

Handbook On

Laws and Regulations Affecting Freedom of Expression, Media Freedom and Digital Rights in Zambia

USAID 'Open Spaces Zambia' Project



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PREFACE

Freedom of expression, digital rights and media freedoms are fundamental rights that constitute a functional democracy. These rights promote good governance through the effective participation of citizens in the governance processes through the available platforms.

The media in Zambia plays a crucial role in facilitating platforms for engagement by citizens. Considered as the fourth estate, the media requires a conducive environment within which to operate in, free from any inhibitions.

However, for journalists, activists, human rights defenders (HRDs), and oppositional voices to fully enjoy their fundamental right to freedom of expression, there is need for these actors to understand the legal environment within the country. This entails them understanding media laws and other pieces of legislation that may hinder freedom of expression, press freedom and other digital rights.

As an institution that promotes free expression and other media freedoms, MISA Zambia is committed to the furtherance of these freedoms through the production of quality information that will enable media practitioners and other players in a democratic dispensation to demand for freedom of expression and media freedom in Zambia through the production of evidence pointing to the need for legal and policy reforms.

Through the production of this handbook, it is hoped that the information contained herein will enhance the knowledge levels on laws that have a bearing on freedom of expression and will capacitate the users of this Handbook to advocate for media law and policy reform in order to avert legislation that hinders media freedom, freedom of expression as well as digital rights.

FOREWORD

MISA Zambia was established to promote and defend media freedom and freedom of expression within Zambia, to take appropriate steps where such freedom is violated and to seek to remove obstacles and impediments to the free flow of information.

The free flow of information allows citizens to be kept up-to-date with the Nation's current affairs thereby allowing them to make informed decisions.

It also allows for the access to information which remains key in the ability of citizens to hold office bearers accountable and promote transparency as well as accountability. Democracy which is essentially about transparency, accountability and good governance is dependent on the ability of citizens to access information. The free flow of information is crucial to the effective respect of human rights.

The role of the media is to educate, inform and entertain. In addition, the media must be left to play its role as a watchdog. This role allows it to bring out issues affecting citizens, without intimidation from state actors.

As we continue to advocate for media freedoms, it is also imperative that the legal environment is suitable for these freedoms to be realised and enjoyed. It has been observed that media practitioners have not invested time to interrogate laws and other pieces of legislation that affect their work. As a result, this leaves them at the mercy of oppressive states, which use these laws to clamp down on media houses and curtail media freedoms.

Media Freedom and Freedom of Expression remains one of MISA Zambia's three programme areas. As such, the institution will continuously strive to support media practitioners, social media users, human rights defenders and citizens with knowledge and information as well as evidence-based advocacy that will address the need for media related legal and policy reforms in Zambia.

Fr. Rev Dr Barnabas Simatende, OMI – MISA Zambia Chairperson

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MISA Zambia is indebted to the team that constituted the peer review panel whose valuable input helped shape the Handbook into what it is now. The Members of the panel were:

- a. Mr. Chris Chirwa (Media Researcher);
- b. Mr. MacDonald Chipenzi (Executive Director, GEARS Initiative);
- c. Dr. Mutambanshiku Bwalya (Lecturer, University of Zambia;
- d. Mr. Muleta Kapatiso (Legal Officer, Chapter One Foundation);
- e. Mr. Matthews Kamanga (Legal Counsel, IBA);
- f. Mr. Joe Nkadaani (Senior Media Lawyer, Internews Zambia);
- g. Mr. Meck Phiri (Senior Journalist Trainer, Internews Zambia).

ABOUT THE OPEN SPACES ZAMBIA (OSZ) PROJECT

The Open Spaces Zambia (OSZ) project is funded by USAID and implemented by Internews in partnership with FHI 360. The OSZ project supports an open, inclusive environment in which media, civil society, and activists provide accurate and impartial information that promotes participation, inclusion and accountability.

List of Abbreviations

ACHRP	–	African Charter on Human and Peoples' Rights
ATI	–	Access to information
AU	–	African Union
CSO	–	Civil Society Organisation
FOI	–	Freedom of Information
HRDs	–	Human Rights Defenders
IBA	–	Independent Broadcasting Authority
ICCPR	–	International Covenant on Civil and Political Rights
ICESCR	–	International Covenant on Economic, Social and Cultural Rights
ICT	–	Information and Communications Technology
LRF	–	Legal Resources Foundation
MISA	–	Media Institute for Southern Africa, Zambia Chapter
MP	–	Member of Parliament
NGO	–	Non-governmental Organisation
OSZ	–	Open Spaces Zambia project
RTK	–	Right to Know
SCZ	–	Supreme Court of Zambia
UDHR	–	Universal Declaration of Human Rights
UN	–	United Nations
UNESCO	–	United Nations Education, Scientific and Cultural Organisation
ZAMEC	–	Zambia Media Council
ZICTA	–	Zambia Information and Communication Technology Authority
ZLDC	–	Zambia Law Development Commission

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1.0 Module One – International Law on the Freedom of Expression

1.1 Learning Objectives

By the end of this module, the reader should be able to:

- a. Describe the freedom of expression;
- b. Outline the main international and regional human rights instruments that provide for the freedom of expression;
- c. Explain the importance of international human rights' provisions on the freedom of expression; and
- d. Explain how international human rights laws that provide for the right to freedom of expression are enforceable within countries that subscribe to them.

1.2 Introduction

In order to appreciate what the freedom of expression is, there will be need for the reader to first understand where this phenomenon comes from. As such, this module will outline, in brief, where the freedom of expression at a global level emanates from. This will entail describing the freedom of expression, then outlining the salient international laws that have provided for it. Once that is done, the module will move on to outline the freedom of expression at the regional level of Africa. The module ends with an explanation on the importance of these international laws to individual nations such as Zambia.

1.3 Freedom of Expression

According to the Freedom Forum Institute, freedom of expression refers to the ability of an individual or group of individuals to express their beliefs, thoughts, ideas, and emotions about different issues free from government censorship.¹ Most constitutions protect the rights of individuals to the freedom of the press, speech, religion, assembly and

¹ Freedom Forum Institute Website. What is Freedom of Expression? Viewed at <https://www.freedomforuminstitute.org/about/faq/what-is-freedom-of-expression/> on 13th June 2022

petition. Some academic scholars cluster most of these freedoms under the overall term “freedom of expression.”

Freedom of expression is critical to the individual liberty and contributes to the marketplace of ideas. Everyone has the right to agree or disagree with those in power, and to express these opinions in peaceful protests. Exercising these rights without fear or unlawful interference is central to living in an open and fair society. Yet governments around the world routinely imprison people for speaking out, even though almost every country's constitution refers to the value of ‘free speech’. Governments have a duty to prohibit hateful and inciteful speech, but many abuse their authority to silence peaceful dissent by passing laws which criminalise (criminalizing) the freedom of expression. How governments tolerate unfavourable views or critical voices is often a good indication of how they treat human rights generally.²

An integral component to the enjoyment of the freedom of expression is the freedom of the press, which is deemed as the right to receive and impart ideas and information without interference. The word ‘interference’ chiefly implies executive control and legislative constraint.³

1.4 International and Regional Human Rights Instruments on Freedom of Expression

Zambia is part of the global community of States. In terms of international standards in as far as the right to freedom of expression is concerned, Zambia is guided by the standards set either by the United Nations (UN), globally, or the African Union (AU), regionally. At global level, there exists an international law called the Universal Declaration of Human Rights (UDHR) passed in 1948, from which the UN in 1966 passed the two most important international laws called the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights

² Amnesty International Website. Freedom of Expression. Viewed at https://www.amnesty.org/en/what-we-do/freedom-of-expression/?utm_source=google&utm_medium=cpc&qclid=Cj0KCQjwyYKUBhDJARIsAMj9IkHA1mFA50CK0qBSuZOMP8Zi110cTflmagkyu8sG9RxyrpknuzcHu6oaAmCCEALw_wcB on 13th May 2022

³ *Indian Express Newspapers (Bombay) V Union of India*, AIR (1986) SC 515.

Module 1

(ICESCR). At regional level the AU passed the African Charter on Human and Peoples' Rights (ACHPR) in 1981. Just like the ICCPR, the ACHPR provides for the right of the freedom of expression.

1.4.1 International Covenant on Civil and Political Rights

The ICCPR contains an article which supports the right to the freedom of expression. This can be found in Article 19 of that treaty. It provides for the said right as follows:

Article 19

1. Everyone shall have the right to hold opinions without interference.

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

3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

(a) For respect of the rights or reputations of others;

(b) For the protection of national security or of public order, or of public health or morals.⁴

In summary, Article 19 of the ICCPR guarantees the right to hold opinions, freedom of expression; which includes freedom to seek, receive and impart information and ideas whether orally, in writing or print either through the media or one's own choice. It also provides

⁴ Article 19 of the International Covenant on Civil and Political Rights

that there are special duties that come with this right which renders it subject to restrictions including respect for the rights or reputations of others, the protection of national security, public order, public health or public morals.

Just as countries around the world have courts to provide for the interpretation of the provisions of their laws, in comparison, under international law, treaties and conventions alike have monitoring mechanisms through which the provisions of a treaty can be interpreted. With regards to the ICCPR, the main treaty monitoring mechanism is called the United Nations Human Rights Committee. The interpretation of treaties that come from these mechanisms are referred to as General Comments. The United Nations Human Rights Committee has had occasion in the past to interpret the provisions of the treaty as they relate to Article 19 in what is called General Comment No. 34

General Comment No. 34 on the ICCPR notes that the right to freedom of expression includes, for example, political debates, commentary on one's own affairs and on public affairs, canvassing, discussions on human rights, journalism, cultural and artistic expressions, teaching, and religious dialogue. It also embraces expressions that may be regarded by some as deeply offensive. The right covers communications that are both verbal and non-verbal, and all modes of expression, including audio-visual, electronic and internet-based modes of communication.⁵

1.4.2 African Charter on Human and Peoples' Rights

On the African continent, nation States through the auspices of the AU have developed an African human rights system. The starting point of this system is the regional human rights law called the ACHPR. The ACHPR like the ICCPR also provides for the right to the freedom of expression. This can be found in Article 9 of the ACHPR. The article provides for it in the following manner:

⁵ Media Defence Website. [Freedom of Expression Under International Law](https://www.mediadefence.org/ereader/publications/introductory-modules-on-digital-rights-and-freedom-of-expression-online/module-1-key-principles-of-international-law-and-freedom-of-expression/the-right-to-freedom-of-expression-under-international-law/). Viewed at <https://www.mediadefence.org/ereader/publications/introductory-modules-on-digital-rights-and-freedom-of-expression-online/module-1-key-principles-of-international-law-and-freedom-of-expression/the-right-to-freedom-of-expression-under-international-law/> on 13th May 2022

Article 9

1. *Every individual shall have the right to receive information.*
2. *Every individual shall have the right to express and disseminate his opinions within the law.*⁶

As is the case with the ICCPR, the ACHPR does have a treaty monitoring instrument, mainly through the African Commission on Human and Peoples' Rights. The Commission has had occasion to give an explanation on the right to the freedom of expression in a document called the Declaration of Principles on Freedom of Expression.

The very first principle in that document covers the importance of the rights to the freedom of expression and access to information. It is provided that the freedom of expression and access to information are fundamental rights protected under the African Charter and other international human rights laws and standards. The respect, protection and fulfilment of these rights is crucial and indispensable for the free development of an individual, the creation and nurturing of democratic societies and for enabling the exercise of other rights. It is also provided that States Parties to the African Charter (States) shall create an enabling environment for the exercise of the freedom of expression and access to information, including by ensuring protection against acts or omissions of non-State actors that curtail the enjoyment of the freedom of expression and access to information.⁷

1.5 The Importance of International Human Rights Provisions

As a UN Member State, Zambia is subject to the oversight of various UN human rights bodies. As a party to specific universal human rights treaties, Zambia's policies and practices are monitored by the UN treaty bodies. Zambia has a duty to submit State Reports to the UN treaty bodies associated with each treaty, which the country has ratified. These reports must be submitted on a periodic basis, and

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

⁷ African Commission on Human and Peoples' Rights. 2019. Declaration of Principles on Freedom of Expression. Accessed at https://www.achpr.org/public/Document/file/English/Declaration%20of%20Principles%20on%20Freedom%20of%20Expression_ENG_2019.pdf on 13th May, 2022

describe the steps that Zambia has taken to implement the treaty provisions. Additionally, certain UN treaties include inquiry procedures, which allow the UN treaty body to consider allegations of grave or systematic human rights violations.⁸

Being a Member State of the AU, Zambia has ratified the African Charter on Human and Peoples' Rights. Thus, the country's human rights policies and practices are monitored by the African Commission on Human and Peoples' Rights (ACHPR), which reviews the State's reports concerning its human rights situation and decides upon complaints of alleged violations.⁹

What this means is that by agreeing to be part and parcel of the UN and AU in as far as it relates to the ICCPR and ACHPR, Zambia has taken on obligations to, among other things, be supervised, at a global and regional level, by the treaty monitoring instruments of these treaties. To that end, these international bodies monitor, periodically, what Zambia does or does not do in relation to the provisions of the said treaties, with each of the treaties providing for the right to the freedom of expression.

