LEGAL NOTE

On
Freedom of Expression, Media Freedom and Digital Rights.

USAID 'Open Spaces Zambia' Project

The Open Spaces Zambia project is funded by USAID and implemented by Internews in partnership with FHI 360

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MISA ZAMBIA

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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.

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 and democratic 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, free from any inhibitions.

In this regard, this Legal Note on Freedom of Expression, Media Freedom, and Digital Rights has been produced to aid the promotion of the above stated rights.

It is envisaged that the Legal Note on Freedom of Expression, Media Freedom, and Digital Rights will aid Human Rights Defenders such as Lawyers, Civil Society Organisations and those in the Justice system in Zambia to defend digital rights, media freedom, and freedom of expression.

As an institution that promotes free expression and other media freedoms, we are grateful to all the cooperating partners who have made this publication possible.

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 organisation collects information and monitors developments and challenges facing the media in Zambia and affiliates and supports an independent media complaints body approved by members to consider and arbitrate media-related complaints.

Similarly, the organisation works to establish links with similar organisations within or outside the region, including human rights and related groups, for cooperation and/or solidarity. Likewise, it facilitates the training of media workers through attachments and mutual exchange programs and broadens the knowledge of workers in independent media through meetings, workshops, and seminars.

Other objectives of MISA Zambia include researching economic, technical, training, legal, and any other impediments to the free flow of information and the development of a vibrant independent media in Zambia and to publish and promote publications on activities of MISA Zambia and its affiliates.

Lorraine Mwanza Chisanga – MISA Zambia Chairperson

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1.0 INTRODUCTION

MISA Zambia is one of the consortium partners under the USAID Open Spaces Zambia (USAID OSZ) project under the lead of FHI 360 and Internsews Network with the aim to strengthen the democratic foundations of freedom of speech and assembly; build independent and new media; and safeguard a space for activists, human rights defenders (HRDs), and oppositional voices to protect the democratic space in Zambia. Other local implementing partners on the project include Panos Institute Southern African and Bloggers of Zambia.

The project supports the production of quality, relevant content, to strengthen the enabling environment for independent media, and advance social and online platforms that allow for free expression and access to information.

The objective behind the development of this Legal Note is to contribute to strengthening the democratic foundations of freedom of speech and assembly, and independent and new media, and safeguard space for activists, human rights defenders, and oppositional voices to protect the democratic space in Zambia. In that way, the Legal Note is targeted at civil society, media and journalists, as well as actors working on human rights in digital contexts, including lawyers. With regards to the lawyers, it is hoped that they will use this Legal Note to engage with lawmakers on submissions around legal reform. It is also hoped that lawyers will use the content of this Legal Note to prepare amicus briefs so as to help the courts in the delivery of judgments in case bordering on freedom of expression from a human rights perspective. To that end, the laws and cases of foreign jurisdictions cited herein will prove helpful in understanding how the law can properly be applied in Zambia.

MISA Zambia engaged the services of a legal consultant for the production of knowledge documents, quite particularly a Legal Note. To this end, the first assignment was for the consultant to produce an inception report containing a roadmap outlining legal procedures that are involved and used by judicial players in the delivery of court judgements relating to freedom of expression, media freedom, promoting respect and protection of human rights across the digital ecosystem in Zambia. Following from that inception report, the consultant went on to produce a Legal Note with guidance from a combined team from Internews and USAID.

The Legal Note provides an overview and detailed legal procedures for civil society organisations, media outlets, journalists and lawyers on cases relating

to freedom of expression, media freedom, promoting respect and protection of human rights across the digital ecosystem. It should be noted that particular attention and specific reference has been made to the laws interrogated in the recently published MISA Hand Book on laws and regulations affecting Freedom of Expression and Media Freedom in Zambia. These laws included:

a. The Zambia Constitution;
b. Penal Code Act;
c. State Security Act;
d. Protected Places Act;
e. National Assembly (Powers and Privileges) Act;
f. Printed Publications Act;
g. Theatres and Cinematography Exhibition Act;
h. Defamation Act;
i. Ministerial and Parliamentary Code of Conduct Act;
j. Contempt of Court (Miscellaneous Provisions) Act;
k. Preservation of Public Security Act;
l. National Archives Act;
m. Cyber Security and Cyber Crimes Act;
n. Data Protection Act;
o. Electronic Communications and Transactions Act;
p. Independent Broadcasting Authority Act; and
q. Information Communications Technology Act.

