidency and the person occupying the office. In a democratic society criticism of the personal disposition and public conduct of who holds the office should be allowed rather than stifled. There is no need to retain section 69 of the Penal Code.

The provisions of the Penal Code thus need to be re-examined in the light of the changing environment where the country aspire to be truly a democratic state with individual liberties further enhanced and guaranteed.

Whereas matters of state security that also deal with espionage, sabotage and activities prejudicial to the interests of the country need legal provisions to safeguard this aspect of governance, provisions and administration of the State Security Act need to be formulated in clear and unambiguous manner to avoid arbitrary actions and measures by the state. The State Security Act should not be used to

target individuals, thereby interfere with individual fundamental liberties, but at a system that endangers the security of the country.

The legal provisions of the National Assembly (Powers and Privileges) Act protect the members of parliament in order that they discharge their functions and obligations as law makers without constraints or restraints. The act guarantees to the members of parliament free expression of views and ideas during parliamentary debates. This in turn enhances the quality of laws enacted and the oversight functions over government. It is important that members of parliament also realize that they are part of the community; they are human beings and should accept constructive criticism rather than shut it out completely.

Ever since the pre-independence days the Public Order Act provided for the preservations of orderly conduct of persons and groups in the public domain or environment, particularly at public rallies, meetings, processions and demonstrations. The act, however, has the inherent character of giving an upper hand to the political party in power when it comes to holding public meetings or rallies, and to disadvantage other 'opposition' political parties. This should change by re-examining the relevance of this order.

It has been observed the Preservation of Public Security Act was enacted in 1960. It was then used to quell imminent political unrest. Times have changed and the return to multiparty politics should guide how this act is used alongside the provisions of the constitution and without taking draconian measures that negatively affect the individual liberties fundamental freedoms of expression.

Whereas provisions of Contempt of Court help people understand limits of reporting during various stages of court proceedings, the act should facilitate rather than inhibit administration of justice. It is well-known that magistrates and judges at different levels of work do not entertain constructive criticism or advice. They are human beings and therefore liable to mistakes. The experience of Mr Masautso Phiri is in this regard invaluable.

### **Section Three: Qualitative Research into Impact of laws on expression**

This section describes the actual extent of the impact of laws that decriminalize freedom of expression as illustrated by views and experiences which individuals endured and describes campaigns for some law reforms that a number of interest groups have undertaken in Zambia. In this regard, interviews were conducted with selected political, media practitioners, advocacy and civil society leaders.<sup>91</sup>

#### **3.1 Interview with key political, advocacy and civil society leaders**

##### **3.1.1 Foundation for Democratic Process (FODEP)**

Mr MacDonald Chipenzi<sup>92</sup> identified sections 67, 69 and Chapter XVIII of the Penal Code, and the Public Order Act as laws that criminalise freedom of expression in Zambia. He said that provision of section 69 of the Penal Code which prohibited defamation of the president was often used to silence opponents and suppress debate on critical national issues, in the same way that criminal defamation in Chapter XVIII of the Penal Code was used to silence other people.

On criminal defamation, he cited one pending case in which he and FODEP were sued by Col Panji Kaunda for a defamatory statement made between 4 October and 7 October 2011.<sup>93</sup> This is in a case

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<sup>91</sup> In spite of repeated efforts, representatives of the judiciary, police, Movement for Multiparty Democracy (MMD) and the United Party for National Development (UPND) were reluctant to be interviewed.

<sup>92</sup> interview on 8 February 2013. Mr MacDonald Chipenzi is Executive Director, Foundation for Democratic Process (FODEP)

<sup>93</sup> *The Post* 10 February 2012.

where Mr Chipenzi issued a media statement questioning the nomination to parliament of Col Kaunda by President Sata, contrary to Article 65(1) of the Constitution, when Col Kaunda had earlier been declared bankrupt. Mr Chipenzi said his media statement merely sought clearance by the authorities not to defame Col Kaunda.

Mr Chipenzi said that of late, the Public Order Act was being used by the government to suppress freedom of expression. He cited incidents where Dr Nevers Mumba, president of the MMD and Mr H Hichilema, president of UPND were separately arrested for addressing informal gatherings of marketeers. He, however, felt that the Supreme Court rulings in *Christine Mulundika & 7 Others v. The People*<sup>94</sup> and *Resident Doctors Association of Zambia and Others v. The Attorney- General*<sup>95</sup> should serve as a worthy guidance. Further, he said that the requirement of the Public Order Act for organisers of meetings to indicate speakers, what is going to be said and in what areas posed limitations in expression.

He said, 'While the Public Order Act does not restrict the president, vice president, ministers and deputy ministers, others need to get clearance, which means that the law in effect is not providing for divergent views to be freely expressed or else speakers of other views are to be caged. This law is only good for dictators and one-party states not a multiparty democracy like Zambia.'

He revealed that the Parliamentary committee on legal affairs, governance, human rights, gender matters and child affairs had written to a number of organisations that included churches and civil society organisations for written submissions of views on the Public Order Act, but when time came for these organisations to make additional oral presentations, the committee cancelled the oral presentations because of the action by the Law Association of Zambia to seek High Court ruling on the constitutionality of the Public Order Act.

Mr Chipenzi said that various laws that limit freedom of expression have impacted negatively on most civil society organisations because various speeches they made to criticise government leadership had to be tailored within the limits of the laws. Civil society organisations have to be on guard to ensure that any statements they issued did not defame the president he said, adding that even during television interviews or discussion programmes contributions were restrained, whereas these were the very platforms where people should normally have been allowed to express their views fully and so be heard.

He identified civil society organisations, journalists and opposition political party leaders as the 'endangered species' that were most targeted by the laws that restrict freedom of expression. He said that in this regard the opposition political party leaders appeared to be closely monitored in all their movements and what they publicly say. He cited the on-going case of Mr Hakainde Hichilema in which he has been charged for uttering false news with intent to cause fear and alarm on 11 June 2012,<sup>96</sup> Mr Chipenzi said that because of their jobs, journalists were conveyors of news, which might be defamatory and so they incurred legal costs to defend themselves as they were personally sued.

In addition, Mr Chipenzi said that lately the Societies Act was being regularly used to stifle freedom of expression through threats of de-registration of any organisation registered under the Act. He said any organisation that was very critical of the government was perceived to be inimical and so by the powers vested in the registrar of societies and the minister of home affairs such an organisation could be de-registered even on flimsy reasons of failure to file annual returns.

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<sup>94</sup> 1995/SCZ/25 (unreported) (SCZ Judgment No. 25 of 1995).

<sup>95</sup> *SCZ Judgment No. 12 of 2003 [2003] ZMSC 31 (28 October 2003)*.

<sup>96</sup> as reflected in section 3.1.7



### 3.1.2 Transparency International Zambia

Mr Goodwell Lungu<sup>97</sup> identified three laws namely, the Penal Code (he named specific sections), the State Security Act, and the Public Order Act as laws which in his view criminalise freedom of expression in Zambia.

On further elaboration, Mr Lungu said that section 53 of the Penal Code gave 'blanket powers to the president to declare a publication prohibited.' He also said that sections 57, 60 and 61 which referred to sedition, were couched in a broad manner such that authorities could easily abuse the provisions contained therein under the pretext that a publication is seditious. Mr Lungu also cited section 69 of the Penal Code as a provision that could be used by a sitting president to stifle all form of criticisms even if such criticism was premised on the personal misconduct or character of the office holder rather than the presidency as the highest office in the country.

Mr Lungu said that although he had not been directly affected by these laws, he was aware of a number of court cases that were adjudged, such as *The People v Bright Mwape and Fred Mmembe* (1995), *Fred Mmembe, Bright Mwape v The People*, and *Fred Mmembe, Masautso Phiri Goliath Mungonge v The People* (1996) which hinged on the cited sections of the Penal Code and on the State Security Act. In respect of the Public Order Act, Mr Lungu cited the cases of *Christine Mulundika and 7 Others v The People* (1995) and the *Resident Doctors Association of Zambia and Others v Attorney General*. He said that each of these cases illustrated how freedom of expression could be repressed. All these cases have referred to in earlier sections of this report.