1.6 Enforceability of International Human Rights Laws

It is one thing to have all these international laws. It is another thing to have these international laws, particularly, the provisions of those laws applicable to people around the world. It therefore, begs the question as to whether or not these international laws are enforceable in different countries around the world.

International human rights law lays down obligations which States are bound to respect. By becoming parties to international treaties, States assume obligations and duties under international law to respect, protect and fulfil human rights. The obligation to respect means that States must refrain from interfering with or curtailing the enjoyment of human rights. The obligation to protect requires to protect individuals and groups against human rights abuses. The obligation to fulfil means

⁸ International Justice Resource Center Website. Viewed at <https://ijrcenter.org/e-content/uploads/2017/11/Zambia.pdf> on 13th May, 2022

⁹ Ibid

that States must take positive action to facilitate the enjoyment of basic human rights.¹⁰

Through the ratification of international human rights treaties, governments undertake to put into place domestic measures and legislation compatible with their treaty obligations and duties.¹¹ Zambia has ratified both the ICCPR and ACHPR. In this way, Zambia undertook to put into place local measures and laws that are in line with its obligations and duties under those international laws. To this end, if it is found that local laws in Zambia are failing to address human rights abuses, there are mechanisms and procedures through which individual citizens within Zambia can lodge complaints at the AU and UN. This is a measure that helps keep Zambia in check with regards to its duties to respect, implement, and enforce international human rights standards within Zambia.

1.7 CASE STUDY

So as to better explain the importance of international law bodies tasked to monitor the implementation of international laws in relation to Zambia, the case of *Legal Resources Foundation (LRF) against Zambia* at the African Commission for Human Rights has been identified. Herein the reader will have an idea of how Zambia found itself appearing before that Commission on account of a matter that had been reported to it by a local non-governmental organisation (NGO) in the name of LRF.

Legal Resources Foundation V. Zambia¹²

The African Commission on Human and People's Rights at its twenty-ninth session held between the 23rd of April to 7th of May 2001 did have occasion to hear and determine a matter between the LRF and Zambia.

¹⁰ Office of the High Commissioner for Human Rights Website. Viewed at <https://www.ohchr.org/en/professionalinterest/pages/internationallaw.aspx>

On 12th June, 2022

¹¹ Ibid

¹² Africalii Website. Viewed at <https://africanlii.org/sites/default/files/judgment/afu/african-commission-human-and-peoples-rights/2001-achpr-31//Legal%20Resources%20Foundation%20v.%20Zambia%2C%20Decision%2C%202011>

Summary of Facts

The summary of facts that brought rise to this case were as follows:

1. The Complainant, LRF an NGO took that complaint against Zambia.
2. The Complainant alleged that the Zambian Government had enacted into law, a constitution which was discriminatory, divisive and violated the human rights of 35 percent of the entire population. The Constitution (Amendment) Act of 1996, it was alleged, had not only violated the rights of its citizens, but had also taken away the accrued rights of other citizens, including the first President, Dr. Kenneth Kaunda.
3. The Complainant alleged that the said Constitution of Zambia Amendment Act of 1996 provided, that anyone who wanted to contest the Office of the President had to prove that both parents were Zambians by birth or descent.
4. Article 35 of the said Constitution Amendment Act further provided that nobody who had served two five-year terms as President shall be eligible for re-election to that office.
5. Complainant alleged that the amended constitutional provisions were in contravention of international human rights instruments in general and the African Charter on Human and Peoples' Rights in particular.
6. Complainant had taken the case to the Supreme Court of Zambia between May and August 1996 seeking:
 - a. A declaration that Articles 34 and 35 of the amended Constitution were discriminatory.
 - b. A declaration that Parliament lacked the power to adopt a new constitution; and

[%20of%2098%20%28ACmHPR%2C%20May.%2007%2C%202001%29.pdf](#) on 31st May, 2022

c. An injunction restraining the President from assenting to the constitution.

7. Complainant alleged that while the case was pending in court, the ruling party, which dominated parliament went ahead to adopt and enact the controversial constitution which the President assented to one week later.

8. The Complainant's case was therefore thrown out of court.

9. The Supreme Court of Zambia is the highest Court of jurisdiction in the land, thus all local remedies had been exhausted.

Decision of the African Commission for Human and People's Rights

The Commission in its Decision found as follows:

- a. That Zambia was in violation of Articles 2, 3(1) and 13 of the African Charter;
- b. Zambia was urged to take the necessary steps to bring its laws and Constitution into conformity with the African Charter; and
- c. Zambia was requested to report back to the Commission when it submitted its next country report in terms of Article 62 on measures taken to comply with this recommendation.

IN A NUTSHELL

- The right to think, speak, have an opinion and receive information are all part of the right to the freedom of expression.
- The right to the freedom of expression is guaranteed globally through the ICCPR, and regionally, the ACHPR.
- Zambia is a party to the ICCPR and ACHPR.
- The ICCPR and ACHPR have had occasion to interpret the provisions of Articles 19 and 9 of their respective treaties.
- The ICCPR and ACHPR have treaty monitoring instruments to which Zambia reports to from time to time.
- Individual citizens of Zambia can lodge complaints at the UN or the AU under the ICCPR and ACHPR.

EXERCISES

1. What is freedom of expression?
2. What does the ICCPR say about the freedom of expression?
3. What does the ACHPR say about the freedom of expression?
4. For Zambia, what is the importance of what the ICCPR and ACHPR say about the freedom of expression?
5. What is the mechanism through which a Zambian citizen can report the State to the UN or AU under the ICCPR or ACHPR?

2.0 Module Two – Zambian Constitutional Framework

2.1 Learning Objectives

By the end of this module, the reader should be able to:

- a. Describe the Zambian constitutional framework; and
- b. The constitutional provisions regarding the freedom of expression.

2.2 Introduction

This module will outline the freedom of expression in the context of the Zambian supreme law, which is the Constitution. In so doing, the module will outline the manner in which the freedom of expression is provided for in the Constitution of Zambia and the implications attached to the manner in which it is provided for.

2.3 Zambian Constitutional Framework

The Constitution of Zambia was established in 1991, and major amendments came into force in early 2016. The Constitution is the supreme law of the nation, and all other written or customary laws are subject to its provisions. The rights contained in the Bill of Rights in the Constitution are universal rights, and apply to all persons equally. The fundamental rights contained in the bill of rights are universal and are enjoyed by every member of the society – irrespective of inter alia race, culture, creed, and social and economic status.¹³

In certain circumstances, however, the State may limit the fundamental rights of persons, if it is reasonable to do so. If the State, however, seeks to limit the rights of any person, it must prove that the limitation of these rights is proportionate and reasonably justifiable in a democratic society. If the State fails to prove this, the limitation is unlawful and unjustifiable. The State must provide evidence to justify the limitation. This evidence must show that there is no alternative or lesser means to protect the valid State interest – other than the

¹³ Southern African Litigation Centre Website: Legal Framework in Zambia viewed at <https://www.southernafricalitigationcentre.org/wp-content/uploads/2017/08/Legal-framework-in-Zambia.pdf> on 13th May 2022

limitation of the right. Bare assertions, suspicions or speculations by the State that a particular act or conduct is contrary to public morality, public interest, or good order, is insufficient to fulfil the requirements necessary for a justified limitation of a constitutional right.¹⁴

2.4 Constitutional Provisions on the Freedom of Expression

The Constitution of Zambia provides for what is called '*protection of freedom of expression*'. This is found in Article 20. The exact wording of that provisions is 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.*¹⁵

What this entails is that a person can give consent for the constitutionally guaranteed protection of her or his right to the freedom of expression to be hindered. If he or she does not give such consent, this means such a person has the right to hold opinions, receive ideas and information and impart and communicate ideas or information. This could be either to the public generally or to a specific class or persons.

However, as indicated in 2.2 above, a number of the guaranteed human rights found in the Zambian Constitution are subject to a number of limitations. The protection of the right to the freedom of expression is not an exception. The limitations on this right are found in Article 20(3) which provides as follows:

¹⁴ Ibid

¹⁵ Article 20(1) of the Zambian Constitution

Module 2

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

(a) that is reasonably required in the interests of defence, public safety, public order, public morality or public health; or

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

(c) that imposes restrictions upon public officers;

and except so far as that provision or, the thing done under the authority thereof as the case may be, is shown not to be reasonably justifiable in a democratic society.¹⁶

What this means is that although the Constitution of Zambia protects the right to the freedom of expression, that right can be limited if it can be shown that the limitation has been necessitated:

(a) in the interests of defence, public safety, public order, public morality or public health;

(b) if it is reasonably required for the purposes of:

(i) protecting the reputations, rights and freedoms of other persons;

(ii) protecting the private lives of persons concerned in legal proceedings;

(iii) preventing the disclosure of information received in confidence;

¹⁶ Article 20(3) of the Constitution

- (iv) maintaining the authority and independence of the courts;
 - (v) regulating educational institutions in the interests of persons receiving instruction therein; or
 - (vi) registration of, or regulating the technical administration or the technical operation of, newspapers and other publications, telephony, telegraphy, posts, wireless broadcasting or television; and
- (c) that imposes restrictions upon public officers.

Ultimately, according to Article 20(3) for a limitation to be allowable, it has to be shown to be reasonably justifiable in a democratic society. The freedom of expression is a right that people have fought for so many years to uphold and protect. Everyone needs their right to express themselves no matter how controversial their opinions might be.

2.5 Media Freedom in Zambia

Media Freedom, otherwise referred to as press freedom, does not exist as a stand-alone right in the Zambian Constitution. It is embedded in the right to freedom of expression, in Article 20 of the Constitution. The rationale being that one cannot express themselves without information and that information is obtained, by and large, through such means as through the media. To that end, it is seen as being embedded in the following provision:

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 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....¹⁷

In its report to the National Assembly at the Fifth Session of the Ninth National Assembly the Parliamentary Committee on Information and Broadcasting informed the House that it observed that despite

¹⁷ Article 20(1) of the Zambian Constitution

Government pronouncements of a free press since the re-introduction of multiparty democracy in 1991 no laws had been amended to that effect. According to the Committee, as a matter of fact, personnel of privately owned media institutions that were highly critical of the Government had encountered serious harassment and intimidation and had been subjected to numerous criminal charges under the Penal Code. In addition, the State Security Act had been used in the past to punish legitimate investigative information and to suppress discussion of public affairs. It was the observation of the Committee that the press ought to be protected in its duties. It took the view that the press cannot work without fear or favour under the prevailing circumstances in Zambia.¹⁸

2.6 CASE STUDY

So as to help the reader appreciate the importance of the constitutional provisions on the right to the freedom of expression, the case of *Roy Clarke V. The Attorney General* is taken as a case study.

Roy Clarke V. The Attorney General¹⁹

Facts of the case

On 1st January 2004, Roy Clarke, a journalist of British nationality who had permanent residence status in Zambia, published a satirical article which referred to allegations of vote-rigging by the President and two government ministers and, using a reference to George Orwell's *Animal Farm*, depicted the officials as animals. On 5th January 2004, a statement from the Permanent Secretary in the Ministry of Home Affairs was published in two national newspapers. The statement said that the Permanent Secretary had recommended to the Minister that Clarke be deported, and that the article's description of the President and Ministers as animals was insulting. The Minister exercised his power and

¹⁸ National Assembly of Zambia. 2006. Report of the Committee on Information and Broadcasting Services for the Fifth Session of the Ninth National Assembly appointed on 19th January, 2006 at page 7

¹⁹ Global Freedom of Expression Website. Viewed at <https://globalfreedomofexpression.columbia.edu/cases/attorney-general-v-clarke/> on 31st May, 2022

discretion under section 26(2) of the Act and said he would deport Clarke so as to protect national security.

Clarke approached the High Court in Lusaka seeking a review of the Minister's decision to deport him, a declaration that the deportation order was unconstitutional and an order that the Minister reconsider his decision after giving Clarke an opportunity to be heard in person. Clarke described the article as a satirical one and not one intended to insult the President or the citizens of Zambia. He said that he believed the decision to deport him was taken partly as a result of his nationality and race, and that the decision infringed his right to the freedom of expression and of the press in terms of Article 20 of the Zambian Constitution.

The Minister responded by stating that his decision to deport Clarke was motivated by his belief that Clarke's continued presence in Zambia was a threat to peace and good order because his description of Zambian people in the article as animals could incite hatred and lead to violence. Therefore, he argued, Clarke's conduct fell within the legislative provision at section 26(2) of the Act which states that: "Any person who in the opinion of the Minister is by his presence or his conduct likely to be a danger to peace and good order in Zambia may be deported from Zambia pursuant to a warrant under the hand of the Minister".

The High Court held that, even though it considered the article "overstretched satire, irritating and insulting", Clarke's rights to the freedom of expression and protection of the law had been infringed by the decision to deport him. The High Court highlighted that as no action had been taken against the newspaper editor, Clarke had been individually targeted, and discriminated against on the grounds of his origin and race.

The Attorney-General appealed the decision to the Supreme Court.

Decision of Supreme Court

The appeal was heard by a full bench, and Chitengi JS delivered the unanimous judgment.