A careful look at the laws highlighted above will reveal that most of them relate to freedom of expression or media freedom issues that arise during physical interaction of human beings. This is because the law relating to online interaction as between and among human beings is a relatively new phenomenon in Zambia. As such, it is not surprising that the most pertinent laws directly affecting freedom of expression or media freedoms online were only introduced in Zambia through 2021 legislation in the form of the Cyber Security and Cyber Crimes Act, Data Protection Act and Electronic Communications and Transactions Act. This therefore begs the question as to how then the law should approach promoting respect and protection of human rights across the digital ecosystem.

Although the law relating to online interaction as between and among human beings is a relatively new phenomenon in Zambia, lessons can be drawn from other countries. In this Legal Note, quite particularly in reference to the foreign cases cited, the reader will appreciate that such laws, along with already existing freedom of expression related laws, have tended to be

used to legitimize repression. This has been done by justifying limitations on speech, illegal or unjustified surveillance, and other rights violations. The reality is that Zambia is rapidly digitizing. So much so that the risk of misuse of technology is growing, which risk becomes evident when one analyses the judgments of foreign cases cited in this Legal Note. It is hoped that as the country continues to digitize, this will be done in tandem with the enactment of clear safeguards, such as those outlined in the Voluntary Guidelines on Government Use of Surveillance Technologies.

Finally, it should be noted that in this Legal Note, a good number of the cases cited hinging on freedom of expression, surveillance and privacy rights refer to the necessity, proportionality and legality test rooted in the International Covenant on Civil and Political Rights. This is a test related to determination of whether or not applicable restrictions on freedom of expression are necessary, proportional to the rights restricted and legal. The foreign cases cited herein show how other countries are applying this test to protect and respect human rights in cases involving digital issues.

2.0 FREEDOM OF EXPRESSION UNDER THE ZAMBIAN CONSTITUTION

The current Constitution of Zambia was enacted in 1991, and major amendments came into force in early 2016. Article 1(1) of the Constitution provides that the Constitution is the supreme law of the nation, and all other written laws 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 enjoyed by every member of the society – irrespective of inter alia race, culture, creed, and social and economic status.[1]

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 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.[2]

2.1 Freedom of Expression in the Zambian Constitution

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*

[1] 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

[2] Ibid

persons, and freedom from interference with his correspondence.[3]

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, 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:

(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

[3] Article 20(1) of the Zambian Constitution

may be, is shown not to be reasonably justifiable in a democratic society.[4]

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;

(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 the 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.

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

[4] Article 20(3) of the Constitution

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….[5]

2.2 Enforcement Mechanisms under the Constitution

Article 28 of the Constitution provides for the mechanisms by which the rights guaranteed under Part III (the Bill of Rights) can be enforced. The provision is called the enforcement of protective provisions article. It provides that if any person alleges that any of the provisions of Articles 11 to 26 inclusive, of which the right to freedom of expression is included therein, and that such right has been, is being or is likely to be contravened in relation to such a person, then that person may apply for redress to the High Court.[6]

When such a petition is brought before a High Court, the Court is mandated to hear and determine such application, determine any question arising from the Subordinate Court and make such order, issue such writs and give such directions as it may consider appropriate for the purpose of giving enforcement to the rights guaranteed under the Bill of Rights.[7] With regards to applications arising from the Subordinate Court the High Court is mandated to attend to questions arising therefrom in relation to the guaranteed rights under the Bill of Rights. Should one not be satisfied with the decision of the High Court, an appeal lies to the Supreme Court.[8]

It should be noted that applications under this provision preclude those relating to proposals contained in any bill which, at the date of the application, has not become a law. Further on, Parliament is empowered to confer upon the Supreme Court or High Court such jurisdiction or powers in addition to those conferred by the Article as may appear to be necessary or desirable for the purpose of enabling that Court exercise its jurisdiction more effectively.[9]

[5] Article 20(1) of the Zambian Constitution
[6] Article 28(1) of the Constitution of Zambia
[7] Article 28(1)(a) and (b)
[8] Article 28 (2) (a) and (b)
[9] Article 28 (3) and (4)

2.3 Case law

2.3.1 Roy Clarke V. The Attorney General[10]

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 Book, *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 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 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

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

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 the 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.

3.0 ZAMBIAN LEGAL FRAMEWORK AFFECTING THE FREEDOM OF EXPRESSION

In Zambia, there are a number of statutes on the statute books, which impact the freedom of expression. These laws are highlighted in this part.