Mr Lungu said that a number of civil society organisations had initiated campaigns for possible review of the Public Order Act. He said that while the Law Association of Zambia had taken the matter to court and was waiting for judgement, the Southern African Centre for Constructive Resolution of Disputes (SACCORD) had previously undertaken a study of the Public Order Act for the purposes of mounting a research-based campaign against the Act.

He said that as far Transparency International Zambia was concerned; it was on account of the unfavourable provision, and barring any person making statements that might prejudice court proceedings, contained in section 116 the Penal Code that the organisation was restrained from commenting on matters before courts for fear of being cited for contempt. On the other hand, he said the TIZ has not in any way tempered any speeches or statements on account of the three laws that he cited as impinging on freedom of expression.

Mr Lungu identified members of the opposition political parties, civil society organisations, human rights activists and media practitioners as being particularly vulnerable to the various laws that criminalise freedom of expression. He explained that it was mostly these groups that were engaged in issuing comments and statements on a variety of governance issues, and such comments invariably tended to be critical of authorities.

### 3.1.3 Patriotic Front

Mr Chanda Mfula<sup>89</sup> offered a rare response in stating that it was difficult for him to pinpoint any laws on the statutes that limited freedom of expression in Zambia. He said that whereas with the results of the 2011 presidential, parliamentary and local government elections held in September 2012 the country underwent a political change this did not amount to a legal change. He said that since the Patriotic Front came to power it had allowed people to express their views freely and had increased the number of media outlets by way new radio and television stations being established in various parts of the country.

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<sup>97</sup> interview on 13 May 2013. Mr Goodwell Lungu is Executive Director, Transparency International Zambia

In Mr Mfula's view criminalization did not apply to freedom of expression, but rather to the incidence of people committing offences. He said that the provisions of various sections of the Penal Code prohibited people from insulting others or from other wrong-doings, adding that any citizen's freedom of expression should not be exercised to the extent of legitimizing insults.

He claimed that prior to 2012 elections, the country was governed by politics not laws and as such the people in power abused the provisions of sections of the Penal Code in order to frame their opponents.<sup>89</sup> interview on 11 June 2013. Mr Chanda Mfula is Media and Publicity Director of the Patriotic Front.

Mr Mfula explained that when Mr Michael Sata sued other people or institutions he merely exercised his right as a citizen to seek redress in the courts of laws whenever he felt injured. He said that it was an affirmation that just as nobody was above the law; nobody should be above their freedom of expression. Furthermore, Mr Mfula said that in dropping a number of defamation cases against media houses or individuals shortly after assuming office as the republican president he was utilizing his right by following the due provisions of the law.

Mr Mfula expressed the view that people ought to be accountable for their actions and therefore they should exercise their freedom of expression with responsibility.

He was aware that MISA Zambia has been campaigning for possible repeal or amendment of some selected laws, as demonstrated by a number of books on media law reforms that the organisation had published.

## **3.2 Interviews with media practitioners**

### **3.2.1 Catholic Media Services**

Fr Paul Samasumo<sup>98</sup> said that Article 20 of the Constitution gives freedom of expression and information to people, but there were also too many derogations that impinge on the freedom of expression. He identified defamation of the president, section 69 of the Penal Code and the Official Secrets Act (now, the State Security Act) as two laws that greatly restrict freedom of expression in Zambia.

On the defamation of the president, Fr Samasumo said, 'It is not right to equate an opinion to a criminal act – which offence should stay as a civil offence.'

He said Zambia was one of the few countries that maintain this legislation which prohibits speaking against the president. He said currently there are eight Catholic community radio stations that operated under the CMS, even though administratively they reported to their respective bishops. Fr Samasumo said that as a result of some of the programmes which were critical of government and in particular, of the president, radio stations were constantly threatened with closure. In some instances ministers had to telephone the ZEC Secretary General to dissuade the Catholic Church against criticising the president.

Fr Samasumo said that the State Security Act did not allow citizens to question what their government was doing. It was abused to hide a lot of wrong doings, but this was not right in a democratic society where it was essential to hold leaders accountable to ensure good governance.

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<sup>89</sup> interview on 8 February 2013. Fr Paul Samasumo is Executive Director, Catholic Media Services and spokesperson of the Zambia Episcopal Conference (ZEC).

He recalled that in August 2012 the CMS was working on a video documentary about 'The decline of industries in Zambia'. He said he had assigned two CMS members of staff to travel to Kabwe to include in their documentary a shot of a defunct Mulungushi Textiles factory.

He said on account of the fact that Mulungushi Textiles was under the Ministry of Defence and therefore considered as a 'military establishment' under the State Security Act, the CMS staff were roughed up by paramilitary police. They were also forced to delete from film footage shot of the building of the factory under pain of losing their camera. He said that to ensure complete deletion the staffer were forced to repeatedly run the recording to and from and in the end the documentary had no shots of visuals.

Fr Samasumo thought that enactment of the Freedom of Information Bill or Access to Information Bill would provide a better remedy to the restrictions imposed by the State Security Act.

He said CMS has on behalf of the Zambia Episcopal Conference been actively involved in advocacy work and campaigns against laws that restrict freedom of expression. For instance, CMS always partnered with PAZA, MISA Zambia, Press Freedom Committee of *The Post* newspaper, ZAMWA, United Nations Information Centre, and PSAf in organising World Press Freedom Day activities and in campaigns against statutory media regulation.

In addition, Fr Samasumo said that CMS collaborated with Caritas Zambia, a sister ministry within ZEC. He said that Caritas Zambia managed a Parliamentary Liaison Programme that engaged various members of parliament to lobby for support. He said while MPs were sympathetic and supportive of introducing media friendly legislation, they were inhibited by restrictions of Article 81 of the Constitution.

He said that at international level CMS occasionally sent out media alerts to Signis whenever Catholic community radio stations in Zambia were threatened or were in any trouble.

He said as Executive Director of CMS he regularly dealt with problems that Catholic community radio stations encountered as a result of these media unfriendly laws. Fr Samasumo said the Catholic radio stations were prohibited from 'importing' international news and that they were too weak to face any litigation of defamation or libel. He said that such a situation inhibited they way the radio stations covered news. He further explained that the same radio stations faced a few challenges such as the need to publish news immediately in the absence of an astute editor to check content. This was because a majority of volunteers at the radio stations did not know or understand provisions of media-related laws it was therefore difficult to avoid pitfalls. In addition, the radio stations did not have editorial policies that contain safeguards on how to handle certain issues at radio stations, just as generally stations were not conversant with 'insult' laws.

As ZEC spokesperson, Fr Samasumo said that he was always mindful of the prohibitions in various existing media-related laws each time ZEC issued pastoral letters or he issued press statements. In particular, he said that he was always very careful not to defame people or infringe existing laws. Further, he said that CMS was to be registered separately so that any litigation against any of these laws was limited to CMS only. Such an arrangement would protect ZEC from being entangled in CMS's litigation.

### 3.2.2 Mr Zunga Siakalima

Mr Zunga Siakalima<sup>99</sup> said that although he was conversant with the provision of the Part III of the Zambian Constitution with regard to the protection of fundamental rights and freedom of the individual, and was aware of a number of High Court judgments related to these rights, he had varied practical experience only in the administration of the Public Order Act. He said he never handled any litigation involving persons aggrieved about infringement of his rights.

He said notwithstanding the guidance offered by the Supreme Court rulings in *Christine Mulundika & 7 Others v. The People* and *Resident Doctors Association of Zambia and Others v. The Attorney- General*, the Zambia Police Service was capable of applying the Public Order Act to the total satisfaction of the Zambian public, if only the police was allowed to perform their work professionally and without external interference. In this regard, he said that the government leaders should give the police some space to handle affairs of public rallies or procession so long as the inspector general on condition that he or she is prepared to be held responsible for any consequences.

In his experience, Mr Siakalima said that the police did not need to block or cancel any processions, demonstrations or public rallies once the notice was received. He said that what was cardinal was to stand by and monitor to ensure that there is order and peace. Mr Siakalima said that there were instances during his tenure as inspector general when some individuals or groups of people would deliberately entice the police to arrest them. His response was always to carefully analyse the situation and interview the persons involved as a way of forestalling any major problems. He said the outcome of such intervention was often positive.