The Supreme Court set aside the decision to deport Clarke because of the satirical article on the basis that the decision was unreasonable, but did not accept that the article fell within the protection given to the freedom of expression by the Constitution.

IN A NUTSHELL

- The Constitution is the supreme law of the country.
- All other laws are subordinate and should be consistent with the Constitution.
- The Constitution has undergone numerous changes in 1964, 1973, 1991, 1996 and 2016.
- The Constitution contains a Bill of Rights, where guaranteed human rights can be found.
- The Constitution protects the right to the freedom of expression in Article 20.
- The Constitution provides for instances when the protection of freedom of expression can be limited.
- For a limitation on the right to the freedom of expression to be allowable, it must be reasonably justifiable in a democratic society.

EXERCISES

1. What is meant by the Constitution being the supreme law?
2. What is meant by all other laws being subordinate and consistent with the Constitution?
3. How many times has the Constitution undergone changes since independence?
4. Where in the Constitution is the right to freedom of expression found?
5. It is said that the right to freedom of expression is not absolute, but limited. Explain what you understand about this.

3.0 Module Three – Zambian Legal Framework Affecting the Freedom of Expression

3.1 Learning Objectives

By the end of this module, the reader should be able to:

1. Identify the various laws affecting the freedom of expression in Zambia;
2. Outline the precise provisions of the identified laws that affect the freedom of expression; and
3. Outline the importance of the identified laws and why it is important for the reader to be aware of them.

3.2 Introduction

This module will outline a wide range of relevant Zambian laws that affect the freedom of expression. In Zambia, there are a number of statutes on the statute books, which directly and indirectly hinder the freedom of expression. For the purposes of clarity, in a number of instances in this module, the verbatim provisions of laws cited are outlined as they appear in the actual law referred to.

3.3 The Penal Code Act, Chapter 87 of the Laws of Zambia

3.3.1 Offences Around Prohibited Publications

3.3.1.1 Prohibited Publications

Certain publications can be declared as prohibited. This law allows for this. Section 53(1) of the Penal Code Act gives the President powers to declare a publication as prohibited. This is provided for as follows:

53. (1) 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.²⁰

3.3.1.2 Offences in Respect of Prohibited Publications

Since a publication can be declared as prohibited, it follows that there are a number of other offences that are also provided for that are related to the prohibition of publications. The Penal Code in Section 54(1) extends offences beyond prohibited publications to those in respect of the same, to such things as importing, publishing, selling, offering to sell, distributing or reproducing of prohibited materials, creating an offence with liability including imprisonment of up to two years, as follows:

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.²¹

3.3.1.3 Delivery of Prohibited Publication to a Police Station

The law provides for how a publication that is declared as prohibited is to be dealt with. In this way Section 55 mandates anyone that receives a prohibited material to deliver the same to a police station, creating an offence with liability including imprisonment for one year, in the following manner:

55. (1) Any person to whom any prohibited publication or any extract therefrom is sent without his knowledge

²⁰ Section 53(1) of the Penal Code Act

²¹ Section 54(1) of the Penal Code Act

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or privy 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 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.²²

3.3.2 Seditious Practices

Although there are a number of provisions that make reference to the word 'sedition', the word itself is not defined in the Penal Code Act. However, the Oxford Dictionary of Current English defines it as being *actions or speech urging rebellion against the authority of a state or ruler*.²³

3.3.2.1 Offences in Respect of Seditious Practices

As is common in many other areas of the Penal Code, certain laws are considered as the basis upon which others exist so much so that in relation to seditious practices, Section 57 of the Penal Code lays out offences in respect of seditious practices, creating an offence with liability including imprisonment for seven years, as follows:

²² Section 55 of the Penal Code Act

²³ Soanes, C. et al. 2006. *Oxford Dictionary of Current English, 4th Edition*. New York: Oxford University Press

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.²⁴

3.3.2.2 Seditious Intention

The law outlines what it refers to as a seditious intent with regards to the offence of seditious practices. Section 60 of the Penal Code Act makes provision for various incidences that are termed as seditious intention, in the following manner:

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

²⁴ Section 57 of the Penal Code Act

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(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:

Provided that an intention, not being an intention manifested in such a manner as to effect or be likely to effect any of the purposes mentioned in the foregoing provisions of this subsection, shall not be taken to be seditious if it is an intention-

(i) to show that the Government have been misled or mistaken in any of their measures; or

(ii) to point out errors or defects in the Government or Constitution 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.²⁵

²⁵ Section 60 of the Penal Code Act

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3.3.2.3 Persons Deemed to Have Published a Seditious Publication

The law on seditious practices goes further to make provisions that hinge on the actions of persons that are deemed to have published material that is seditious. Section 61(1) provides for persons that the law deems to have published seditious material, in the following manner:

61. (1) In any prosecution for publishing a seditious publication where it is proved that the publication has been published, the following persons shall be deemed to have published such publication: Persons deemed to have published a seditious publication

(a) in the case of a publication of a society, the office-bearers of the society;

(b) any person referred to in the publication as being the editor, assistant editor or author of such publication;

(c) any person who is proved to be the editor of such publication; and

(d) any person who is proved to have published such publication.²⁶

3.3.3 Insulting the National Anthem

As strange as it sounds, there is an offence against insulting the national anthem. Section 68 creates an offence for uttering or publishing an insult to the national anthem with liability including imprisonment of up to two years, in the following manner:

68. Any person who does any act or utters any words or publishes any writing, with intent to insult or bring into contempt or ridicule the official national anthem of Zambia, is guilty of an offence and is liable on conviction to imprisonment for a period not exceeding two years.²⁷

²⁶ Section 61(1) of the Penal Code Act

²⁷ Section 68 of the Penal Code Act

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3.3.4 Defamation of the President

It is an offence to defame the President. Section 69 provides for an offence of Defamation of the President, creating liability including imprisonment of up to three years, in the following manner:

69. 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.²⁸

3.3.5 Expressing or Showing Hatred, Ridicule or Contempt for Persons Because of Race, Tribe, Place of Origin or Colour

The law prohibits any person from expressing or showing hatred, ridicule or contempt for other persons on the basis of their race, tribe, place of origin or colour. Section 70(1) makes it an offence for one to express hatred, ridicule or contempt for a person on account of race, tribe, place of origin or colour, with liability including imprisonment for up to two years, in the following manner:

Section 70. (1) Any person who utters any words or publishes any writing expressing or showing hatred, ridicule or contempt for any person or group of persons wholly or mainly because of his or their race, tribe, place of origin or colour is guilty of an offence and is liable on conviction to imprisonment for a period not exceeding two years.²⁹

3.3.6 Defamation of Foreign Princes

Just like it is an offence to defame the President, it is also an offence to defame a prince from a foreign country. Section 71 makes it an offence to defame a foreign prince, including liability of a misdemeanour, as follows:

²⁸ Section 69 of the Penal Code Act

²⁹ Section 70(1) of the Penal Code Act

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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.³⁰

3.3.7 Prohibition of Taking Photographs in Court

The taking of photographs in court is prohibited. Section 117(1) makes it an offence for one to take photos in court, creating liability of fines in respect of each such offence, in the following manner:

117. (1) No person shall-

(a) take or attempt to take in any court any photograph, or, with a view to publication, make or attempt to make in any court any portrait or sketch, of any person, being a Judge of the court or a juror or a witness in or a party to any proceedings before the court, whether civil or criminal; or

(b) publish any photograph, portrait or sketch taken or made in contravention of the provisions of this subsection or any reproduction thereof;

and if any person acts in contravention of this subsection, he shall be liable to a fine not exceeding one thousand five hundred penalty units in respect of each offence.³¹

³⁰ Section 71 of the Penal Code Act

³¹ Section 117(1) of the Penal Code Act

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3.3.8 Obscene Matters or Things

The law creates an offence in relation to obscenity whether in the form of material or things. Section 177(1) creates offences related to obscene matters or things, including liability of up to five years imprisonment, in the following manner:

177. (1) Any person who-

(a) makes, produces or has in his possession any one or more obscene writings, drawings, prints, paintings, printed matter, pictures, posters, emblems, photographs, cinematograph films or any other object tending to corrupt morals; or

(b) imports, conveys or exports, or causes to be imported conveyed or exported, any such matters or things, or in any manner whatsoever puts any of them in circulation; or

(c) carries on or takes part in any business, whether public or private, concerned with any such matters or things, or deals in any such matters or things in any manner whatsoever, or distributes any of them, or exhibits any of them publicly, or makes a business of lending any of them; or

(d) advertises or makes known by any means whatsoever with a view to assisting the circulation of, or traffic in, any such matters or things, that a person is engaged in any of the acts referred to in this section, or advertises or makes known how, or from whom, any such matters or things can be procured either directly or indirectly; or

(e) publicly exhibits any indecent show or performance or any show or performance tending to corrupt morals;

is guilty of a misdemeanour and is liable to imprisonment for five years or to a fine of not less than fifteen thousand penalty units nor more than seventy-five thousand penalty units.³²

³² Section 177(1) of the Penal Code Act

3.3.9 Criminal Defamation

Defamation under the law and in certain circumstances is a crime. Section 191 creates an offence of criminal defamation, libel in particular, with liability of a misdemeanour, in the following manner:

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".³³

3.4 The State Security Act, Chapter 111 of the Laws of Zambia

Another problematic piece of legislation for media practitioners in Zambia is the State Security Act Cap 111 of the laws of Zambia. It is an Act intended to enhance the provisions 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. The security of any nation must be guarded against the enemy. The State must ensure that people are protected against those who plan harm to the nation. Key installations of the any country must be secured too. Irresponsible disclosure of information may just go to provide more information to those with bad intentions of attacking the nation.³⁴

There is a genuine need to protect the security of the nation. Such a law with its wide sweeping provisions encourages the culture of secrecy in government. Even information that could be beneficial to the public is classified. Public officials use this as a defence mechanism to deny providing public information to journalists.³⁵

³³ Section 191 of the Penal Code Act

³⁴ Submission to the Legal and Justice Sector Reforms Commission by MISA Zambia, 8th December 2014 at pages 15 and 16

³⁵ Ibid

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3.5 Protected Places Act, Chapter 125 of the Laws of Zambia

This law provides for the control of the entry of persons into certain places and for the control of the movements and conduct of persons within certain areas.³⁶ In this regard, the Act makes provision for what are referred to as 'protected places' and 'protected areas'.

Protected places are provided for in Section 5(1) as follows:

5. (1) If, in regard to any premises, it appears to the President to be necessary or expedient that special precautions should be taken to prevent the entry of unauthorised persons, he may, by statutory order, declare those premises to be a protected place for the purposes of this Act; and so long as the order is in force no person, other than a person who is, or who belongs to a class of persons which is, specifically exempted in such order, shall be in those premises unless he is in the possession of a pass card or permit issued by such authority or person as may be specified in the order, or has received the permission of an authorised officer on duty at those premises to enter them.³⁷

It is worth noting that it is an offence for anyone unauthorized to be found in a protected place, with the Act attaching liability including imprisonment for up to five years.³⁸

On the other hand, protected areas are provided for as follows:

6. (1) If, in regard to any area, it appears to the President to be necessary or expedient that special measures should be taken to control the movements and conduct of persons, he may, by statutory order, declare such area to be a protected area.

As is the case with protected places, it is an offence for anyone unauthorized to be found in a protected area, yet again with the Act attaching liability including imprisonment for up to five years.³⁹

³⁶ Preamble to the Protected Places Act, Chapter 125 of the Laws of Zambia

³⁷ Section 5(1) of the Protected Places Act

³⁸ Section 5(3) of the Protected Places Act

³⁹ Section 6(3) of the Protected Places Act

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3.6 National Assembly (Powers and Privileges) Act, Chapter 12 of the Laws of Zambia

This Act makes provision for the declaration and definition of certain powers, privileges and immunities of the National Assembly and of the members and officers of the Assembly, secures freedom of speech in the National Assembly, regulates admittance to the precincts of the National Assembly and gives protection to the persons employed in the publication of the reports and other papers of the National Assembly.

The Act empowers the house to exclude persons it calls 'strangers' from the proceedings of the house.⁴⁰ A stranger is defined as any person other than a member or an officer.⁴¹

It is worth noting that the Act creates offences that have a bearing on the work of journalists. These include:⁴²

- (a) publishing a report of any proceedings of the Assembly or any committee when such proceedings have not been held in public;
- (b) publishing any false or scandalous libel on the Assembly or any report which willfully misrepresents in any way any proceedings of the Assembly or any committee;
- (c) publishing 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;
- (d) printing or causing 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, under the authority of the Assembly, or the Speaker, and the same is not so printed; and
- (d) publishing or printing 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.

⁴⁰ Section 7(1) of the National Assembly (Powers and Privileges) Act

⁴¹ Section 2 of the National Assembly (Powers and Privileges) Act

⁴² Section 25 of the National Assembly (Powers and Privileges) Act

The penalty attached to one found liable under these provisions is as much as imprisonment for up to twelve months.

3.7 Printed Publications Act, Chapter 161 of the Laws of Zambia

This is a law that makes provision for the registration of newspapers and the printing and publication of books and the preservation of printed works published in Zambia.