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

3.1.1 Offences Around Prohibited Publications

3.1.1.1 Prohibited Publications

Certain publications can be declared as prohibited. 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.*[11]

3.1.1.2 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*

[11] Section 53(1) of the Penal Code Act

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.[12]

3.1.1.3 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 or privity or in response to a request made before the publication was declared to be a prohibited publication, or who has in his possession any prohibited publication or extract therefrom at the date when the publication is declared to be a prohibited publication, shall forthwith if or as soon as the nature of the contents thereof have become known to him, or in the case of a publication or extract therefrom which is in the possession of such person before an order declaring it to be a prohibited publication has been made, forthwith upon the making of such an order, deliver such publication or extract therefrom at the nearest police station of which an officer of or above the rank of Sub Inspector 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.[13]

[12] Section 54(1) of the Penal Code Act
[13] Section 55 of the Penal Code Act

3.1.2 Definition of Sedition

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*.[14]

3.1.2.1 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 exists 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:

> *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.*[15]

3.1.2.2 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 seditions 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*

[14] Soanes, C. et al. 2006. Oxford Dictionary of Current English, 4th Edition. New York: Oxford University Press
[15] Section 57 of the Penal Code Act

(b) to bring into hatred or contempt or to excite disaffection against the Government as by law established; or

(c) to excite the people of Zambia to attempt to procure the alteration, otherwise than by lawful means, of any other matter in Zambia as by law established; or

(d) to bring into hatred or contempt or to excite disaffection against the administration of justice in Zambia; or

(e) to raise discontent or disaffection among the people of Zambia; or

(f) to promote feelings of ill will or hostility between different communities or different parts of a community; or

(g) to promote feelings of ill will or hostility between different classes of the population of Zambia; or

(h) to advocate the desirability of any part of Zambia becoming an independent state or otherwise seceding from the Republic; or

(i) to incite violence or any offence prejudicial to public order or in disturbance of the public peace; or

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

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 aforegoing 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.[16]

3.1.2.3 Persons Deemed to Have Published a Seditions Material

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 seditions 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.[17]

3.1.3 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

[16] Section 60 of the Penal Code Act
[17] Section 61(1) of the Penal Code Act

imprisonment for a period not exceeding two years.[18]

3.1.4 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.*[19]

3.1.5 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:

> *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.*[20]

[18] Section 68 of the Penal Code Act
[19] Section 70(1) of the Penal Code Act
[20] Section 71 of the Penal Code Act

3.1.6 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.*[21]

3.1.7 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*

[21] Section 117(1) of the Penal Code Act

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.[22]

3.1.8 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 misdemenour, 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".[23]

3.1.9 Case law

This is not a common area for jurisprudence from our courts. However, lessons can be drawn from other jurisdictions. The first case cited here is from Kenya. It brings out the decision of a Kenyan Court that was faced with determining whether or not a criminal offence for defamation as constitutional, relevant, on the basis that it essentially sought to criminalise civil interactions between citizens of that country. The second cited case is from South Africa, and it

[22] Section 177(1) of the Penal Code Act
[23] Section 191 of the Penal Code Act

brings out an issue of how an offence of criminal defamation can be used as a means of silencing otherwise critical voices.

3.1.9.1 Okuta v. Attorney General, 2017

In Kenya, the High Court declared the offence of criminal defamation under section 194 of the Kenyan Penal Code to be unconstitutional. Two Kenyan nationals were charged with criminal defamation for statements made on a Facebook page. They subsequently challenged the constitutionality of the offence, which carried the maximum penalty of two years' imprisonment. In a groundbreaking ruling, the High Court of Kenya declared that section 194 was unconstitutional as it was a disproportionate limitation on the right to freedom of expression. The Court concluded that the invocation of criminal defamation for the purpose of protecting a personal reputation was "clearly excessive and patently disproportionate" and that there was an alternative civil remedy for defamation."[24] In the ruling the High Court relied on regional, especially the African Court of Human Rights, and international standards on freedom of expression.[25]

3.1.9.2 Mineral Sands Resources (Pty) Ltd v. Reddell; Mineral Commodities Limited v. Dlamini; Mineral Commodities Limited v. Clarke, 2021

In South Africa, the Western Cape High Court dismissed defamation cases brought against environmental activists because they "were not genuine but were an attempt to silence opposition" to the mining companies' actions. In their decision, the Court referenced European Court of Human Rights cases and Canadian cases.[26]

3.2 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

[24] Columbia Global Freedom of Expression https://globalfreedomofexpression.columbia.edu/cases/okuta-v-attorney-general/

[25] https://blogs.harvard.edu/cyberlawclinic/2017/02/08/kenyan-court-knocks-down-criminal-defamation-safeguards-freedom-of-expression/

[26] https://globalfreedomofexpression.columbia.edu/cases/mineral-sands-resources-pty-ltd-v-reddell-mineral-commodities-limited-v-dlamini-mineral-commodities-limited-v-clarke/

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.[27]

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.[28]

3.3 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.[29] 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.*[30]

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.[31]

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

[28] Ibid

[29] Preamble to the Protected Places Act, Chapter 125 of the Laws of Zambia

[30] Section 5(1) of the Protected Places Act

[31] Section 5(3) of the Protected Places Act

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.[32]

3.4 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.[33] A stranger is defined as any person other than a member or an officer.[34]

It is worth noting that the Act creates offences that have a bearing on the work of journalists. These include:[35]

(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

[32] Section 6(3) of the Protected Places Act
[33] Section 7(1) of the National Assembly (Powers and Privileges) Act
[34] Section 2 of the National Assembly (Powers and Privileges) Act
[35] Section 25 of the National Assembly (Powers and Privileges) Act

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.