Mr Siakalima cited an incident in which students from the University of Zambia had decided to march to the embassy of the Democratic Republic of Congo (then called Zaire) to demonstrate in solidarity against ill-treatment of some students in that country. Government's initial response was for the police to bar the demonstration, to which the students protested vehemently. As inspector general, Mr Siakalima decided otherwise. He let the students march to the embassy to present a petition, but on finding that the ambassador was out of the office, they decided to march to the ministry of foreign affairs. He said although the route for the procession had changed, Mr Siakalima instructed his officers to monitor without molesting or intimidating the students in any way. The Minister of Foreign Affairs at the time, Mr Luke Mwananshiku gladly received the petition for onward transmission to the embassy of Zaire, and the students happily returned to their campus.

In Mr Siakalima's view, however, there was a need for the Public Order Act to be reviewed and amended in light of current political developments to meet the aspirations of democratic dispensation.

He also alluded to events during the latter half of 1990, just before the return to multiparty politics, when a referendum was due to be held. He said a statutory instrument had been issued authorising district secretaries, not the police, to administer the Public Order Act and issue permits for people interested in holding rallies. He said, 'Everything worked very well and in fact the district secretary in Luanshya district had such authority as to tell Mr Grey Zulu, then Secretary General of UNIP and number two person in the country's leadership to end his public meeting because his time had lapsed.'

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<sup>99</sup> interview on 15 January 2013. Mr Zunga Siakalima is currently a private lawyer, but a long-serving police officer. On two occasions he served as the Inspector General of Zambia Police Service under President F J T Chiluba and under President L P Mwanawasa. The position of Inspector General is the highest rank in the Zambia Police Service.

### 3.2.3 Mr Godfrey Malama

Mr Godfrey Malama<sup>100</sup> demonstrated broad understanding of legislation that restricted freedom of expression in Zambia, having served on the Media Reform Committee (MRC). He said the MRC had identified a number of laws that in one way or the other impacted on freedom of expression. Among these were sections 53, 54, 55, 60, 61, 67, 69, 70, 71, 116, 117, and 177 of the Penal Code; The Official Secrets Act (now merged with the State Security Act), the Preservation of Public Security Act, the Printed Publications Act, Contempt of Court Act, Defamation Act, and the National Assembly (Powers and Privileges) Act. Mr Malama said on each of these sections of the Penal Code and the acts, the MRC made its observations and recommendations for amendments or repeal, and these constituted a final report of “Recommendations for Media Reform in Zambia” that, was submitted to the Ministry of Information and Broadcasting Services in August 1993.

Selectively, Mr Malama made some observations on sections of the Penal Code. He said section 60 on seditious intentions directly affects the role of the press because the legislation prohibits challenging or questioning actions of government as any stinging criticisms could be considered seditious.

He said the provision of 69 which is on defamation of the president limits the level and scope of criticism which people can direct at the office of the president. He said that people should be allowed to criticise and that such criticism should not necessarily be considered as defaming the president.

Mr Malama said that foreign princes should not be considered as private citizens, but rather as leaders who should be criticised for in their public conduct and actions. It is for this reason that section 71 of the Penal Code should be repealed altogether.

Having been a member of the MRC, he was clearly aware of various advocacy campaigns seeking media-friendly law reforms and amendment of laws that limited freedom of expression. Mr Malama regretted that since the campaigns of late 1990’s nothing tangible seems to have been done to finally achieve desired changes. He nonetheless applauded the campaigns by media practitioners, media associations and media houses for media law reform that have steadfastly been sustained since the early days of MRC.

He said section 67 of the Penal Code did not provide any defence for publishing ‘false news with intent to cause fear and alarm to the people’. Mr Malama said the provision did not define what constitutes ‘false news’ and in the journalistic world there are many things that happen which on their face value might not necessarily appear to be false.

In 2006 when he was Managing Director and Managing Editor of the *Zambia Daily Mail* newspaper Mr Malama had his share of experience under section 67 even though the matter did not go as far as the courts. During the 2006 presidential, parliamentary and local government elections, as is customary during elections, the Chairperson of the Electoral Commission of Zambia (ECZ) provides regular up-dates of election results during media briefings. On the basis of these up-date results, Mr Malama authorised the publication of the results and one front-page lead story was headlined ‘Sata leads in the elections’. The next update election results also showed that Mr Sata of the Patriotic Front was maintaining the lead again, until the third up-date election results when Dr Levy Mwanawasa of the Movement for Multiparty Democracy (MMD) took the lead. By close of the elections, however, Dr Mwanawasa won the elections as the duly elected presidential candidate.

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<sup>100</sup> interview on 16 February 2013. Mr Godfrey Malama is Managing Director of Times-Printpak Zambia Limited, publishers of the *Times of Zambia* and *Sunday Times of Zambia* newspapers served as a member on the 26-member Media Reform Committee (MRC).

Mr Malama said, 'After the elections, the MMD-led government challenged the *Zambia Daily Mail* article that indicated that Mr Sata was leading in the elections. What was puzzling was that the government was not challenging the ECZ results, which were the basis for our paper's articles.

'The Board of Directors then charged me with an offence of "publishing false news with the intent of causing fear, alarm and despondency", which of course I disputed and challenged them to repudiate the results that the ECZ announced,' he said.

He said that the Board met on three consecutive days and agreed with Mr Malama's position that he did not publish false news. He said the Board, however, recognised that the government, as owners of the newspaper, held the right on the final decision. Eventually, Mr Malama's contract was prematurely terminated on 30 November 2006, after working as the chief executive officer of *Zambia Daily Mail* for seven years. The company did not pay Mr Malama's terminal benefits until he sued the company in long protracted court proceedings.

Mr Malama said, 'Although the charge against me was not taken to court, this was veiled threat, as it was clear that this provision in section 67 of the Penal Code was abused because there is no regulation that requires the editorial offices should close down until final elections results are out. Moreover, as the editor, I was alive to the fact that once the counting of ballots begins one cannot speculate under the Electoral Code of Conduct.'

On the Preservation of Public Security Act, Mr Malama said that the act gives the president absolute discretion to make a declaration on any issue he considers prejudicial, but the law was in many respects incompatible with the public's right to information.

Mr Malama said that during the one-party state era, the media fraternity vigorously resisted a press council bill intended to impose statutory regulation of the media that the Kaunda government had wanted to introduce in parliament.

He said that having been a member of the original MRC that was constituted by the MMD government in 1992, he continued to be associated with subsequent advocacy campaign activities. Mr Malama recalled that there was a sustained campaign against a widely publicised media bill for media statutory regulation and accreditation which this time the MMD government proposed in 1997. In his view such a bill was unnecessary in a multiparty democracy.

He further recalled that in 2004 six media associations, MISA Zambia, PAZA, Zambia Union of Journalists, Zambia Media Women's Association, the Press Freedom Committee of *The Post* newspaper and the Society for Senior Journalists of Zambia (SSJZ) teamed up to put up a spirited legal challenge to the minister of information and broadcasting services in the High Court over the minister's failure to submit names of nominees to serve on the Zambia National Broadcasting Corporation and Independent Broadcasting Authority boards for ratification by parliament.

Mr Malama said that in 2010 the MMD government, again tried to impose media statutory control, but the media fraternity and sorority vehemently rejected this, opting instead for self-regulation. He said, 'As public watchdogs there is a great need for the media practitioners to stay steadfast in the campaign and advocacy activities because any let up can see the re-introduction of statutory regulation of the media.'

In respect of the impact and effect of the various existing laws that limit freedom of expression on the way the *Times of Zambia* and the *Sunday Times of Zambia* newspapers cover news or provide information to the public, Mr Malama said that being aware of the laws helped his company to observe and comply with these laws in their current state. He hoped, however, that they would

either be repealed or amended. He strongly believed that while the various media unfriendly laws remain in the statute books it was best to observe them to avoid unnecessary litigation.

He also suggested that the media in Zambia would greatly benefit from provisions of relevant regional and international treaties and declarations to which the country was party or signatory if these were domesticated or formally adopted. He did, however, express some caution that it was necessary to first carefully examine the actual content of the provisions in these treaties or declarations to ensure that they truly add value to the media in Zambia.