Regardless of under what law a newspaper is registered, this law creates a further regulatory requirement for newspapers. It provides that no person shall print or publish, or cause to be printed or published, any newspaper until it has been registered at the office of the Director (National Archives) at Lusaka the full and correct title thereof and the full and correct names and places of abode of every person who is or is intended to be the proprietor, editor, printer or publisher of such newspaper, and the description of the premises where the same is to be published. It goes on to provide that every alteration in such particulars shall forthwith be registered in like manner.⁴³ An offence is created for noncompliance with this provision with a penalty for liability of up to three thousand penalty units.⁴⁴

3.8 Theatres and Cinematography Exhibition Act, Chapter 158 of the Laws of Zambia

This law was created to regulate and control theatres and cinematography exhibitions.⁴⁵ Of interest to journalists, particularly those that are in the business of plying their trade through the development of film documentaries is that the law empowers the Minister, by Gazette notice, to appoint one or more Film Censorship Boards consisting of such number of persons as the Minister may determine.⁴⁶

⁴³ Section 5(1) of the Printed Publications Act

⁴⁴ Section 5(2) of the Printed Publications Act

⁴⁵ Preamble to the Theatres and Cinematography Exhibition Act, Chapter 158 of the Laws of Zambia

⁴⁶ Section 7 of the Theatres and Cinematography Exhibition Act

At the time of the enactment of this law, the function of the Film Censorship Board entailed viewing or screening all films that were shown to the public in various cinema halls in the country. This was in those days when cinema halls were few and technology for showing films had not advanced as it is today. The Board was privy to watching all films, for the purposes of rating them, determining whether or not they were universal for all to see or even banned as being too graphic and unsuitable. In short, the role of the Film Censorship Board was to clear or ban what films should be shown to the public in cinema halls.

3.9 Defamation Act, Chapter 68 of the Laws of Zambia

This law makes provision for the consolidation and amendment of the law relating to libel, other than criminal libel, and slander.⁴⁷ Under that law, a newspaper can report of proceedings in court privileged. In that way journalists are protected by the law. The law provides that a fair and accurate report in any newspaper of proceedings publicly heard before any court exercising judicial authority within Zambia shall, if published contemporaneously with such proceedings, be absolutely privileged. This is provided that nothing in the section shall authorise the publication of any blasphemous or indecent matter.⁴⁸

Section 9 of the Act provides for qualified privilege with a detailed schedule of what statements are considered as privileged without explanation on one hand and those privileged with explanation on the other hand. The same annexed to the Act.⁴⁹

It is worth noting that the most common defenses to a law suit of defamation are truth, consent, privilege and the statute of limitations. Further on, perhaps the most distinct aspect of the defamation cause of action is that falsity is required. In other words, the statement publicised about the plaintiff must be false in order to prove defamation. Therefore, it may come as no surprise that truth would hurt or even defeat the entire defamation claims. The entire purpose of the defamation cause of action is to provide a remedy for individuals who have had their reputations maligned. While the law is capable of providing a remedy to people whose reputations were wrongfully

⁴⁷ Preamble to the Defamation Act, Chapter 68 of the Laws of Zambia

⁴⁸ Section 8 of the Defamation Act

⁴⁹ Schedule to the Defamation Act pursuant to Section 9

maligned, those whose reputation have been maligned due to truthful accusations unfortunately may have no legal recourse.⁵⁰

3.9.1 Privileged Statements

As has been highlighted, one of the most common defences to a suit of defamation is that the maker of the statement holds some form of privilege that allows him or her to make the statement. This could arise by virtue of the office that one holds for instance. In what appears to be an apparent attempt to create clarity on the defence of privilege, the Defamation Act distinguishes between what it refers to as statements that are privileged without an explanation and those that although are privileged require an explanation of sorts.

3.9.1.1 Statements privileged without explanation

Under the law, the following statements are privileged without the need for one to explain him or herself:

1. A fair and accurate report of any proceedings in public of the legislature;
2. A fair and accurate report of any proceedings in public of an international organisation;
3. A fair and accurate report of any proceedings in public of the International Court of Justice or any other judicial or arbitral tribunal deciding matters in dispute between States;
4. A fair and accurate report of any proceedings before a court;
5. A fair and accurate report of any proceedings in public of a body or person appointed to hold a public inquiry by the Government or legislature;
6. A fair and accurate copy of or extract from any register kept in pursuance of the provisions of any written law; and

⁵⁰ Kokozyan Law Firm Website. Viewed at <https://www.losangelesemployeelawyer.com/defenses-to-defamation.html#:~:text=The%20most%20common%20defenses%20to,in%20order%20o%20prove%20defamation> on 31st May, 2022

7. A notice or advertisement published by or on the authority of any court within Zambia or any Judge or officer of such court.

3.9.1.2 Statements privileged subject to explanation

Under the law, the following statements are privileged but subject to an explanation:

1. A fair and accurate report of the findings or decision of any of the following associations, or of any committee or governing body thereof, that is to say:

(a) an association formed in Zambia for the purpose of promoting or encouraging the exercise of or interest in any art, science, religion, or learning, and empowered by its constitution to exercise control over or adjudicate upon matters of interest or concern to the association, or the actions or conduct of any persons subject to such control or adjudication;

(b) an association formed in Zambia for the purpose of promoting or safeguarding the interests of any trade, business, industry or profession, or of the persons carrying on or engaged in any trade, business, industry or profession, and empowered by its constitution to exercise control over or adjudicate upon matters connected with the trade, business, industry or profession, or the actions or conduct of those persons;

(c) an association formed for safeguarding the interests of any game, sport or pastime to the playing or exercise of which members of the public are invited or admitted, and empowered by its constitution to exercise control over or adjudicate upon persons connected with or taking part in the game, sport or pastime; being a finding or decision relating to a person who is a member of or is subject by virtue of any contract to the control of the association.

2. A fair and accurate report of the proceedings at any public meeting held in Zambia.

3. A fair and accurate report of the proceedings at any meeting or sitting in any part of Zambia of-

(a) any local authority or committee of a local authority or local authorities;

- (b) any commission, tribunal, committee or person appointed for the purposes of any inquiry by Act or by the President;
- (c) any other tribunal, board, committee or body constituted by or under, and exercising functions under, any written law.
4. A fair and accurate report of the proceedings at a general meeting of any company or association constituted, registered or certified by or under any written law.
5. A copy or fair and accurate report or summary of any notice or other matter issued for the information of the public by or on behalf of the Government of Zambia, a local authority or superior police officer.

3.10 Ministerial and Parliamentary Code of Conduct Act, Chapter 16 of the Laws of Zambia

This law provides for the establishment of a code of conduct for Ministers and Deputy Ministers and a code of conduct for Members of the National Assembly.⁵¹

Of interests to the media is the fact that proceedings under the Act can be raised with reference to something published in the media. Sections 13(1) and particularly Section 13(2) are instructive on this, providing in the following manner:⁵²

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.

⁵¹ Preamble to the Ministerial and Parliamentary Code of Conduct Act, Chapter 16 of the Laws of Zambia

⁵² Sections 13(1) and (2) of the Ministerial and Parliamentary Code of Conduct Act

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3.11 Contempt of Court (Miscellaneous Provisions) Act, Chapter 38 of the Laws of Zambia

This law provides for the amendment of the law relating to contempt of court and to restrict the publication of the details of certain proceedings.⁵³ The law protects what it refers to as innocent publications where one does not know that the publication concerns proceedings that are before court.⁵⁴

The publication of proceedings held in private is not of itself contemptuous unless they concern:⁵⁵

- a. the wardship or adoption of an infant including guardianship, custody, maintenance or upbringing of an infant, or rights of access to an infant;
- b. proceedings brought under the law 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;
- d. where the information relates to a secret process, discovery or invention which is in issue in the proceedings;
- e. where the court expressly prohibits the publication of all information relating to the proceedings; and
- f. where the proceedings are an appeal under the law with respect to income tax.

The law places specific restrictions on what can and cannot be published with regards to matrimonial proceedings. One cannot under the law publish or print details relating to any indecent matter or indecent medical, surgical or physiological details being a matter or details the publication of which would be calculated to injure public morals.⁵⁶ However, what can be published in relation to judicial

⁵³ Preamble to the Contempt of Court (Miscellaneous Provisions) Act, Chapter 38 of the Laws of Zambia

⁵⁴ Section 2(1) of the Contempt of Court (Miscellaneous Provisions) Act

⁵⁵ Section 3(1) of the Contempt of Court (Miscellaneous Provisions) Act

⁵⁶ Section 4(1) of the Contempt of Court (Miscellaneous Provisions) Act

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proceedings for dissolution of marriage, nullity of marriage, judicial separation, or restitution of conjugal rights are:⁵⁷

- i. the names, addresses and occupations of the parties and witnesses;
- ii. a concise statement of the charges, defences and countercharges in support of which evidence has been given;
- iii. submissions on any point of law arising in the course of the proceedings, and the decisions of the court thereon; and
- iv. the judgment of the court and observations made by the Judge or magistrate in giving judgment.

3.12 The Preservation of Public Security Act, Chapter 112 of the Laws of Zambia

This is a law that provides for preservation of public security.⁵⁸ This law comes into effect when the country is undergoing a state of emergency as provided for under the Constitution. Quite particularly, of concern should be the provisions of Sections 3(2)(a) of the Act that provides in the following manner:

*3. (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.*⁵⁹

3.13 The National Archives Act, Chapter 175 of the Laws of Zambia

This law provides for the preservation, custody, control and disposal of public archives, including public records of Zambia.⁶⁰ Section 11 of the

⁵⁷ Section 4(1)(b) of the Contempt of Court (Miscellaneous Provisions) Act

⁵⁸ Preamble to the Preservation of Public Security Act

⁵⁹ Section 3(2)(a) of the Preservation of Public Security Act

⁶⁰ Preamble to the National Archives Act

Act provides that public archives which have been in existence for a period of not less than twenty years may be made available for public inspection. Under Section 11 (2) provision is made to the effect that notwithstanding the provisions of subsection (1), the Minister may order that public archives or category thereof ought not to be made available for public inspection.

A duty is placed on the Director of National Archives to provide reasonable facilities at such times and, on the payment of such fees, for the public to inspect or obtain copies or extracts from public archives in the National Archives.⁶¹

CASE STUDY

Defamation of the President

The offence of defaming the President has been used far more in Zambia over the past decade than in many other countries. This is a great cause of concern and requires clear statements from the courts which would narrow the application of the offence and emphasise the importance of criticism in a democratic country.⁶² There are a number of concerns with this offence. This offence is archaic. Public figures ought to be required to tolerate a greater degree of criticism. The sanction is further so severe as to inhibit the freedom of expression.⁶³

Fred Mmembe, Bright Mwape V. The People and Fred Mmembe, Masautso Phiri, Goliath Mungonge V. The People

S.C.Z. Judgment No. 4 of 1996

This is the leading case on defamation of the President. In that case the Supreme Court was faced with the issue of whether Section 69 of the Penal Code infringes right to freedom of expression as provided for in Article 20 of the Zambian Constitution.

⁶¹ Section 11 of the National Archives Act

⁶² Southern African Litigation Centre Website. Viewed at <https://www.southernafricalitigationcentre.org/2019/05/25/zambia-challenging-the-enforcement-of-the-offence-of-defamation-of-the-president/> on 31st May, 2022

⁶³ Ibid

Facts of the case

This was a matter that was in the Supreme Court on appeal from the High Court. The appellants had been charged in a magistrate's court with contraventions of Section 69 of the Penal Code in that they had allegedly defamed the President. They requested the magistrate to refer the matter to the High Court in order to determine the constitutionality of Section 69 of the Penal Code. The High Court heard arguments on the issues of whether Section 69 contravened Article 20 of the Constitution and ruled that they did not. On appeal it was submitted by the appellants that the criminal provision offended against the right to the freedom of expression in Article 20 and thus in breach of the Constitution.

Decision of the Supreme Court

The Supreme Court decided as follows:

- i. That no one could seriously dispute that side by side with the freedom of speech was the equally very important public interest in the maintenance of the public character of public men for the proper conduct of public affairs which requires that they be protected from destructive attacks upon their honour and character. When the public person was the head of state the public interest was even more self-evident.
- ii. There was nothing in Article 20 which immunized defamation: a law met the test of being reasonably required if it had as its aim at least one of the interests or purposes listed in Article 20(3) of the Zambian Constitution.
- iii. Section 69 was furthermore reasonably required to forestall a breakdown of public order and there was accordingly a proximate relationship between the two as required by the Constitution.
- iv. As to whether section 69 was reasonably justifiable in a democratic society, the Court was of the opinion that it would not be authority for the non-criminalisation of defamation of the President just because there may be other measures to counteract attacks to him. There was no pervasive threat inherent in Section 69 which endangered the freedom of expression.

IN A NUTSHELL

There are a number of specific laws that impact on the work of journalists. These include:

- a. Penal Code
- b. State Security Act Chapter 111
- c. Protected Places Act
- d. National Assembly (Powers and Privileges) Act
- e. Printed Publications Act
- f. Theatres and Cinematography Act
- g. Defamation Act
- h. Ministerial and Parliamentary Code of Conduct Act
- i. Contempt of Court (Miscellaneous Provisions) Act
- j. Preservation of State Security Act
- k. National Archives Act

EXERCISES

What do you think is the impact of the following laws on freedom of expression?