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

3.5 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.[36] An offence is created for noncompliance with this provision with a penalty for liability of up to three thousand penalty units.[37]

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

This law was created to regulate and control theatres and cinematograph exhibitions.[38] 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.[39]

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[36] Section 5(1) of the Printed Publications Act
[37] Section 5(2) of the Printed Publications Act
[38] Preamble to the Theatres and Cinematography Exhibition Act, Chapter 158 of the Laws of Zambia
[39] 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.

3.7 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.[40] 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.[41]

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.[42]

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

[40] Preamble to the Defamation Act, Chapter 68 of the Laws of Zambia
[41] Section 8 of the Defamation Act
[42] 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.[43]

3.7.1 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.

3.7.1.1 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
7. A notice or advertisement published by or on the authority of any court within Zambia or any Judge or officer of such court.

3.7.1.2 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:

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

(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.

3.8 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.[44]

[44] Preamble to the Ministerial and Parliamentary Code of Conduct Act, Chapter 16 of the Laws of Zambia

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:[45]

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

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

3.9 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.[46] The law protects what it refers to as innocent publications where one does not know that the publication concerns proceedings that are before court.[47] The publication of proceedings held in private is not of itself contemptuous unless they concern:[48]

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.

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[45] Sections 13(1) and (2) of the Ministerial and Parliamentary Code of Conduct Act
[46] Preamble to the Contempt of Court (Miscellaneous Provisions) Act, Chapter 38 of the Laws of Zambia
[47] Section 2(1) of the Contempt of Court (Miscellaneous Provisions) Act
[48] Section 3(1) of the Contempt of Court (Miscellaneous Provisions) Act

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.[49] However, what can be published in relation to judicial proceedings for dissolution of marriage, nullity of marriage, judicial separation, or restitution of conjugal rights are:[50]

i. the names, addresses and occupations of the parties and witnesses;

ii. a concise statement of the charges, defences and counter charges 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.

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

This is a law that provides for preservation of public security.[51] 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.*[52]

3.11 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.[53] Section 11 of the 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

[49] Section 4(1) of the Contempt of Court (Miscellaneous Provisions) Act
[50] Section 4(1)(b) of the Contempt of Court (Miscellaneous Provisions) Act
[51] Preamble to the Preservation of Public Security Act
[52] Section 3(2)(a) of the Preservation of Public Security Act
[53] Preamble to the National Archives Act

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.[54]

[54] Section 11 of the National Archives Act

4.0 LAWS AFFECTING HUMAN RIGHTS ACROSS THE DIGITAL ECOSYSTEM

A careful look at the laws interrogated thus far in this Legal Note reveals that most of them relate to freedom of expression or media freedom issues that arise during physical interaction of human beings. This is because the law relating to online interaction as between and among human beings is a relatively new phenomenon in Zambia. This therefore begs the question as to how then the law should approach promoting respect and protection of human rights across the digital ecosystem.

In this part of this Legal Note, recourse will be had to foreign jurisdictions that have had, for a longer period than Zambia, the benefit of laws directly affecting freedom of expression or media freedoms in the digital space. More so, attention will be drawn to instances where the courts in those jurisdictions have had the opportunity to hand down judicial interpretation and guidance on those laws. In so doing, it is hoped that light will be shed on what are some of the most commonly identified issues surrounding the restriction of freedom of expression online. With this, this Legal Note will draw attention to laws that are commonly misused for repression in other jurisdictions, paying particular attention to similar provisions within Zambia.

The reader might want to take note of how the laws thus far looked at tend to be employed when it comes to the limiting of human rights in digital contexts. This can be seen in how interaction on online platforms such as social media are the subject of the same limits as physical interaction. This can be seen, for example, in the application of the law on defamation, libel, sedition, including other national security laws so as to justify repression of freedom of expression.

4.1 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.[55]

[55] Preamble to the Cyber Security and Cybercrimes Act, No. 2 of 2016

4.1.2 Case law

This is not a common area for jurisprudence from our courts. However, lessons can be drawn from other jurisdictions.