In the run up to the presidential, parliamentary and local government elections in September 2011 the Times of Zambia newspaper published a number of articles that were critical of Mr Michael Sata and Mr Given Lubinda then both as members of the opposition party, Patriotic Front. Such articles included 'PF gets Afghan Taiwanese cash for Lusaka land' published in the Times of Zambia newspaper edition of 6 July 2011 and 'Sata condemned over \$45 million Taiwan funding' published in the Times of Zambia newspaper of 7 July 2011.<sup>101</sup>

The two articles were retracted with an apology on 8 November 2012 and 19 January 2013. Mr Malama, who was appointed Managing Director of Times-Printpak Zambia Limited publishers of the Times of Zambia and Sunday Times of Zambia newspapers by the PF government in October 2011, explained during the interview that the newspaper tendered its apology because it did not have any defence of truth whatsoever in both articles.

He said, 'Whereas His Excellency President Sata has not taken any action, our company has agreed to pay K105 million to Mr Lubinda and his lawyers in compensation.'

Interestingly enough, on 14 November 2011 President Sata discontinued three libel court cases against the Zambia Daily Mail newspaper based on articles that were published in the paper before the 2011 elections.<sup>102</sup>

### 3.2.4 Mr Isaac Chipampe

Mr Isaac Chipampe<sup>103</sup> identified criminal libel, defamation of the president and sedition as legislation that limit freedom of expression in Zambia. He also observed that insofar as the Zambian Constitution did not explicitly provide for the freedom of the media, the Constitution could to some extent be considered as limiting freedom of expression. In respect of the Constitution, Mr Chipampe said the provision in Article 20 was somewhat restrictive because it does not state categorically that the media is free, all it does is to provide for the freedom of expression.

As chief executive officer of a newspaper that in March 2012 breached the National Assembly (Powers and Privileges) Act, Mr Chipampe was quick to include this act among laws that impacted negatively on the right to freedom of expression. He said that according to the act no person can comment on what was going on in parliament or criticise members of parliament, adding that blanket protection of MPs worked against the media. In his view, MPs are representatives of the public, but one cannot criticise them because if one did so one would be charged for contempt of parliament. This observation, however, was erroneously made against the backdrop of articles that the *Zambia Daily Mail* newspaper published on 14 March 2012 headlined 'Beware chicken lovers', on 15 March 2012 headlined '50 000 chicken jobs face "slaughter"' and on 16 March 2012 headlined

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<sup>101</sup> 2011/HP/680.

<sup>102</sup> *Zambia Daily Mail* 20 November 2011 1.

<sup>103</sup> interview on 22 May 2013. Mr Isaac Chipampe is Managing Director of Zambia Daily Mail Limited, publishers of *Zambia Daily Mail* and *Sunday Mail*

‘Dressed chicken goes to Parley’ along with an editorial comment headlined ‘State puts chicken debate to rest’.<sup>104</sup>

In its coverage of the story, the *Zambia Daily Mail*<sup>105</sup> stated that [Mr Nkombo] ‘He wanted to prove that imported chickens are already on the market and he comically did this by stuffing the chicken in his jacket and later laid it on the table of the House, after raising a point of order.’ The editorial comment of the same edition, however, went further, and included:

But while we understand the importance of this issue, we find the behaviour of United Party for National Development (UPND) member of Parliament Garry Nkombo appalling and totally unparliamentary.

We fail to understand how an honourable MP, well-respected and representing thousands of people in his constituency, can ‘smuggle’ a chicken into Parliament even when he wanted to drive a point home.

An MP, or even an ordinary citizen for that matter, is not expected to tuck a chicken in his jacket. No! There must be some decency in debate, behaviour and general practice of politics in Zambia.

Mr Nkombo lodged a complaint to the speaker of the national assembly stating that he had been ‘ridiculed for performing the oversight role on government and the newspaper consequently breached his parliamentary privileges’. He denied that he had ‘stuffed a dressed chicken’ in his pocket.

Mr Chipampe said that the incident was referred to the parliamentary committee on privileges chaired by the deputy speaker, Mr Mkhondo Lungu. He said that he and Mr Nkombo were summoned to appear before the committee to make their oral submissions on the matter, which they did.

He said that he was later summoned and appeared in the main chamber on 18 July 2012, when Dr Patrick Matibini, the speaker of the national assembly formally announced that parliament had found the *Zambia Daily Mail* in breach of parliamentary privilege. Mr Chipampe said that the paper having been a first offender was reprimanded and he was made to publicly apologise to both parliament and to Mr Nkombo.

On reflection, Mr Chipampe admitted that the parliamentary committee on privileges was right insofar as it followed the law, the National Assembly (Powers and Privileges) Act, but he felt that the electorate should be free to criticise and advise the MPs, rather than be constrained by the Act.

He said he had learnt his lesson, such that since the story of the dressed chicken he ensures that the newspaper does not criticise members of parliament.

Mr Chipampe said that whereas the laws that limited freedom of expression did not directly affect him, he did state that as far as the media in Zambia was concerned, *The Post* newspaper was one that was badly affected. He said several members of staff at *The Post* newspaper personally experienced the challenges of appearing in court to answer various charges of defaming the president, and breaching the State Security Act.

He said apart from a few books he had read, Mr Chipampe said he was not aware of any campaigns aimed at media law reforms, but felt that such campaigns should come from media

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<sup>104</sup> *Zambia Daily Mail* 16 March 2012 1

<sup>105</sup> The series of articles were based on government’s ban on importation of chickens. Mr Garry Nkombo, MP for Mazabuka Central and member of the United Party for National Development (UPND) sought to demonstrate to government that the ban had been flouted by Shoprite Checkers. Mr Nkombo bought one dressed chicken from Shoprite, packed it in an envelope and laid it on the table in parliament to make his point.



associations. His view was that a great deal has already been said about certain sections of the Penal Code that impact adversely on freedom of expression that need to be reviewed. He said it appeared that there have been no serious campaigns as the public concentrated on constitutional making process.

Mr Chipampe held the view that defamation laws protected an individual more than media practitioners who worry about the repercussions of being taken to court. He is hopeful that the forthcoming enactment of the Access to Information Bill would mitigate the worry because at least media practitioners would have access to documentary evidence for their respective defences before the court.

He said that the *Zambia Daily Mail* and the *Sunday Mail* always ensure avoiding obvious mistakes by keeping clear of stories that have the potential of breaking the laws. Thus stories are subjected to detailed scrutiny for libel or breach of any laws that criminalise freedom of expression during the editorial meetings such that any defamatory statements are removed before finally publishing the articles. He said that as a result of such an approach the Zambia Daily Mail Limited has remained open to all available sources of information, but upholds the credibility of the newspaper by ensuring proper judgement of news worthiness of each story and each source. Mr Chipampe affirmed that in the past the newspaper had given too much space to too many news sources, some of whom provided stories that opened a can of libel suits against the company, particularly prior to the 2011 general elections.

He said although Mr Michael Sata dropped a number of defamation cases that he preferred against Zambia Daily Mail Limited before he was elected president in 2011, the company did nevertheless pay lawyers that processed the cases. Mr Chipampe said that two to three other people who sued the newspaper prior to the elections withdrew their suits. But their lawyers had to be paid.

Mr Chipampe said that in another article published in the *Zambia Daily Mail* newspaper of 4 January 2010 headlined 'Kunda must go campaign: History repeats itself', the company negotiated for an out of court settlement and agree to pay the litigant the sum of K85million (US\$17 000).

He said that in general, ownership of any newspaper impacted greatly on or in determining the stories to be published in the newspaper. He said it was fortunate that currently the *Zambia Daily Mail* faced no such pressures because every effort is made to balance stories and in case of stories that were extremely critical efforts were made to multi-source views prior to publishing in the paper.

Mr Chipampe said he had some idea of international treaties that promoted freedom of expression to which Zambia was party, but he felt that where the provisions of such treaties were beneficial to Zambia's democratic governance, there was urgent need to domesticate such treaties.

He said currently the circulation of the *Zambia Daily Mail* ranged between 20 000 and 22 000 copies per day.

### **3.2.5 Jane Chirwa Da Silva**

Ms Jane Chirwa Da Silva<sup>106</sup> identified provisions of sections 67(publication of false news with intent to cause fear and alarm to the public), 69 (defamation of president), Chapter XVIII (defamation) of the Penal Code and the Societies Act as the prominent pieces of legislation that limit freedom of expression.