1. Penal Code
2. State Security Act Chapter 111
3. Protected Places Act
4. National Assembly (Powers and Privileges) Act
5. Printed Publications Act
6. Theatres and Cinematography Act
7. Defamation Act
8. Ministerial and Parliamentary Code of Conduct Act
9. Contempt of Court (Miscellaneous Provisions) Act
10. Preservation of State Security Act
11. National Archives Act

4.0 Module Four – Access to Information

4.1 Learning Objectives

By the end of this module, the reader should be able to:

- a. Describe Access to Information;
- b. Highlight the historical attempts to pass an Access to Information law; and
- c. Point out the salient provisions in the draft Access to Information Bill.

4.2 Introduction

This module outlines the Access to Information. This is done firstly by describing the Access to Information, with an outline of the historical attempts at passing a Freedom of Information law in Zambia following thereafter. It ends with highlighting salient provisions in the draft Freedom of Information Bill.

4.3 What is Access to Information?

Access to information (ATI) is the concept that information held by public or state institutions or private institutions conducting business that has implications for the public should be accessible to the public. It is also referred to as Freedom of Information (FOI) or the Right to Know (RTK). The basis for this accessibility is that all information kept in public institutions belongs to the public. Therefore, the public should be allowed to access such information. Access to information is also a human right and therefore it is an entitlement.⁶⁴

Article 19 of the Universal Declaration of Human Rights states that *“Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through media and regardless of frontiers.”* Since access to information is a right, the State is

⁶⁴ Kayula, L. (2018). *Access to Information Law in Zambia: For Who and For What?* Lusaka, Zambia: Jesuit Centre for Theological Reflection (JCTR) at pages 7 to 12. Viewed at <https://repository.jctr.org.zm/handle/123456789/143> on 16th May 2022

obligated as a duty-bearer to facilitate this right through legal mechanisms. A piece of legislation that provides for a right to access information is referred to as an Access to Information law or Freedom of Information law.⁶⁵

4.3.1 Historical Attempts at Passing a Freedom of Information Law in Zambia

On 22nd November, 2002, the Minister of Information and Broadcasting, Newsteadimba, presented the Freedom of Information Bill No. 22 of 2002, to the National Assembly for the First Reading and later on the 28th of November, 2002 for the Second Reading.⁶⁶ On 18th December, 2002, however, the government, in a surprise turn of events, deferred the consideration of the Freedom of Information Bill. As a matter of fact, Parliament was dissolved on 26th July, 2006. The withdrawal of the Freedom of Information Bill from the National Assembly on insubstantial reasons raised serious questions about government's commitment and political will to enact a freedom of information law.⁶⁷

Fast forward, seven years later, in an address to the National Assembly in September of 2013, two years after the Patriotic Front (PF) Government took office, after defeating the Movement for Multi-Party Democracy (MMD) in a historic election, the then Minister of Information and Broadcasting Services, Hon. Mwansa Kapeya, told the nation that the enactment of the Access to Information Bill was the easier part. According to him, it was the implementation that was much more challenging. He went on to state that without careful planning, the country risked having a law that could not be implemented. Hon. Kapeya explained that this would be more frustrating than to wait a little bit more for the foundation to be laid.⁶⁸

⁶⁵ Ibid

⁶⁶ Matibini, P. Dr., 2006. The Struggle for Media Law Reforms in Zambia. Media Institute of Southern Africa – Zambia Chapter: Lusaka at page 100

⁶⁷ Ibid at pages 120 and 124

⁶⁸ Kapeya, M. MP. September, 2013. Ministerial Statement on the Access to Information Bill Presented to Parliament, Minister of Information and Broadcasting Services. National Assembly. Viewed at <https://www.parliament.gov.zm/node/2051> on 16th May, 2022

The Minister told the National Assembly that as part of the process of preparing the Bill, the Ministry of Justice, had advised his Ministry to ensure that selected laws that had been identified to impact on the ATI were also amended in order to ensure that when the Bill was enacted, it did not conflict with these laws. Some of the laws that would conflict the Access to Information Bill include the following:⁶⁹

- a. The Constitution of Zambia;
- b. The Zambia Security Intelligence Service Act;
- c. The State Security Act;
- d. The Official Oaths Act;
- e. The National Assembly (Powers and Privileges) Act;
- f. The Protected Places and Areas Act;
- g. The Census and Statistics Act;
- h. The Copyright and Performances Rights Act;
- i. Electoral Act;
- j. The Information and Communication Technologies Act;
- k. The National Archives Act;
- l. Electronic Communications and Transactions Act; and
- m. The National Health Research Act.

According to the Minister, the list above was not exhaustive and that was the basis on which the Ministry of Justice advised the Ministry of Information and Broadcasting Services to engage a legal expert to review all the above-mentioned laws and identify other laws that would be in conflict with the Access to Information Bill once enacted into law. He ended his statement by assuring the nation that his government had nothing to hide and was committed to enacting the Access to Information Bill.⁷⁰

It is common knowledge that the Bill was never enacted into law by the PF Government that was removed out of power by the United Party for National Development (UPND) in yet another historic election in

⁶⁹ Ibid

⁷⁰ Ibid

August of 2021. The UPND Government, like the PF Government, has pledged to enact a Freedom of Information law. In his first address to the Thirteenth Parliament, President Hakainde Hichilema promised that in order to improve the governance environment, his government would enhance media freedom and ATI by facilitating the establishment of a media self-regulating regulatory framework, and enacting legislation on the ATI.

4.4 Salient Provisions of the Draft Access to Information Bill

The draft Access to Information Bill contains clauses covering such matters as:

- i. Appointment of information officers;
- ii. Establishment, functions and composition of an Access to Information Commission;
- iii. Appointment of a Director General, Secretariat and Staff of the Commission;
- iv. Proactive Disclosure of information by public institutions;
- v. A period for compliance;
- vi. National security, defence and international relations as they relate to freedom of information;
- vii. Enforcement or administration of the law;
- viii. Legal professional privilege;
- ix. Personal privacy;
- x. Trade secrets and commercial interests as they relate to freedom of information;
- xi. Protection of life, health and safety of individual as it relates to freedom of information;
- xii. National economy as it relates to freedom of information;
- xiii. Disclosure of information in public interest;
- xiv. Right of access to information from public bodies;
- xv. Language of access;

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- xvi. Decision on request and timelines;
- xvii. Grant or refusal of request;
- xviii. Complaints to Commission;
- xix. Guidelines for public on access to information;
- xx. Offences;
- xxi. Training of officials; and
- xxii. Regulations.

IN A NUTSHELL

- o Access to information (ATI) requires institutions conducting business that has implications for the public to have its information accessible to the public.
- o There have been historical attempts at passing a Freedom of Information/Access to Information Law in Zambia.

EXERCISES

- o Describe Access to Information?
- o Account for the historical attempts at passing a Freedom of Information Law in Zambia.
- o What are the salient features of the draft Access to Information Bill?

5.0 Module Five – Digital Rights

5.1 Learning Objectives

By the end of this module, the reader should be able to:

- a. Describe digital rights;
- b. Point out the key laws affecting the freedom of expression online; and
- c. Point out key issues of concern in the digital rights laws of Zambia.

5.2 Introduction

This module starts by providing a description of the digital rights. It moves on to highlight the salient provisions of the law affecting the freedom of expression online. It ends with pointing out key issues of concern in the digital rights laws of Zambia.

5.3 Digital Rights

Digital rights are basically human rights in the internet era. The rights to online privacy and freedom of expression, for example, are really extensions of the equal and inalienable rights laid out in the United Nation's Universal Declaration of Human Rights. According to the UN, disconnecting people from the internet violates these rights and goes against international law. As we increasingly conduct our lives online – shopping, socialising and sharing information – our digital rights, particularly the rights to privacy and freedom of expression, are becoming more important.⁷¹

It is no secret that the Internet is the most disruptive communication technology of our time, revolutionising the free flow of information between individuals by offering anyone with an Internet connection

⁷¹ World Economic Forum Website. Viewed at <https://www.weforum.org/agenda/2015/11/what-are-your-digital-rights-explainer> on 16th May, 2022

the ability to gather and share information and ideas. Yet the technologies that make this possible can also be used to limit access to information through content blocking and full-scale Internet shutdowns, or stifle expression through surveillance on a scale previously unimaginable. In recent years, States have adopted a myriad of laws to regulate content online, increasingly putting pressure on private actors to censor content, which they deem illegal or simply 'harmful.' Much of the world's online content is now regulated by the community standards and algorithms of a handful of Internet companies, whose operations and processes lack transparency. The internet users' right to free expression is easily subject to abuse in this regulatory environment, the complexity of which is compounded by the fact that the Internet is a public space built on decentralized private infrastructure.⁷²

5.4 Legal Provisions Affecting the Freedom of Expression Online

The Cybersecurity and Cybercrimes Draft Bill, 2021 was introduced into Zambia's Parliament in February 2021. Civil society was concerned that the Bill, restricted the freedom of expression and violated the right to privacy of Zambian citizens.⁷³ That notwithstanding, in the same year of 2021 the Zambian government passed three pieces of legislation that by their very nature were bound to have an impact on freedom of expression online. These laws were the Cyber Security and Cybercrimes Act, the Data Protection Act and the Electronic Communications and Transactions Act. Herein, the salient features of these laws are outlined.

In his foreword to the Zambia National Cyber Security Policy, the Minister of Communications and Transport, Hon. Mutotwe Kafwaya, MP, stated that the Zambian Government and private sectors had continued the rollout and investment in Information and Communications Technology (ICT) networks and systems, which had increased access to ICTs and the internet. According to him, these had been powerful tools for human and economic development which had simplified the provision of health care, financial services, education, agriculture, mining, commerce, transportation, banking,

⁷² Article 19 Website. Viewed at <https://www.article19.org/issue/digital-rights> on 16th May, 2022

⁷³ International Center for Non-Profit Law. 2021. [Legal Analysis on Zambia's Cybersecurity and Cybercrimes Draft Bill, 2021](#)

manufacturing, energy, trade, media and broadcasting services, amongst others.⁷⁴

Hon. Kafwaya noted that as a result of the substantial increase in access to the internet in the country, concerns around cybersecurity had become prominent. He stated that access to the internet had brought about a new type of risk and threat to national peace which in itself would need new forms of defence to counter it. He stated that cyber-attacks were growing in prominence every day and the role the attacks played in the people's daily lives were not supposed to be underestimated. Among other things, the aim of the Policy was to reform the legal and regulatory framework on cybersecurity and cybercrimes in the country.⁷⁵

a. Cyber Security and Cybercrimes Act, No. 2 of 2021

This Act makes provision for the constitution of the Zambia Computer Incidence Response Team and provides for its functions, the constitution of the National Cyber Security Advisory and Coordinating Council and provides for its functions, the continuation of the Central Monitoring and Co-ordination Centre, the protection of persons against cybercrime, child online protection, facilitates identification, declaration and protection of critical information infrastructure, the collection of and preservation of evidence of computer and network related crime, the admission in criminal matters of electronic evidence and registration of cyber security service providers.⁷⁶

b. Data Protection Act, No. 3 of 2021

This Act makes provision for an effective system for the use and protection of personal data, regulation of the collection, use, transmission, storage and otherwise processing of personal data, establishment of the Office of the Data Protection Commissioner and

⁷⁴ Ministry of Communications and Transport. 2021. National Cyber Security Policy. Viewed at <https://www.zicta.zm/storage/sites/attachments/TVV4W9VO7MgaBMtdHT4h09NNq8XSXyS3VVYU44PF.pdf> on 14th June, 2022

⁷⁵ Ibid

⁷⁶ Preamble to the Cyber Security and Cybercrimes Act, No. 2 of 2016

provides for its functions, the registration of data controllers and licensing of data auditors, the duties of data controllers and data processors and the rights of data subjects.⁷⁷

c. Electronic Communications and Transactions Act, No. 4 of 2021

This Act provides for a safe and effective environment for electronic transactions, promotes secure electronic signatures, facilitates electronic filing of documents by public authorities, the use, security, facilitation and regulation of electronic communications and transactions, promotes legal certainty and confidence, and encourages investment and innovation in relation to electronic transactions, regulates the National Public Key Infrastructure, and repeals and replaces the Electronic Communications and Transactions Act, 2009.⁷⁸

5.5 Issues of Concern in the Digital Rights Zambia's Laws

A consortium of non-governmental organisations widely objected the passing of these pieces of legislation into law and mounted vigorous campaigns which did not yield the intended results. In a letter signed on behalf of 10 organisations, Chapter One Foundation Executive Director Linda Kasonde stated that the provisions of the bill had the potential to facilitate and enhance wanton surveillance and censorship of communication between members of the public through censorship. The strong opposition to the passing of these Bills was even witnessed in Parliament during the Second Reading Stage of the Cyber Security and Cybercrimes Bill as 83 Members of Parliament voted in the affirmative, 52 in the negative and one chose to be absent from the voting process.