4.1.2.1 Andama v. Director of Public Prosecutions, 2019

In Kenya the Nairobi High Court ruled that a provision criminalizing the publication of "obscene information in electronic form" was an unjustifiable limitation of the rights to freedom of expression and to a fair trial."[56]

A contrast can be made with the situation pertaining in Zambia. By way of example, under the ***Cyber Security and Cybercrimes Act***, there is provision similar to this. ***Section 59*** makes it an offence for a person to publicly exhibit any indecent show or performance or any show or performance tending to corrupt morals through a computer system. If found guilty, such a person is liable to a fine not exceeding ten thousand penalty units.[57] It can be argued that in the absence of judicial interpretation to this provision by the Zambian courts, that this provision limits the right to freedom of expression as the right to publicly make exhibits, shows or performances is being limited to what is referred to as a tendency to corrupt morals. What exactly that means is not defined by the Act.

4.1.2.2 Okoiti v. Communications Authority of Kenya, 2018

In Kenya, the Government's Communications Authority had a plan to install a surveillance system (Device Management System–DMS) on mobile networks allowing access to consumer's data. The High Court of Kenya ruled that the Communications Authority's plan was unconstitutional and that the system was "a threat to the subscribers' privacy." Notably, the High Court Judge Mativo referenced international and regional human rights in its judgement, including "the Universal Declaration of Human Rights, which he said provided the "modern privacy benchmark at an international level". [para. 66] He went on to acknowledge that "[t]he recognition and protection of the right to privacy as a fundamental human right in the [Kenyan] Constitution provides an indication of its importance". [para. 68] He also noted that there are international instruments and pieces of domestic legislation that addressed data protection. He observed that the European Court of Human Rights (ECtHR) had "long recognised the intrusiveness inherent in government interception of the content of communications". [para. 69] He referred, for

[56] Columbia Global Freedom of Expression https://globalfreedomofexpression.columbia.edu/cases/andama-v-director-of-public-prosecutions/

[57] Section 59 (1)(e) and (2) of the Cyber Security and Cybercrimes Act, No. 2 of 2021

instance, to 10 Human Rights Organisations v. The United Kingdom where the ECtHR compared the collection of communications data to "having a private investigator trailing a targeted individual at all times". [para. 72]"[58]

A contrast can be made with the situation pertaining in Zambia. By way of example, under ***Section 28*** of the ***Cyber Security and Cybercrimes Act***, provision is made that 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 the Act, apply, ex-parte, to a Judge, for an interception of communications order. It goes on to provide, in part, that a Judge to whom an application is made may make an order 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.[59] It can be argued that in the absence of judicial interpretation of this provision by the Zambian courts, the provision can be used by law enforcement officers to limit the right to freedom of expression by way of intercepting communications through service providers.

4.1.2.3 Kenya Human Rights Commission v. Communications Authority of Kenya, 2018

This was a case, in Kenya, that dealt with the same proposed electronic surveillance Device Management System discussed in the *Okoiti v. Communications Authority of Kenya case* cited above. The High Court again ruled that the proposed system was a violation of the right to privacy. Again, the High Court referenced international and regional human rights law and cases. "The High Court Judge noted the emerging threats that exist in the digital era, in which people's lives are increasingly being conducted online, and remarked on the importance of the internet for individuals to express themselves, conduct their business, and explore their sexuality."[60]

A contrast can be made with the situation pertaining in Zambia. By way of example, under ***Section 28*** of the ***Cyber Security and Cybercrimes Act***, provision is made that the Judge granting a law enforcement officer

[58] Columbia Global Freedom of Expression https://globalfreedomofexpression.columbia.edu/cases/okoiti-v-communications-authority-kenya/
[59] Section 28 (1) and (3)(a) of the Cyber Security and Cybercrimes Act
[60] Columbia Global Freedom of Expression https://globalfreedomofexpression.columbia.edu/cases/kenya-human-rights-commission-v-communications-authority-kenya/

authority to intercept communication, can do so to the extent of authorising the law enforcement officer to enter specified premises with a warrant and to install on such premises any device for the interception and retention of a specified communication or communications of a specified description and to remove and retain such device.[61] It can be argued that in the absence of judicial interpretation of this provision by the Zambian courts, the provision can be used by law enforcement officers to limit the right to freedom of expression by way of intercepting communications through the installation on such premises any device for the interception and retention of a specified communication or communications.