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<sup>106</sup> interview 1 February 2013. Ms Jane Chirwa Da Silva is Information and Researcher Officer, MISA Zambia.

She pointed out that the provisions of the defamation of president had been used very many times against Mr Fred M'membe of *The Post* newspaper. In this regard, there were records of court cases in which Mr M'membe was cited, charged and more acquitted than found guilty. She noted also that other media practitioners had also been charged.

Ms Da Silva observed that defamation under the Penal Code had greatly threatened freedom of expression because of crippling excessive claims such as those sought by the Minister of Defence, Mr Geoffrey Mwamba of K500 million (US\$100 000) and by the registrar of societies, Mr Clement Andeleki of K2 billion (US\$400 000) against the *Daily Nation* and its agent, Mr Richard Sakala.

She said that the Societies Act had been used by government through the registrar of societies to suppress the online newspaper, *Zambian Watchdog* with threats of closure for not complying with the provisions of the Act.

Ms Da Silva said the foregoing laws and many others seriously affected the ability of the media in Zambia to report freely. She said there was an urgent need to review and revise every law that restricted freedom of expression and access to information.

As regards campaign and advocacy work, she said MISA Zambia had partnered with various like-minded organisations in different campaigns, such that when it came to lobbying for support for the enactment of the Freedom of Freedom Bill and the Independent Broadcasting Bill, the organisation worked with media associations. She said MISA Zambia worked, in addition to media associations, with the Jesuit Centre for Theological Reflections (JCTR), Zambia Civic Education Association (ZCEA), Caritas Zambia and the Non-Government Organisations Coordinating Council (NGOCC) in the case of campaign for the Access to Information Bill. The campaign took the form of radio and television programmes as well as meetings with selected influential groups and traditional leaders.

Ms Da Silva said that MISA Zambia also collaborated with the Foundation for Democratic Process (FODEP) and the Southern African Centre for Constructive Resolution of Disputes (SACCORD) when it campaigned against media statutory regulations. The campaign resulted in statutory regulation not being put into effect.

She said that as part of its campaign and advocacy activities, MISA Zambia commissioned and undertook some research whose findings were published. The organisation also submitted position papers on issues that were critical to the development of media in Zambia, and such papers included a campaign for media friendly legislation. She cited the recent publication of the 'Study Report on Media Laws and Policies in Zambia' researched and written by Mr Eustace Nkandu.

Ms Da Silva has had her personal experience with the law to share. On 5 June 2002, she and three others, Mr Emmanuel Chilekwa, the managing editor, Mr Kingsley Lweendo and Shadreck Banda, assistant editor of *The People* newspaper were arrested for defaming President Levy Mwanawasa in the paper's edition for 25-31 May 2002. They were released on 30 July 2002 by Lusaka Magistrate Frank Tembo after the journalists apologised to the state and the president for the false article.

Essentially, a letter was produced which expressed remorse and outlined how the plot to write the story had been hatched. The letter also had stated that the information that President Mwanawasa had brain damage had been provided by former President Chiluba, his former press aide, Mr Richard Sakala and former information minister, Mr Vernon Mwaanga.<sup>107</sup>

Ms Da Silva, then still a journalism student at Evelyn Hone College in Lusaka spent 18 days in prison and during that period she missed class. She said that her experience in prison was traumatic

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<sup>107</sup> Inter-African Network for Human Rights and Development (Afronet) *Human Rights Report Zambia – 2002* 35.

in that she shared the cell with women that had been charged for murders and that fact alone kept her in a state of shock. She said she was mentally tortured at the thought of having been declared a criminal for writing a story and even questioned her choice of career.

She said that instead of going to class every day she had to appear in court, while back in the cell, toilets were not clean, ventilation was poor and sleeping facilities and space were not only scarce but unsatisfactory. Ms Da Silva said, 'There are self-imposed "captains" in prison who feel free to snatch anything be it clothes, shoes or food that belongs to other people.'

### 3.2.6 Mr Augustine Phiri

Mr Augustine K Phiri<sup>108</sup> was in 1988 charged under section 67 of the Penal Code for publishing false news with intent to cause fear and alarm to the public after he wrote a news story about a child that was trampled upon and died.

The incident occurred at NIEC Stores in Mufulira on the morning of 4 February 1988. Shoppers, mostly women, gathered and formed a long queue outside the shop as early as 04.00 hours after word went round the previous day that a truck laden with bags of mealie meal, which was in short supply at the time, would deliver the much sought after commodity.

When the truck eventually arrived, confusion broke out as people jostled to be served early. In the process, a baby dropped from the back of its mother, who was in the queue and it was trampled on. The baby was rushed to a nearby Ronald Ross Hospital run by a government-owned company, Zambia Consolidated Copper Mines (ZCCM). The baby was, however, pronounced dead on arrival.

Mr Phiri said, 'As a bubbling young reporter for the Zambia News Agency (ZANA), this was a juicy piece of news not to be missed and did what was expected of me. However, as I prepared myself to report for work the following morning, on 5 February, I was surprised to be visited by the head of the Mufulira district intelligence. He asked me about the story which was in the *Times of Zambia*, which I had not yet seen in print myself.

'And at the office, I received a barrage of telephone calls from my superiors at ZANA headquarters in Lusaka and others from unknown government offices wanting to know more about the story. The heat was too much and so on advice from my supervisors at ZANA in Lusaka, I took a day off. There were no mobile phones at the time and so I was out of reach in peace for a while.'

Mr Phiri said that two days later he was summoned to the local police station, where he gave a statement and was subsequently arrested, but released on police bond pending appearance in a magistrate's court.

The story of Mr Phiri's arrest generated heated debate especially among fellow journalists in Zambia. It was a topical issue in newsrooms, press clubs and media associations.

Mr Phiri in melancholy narrated his ordeal, 'When I finally appeared in court scarcely a week later for plea before lady magistrate, Ms Mushoba Mulikita, the police surprised me when it withdrew the bond, meaning I was headed for Mufulira Remand Prison opposite Mufulira Teachers Training College. There was no lawyer for me and no one from ZANA was present.

'Swiftly I applied for bail which was granted in the sum of K1,800 - a substantial amount at the time as it was equivalent to six months' salary of a government executive officer - with two working sureties, who were found, but there was no money. I was ushered into the holding cells at the magistrate's court while my wife dashed off to the bank to withdraw the money for bail. In the cells I was told that I would

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<sup>108</sup> interview on 26 January 2013. Mr Augustine Phiri is a retired journalist who worked for ZANIS for many years, until his retirement

find other suspects facing various offences and one juvenile advised me to carry packets of cigarettes to the remand prison to ward off mistreatment from prison bullies.'

He said, 'This was extremely frightening considering that I was possibly going to meet inmates I had written articles about earlier during my career as a journalist. Happily, relief came when my wife arrived, paid the bail money and I was released without having to go to the dreaded Mufulira Remand Prison.'

When ZANA provided Mr. Phiri with a lawyer from Legal Aid Department, the Press Association of Zambia (PAZA) and the Commonwealth Press Union - Zambia Chapter objected to this arrangement arguing that the 'persecutor' (the government) could not be a fair defence counsel at the same time. As a result the two organisations decided to and hired Mr Levy Mwanawasa, who successfully defended him.

Mr Phiri held the view that the principle of confidentiality proved to be a double edged sword during trial because Mr Komani Kachinga, Editor-in-Chief of *Times of Zambia* newspaper and Mr David Kashweka, Editor-in-Chief of ZANA, at the time, were threatened with jail terms for refusing to testify against him.

He said, 'Mr Kachinga and Mr Kashweka were to be locked up in prison for a week and brought back to court, and back to prison repeatedly until such time that they yielded. For, while journalism ethics are against revealing sources of information, the law of confidentiality does not say so.' Mr Phiri added, 'Only priests cannot disclose confessions of their faithful; doctors cannot reveal diseases of their patients; and lawyers admissions of guilty in confidence of clients. The three professionals are immune from prosecution in these circumstances but not journalists.'

Mr Phiri recalled that luckily, it did not amount to that for Mr Kachinga and Mr Kashweka as they testified upon careful legal advice from Mr Mwanawasa. On the other hand, Dr Godfrey Katema, medical officer at Ronald Ross Hospital, refused to testify for the state against him and did not even show up in court. Mr Phiri in fact said that, later Dr Katema had confided in him that he could not tell the court what government agents had wanted him to say, that is, that 'no child had died in that mealie meal incident' and so he chose to stay away from court. In a way, Mr Phiri reflected that he benefitted from the principle of confidentiality which earlier threatened to deal sternly with Mr Kachinga and Mr Kashweka.