⁷⁷ Preamble to the Data Protection Act, No. 3 of 2016

⁷⁸ Preamble to the Electronic Communications and Transactions Act, No. 4 of 2016

5.5.1 Cyber Security and Cybercrimes Act

Interception

The reader will be interested to note that the law provides against what it refers to as interception. This should be of concern to the reader so much so that this portion of the module will guide the reader in highlighting what is meant by interception, when it is prohibited, when it is lawful, how it can be conducted and ultimately who has the power to conduct interception. In that way, the reader is expected to have a better understanding of how and why this issue is of concern to human rights defenders, media practitioners and digital space users.

Section 2 of the law defines interception in the following manner:

"interception" means an act, by a person who is not a party to a conversation, of wiretapping subscribers or aural or other acquisition of conversation of any wire, electronic or oral communication through the use of an electronic, mechanical or other device.⁷⁹

Section 26 of the law prohibits interception. It goes further to make it an offence for anyone to commit an act of interception in the following manner:

26. (1) A person commits an offence, if that person:

(a) intercepts, attempts to intercept or procures another person to intercept or attempt to intercept any communication; or

(b) use, attempt to use or procure another person to use or attempt to use any electronic, software, mechanical or other device to intercept any communication.

(2) A person who contravenes subsection (1) commits an offence and is liable, on conviction, to a fine not exceeding one million penalty units

⁷⁹ Section 2 of the Cyber Security and Cybercrimes Act

or to imprisonment for a term not exceeding ten years or to both.

However, the reader will be interested to note that the same law also provides for what it refers to as 'lawful Interception'. This provision allows for a law enforcement officer, where the law enforcement officer has reasonable grounds to believe that an offence under the Act has been, is likely to be or is being committed, and for the purpose of obtaining evidence of the commission of the said offence, apply, ex-parte, to a Judge, for an interception of communications order. Section 28 provides for this lawful interception in the following manner:⁸⁰

28. (1) Subject to subsection (2), a law enforcement officer may, where the law enforcement officer has reasonable grounds to believe that an offence has been committed, is likely to be committed or is being committed and for the purpose of obtaining evidence of the commission of an offence under this Act, apply, ex-parte, to a Judge, for an interception of communications order.

(2) A law enforcement officer shall, apply for a written consent of the Attorney-General in a prescribed manner and form, before making an application under subsection (1).

(3) A Judge to whom an application is made under subsection (1) may make an order—

(a) requiring a service provider to intercept and retain a specified communication or communications of a specified description received or transmitted, or about to be received or transmitted by that service provider;

(b) authorising the law enforcement officer to enter specified premises with a warrant and to install on such premises any device for the

⁸⁰ Section 28 of the Cyber Security and Cybercrimes Act

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interception and retention of a specified communication or communications of a specified description and to remove and retain such device;

(c) requiring any person to furnish the law enforcement officer with such information, facilities and assistance as the Judge considers necessary for the purpose of the installation of the interception device; or

(d) imposing the terms and conditions for the protection of the interests of the persons specified in the order or any third parties or to facilitate any investigation.

(4) A Judge may grant an order under subsection (3) where the Judge is satisfied that—

(a) the written consent of the Attorney-General has been obtained as required by subsection (2); and

(b) there are reasonable grounds to believe that material information relating to the—

(i) commission of an offence under this Act or any other law; or

(ii) whereabouts of the person suspected by the law enforcement officer to have committed the offence; is contained in that communication or communications of that description.

(5) Any information contained in a communication—

(a) intercepted and retained pursuant to an order under subsection (3); or

(b) intercepted and retained in a foreign State in accordance with the law of that foreign State and certified by a Judge of that foreign State to have been so intercepted and retained, shall be admissible in proceedings for an offence under

this Act, as evidence of the truth of its contents despite the fact that it contains hearsay.

(6) An interception of communications order referred to in this section shall be valid for a period of three months and may, on application by a law enforcement officer, be renewed for such period as the Judge may determine.

(7) An action does not lie in any court against a service provider, any officer, employee or agent of the service provider or other specified person, for providing information, facilities or assistance in accordance with the terms of a court order under this Act or any other law.

It is also interesting to note who the law considers as law enforcement officers for the purposes of these provisions. Section 2 of the law defines a law enforcement officer in the following manner:⁸¹

"law enforcement officer" means:

(a) a police officer above the rank of sub inspector;

(b) an officer of the Anti-Corruption Commission;

(c) an officer of the Drug Enforcement Commission;

(d) an officer of the Zambia Security Intelligence Service; and

(e) any other person appointed as such by the Minister for purposes of this Act.

5.5.2 Data Protection Act

The reader will be interested to note that the law provides for inspectors who have the power to enter the premises of persons that handle personal data in an effort to conduct investigations as to whether or not the handling of such data is not being done in a criminal manner. To that end, the issue of concern is in the powers that

⁸¹ Section 2 of the Cyber Security and Cybercrimes Act

these inspectors have and how the exercise of such powers can have an impact on the work of human rights defenders, media practitioners and digital space users. In so doing, the reader will need to appreciate the terms used in the law such as personal data, processing, data controller and data processor.

i. Personal data, Data controllers and Data Processors

It should be noted that the Act provides for both the processing and control of personal data. To that extent, it is very important that for the purposes of this Act, the reader needs to know how the act defines 'personal data', 'processing', 'data controller' and 'data processor'. This is done in the following manner:⁸²

'Personal data'

"Personal data" means data which relates to an individual who can be directly or indirectly identified from that data which includes a name, an identification number, location data, an online identifier, or one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person.

'Processing'

"Processing" means an operation or a set of operations which is or are performed on personal data, whether or not by automatic means, including the collection, recording or holding of the data or the carrying out of any operation or set of operations on data, including— (a) organisation, adaptation or alteration of the data; (b) retrieval, consultation or use of the data; (c) alignment, combination, blocking, erasure or destruction of the data; or (d) disclosure of the information or data by transmission, dissemination or otherwise making available.

⁸² Section 2 of the Data Protection Act

'Data controller'

"data controller" means a person who, either alone or jointly with other persons, controls and is responsible for keeping and using personal data on a computer, or in structured manual files, and requests, collects, collates, processes or stores personal data from or in respect of a data subject.

'Data processor'

"data processor" means a person, or a private or public body that processes personal data for and on behalf of and under the instruction of a data controller.

ii. Inspectors

This Act creates civil servant positions of Inspectors in the following manner:

7. (1) The Civil Service Commission may appoint a suitably qualified person to be an inspector for the purposes of ensuring compliance with this Act.

(2) The Civil Service Commission shall issue an inspector with an identification card and a certificate of appointment in the prescribed form which are prima facie evidence of the inspector's appointment.

The Act also lays out the powers and functions of these Inspectors in the following manner:

8. (1) An inspector may, for the purpose of enforcing the provisions of this Act, at any reasonable time and with a warrant— (a) enter and inspect the business premises of a data controller or data processor;

(b) inspect equipment and supplies in or about the licensed premises;

(c) have access to and inspect, examine and audit documents, books and records of the data controller or data processor;

(d) remove a document, book, record or other document which an inspector believes may afford evidence of offence under this Act;

(e) require from a data controller or data processor an explanation of any record or entry in the document, book, record or other document;

(f) make copies of or extracts from, a document, book, record or other document relating to the licensed activity on any premises that has a bearing on an investigation; and

(g) remove from the premises any equipment, commodity or product used in contravention of this Act.

Also of interest is the fact that the law provides the same inspectors with the power to make arrests without a warrant. This is provided for in the following manner:⁸³

9. (1) An inspector may arrest a person, without a warrant, where the inspector has reasonable grounds to believe that the person:

(a) has committed an offence under this Act;

(b) is about to commit an offence under this Act and there is no other way to prevent the commission of the offence; or

(c) is willfully obstructing an inspector in the execution of the inspector's duties.

⁸³ Section 9 of the Data Protection Act

(2) An inspector who makes an arrest under subsection (1) shall, without delay, have the person arrested brought to a police station.

5.5.3 Electronic Communications and Transactions Act

The reader will be interested to know that this law requires a service provider to provide the general public with very detailed information about its business of an electronic format accessible by anyone that wishes to do business with the said provider. This can be for either goods or services. As will be seen, these requirements can be quite onerous, especially for small and emerging businesses, which is compounded by the fact that the failure to comply with this provision is actually an offence under the Act.

The requirements are provided for as follows:⁸⁴

63. (1) A supplier offering goods or services for sale, hire or exchange by way of an electronic transaction shall, where applicable, make the following information available to consumers on the website, application or other electronic media platform, where the goods or services are offered:

- (a) the supplier's full name and legal status;*
- (b) the supplier's physical address and telephone number;*
- (c) the supplier's website address and email address;*
- (d) membership to any self-regulatory or accreditation body to which that supplier belongs or subscribes and the contact details of that body;*
- (e) any code of conduct to which that supplier subscribes and how that code of conduct may be accessed electronically by the consumer;*

⁸⁴ Section 63 of the Electronic Communications and Transactions Act

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(f) in the case of a legal person, its registration number, the names of its office bearers and its place of registration;

(g) the physical address where that supplier will receive legal service of documents;

(h) a description of the main characteristics of the goods or services offered by that supplier to enable a consumer make an informed decision on the proposed electronic transaction;

(i) the full price of the goods or services, including transport costs, taxes and any other fees or costs;

(j) the manner of payment for the goods or services;

(k) any terms of agreement, including any guarantees, that will apply to the transaction and how those terms may be accessed, stored and reproduced electronically by consumers;

(l) the time within which the goods will be dispatched or delivered or within which the services will be rendered;

(m) the manner and period within which consumers can access and maintain a full record of the transaction;

(n) the return, exchange and refund policy of that supplier;

(o) any alternative dispute resolution code to which that supplier subscribes and how the wording of that code may be accessed electronically by the consumer;

(p) the security procedures and privacy policy of that supplier in respect of payment, payment information and personal information;

(q) where appropriate, the minimum duration of the agreement in the case of an agreement for the supply of products or services to be performed on an ongoing basis or recurrently;

(r) the rights of consumers in terms of section 65 where applicable;

(s) health and safety information; and

(t) any other information as maybe prescribed.

(7) A person who contravenes provisions of subsection (1) commits an offence.

IN A NUTSHELL

- Digital rights are basically human rights enjoyed online.
- The main digital rights laws in Zambia are the Cyber Security and Cybercrimes Act, Data Protection Act and the Electronic Communications and Transactions Act.
- There are a number of issues in these laws that should be of concern to human rights defenders, media practitioners and digital space users.

EXERCISES

1. What do you understand by digital rights being human rights?
2. What does the Cyber Security and Cybercrimes Act provide for?
3. What does the Data Protection Act provide for?
4. Point out the issues of concern to human rights defenders, media practitioners and digital space users in Zambia's digital rights laws.

6.0 Module Six – Broadcasting and Telecommunications

6.1 Learning Objectives

By the end of this module, the reader should be able to:

- a. Describe the regulation of broadcasting and telecommunications;
- b. Point out the salient provisions of the Independent Broadcasting Authority Act; and
- c. Identify the prominent provisions of the Information Communications Technology Act.

6.2 Introduction

In this module the regulation of broadcasting and telecommunications is highlighted. The salient provisions of the Independent Broadcasting Authority and Information Communications Technologies Acts are highlighted.

6.3 Independent Broadcasting Authority Act

This Act provides for the establishment of the Independent Broadcasting Authority (IBA), defines its functions and for the control and regulation of broadcasting services.⁸⁵ The Act defines 'broadcasting' as the distribution of television or radio, by means of terrestrial or satellite.⁸⁶

The functions of the Authority are to regulate the broadcasting industry in Zambia.⁸⁷ Quite particularly, the functions of the Authority are:⁸⁸

- (a) to promote a pluralistic and diverse broadcasting industry in broadcasting;
- (b) establish guidelines —

⁸⁵ Preamble to the Independent Broadcasting Authority Act, No. 17 of 2002

⁸⁶ Section 2 of the Independent Broadcasting Authority Act

⁸⁷ Section 5 of the Independent Broadcasting Authority Act

⁸⁸ Section 5(2) of the Independent Broadcasting Authority Act

Module 6

- (i) for the development of broadcasting in Zambia through a public process which shall determine the needs of citizens and social groups in regard to broadcasting;
 - (ii) for the issuing of licenses, giving due regard to the need to discourage monopolies in the industry; and
 - (iii) on the required levels of local content and other issues that are relevant for a pluralistic and diverse broadcasting industry;
- (c) to safeguard the rational and efficient use of the frequencies allocated to broadcasters by developing a frequency plan for broadcasting, which shall be a public document, in compliance with international conventions;
- (d) to grant, renew, suspend and cancel licenses and frequencies for broadcasting and diffusion services in an open and transparent manner;
- (e) to enforce the compliance of broadcasting and diffusion services with the conditions of the licenses issued under the Act;
- (f) to issue to any or all broadcasters, advisory opinions relating to broadcasting standards and ethical conduct in broadcasting;
- (g) to oblige broadcasters to develop codes of practice and monitor compliance with those codes;
- (h) to develop program standards relating to broadcasting in Zambia and to monitor and enforce compliance with those standards;
- (i) to receive, investigate and decide on complaints concerning broadcasting services including public broadcasting services;
- (j) to develop regulations in regard to advertising, sponsorship, local content, and media diversity and ownership; and
- (k) to perform such other functions as may be conferred on it by this or any other Act.