4.1.2.4 Alai v. Attorney General, 2017

In Kenya, the High Court ruled in favor of freedom of expression when it overturned the government's arrest of a blogger and political commentator who had been "charged with undermining the authority of the President after he described the President as immature in a tweet." The High Court ruled that "public officers have to tolerate criticism in an open and democratic state."[62]

A contrast can be made with the situation pertaining in Zambia. By way of example, under ***Section 65*** of the ***Cyber Security and Cybercrimes Act***, provision is made for the offence of hate speech. In that way, a person who, using a computer system, knowingly without lawful excuse, uses hate speech commits an offence and is liable, on conviction, to a fine not exceeding five hundred thousand penalty units or to imprisonment for a period not exceeding two years, or to both.[63] It can be argued that in the absence of judicial interpretation of this provision by the Zambian courts, the provision can be used by law enforcement officers to clamp down on online freedom of expression, under the guise that the same amounts to hate speech.

In a sense, such an argument is vindicated when one has recourse to the definition of hate speech under the Act. It is defined as verbal or non-verbal communication, action, material whether video, audio, streaming or written, that involves hostility or segregation directed towards an individual or particular social groups on grounds of race, ethnicity, antisemitism, tribalism,

[61] Section 28 (3)(b) of the Cyber Security and Cybercrimes Act
[62] Columbia Global Freedom of Expression
https://globalfreedomofexpression.columbia.edu/cases/alai-v-attorney-general/
[63] Section 65 of the Cyber Security and Cybercrimes Act

sex, age, disability, colour, marital status, pregnancy, health status and economic status, culture, religion, belief, conscience, origin.[64]

4.1.2.5 Andare v. Attorney General, 2016

In Kenya, the High Court ruled that Section 29 of Kenya's Information and Communication Act, which criminalized offensive or false information, "was unconstitutional because it unjustifiably limited freedom of expression and because it was worded in vague terms." The case involved the arrest and prosecution of Geoffrey Andare for a Facebook post. The High Court's decision referenced the "European Court of Human Rights judgment in Sunday Times v. United Kingdom."[65]

A contrast can be made with the situation pertaining in Zambia. By way of example, under ***Section 54*** of the ***Cyber Security and Cybercrimes Act***, provision is made for the offence of publication of information. It provides that a person who, with intent to compromise the safety and security of any other person, publishes information or data presented in a picture, image, text, symbol, voice or any other form in a computer system commits an offence and is liable, on conviction, to a fine of not less than five hundred thousand penalty units or to imprisonment for a term exceeding five years or to both.[66] It can be argued that in the absence of judicial interpretation of this provision by the Zambian courts, the provision can be used to limit freedom of expression online extending its application to online publication of information that otherwise falls within the ambit of the exercise of freedom of speech.

4.1.2.6 Justice and Minister of Police v. amaBhungane Centre for Investigative Journalism, 2021

In South Africa, the Constitutional Court ruled that parts of the Regulation of Interception of Communications and Provision of Communication-Related Information Act No. 70 of 2002 (RICA) were unconstitutional because aspects of its surveillance practices did not comply with Article 14 of the Constitution which guarantees privacy. In specific, the lack of oversight, accountability, and repeated reports of abuse were all problems. In its ruling the Court referenced European Court of Human Rights cases and a "UN Human Rights Committee's report on RICA in 2015 which had expressed concern about the "relatively low threshold for conducting surveillance … and the relatively

[64] Section 2 of the Cyber Security and Cybercrimes Act
[65] Columbia Global Freedom of Expression, https://globalfreedomofexpression.columbia.edu/cases/andare-v-attorney-general/
[66] Section 54 of the Cyber Security and Cybercrimes Act

weak safeguards, oversight and remedies against unlawful interference with the right to privacy" [para. 36]." The ruling gave parliament 3 years to reform or replace the law.[67]

A contrast can be made with the situation pertaining in Zambia. By way of example, under ***Section* 14** of the ***Cyber Security and Cybercrimes Act***, provision is made for emergency cyber security measures and requirements. It provides that the Minister may, in consultation with other relevant agencies, issue regulations authorising or directing a person or organisation specified in the regulations to take such measures or comply with such requirements, where the Minister considers it necessary for the purposes of preventing, detecting or countering a threat to the essential services, national security and defence, foreign relations, economy, public health and public safety, public order of the Republic or an electronic communication system, computer system and information system. It goes on to provide that a person who fails to take any measure or comply with any requirement directed by the Minister commits an offence and is liable on conviction to a fine not exceeding one hundred thousand penalty units or to imprisonment for a term not exceeding three months or to both.[68]

On the face of it, these look like wide powers that are vested in the Minister. It can be argued that in the absence of judicial interpretation of this provision by the Zambian courts, the provision can is open to abuse if kept unchecked. Unfortunately, the section does not provide for a check on the Minister's exercise of this power.