During trial, Magistrate Mulikita advised journalists in Zambia to lobby government to have them included on the list of professionals like medical doctors, lawyers and priests, in order for them to enjoy immunity from prosecution under the law of confidentiality.

Mr Phiri was suspended from duty from February 1988 to January 1989. Although, he still inexplicably remained on full salary, the idleness and court appearance debilitated him physically and mentally. He said the probability of losing his journalism career 'I loved and invested in so much over the years coupled with the thought of going to prison in case I lost the case, wore me down immensely. Luckily, it did not happen,' Mr Phiri recalled.

He said, 'The purpose of any law is, among others, to punish offenders. I have not heard of anyone in Zambia, journalists included, who have been convicted and sent to prison for "publishing false news with intent to cause alarm and fear to the public." This law does not serve the purpose and should be discarded just like a cat which cannot catch a house rat.'

Mr Phiri confirmed that in spite of the article that was published in the *Times of Zambia* on 5 February 1988 Mufulira district experienced no fear or alarm and not a single person ever fled from the district.

## Conclusion

The experiences by different people have been varied, but the fact that similar laws have been cited as being unfriendly to freedom of expression clearly demonstrates that some specific existing laws need to be reviewed and possibly revised. Similar sections of the current Penal Code have been cited as limiting freedom of expression and different persons were adversely affected by these sections of the Code. Criminal defamation, poor and unprofessional way in which the Public Order Act has over the years been applied, and restrictions imposed by the State Security Act justify a revisit for the betterment of a democratic society. There is an urgent need to enact the Freedom of Information Bill or the Access to Information to facilitate access to information by media practitioners, interest groups and the general public.

### 3.3 Description of campaigns to reform laws

In Zambia freedom of expression and access to information have for a long time been generally seen and treated as rights exclusively for the benefit of the media and media practitioners. Similarly, the way in which media organisations and media practitioners vigorously campaigned for reform laws, particularly media related, also gave the impression that only they were in dire need for the law reforms that would enable them to work unimpeded. This perception has resulted in the general public distancing itself from any efforts or campaigns for reform laws. Consequently, the media in Zambia has in fact initiated advocacy and campaigns for reform laws.

The genesis of media law reforms campaign started with the change of government from one-party state UNIP-led to multiparty state MMD-led, but more in earnest in October 1992 when the minister of information and broadcasting services organised a national seminar on 'Media and Democracy in Zambia - The Way Forward.'<sup>109</sup> As a result of the deliberations of the seminar a media reform committee (MRC), comprising 26 members drawn from the public and private media, Ministry of Information and Broadcasting Services, Ministry of Commerce Trade and Industry, the University of Zambia, Zambia Institute for Mass Communication (ZAMCOM), Evelyn Hone College, Law Association of Zambia (LAZ), Press Association of Zambia (PAZA) and a number of other civil society organisations was established with the blessings of the MIBS. The mandate of the MRC was to review the state of the media in Zambia with the aim of advancing press freedom and the democratic process.<sup>110</sup> In 1996 Prof Francis Kasoma applying on his own behalf and representing members of PAZA in the High Court<sup>111</sup> challenged the government's decision to constitute the Media Association of Zambia (MAZ) to replace PAZA. And High Court Commissioner, Justice Anthony Nyangulu ruled on 22 August 1997 that government's decision to create MAZ was not in furtherance of the objectives or purposes embodied in the Constitution, in particular, those protected in Articles 20 and 21. He therefore quashed his decision and suspended the Bill in Parliament.

The tempo of the campaign for media freedom was heightened further, when on 7 April 1997 the government published<sup>112</sup> in the newspapers a Media Council of Zambia Bill (1997). The objects of the bill were to establish the Media Council of Zambia of Zambia; provide for the accreditation of journalists and provide for matters connected with or incidental to the foregoing.

The publication of the bill triggered off mass protests and criticisms from media houses and practitioners and the public in general. Journalists in the capital city, Lusaka and on the Copperbelt organised protest marches. In response, on 15 April 1997 the Minister of Information and

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<sup>109</sup> *On Air – Zambia AfriMap* 2010 12.

<sup>110</sup> interview with Mr Godfrey Malama, Managing Director, Times-Printpak Zambia Limited and a founder-member of MRC on 16 February 2013.

<sup>111</sup> 951HP/2959 on 28 June 1996.

<sup>112</sup> *Times of Zambia* 7 April 1997 13.

Broadcasting Services, (MIBS), Mr David Mpamba announced the withdrawal of the draft, citing need for further consultation and dialogue.

The Media Liaison Committee (MLC) comprising PAZA, Zambia Union of Journalists (ZUJ), Zambia Media Women's Association (ZAMWA), Zambia Independent Media Association (ZIMA) fore-runner of Media Institute of Southern Africa-Zambia Chapter (MISA Zambia), and Commonwealth Press Union-Zambia Chapter (CPU-Zambia) spurned calls for dialogue from the government and suspected that the government merely wanted to please the donors ahead of a consultative group meeting two weeks later. The MLC move was supported by LAZ, Zambia Independent Monitoring Team (ZIMT), and the Foundation for Democratic Process (FODEP and the Africa Network for Human Rights and Development (Afronet).<sup>113</sup>

The bill was never presented to parliament, but Deputy Minister, MIBS, Mr. Ernest Mwansa was later to claim that it was not a bill as it had not been sent to cabinet for approval. This was during a presentation of a paper on 'Regulating the Media: A Government Perspective.'<sup>114</sup> When the recommendations<sup>115</sup> that had been submitted to the MIBS in August 1993 were not acted upon, the MRC representatives reconvened on 16 June 1999 and mandated a task force, led by Lusaka lawyer, Mr John Sangwa, to review pieces of legislation that impeded media work. Membership of the task force was made up of media practitioners, and representatives of MIBS, Human Rights Commission, LAZ, ZAMCOM, MISA Zambia, PAZA and Legal Resource Foundation. The task force concluded its work in January 2000 by producing a report on media law reform, which has since then been used as a key reference point for subsequent campaign for media law reforms.<sup>116</sup>

Like the previous report of the MRC, the report of the Task Force on Media Law Reform has by and large remained a reference tool for further advocacy and campaigns because the government has not yet implemented the majority of the recommendations contained in the report. The major, exception, however, was that at the instigation of subsequent campaigns by media institutions and practitioners, the government finally tabled the Independent Broadcasting Authority Bill (2002)<sup>117</sup> and the Zambia National Broadcasting Corporation (Amendment) Bill (2002),<sup>118</sup> both of which were enacted into law. A third bill, the Freedom of Information Bill (2002),<sup>119</sup> also recommended by the Task Force among its recommendations, and has yet to be enacted.

Although various media houses continued with campaigns for media law reforms, a joint campaign resumed on 23 January 2002 with a special meeting of the Media Legal Reform Committee (MLRC) at MISA Zambia Secretariat. The meeting was attended by representatives from MISA Zambia, Zambia Media Women's Association (ZAMWA) and PAZA. Present at the meeting was Mr Dipak Patel, then a member of parliament to provide guidance on the procedure for introducing private members' bills in parliament. This meeting generated an agenda for follow up actions that included commissioning, on 5 February 2002 of a legal firm, Messrs MNB Legal Practitioners, to draft the Independent Broadcasting Authority, Broadcasting and Freedom of Information Bills. At this stage the Zambia Union of Journalists (ZUJ) also came on board.

Part of the new strategy included holding of a bush meeting on 20 May 2002, with political parties represented in parliament; followed by another meeting with members of parliament on 14 July 2002, a 13-week series of sensitisation television programme on 'Media and the Public' and a workshop for MPs on 28 July 2002. While these interactions were taking place draft bills, as private

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<sup>113</sup> *Times of Zambia* 7 April 1997 13.

<sup>114</sup> n 64 above 28.

<sup>115</sup> Recommendations for Media Reform in Zambia by Media Reform Committee August 1993.