It is an offence, under the Act, for a person to operate or provide a broadcasting service in Zambia otherwise than in accordance with the terms and conditions of a license issued by the Authority and on

payment of such fees as the Minister may, on the recommendation of the Authority, prescribe.⁸⁹

The law provides for the Authority to grant a commercial broadcasting license to:⁹⁰

- (a) provide a diverse range of programming addressing a wide section of the country;
- (b) provide programming in the official language or in any other local language of the Republic widely spoken in the country or any particular area; and
- (c) provide within a reasonable time comprehensive coverage of the areas which they are licensed to serve.

The Act also empowers the Authority to grant a community or religious broadcasting license for free-to-air radio broadcasting service and free-to-air television service.⁹¹

The law places specific conditions attached to these licenses. These include:⁹²

- (a) specify the site or sites at which any broadcasting station to be operated under the Authority of the license are to be located and regulate the manner of their installation;
- (b) specify the kind of broadcasting authorised by the license and regulate the type and standard of broadcasting station apparatus to be used in any such broadcasting station;
- (c) require the payment to the Authority of a fee on grant of the license and of annual or other periodic license fees;
- (d) require the licensee or any other person concerned in providing any service authorised by the license to furnish to the Authority such documents, accounts, returns, estimates and other information as the Board considers necessary for the purposes of exercising or performing the powers and functions of the Authority under this Act;

⁸⁹ Section 19(1) of the Independent Broadcasting Authority Act

⁹⁰ Section 21(1) of the Independent Broadcasting Authority Act

⁹¹ Section 22 of the Independent Broadcasting Authority Act

⁹² Section 27 of the Independent Broadcasting Authority Act

- (e) require the licensee to refer specified matters to the Authority for determination;
- (f) require the licensee to comply with directions given by the Authority from time to time in relation to specified matters;
- (g) provide for arbitration of disputes arising in connection with the terms and conditions of, or otherwise concerning, the license in accordance with the Arbitration Act; and
- (h) require and regulate the payment of fines and penalties by the licensee for breaches of any specified terms and conditions of the license.

The IBA Act has been amended twice through the IBA (Amendment) Act of 2010 which removed the diffusion service from being under the authority of the IBA and the IBA (Amendment) Act of 2017 which provides for the charging and collection of television levy by the IBA.

6.4 Information Communications Technology Act

The Act provides for the continuation of the existence of the Communications Authority and re-named it as the Zambia Information and Communication Technology Authority (ZICTA), the regulation of information and communication technology, facilitates access to information and communication technologies, protect the rights and interests of service providers and consumers and repeals the Telecommunications Act, 1994, and the Radiocommunications Act, 1994.⁹³ The function of the Authority are to regulate the provision of electronic communication services and products and monitor the performance of the sector, including the levels of investment and the availability, quality, cost and standards of the electronic communication services.⁹⁴

Under the Act a person shall not operate an electronic communications network or provide an electronic communications service without a license issued under the Act.⁹⁵ It is also an offence,

⁹³ Preamble to the Information and Communication Technologies Act, No. 15 of 2009

⁹⁴ Section 4(1) of the Information and Communication Technologies Act

⁹⁵ Section 9(1) of the Information and Communication Technologies Act

under the Act, for a person to establish and operate a radio station or provide a radiocommunication service without a license.⁹⁶

IN A NUTSHELL

- The IBA exists to regulate the broadcasting industry in Zambia.
- The Information and Communications Technologies Act provides for the continuation of the existence of the Communications Authority and re-names it as the Zambia Information and Communication Technology Authority.

EXERCISES

1. What is the role of the IBA?
2. Highlight the salient provisions of the Independent Broadcasting Authority Act.
3. Highlight the outstanding provisions of the Information and Communications Technologies Act.

⁹⁶ Section 28(1) of the Information and Communication Technologies Act

7.0 Module Seven – Advocacy and Law Reform on the Freedom of Expression

7.1 Learning Objectives

By the end of this module, the reader should be able to:

- a. Explain what is meant by advocacy;
- b. Explain how advocacy is conducted;
- c. Explain what law reform is;
- d. Explain how law reform takes place in Zambia; and
- e. Identify the main issues for advocacy and law reform on freedom of expression in Zambia.

7.2 What is Advocacy?

Advocacy is defined as any action that speaks in favour of, recommends, argues for a cause, supports or defends, or pleads on behalf of others.⁹⁷ In another sense, advocacy means giving a person support to have their voice heard. It is a service aimed at helping people understand their rights and express their views.⁹⁸ For the purposes of this handbook, advocacy would entail the readers: human rights defenders, media practitioners and digital space users speaking in favour, arguing for, supporting, defending or pleading on behalf of their own communities on issues of freedom of expression in Zambia.

7.3 How is advocacy conducted? The following list of advocacy activities is not exhaustive. The list can serve to motivate others and suggest ideas for future advocacy on all fronts and in all kinds of struggles.⁹⁹

⁹⁷ Missouri Foundation for Health website viewed at https://mffh.org/wp-content/uploads/2016/04/AFJ_what-is-advocacy.pdf on 14th June, 2022

⁹⁸ Advocacy Focus UK Website viewed at <https://advocacyfocus.org.uk/services/understanding-advocacy/> on 14th June, 2022

⁹⁹ Missouri Foundation for Health website viewed at https://mffh.org/wp-content/uploads/2016/04/AFJ_what-is-advocacy.pdf on 14th June, 2022

- a. Organizing: Build power at the base;
- b. Educate Legislators: Provide information on issues;
- c. Educating the Public about the Legislative Process: Introduce communities and constituencies to the legislators whose represent them;
- d. Research: Produce relevant resources that reflect the real story of your community;
- e. Organizing a rally: Mobilize for your cause;
- f. Regulatory efforts: Take action at the agencies;
- g. Public education: Educate the community on the issues;
- h. Educational conferences: Gather, network, share information, and plan for the future;
- i. Training: hold training sessions that teach successful strategies and skills for direct action organizing on issues;
- j. Litigation: Win in court for your cause or your community; and
- k. Lobbying: Advocate for or against specific legislation.

7.4 What is law reform?

Law reform refers to the process of examining existing laws, and advocating and implementing changes in a legal system, usually with the aim of enhancing justice or efficiency.¹⁰⁰ For the purposes of this handbook, law reform would entail examining existing laws, advocating and implementing changes in the Zambian law with regards to laws affecting freedom of expression.

7.5 How does law reform take place in Zambia?

Pursuant to the Zambia Law Development Commission Act, Chapter 32 of the Laws of Zambia, ZLDC, a quasi-government institution was established to conduct law reform. Ideally, this is the means through which law reform is to be conducted. However, law reform can and

¹⁰⁰ Westaway Law Group Website viewed at <https://westawaylaw.ca/law-reform/> on 14th June, 2022

has been initiated at the level of line ministries who recommend to the ministry of justice, that takes the said recommendations to cabinet, and if approved later find their way to the National Assembly. According to the ZLDC Act, its functions are to:¹⁰¹

- a. Revise and reform the law in Zambia;
- b. Codify unwritten laws in Zambia;
- c. Review and consider proposals for law reform referred to the Commission by the Minister of Justice or the members of the public;
- d. Hold seminars and conferences on legal issues;
- e. Translate any piece of legislation into local languages;
- f. To research and make recommendations on:
 - (i) The socio-political values of the Zambian people that should be incorporated into legislation;
 - (ii) The anomalies that should be eliminated in the statute book;
 - (iii) New and more effective methods of administration of the law and the dispensation of justice that should be adopted and legislated;
 - (iv) New areas of the law that should be developed which are responsive to the changing needs of Zambian society; and
 - (v) The removal of archaic pieces of legislation from the statute book.

7.6 What are the main issues for advocacy and law reform on the freedom of expression in Zambia?

7.6.1 Enforceability of International Human Rights Standards

It is important for the reader to appreciate that there are ways in which international laws that Zambia has ascribed to can be utilised by ordinary Zambians. For the purposes of this handbook, the reader will be interested to know how an ordinary citizen could make use of

¹⁰¹ Zambia Law Development Commission Website viewed at <http://www.zambialawdevelopment.org/what-we-do/> on 14th June, 2022

international opportunities to address their grievances with regards to alleged violations of the freedom of expression.

The ability of individuals to complain about the violation of their rights in an international arena brings real meaning to the rights contained in the human rights treaties. There are three main procedures for bringing complaints of violations of the provisions of the human rights treaties before the human rights treaty bodies: individual communications, state-to-state complaints and inquiries.¹⁰²

a. Individual Communications

There are nine core international human rights treaties. Each of these treaties has established a "treaty body" (Committee) of experts to monitor implementation of the treaty provisions by its States parties. Treaty bodies may, under certain conditions, consider individual complaints or communications from individuals. Anyone can lodge a complaint with a Committee against a State. Complaints may also be brought by third parties on behalf of individuals, provided they have given their written consent. In certain cases, a third party may bring a case without such consent, for example, where a person is in prison without access to the outside world or is a victim of an enforced disappearance.¹⁰³

b. Inter-state communications

Several of the human rights treaties contain provisions to allow for State parties to complain to the relevant treaty body about alleged violations of the treaty by another State party.¹⁰⁴

c. Inquiries

Upon receipt of reliable information on serious, grave or systematic violations by a State party of the conventions they monitor, a treaty body may, on their own initiative, initiate inquiries if they have received reliable information containing well-founded indications of serious or systematic violations of the conventions in a State party.¹⁰⁵

¹⁰² Office of the High Commissioner for Human Rights Website viewed at <https://www.ohchr.org/en/treaty-bodies/complaints-about-human-rights-violations> on 14th June, 2022

¹⁰³ Ibid

¹⁰⁴ Ibid

¹⁰⁵ Ibid

7.6.1.1 Advocacy Issue

This therefore begs the question as to what can be done about the enforcement of international laws on the freedom of expression in Zambia. What can human rights defenders, media practitioners and digital space users do about this?

7.6.2 Access to Information Bill

The campaign for an Access to information, also referred to as Freedom of Information, has been around for a long time. Successive governments have promised to enact the same into law but did not do so. It is important for the reader to appreciate the necessity of having such a law in place and what the general view of those that advocate for it is.

To access information is both a human right and a social need. It is a necessity particularly in a democracy where every citizen has a role to play in the governance of the country. It promotes transparency and accountability; it helps in the fight against corruption and generally leads to open governments and to effective democratic participation by the public. Government has an obligation to make access to information possible as a duty-bearer, while the public is entitled to demand that their right is fulfilled. When there is no legal channel to do so, the challenge of enjoying this right is greatly increased. Thus, the duty-bearer and the rights-holders have a responsibility to play their part in ensuring the enjoyment of access to information. Concerted efforts from the wider civil society and the public that can ensure there is an ATI law in Zambia, just as there are in several African countries. Thus, the ATI Bill must become a reality in Zambia.¹⁰⁶

7.6.2.1 Advocacy Issue

This therefore begs the question as to what can be done about the *lack of access to information law in Zambia*. What can human rights defenders, media practitioners and digital space users do about this?

¹⁰⁶ Kayula, L. (2018). Access to Information Law in Zambia: For Who and For What? Lusaka, Zambia: Jesuit Centre for Theological Reflection (JCTR)

7.6.3 Laws Inimical to the Freedom of Expression

ZLDC has submitted that the Penal Code was enacted in 1931, replacing the English common law that had been in force up to that time. The Penal Code has never been comprehensively reviewed since it was enacted. In 2011, the Minister of Justice instructed the ZLDC to undertake a project to review the PC and related legislation.¹⁰⁷

ZLDC has recommended the repeal or amendment as appropriate, of provisions that are reminiscent of the colonial era, which include defamation of foreign princes. It has further recommended the repeal of provisions relating to defamation, as they compromise the freedom of expression and are inconsistent with the international law. In the view of ZLDC, redress can be sought through civil litigation.

These offences are found in the Penal Code Act. There are a number of other laws that have been argued to be inimical to media freedom, including but not limited to the following:

- a. State Security Act;
- b. Protected Places Act;
- c. National Assembly (Powers and Privileges) Act;
- d. Printed Publications Act;
- e. Theatres and Cinematography Act;
- f. Defamation Act;
- g. Ministerial and Parliamentary Code of Conduct Act;
- h. Contempt of Court (Miscellaneous Provisions) Act;
- i. Preservation of State Security Act; and
- j. National Archives Act.

7.6.3.1 Advocacy Issue

This therefore begs the question as to what can be done about the presence of laws that are inimical to the freedom of expression in Zambia. What can human rights defenders, media practitioners and digital space users do about this?

¹⁰⁷ ZLDC. Report on the Review of the Penal Code and Criminal Procedure Code Acts. Viewed at <http://www.zambialawdevelopment.org/download/reportreview-of-the-penal-code-act-chapter-87-of-the-laws-of-zambia-and-the-criminal-procedure-code-chapter-88-of-the-laws-of-zambia/> on 31st May, 2022

7.6.4 Digital Rights Legislation

Before the enactment of the 2021 digital laws, civil society launched numerous campaigns aimed at advocating against the enactment of the said laws. One of the organisations that was very active in those campaigns was Bloggers of Zambia.