4.1.2.7 Registered Trustees of the Socio-Economic Rights and Accountability Project (SERAP) vs. Federal Republic of Nigeria, 2022

In West Africa, in a March 22, 2022 ruling the Community Court of Justice of ECOWAS, "ordered the Republic of Nigeria to amend Section 24 of its Cybercrime (Prohibition, Prevention, etc) Act of 2015 in order to ensure conformity with the country's obligations under the African Charter on Human and Peoples' Rights (ACHPR) and the International Covenant on Civil and Political Rights (ICCPR)."[69] Section 24 of the Cybercrime Act not only criminalized pornography and cyberbullying but also criminalized "insulting or

[67]https://globalfreedomofexpression.columbia.edu/cases/amabhungane-centre-for-investigative-journalism-v-minister-of-justice-and-minister-of-police-v-amabhungane-centre-for-investigative-journalism/
[68] Section 14 (1) and (2) of the Cyber Security and Cybercrimes Act
[69]http://www.courtecowas.org/2022/03/27/court-orders-nigeria-to-align-its-cybercrime-law-with-its-international-obligations/

stalking public officials online."[70] The non-governmental organization, SERAP, had submitted the case before the court asserting that Section 24 of the Cybercrime Act violated the right to freedom of expression because the government of Nigeria had used the vague and ambiguous law "to harass, intimidate, arbitrarily arrest and detain and unfairly prosecute users of the social media, human rights defenders, activists, journalists, broadcasters and bloggers who express their views perceived to be critical of the Government both at the Federal and State levels."[71]

A contrast can be made with the situation pertaining in Zambia. By way of example, under ***Section 69*** of the ***Cyber Security and Cybercrimes Act***, provision is made for the offence of harassment utilising means of electronic communication. The section provides that a person who using a computer system intentionally initiates any electronic communication, with the intent to coerce, intimidate, harass, or cause emotional distress to a person commits an offence and is liable, on conviction, to a fine not exceeding five hundred thousand penalty units or to imprisonment for a period not exceeding five years, or to both.[72] It can be argued that in the absence of judicial interpretation of this provision by the Zambian courts, the provision has the potential to limit freedom of expression online by accusations that boarder on bringing the actions of online users within the context of this provision.

4.1.2.8 The Registered Trustees of the Socio-Economic Rights and Accountability Project (SERAP) V. the Federal Republic of Nigeria and Cross River States

In West Africa, the Community Court of Justice of ECOWAS was moved by the Registered Trustees of the Socio-Economic Rights and Accountability Project against the Federal Republic of Nigeria and another for violating the rights of Agba Jalingo, publisher of the online news outlet CrossRiverWatch. Jalingo was arrested in 2019 for alleging the Cross River state governor was corrupt.[73] In July 2021, the Court of Justice ruled against the Nigerian government and ordered them to pay 30 million naira to Jalingo for violating his rights.[74]

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[70] https://www.forbes.com/sites/emmawoollacott/2022/04/04/nigerian-cybercrime-law-ruled-illegal-over-human-rights-concerns/?sh=4db3b73d1409

[71] http://www.courtecowas.org/2022/03/27/court-orders-nigeria-to-align-its-cybercrime-law-with-its-international-obligations/

[72] Section 69 of the Cyber Security and Cybercrimes Act

[73] https://guardian.ng/news/agba-jalingo-ecowas-court-awards-n30m-damages-against-fg/

[74] Freedom on the Net 2021, Nigeria, https://freedomhouse.org/country/nigeria/freedom-net/2021

A contrast can be made with the situation pertaining in Zambia. By way of example, under ***Section 54*** of the ***Cyber Security and Cybercrimes Act***, provision is made for the offence of publication of information. It provides that a person who, with intent to compromise the safety and security of any other person, publishes information or data presented in a picture, image, text, symbol, voice or any other form in a computer system commits an offence and is liable, on conviction, to a fine of not less than five hundred thousand penalty units or to imprisonment for a term exceeding five years or to both.[75] It can be argued that in the absence of judicial interpretation of this provision by the Zambian courts, the provision can be used to limit freedom of expression online extending its application to online publication of information that otherwise falls within the ambit of the exercise of freedom of speech.

4.1.2.9 The Incorporated Trustees of Laws and Rights Awareness Initiatives vs. Federal Republic of Nigeria, 2020

In West Africa, this case was heard before the Community Court of Justice, the Economic Community of West African States (ECOWAS). The Incorporated Trustees of Laws and Rights Awareness Initiatives argued that section 24 of the Cybercrime Act of 2015 limited freedom of expression on the internet in violation of international law and its authorization of fines of 10 to 25 million Naira and possible 3-10 years in prison for violations was disproportionate. The Court ruled that the penalties "are not necessary in a democratic society and disproportionately violate the right to freedom of expression, guaranteed by Articles 9 (2) and the ACHPR [African Charter on Human and Peoples' Rights] and 19 of the ICCPR [International Covenant on Civil and Political Rights]."[76] Therefore, the Court ordered the Nigerian government to "repeal or amend Section 24 of the Cybercrime Act 2015."