<sup>116</sup> n 24 above

<sup>117</sup> Independent Broadcasting Authority Bill No. 13 of 2002.

<sup>118</sup> Zambia National Broadcasting Corporation (Amendment) Bill No. 21 of 2002.

<sup>119</sup> Freedom of Information Bill No. 14 of 2002.

members' bills, were finalised, widely publicised in *The Post, Monitor* and *Times of Zambia* newspapers on 22 October 2002 and scheduled for formal presentation in parliament on 5 November 2002.<sup>120</sup> The presentation of the private members' bills could not proceed on account of Article 81 of the Constitution because any bill that has financial implications requires the consent of the president and presented through the vice president or a minister. The private members' bills were withdrawn, but that rare move of initiating such bills by media organisations, with the support of members of parliament spurred government to quickly prepare government bills that included Zambia National Broadcasting Corporation (Amendment) Bill, the Independent Broadcasting Authority Bill and the Freedom of Information Bill, all of which were of an improved content to that the private members' bills that had been prepared.

The Zambia National Broadcasting Corporation (Amendment), the Independent Broadcasting Authority and the Freedom of Information Bills were all subsequently presented to parliament on 22 November 2002. While the first two bills were finally passed by parliament and given presidential assent on 31 December 2002, the Minister of Information and Broadcasting Services withdrew the Freedom of Information Bill on 18 December 2002, claiming that it needed further detailed consideration.

The enactment of the Zambia National Broadcasting Corporation (ZNBC) (Amendment) Act, No. 20 of 2002 and the Independent Broadcasting Authority Act, No. 17 of 2002 generated high hopes for positive changes to broadcasting in Zambia. In the area of reducing the powers of the minister of information and broadcasting services in the control and governance of the Zambia National Broadcasting Corporation, the ZNBC (Amendment) Act transferred these powers to an independently selected board of directors, while the Independent Broadcasting Authority (IBA) Act was to establish an IBA, define its functions, provide for the control and regulation of broadcasting and diffusion services, among other responsibilities. Similar to the ZNBC (Amendment) Act, the IBA Act provided for an independently selected board of directors.

The ZNBC (Amendment) and the IBA Acts provided a temporary relief to the media because the appointment of the independently selected board of directors on recommendation to the minister of information and broadcasting services for onward ratification by parliament, by two ad hoc appointments committees rammed into tortuous legal and technical difficulties. The two ad hoc appointments committees ran advertisements on radio and in newspapers between 10 and 29 September 2003 inviting members of the public to submit names for considerations for appointment on the boards of ZNBC and IBA. When names of nine part-time persons, in accordance with section 4(2) of the ZNBC (Amendment) and nine part-time persons, in accordance with section 7(2) of the IBA Act, selected for nominations to serve of the boards of ZNBC and IBA, respectively, were submitted to the minister of information and broadcasting services, Mrs Mutale Nalumango for ratification by parliament, the minister delayed in doing so. MISA Zambia made representations to the minister for necessary action, while in parliament members of the opposition parties queried the minister for her inaction to table names of the nominees to the two boards. The minister's view was that the ad hoc appointments committees had overlooked 'the need for gender balance and nature of the sectors were the nominees were drawn.'<sup>121</sup> In effect the minister appeared inclined to veto names of some of the nominees, at which point MISA Zambia, PAZA, ZUJ, ZAMWA, the Society for Senior Journalists and *The Post* Press Freedom Committee decided to apply to the High Court for Zambia for judicial review, as a way of resolving the stalemate.<sup>122</sup>

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<sup>120</sup> P Matibini, *The struggle for media law reforms in Zambia* (2006) 46-50

<sup>121</sup> n 96 above 130

<sup>122</sup> n 96 above 132

In the subsequent High Court judgement on 23 December 2004, Justice Gregory S Phiri observed that there was no dispute whatsoever that the minister did make a decision not to take all names of persons recommended by the ad hoc appointments committees to the national assembly for ratification. After comprehensively analysing the case at hand Justice Phiri ruled in favour of the applicants by stating that the minister's decision was bad at law and therefore null and void.<sup>123</sup> On appeal by the minister, on behalf of the government, to the Supreme Court comprising the full bench of the Chief Justice, Deputy Chief Justice and three Supreme Court Judges, on 11 October 2006, the state had argued that the role of the ad hoc appointments committees was to 'recommend' and that the 'advice' given to the minister could be accepted or rejected.<sup>124</sup> The Supreme Court passed its ruling in March 2007 in favour of the state on technicality of the literal interpretation of the word 'recommend.'

Notwithstanding the foregoing developments, in an unexpected move by government, parliament in March 2010 passed another ZNBC (Amendment) Act No. 16 and signed into law by the president on 13 April 2010. A second amendment, the IBA (Amendment) Act No. 26 was passed in July 2010 and assented by the president on 14 August 2010. The two amendments scrapped the ad hoc appointments committees and restored the power to appoint the boards to the minister.<sup>125</sup> The boards were also responsible for appointing the chief executive officers of ZNBC and IBA. Insofar as the boards have not been appointed since 2010, the new government of the Patriotic Front proceeded to appointing a new director general of ZNBC in October 2011 shortly after taking over from the Movement for Multiparty Democracy. In December 2012 the ministry of information and broadcasting services published, in local newspapers, advertisements inviting suitable applicants to take up the position of director general, IBA. The advertisement of the post signalled the start of the implementation of the IBA Act, which has not been operational since 2002.

On 27 June 2013 the Minister of Information and Broadcasting Services announced the appointment of Ms Josephine Mapoma, a former permanent secretary in the Ministry and later lecturer, Mass Communications of the University of Zambia, as the first director general of the IBA – within the provision of the amended IBA as in 2010. Members of the IBA board, as with the ZNBC board were as of mid-November 2013 not yet appointed. Notwithstanding the lean IBA staff, the IBA is operational and has issued new broadcasting licences and permits for the construction of masts.

On the other hand, the challenge of getting the Freedom of Information or the Access to Information (ATI) Bill enacted remains. The campaign has to continue. In the same vein, campaigns and lobbying for amendments and repeals of media laws that restrict freedom of expression and media work have to be stepped up for desired results.

While since assuming power the Patriotic Front government continued to make live promises of tabling the ATI Bill to parliament through a number of pronouncementnew developments. The draft ATI Bill finalised by government in close consultation with a task force of a consortium of advocacy civil society organisations, was considered flawed by the government. This was primarily because in its current state could not be operationalised once passed by parliament until it was harmonised with other existing 13 pieces of legislation. These pieces of legislation include National Archives Act, Protected Places and Areas Act, Electronic Communications and Transactions Act, Zambia Security Intelligence Act, Official Oaths Act, and sections of the Penal Code as well as the Radio Communications Act, the latter was at any rate already repealed. Since September 2013 a legal consultant was commissioned by the government to carefully examine the 13 laws and to revise the

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<sup>123</sup> n 96 above 139

<sup>124</sup> n 96 above 146

<sup>125</sup> n 85 above 117.



draft ATI Bill in such a way that the new ATI Bill would obviate any encumbrances likely to be imposed by the 13 existing laws.

The local campaign for Access to Information was heightened when MISA Regional Office in collaboration with the working group of the African Platform on Access to Information (APAI) and MISA Zambia organised a two-day African Regional Conference, 25-26 September 2013, on the Right to Access Information. Arising from the conference a number of resolutions and strategies were formulated to ensure speedier enactment of ATI.<sup>126</sup>

Various media associations and institutions have maintained close collaboration and have continued their advocacy and campaign activities. They will, however, need to regularly review progress and work out new strategies in order to achieve results that demonstrate progress. The seeming long delay in making ZAMEC operational is a case in point. While ZAMEC will take care of self-regulation for the media in the country, there are still other areas, such as the campaign to transform the Zambia National Broadcasting Corporation into a public service broadcaster. This is an aspect that calls for concerted and well-articulated campaign.

There is a glimmer of hope that, through the Zambia Law Development Commission, various laws that have been identified as limiting freedom of expression and access to information could be reviewed, revised or repealed. Use of the Commission would probably offer a quicker solution to the advocacy and campaign work of the media associations than merely referring to the old reports and efforts for government to take follow up action. It is encouraging to note that MISA Zambia is already collaborating with the ZLDC and this relationship should be consolidated so that MISA Zambia's campaign is better focused and more effective in influencing law reforms.