A report by the Bloggers of Zambia on the review of the Cyber Security and Cybercrimes Bill of 2017 noted that at African Union level, the continent had set the pace by putting in place the African Union Convention on Cyber Security and Personal Data Protection. The contents of the said convention urged States to be cautious in their approach to dealing with issues of cyber security and personal data protection so much so that it made very critical proposals with how state parties are to begin the implementation of dealing with cyber security and cybercrime, which included the putting in place of national policies that would eventually lead to strategies one of which was the passing of relevant legislation.¹⁰⁸

To that end, the Bloggers of Zambia recommended that the civil society advocated for a widely debated and comprehensive national policy with the input of relevant stakeholders to be put in place. It was their position that from such a policy, strategies could be developed, including an appropriate legislative framework that speaks to the policy. However, noting that the Zambian government appeared to be in a hurry to put in place a cyber security and cybercrimes law, it was recommended that if their efforts failed then civil society should advocate for a law that covered online fundamental human rights and freedoms in line with the Malabo Convention.

7.6.4.1 Advocacy Issue

This therefore begs the question as to what can be done about the *presence of the Cyber Security and Cybercrimes Act, the Data Protection Act and the Electronic Communications and Transactions Act in the absence of widely debated, comprehensive policy with the input of relevant stakeholders*. What can human rights defenders, media practitioners and digital space users do about this?

¹⁰⁸ Bloggers of Zambia. 2019. Report on Review of the Cyber Security and Cybercrimes Bill 2017 (Zambia) and the African Union Convention on Cyber Security and Personal Data Protection (Malabo Convention)

7.6.5 Self-Regulation of the Media versus Statutory Regulation

The power of the media to damage reputations, invade privacy and conduct partisan campaigns is to a considerable extent not constrained by legal restrictions. Libel is the most obvious constraint. However, skillful editing can permit damage to be done at minimal risk to the publishers. The comparative freedom enjoyed by the media to behave unfairly towards individuals or organisations has led to the establishment of tribunals that aim to regulate media ethics, through adjudicating complaints by members of the public who claim to have been unfairly treated by journalists and editors.¹⁰⁹

The idea that disputes over the content of newspapers might be resolved by some independent, but non-legal body first developed in Sweden, where publishers and journalists established a Press Fair Practices Board in 1916. In due course, all major Swedish newspapers bound themselves by contract to accept the ruling of the press Ombudsman – a judge who rules on complaints from the public, orders newspapers to print retractions of false statements and fines them for proven deviation from a code of conduct drawn up by the country's Press Council. In Britain after the lifting of Wartime Censorship in 1945 a Royal Commission on the Press was established with the objective of furthering the free expression of opinion, through the press and the greatest practicable accuracy in the presentation of news.¹¹⁰

In October, 1992 the government, with Mr. Dipak Patel at the helm of the Ministry of Information and Broadcasting Services, organised a seminar that eventually gave birth to the government appointed Media Reform Committee (MRC). One of the many recommendations made by the MRC in September 1993, was that media ethics and practices should be subject of self-regulation by journalists, associations and other media groups with no statutory powers. The MRC was opposed to the formation of a Media Council or any other statutory body with powers to regulate the operations of journalists or media organisations.¹¹¹

¹⁰⁹ Matibini, P. 2006. The Struggle for Media Law Reforms in Zambia. Media Institute of Southern Africa – Zambia Chapter: Lusaka at page 18

¹¹⁰ Ibid at page 19

¹¹¹ Ibid at pages 6 and 21

Module 7

The notion of self-regulation is important in keeping the state at arm's length and also provides insurance against statutory control of the journalism profession. However, the success of self-regulation is largely dependent on the commitment of the media houses to the institution and mechanisms put in place for self-regulation. The experience gained as at the end of 2006, clearly demonstrated that a lot of work was required to be undertaken by the media community to popularize the notion of self-regulation.¹¹²

In a study on media legislation in Africa, the United Nations Education, Scientific and Cultural Organisation (UNESCO) in terms found that South Africa recognises the role of independent bodies in upholding professional standards, as in the Broadcasting Complaints Commission of South Africa and the Press Ombudsman. Statutory bodies also exist like the Complaints and Compliance Committee of the South African regulator, the High Council in Mozambique and the National Media Commission in Ghana. In many countries, unrecognised private bodies, such as Zambian journalists' organisations or Senegal's CRED, play this role but without much practical authority. There are also countries where governmental bodies directly enforce standards, such as through warnings, application of license conditions and even withdrawal of the license. Some specify codes of conduct, others do not. In some cases, such as Kenya, a statutory body has been proposed by government to 'police' ethical conduct. International best practice puts the emphasis on effective self-regulation, with the onus on the media industry to ensure that its members live up to codes and ethics.¹¹³

7.6.5.1 Hybrid Media regulation

In the debate about media ethics, the major question is: Should the media be encouraged to regulate itself, or is statutory regulation necessary? Generally, the opinion is polarised, with the media supporting the former option and government the latter. Perhaps, it is necessary to appreciate both sides of the argument.

¹¹² Ibid at page 32

¹¹³ Berger, G. Prof. Media Legislation in Africa: A Comparative Legal Survey. UNESCO: School of Journalism and Media Studies, Rhodes University at page 142

From a government point of view, the media can often seem over-intrusive, careless of the effects of their output on those it concerns and, in some cases, possessing a tendency to misreport and misstate at every opportunity. On the other hand, the media's preference for self-regulation stems from a belief that statutory methods often imply heavy-handed control, censorship or the encouragement of self-censorship.

7.6.5.2 Advocacy Issue

This therefore begs the question as to *what should be done about the regulation of the media. Should it be self-regulated or should be regulated by statute?* What should be the position of human rights defenders, media practitioners and digital space users on this very important issue?

IN A NUTSHELL

- In a sense, advocacy refers to means giving a person support to have their voice heard.
- There are a number of ways in which advocacy can be conducted.
- Law reform refers to the process of examining existing laws, and advocating and implementing changes in a legal system.
- Law reform in Zambia take place through the auspices of the Zambia Law Development Commission.
- There are a number of advocacy issues on law reform on the freedom of expression in Zambia.

EXERCISES

1. What is advocacy?
2. How is advocacy conducted?
3. What is law reform?
4. How does law reform take place in Zambia?
5. Identify the main issues for advocacy and law reforms on freedom of expression in Zambia.

Bibliography

International Laws

African Charter on Human and Peoples' Rights

International Covenant on Civil and Political Rights

Zambian Laws

Constitution of Zambia

Contempt of Court (Miscellaneous Provisions) Act

Cyber Security and Cybercrimes Act

Data Protection Act

Defamation Act

Electronic Communications and Transactions Act

Independent Broadcasting Authority Act

Information and Communication Technologies Act, No. 15 of 2009

Ministerial and Parliamentary Code of Conduct Act

National Assembly (Powers and Privileges) Act

Penal Code Act

Printed Publications Act

Protected Places Act

Theatres and Cinematography Exhibition Act

Cases

Fred Mmembe, Bright Mwape V. The People and Fred Mmembe, Masausto Phiri, Goliath Mungonge V. The People S.C.Z. Judgment No. 4 of 1996

Legal Resources Found. v. Zambia, Communication No. 211/98, 14th African Commission for Human and Peoples' Rights (2000-2001)

Roy Clarke V. The Attorney General Appeal No. 96A of 2004

Books

Berger, G. Prof. Media Legislation in Africa: A Comparative Legal Survey. UNESCO: School of Journalism and Media Studies, Rhodes University

Kayula, L. (2018). Access to Information Law in Zambia: For Who and For What? Lusaka, Zambia: Jesuit Centre for Theological Reflection (JCTR)

Matibini, P. 2006. The Struggle for Media Law Reforms in Zambia. Media Institute of Southern Africa – Zambia Chapter: Lusaka

Soanes, C. (Ed.). 2006. Oxford Dictionary of Current English, 4th Edition. New York: Oxford University Press

Articles, Reports, Statements and Submissions

Bloggers of Zambia. 2019. Report on Review of the Cyber Security and Cybercrimes Bill 2017 (Zambia) and the African Union Convention on Cyber Security and Personal Data Protection (Malabo Convention)

International Center for Non-Profit Law. 2021. Legal Analysis on Zambia's Cybersecurity and Cybercrimes Draft Bill, 2021

Kapeya, M. MP. September, 2013. Ministerial Statement on the Access to Information Bill Presented to Parliament, Minister of Information and Broadcasting Services. National Assembly

National Assembly of Zambia. 2006. Report of the Committee on Information and Broadcasting Services for the Fifth Session of the Ninth National Assembly appointed on 19th January, 2006

Report of the Task Force on Media Law Reform, January 2000

Submission to the Legal and Justice Sector Reforms Commission by MISA Zambia, 8th December 2014

Websites

Advocacy Focus UK Website viewed at
<https://advocacyfocus.org.uk/services/understanding-advocacy>

African Commission on Human and Peoples' Rights. 2019. Declaration of Principles on Freedom of Expression. Accessed at https://www.achpr.org/public/Document/file/English/Declaration%20of%20Principles%20on%20Freedom%20of%20Expression_ENG_2019.pdf

Africalii Website. Viewed at <https://africalii.org/sites/default/files/judgment/afu/african-commission-human-and-peoples-rights/2001-achpr-31//Legal%20Resources%20Foundation%20v.%20Zambia%2C%20Decision%2C%20211%20of%2098%20%28ACmHPR%2C%20May.%2007%2C%202001%29.pdf> on 31st May, 2022

Amnesty International Website. Freedom of Expression. Viewed at https://www.amnesty.org/en/what-we-do/freedom-of-expression/?utm_source=google&utm_medium=cpc&gclid=Cj0KCQjwyYKUBhDJARIsAMj9IkHA1mFA50CK0qBSuZOMPBi110ctTlmagkyu8sG9RxyrpknuZcHu6oaAmCCEALw_wcB

Article 19 Website. Viewed at <https://www.article19.org/issue/digital-rights>

Article 19 Website. Viewed at <https://www.article19.org/issue/safety-of-journalists-and-human-rights-defenders/>

Freedom Forum Institute Website. What is Freedom of Expression? Viewed at <https://www.freedomforuminstitute.org/about/faq/what-is-freedom-of-expression/>

International Justice Resource Center Website. Viewed at <https://ijrcenter.org/wp-content/uploads/2017/11/Zambia.pdf>

Kokozian Law Firm Website. Viewed at <https://www.losangelesemployeeelawyer.com/defenses-to-defamation.html#:~:text=The%20most%20common%20defenses%20to,in%20order%20to%20prove%20defamation> on 31st May, 2022

Media Defence Website. Freedom of Expression Under International Law. Viewed at <https://www.mediadefence.org/ereader/publications/introductory-modules-on-digital-rights-and-freedom-of-expression-online/module-1-key-principles-of-international-law-and-freedom-of-expression/the-right-to-freedom-of-expression-under-international-law/>

Missouri Foundation for Health website viewed at https://mffh.org/wp-content/uploads/2016/04/AFJ_what-is-advocacy.pdf

Mitchel, T. 2019. Journalists as Human Rights Defenders: International Protection of Journalists in Context of Violence and Impunity. Viewed at <file:///C:/Users/Daniel%20Libati/Downloads/Mitchell2019JournalistsasHumanRightsDefenders-InternationalProtectionofJournalistsinContextsofViolenceandImpunity.pdf>

Office of the High Commissioner for Human Rights Website. Viewed at <https://www.ohchr.org/en/professionalinterest/pages/internationallaw.aspx>

Southern African Litigation Centre Website. Viewed at <https://www.southernafricalitigationcentre.org/2019/05/25/zambia-challenging-the-enforcement-of-the-offence-of-defamation-of-the-president/> on 31st May, 2022

Southern African Litigation Centre Website: Legal Framework in Zambia viewed at <https://www.southernafricalitigationcentre.org/wp-content/uploads/2017/08/Legal-framework-in-Zambia.pdf>

Westaway Law Group Website viewed at <https://westawaylaw.ca/law-reform/>

Zambia Law Development Commission Website viewed at <http://www.zambialawdevelopment.org/what-we-do/>

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One of the objectives of the handbook is to support from a legal and policy perspective the Civil Society Organisations (CSOs) & citizenry in their efforts to improve reforms for freedom of expression policy and legal environment. This Handbook has been developed to make it easier for stakeholders to understand the Zambian legal framework and the various laws that have an impact on Media freedom, freedom of expression and digital rights in order to supplement their advocacy efforts.

The stakeholders will include CSOs, activists, Human Rights Defenders (HRDs), Digital rights activists, students from institutions of higher learning, judicial and law enforcement actors.

MISA Zambia with support from the local partners will strive to continue the advocacy for freedom of expression and media law reforms through information sessions and advocacy trainings.

MISA Zambia is one of the local partners that FHI 360 and Internews have entered a partnership with under the OSZ project which is aimed at strengthening the democratic foundations of freedom of speech and assembly, building independent and new media and safeguarding space for activists, HRDs, and oppositional voices to protect the democratic space in Zambia.



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