It should be observed that the promises for media reform contained in the manifesto of the Patriotic Front (PF) elected into government in September 2011 will need some concerted strategy for the government to stir into action. For instance, shortly after coming to government in September 2011 the PF government assured the nation that the Freedom of Information Bill would be introduced in parliament in six months' time. New developments and challenges set in; however, resulting in further, but perhaps necessary delays as a renamed draft Access to Information Bill underwent a consultative process of progressive revisions.

The campaign and advocacy activities for law reforms to enhance freedom of expression and access to information should continue, but this should be intensified, with measurable milestones, in order to expedite achievement of this ideal.

#### **Section Four: Conclusion and recommendations**

This Zambia Pilot Study Report has provided a brief political and historical background of the country, from the time of independence through to the current state. It also provided a number of international treaties that Zambia is party to and how these treaties have had little influence in the way the country has responded to the ideals of promoting freedom of expression and access to information as espoused in the Declaration of Principles on Freedom of Expression in Africa. The main reason for this is that Zambia observes the dualist legal system. There is therefore a need to either domesticate these international treaties or at least to adopt some best practices or aspects of them in order to put them into effect.

The report has given a brief outline of the long journey, through a series of constitutional review commissions that the country has undergone in framing a constitution that would stand the test of time. In this regard there have been varied versions on how to enhance freedom of expression and

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<sup>126</sup>Report on ACTION Conference, October 2013, Media Institute of Southern Africa, 7

the search for a lasting constitution is still ongoing. In the meantime the doctrine of separation of powers, with three branches of state, the executive, legislature and judiciary, being recognised is strongly entrenched in the constitution of the country. There is also a systematic process for law reforms, partly managed by the Zambia Law Development Commission and eventually enacted by parliament. In Zambia, Article 81 of the Constitution bars introduction of bill that have financial implications by a member of parliament other than by the vice president or a minister on behalf of the executive.

There has since the return to plural politics in 1991 a proliferation of electronic broadcasting stations and newspapers including online ones. The last named have provided rumours, gossip and speculative information which has also given people chance to sift through and assess what to believe and what not to believe, but all these have provided the populace with information from diverse sources and for it to express ideas and thoughts through these channels. In response to perhaps regulate the media, the Zambia Media Council was formally established as self-regulation entity for the media in Zambia.

A review of existing legislation considered to criminalise expression was undertaken and revealed a need for a formal programme for review, revision or possible repeal. It was evident that various laws were passed or allowed to continue by successive governments because they support their control over people's opportunity and ability to freely express their views. Insofar as legislation that limits expression is concerned it was noted that concerted efforts were triggered by the national conference held in 1992 to review the media in Zambia and the way forward. The conference resulted in the formation of a Media Reform Committee (MRC) and MRC's work led to major advocacy and campaign activities that have since remained robust and vibrant.

There is a great need to scale up the campaign, but in so doing there is a need to articulate issues and to establish some milestones to facilitate periodic review of achievement or failure to re-strategise. In this regard it is important to focus on one or two targets at a time for maximum activity and impact.

This report has brought out examples and court cases to show the extent to which various laws have impacted on freedom of expression or how successive governments have used the provisions of various laws to its advantage, oblivious of the public interest.

The struggle for media-friendly law reforms has been a very long one but must be sustained. As a result of the initial work of the MRC in 1992 and other subsequent active campaigns by various media organisations and institutions, a number of existing laws have been identified and, for given reasons, recommended for review, amendment or altogether repeal.

#### **4.1 Recommendations**

It is accordingly recommended that various aspects of laws that are ambiguous and broadly defined should be revised and framed in a clearer manner. Experience has over the years shown that while various stakeholders or interest groups are keen to step up the campaign for law reforms, including media law reforms, in the absence of the government driving the reforms, bold initiatives are lacking to effectively propel the campaign for results. There are possibly two options that could be adopted. One, there is a need to widely publicise any of the specific laws that need reform or repeal as a way of sharing the information with the wider cross-section of the citizenry to ensuring mustering maximum support. Two, the office of the UN Special Rapporteur could assist through bilateral meetings. In this regard, it is envisaged that a well-structured meeting between a representative of the UN Special Rapporteur and representatives of the Zambian government, and some of the

interest groups focused on possible review of the selected laws is likely to yield better results and attention than written reports. It is also recommended as follows:

## **1. Penal Code**

The Penal Code contains a large number of sections and provisions that touch on freedom of expression. Those that restrict expression include:

### **(a) *Prohibited publications***

This section of the Penal Code should be repealed to allow free ideas and thoughts to enhance freedom of expression in a democratic society of Zambia.

### **(b) *Offences in respect of seditious practices***

The section should be amended to provide for clear definitions of terms such as 'seditious'. There is a need to ensure that determination of seditious acts are clearly spelt out so that final determine of seditious practices are not let to the courts alone.

### **(c) *Publication of false news with intent to cause fear and alarm***

This section should be amended to provide space for investigative reporting and provide for police to investigate thoroughly before the arrest a suspected originator of false news.

### **(d) *Defamation of president***

This section should be repealed because the provision is abused to protect the person not the institution. The provision overly protects of insulates the person while prohibiting political opponents from exposing the personal misconducts of the incumbent president. The provision of this section is unfair in an environment of competition and democratic elections.

### **(e) *Defamation of royal princes***

This provision should be repealed. It is archaic and gives unnecessary protection to princes.

### **(f) *Criminal defamation***

Sections 191-198 of the Penal Code should be repealed as the provision of Defamation, Chapter 68 of the laws of Zambia provide sufficient mechanism for the more acceptable civil defamation procedure.

## **2. State Security Act**

This act should be reviewed, and revised to update it in the light of the new situation that has emerged. Having regard to the provisions of the Johannesburg Principles and the Declaration on Freedom of Expression in Africa, the act should have the archaic provisions repealed.

## **3. National Assembly (Powers and Privileges) Act**

This law should be objectively reviewed and amended to ensure that the members of the National Assembly being human beings drawn from the Zambian society relate to the society they live in rather than making the National Assembly too exclusive. The act should facilitate inclusiveness and mechanism for improving community engagement with the national assembly.

#### **4. National Archives Act**

The act should be amended to remove the discretion of the minister or the director in enabling the public access to records. There should be clear provision of what materials, and when such materials would be accessible without depending on the goodwill of the minister or the director of national archives.

#### **5. Public Order Act**

This act should be amended to provide for clearer parameters for professional and objective police role in administering the provisions of this act, if it must continue to exist in the statute books. The amendment should provide space or voice for all rather than restrict others.

#### **6. Preservation of Public Security Act**

The act should be reviewed to conform within the context of the current geo-political situation for revision and to repeal certain sections that are archaic.

#### **7. Printed Publications Act**

This law should be amended to remove mandatory registration of newspapers which at any rate operate as corporate companies and are registered as such under the Patents and Companies Registration Agency and to remove mandatory requirement of registration of any changes in the editors of the newspaper. The necessity for mandatory registration of newspapers does not arise in a democratic society.

#### **8. Parliamentary and Ministerial Code of Conduct**

The act should be revised to ensure that media practitioners are protected from revealing source of their information when called upon to appear before a tribunal.

#### **9. Contempt of Court (Miscellaneous Provisions) Act**

The act should be revised to allow coverage and reportage of cases. It should be incumbent upon media houses to determine what to finally publish. There is a strong case for the public's right to know.

#### **10. Pending legislation**

Although the Independent Broadcasting Authority Act has been activated through the establishment of a secretariat, the provisions of the act have not been followed to the letter. This because while the Ministry of Information and Broadcasting Services recently advertised for the post of the director general, the board has not been appointed. There is need to monitor how the IBA is going to operate.

The nation is still waiting for the enactment of the Freedom of Information Bill or the Access to Information Bill. It is important to check the provision of the bill that would finally be tabled in parliament in June 2013, a date given by the Permanent Secretary, Ministry of Information and Broadcasting Services on 28 February 2013.

Pertinent to this discourse is the fact that the IBA act of 2002 and the Zambia National Broadcasting Corporation (Amendment) Act of 2002 underwent further amendment in March 2010, it is important to ensure that these amendments are reversed if the operations of the ZNBC and IBA are going to be truly effective.