A contrast can be made with the situation pertaining in Zambia. By way of example, under ***Section 54*** of the ***Cyber Security and Cybercrimes Act***, provision is made for the offence of publication of information. It provides that a person who, with intent to compromise the safety and security of any other person, publishes information or data presented in a picture, image, text, symbol, voice or any other form in a computer system commits an offence and is liable, on conviction, to a fine of not less than five hundred thousand penalty units or to imprisonment for a term exceeding five years or

[75] Section 54 of the Cyber Security and Cybercrimes Act

[76] Court of Justice of the Economic Community of West African States (ECOWAS) Holden at Abuja, Nigeria on Friday, 10th of July 2020, Suit No. ECW/CCJ/APP/53/2018, Judgment No ECW/CCJ/JUD/16/20.

to both.[77] It can be argued that in the absence of judicial interpretation of this provision by the Zambian courts, the provision can be used to limit freedom of expression online extending its application to online publication of information that otherwise falls within the ambit of the exercise of freedom of speech. What is worse is that it tends to shift the burden of proof to the person publishing information with regards to 'intent to compromise the safety and security of any other person'.

4.2 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 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.[78]

4.2.1 Case law

This is not a common area for jurisprudence from our courts. However, lessons can be drawn from other jurisdictions.

4.2.1.1 Nubian Rights Forum v. Attorney General, 2020

In Kenya, in response to a legal challenge about the constitutionality of amendments to the Registration of Persons Act that mandated the creation of a central database of biometric information, the "High Court of Kenya held that the collection of DNA and GPS data was an unjustifiable infringement of the right to privacy and therefore unconstitutional, and that the general data protection framework was insufficient."[79]

A contrast can be made with the situation pertaining in Zambia. By way of example, ***part VII*** of the ***Data Protection Act, No. 3 of 2021*** provides for exemptions from principles and rules of processing data. These exemptions extend to national security, defence and public order[80], prevention, detection, investigation and prosecution of contraventions of law[81], processing for purposes of legal proceedings[82], research, archiving or

[77] Section 54 of the Cyber Security and Cybercrimes Act
[78] Preamble to the Data Protection Act, No. 3 of 2016
[79] Columbia Global Freedom of Expression https://globalfreedomofexpression.columbia.edu/cases/nubian-rights-forum-v-attorney-general/
[80] Section 39 of the Data Protection Act
[81] Section 40 of the Data Protection Act
[82] Section 41 of the Data Protection Act

statistical purposes[83] and journalistic purpose[84]. It can be argued that in the absence of judicial interpretation of this provision by the Zambian courts, that as was the case in Kenya such exemptions only serve to limit constitutionally guaranteed rights to the right to privacy.

4.3 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.[85]

[83] Section 42 of the Data Protection Act
[84] Section 43 of the Data Protection Act
[85] Preamble to the Electronic Communications and Transactions Act, No. 4 of 2016

5.0 BROADCASTING AND TELECOMMUNICATIONS

5.1 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.[86] The Act defines 'broadcasting' as the distribution of television or radio, by means of terrestrial or satellite.[87]

The functions of the Authority are to regulate the broadcasting industry in Zambia.[88] Quite particularly, the functions of the Authority are:[89]

(a) to promote a pluralistic and diverse broadcasting industry in broadcasting;

(b) establish guidelines —

(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;

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[86] Preamble to the Independent Broadcasting Authority Act, No. 17 of 2002
[87] Section 2 of the Independent Broadcasting Authority Act
[88] Section 5 of the Independent Broadcasting Authority Act
[89] Section 5(2) of the Independent Broadcasting Authority Act

(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.[90]

The law provides for the Authority to grant a commercial broadcasting license to:[91]
(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.[92]

The law places specific conditions attached to these licenses. These include:[93]
(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,

[90] Section 19(1) of the Independent Broadcasting Authority Act
[91] Section 21(1) of the Independent Broadcasting Authority Act
[92] Section 22 of the Independent Broadcasting Authority Act
[93] Section 27 of the Independent Broadcasting Authority Act

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;
(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.

5.1.1 Case law

5.1.2 Festus A.O. Oqwuche esq and Crownfield Solicitors vs. Federal Republic of Nigeria, 2018

In West Africa, in a case heard before the Community Court of Justice, the Economic Community of West African States (ECOWAS). The case involved a complaint about a 2014 National Broadcasting Commission (NBC) demand that all broadcasting houses must give 48 hours' notice before airing any live political programs because the content of those programs have been "inciting, provocative, highly divisive and threaten the unity and peace of the country."[94] The NBC included social media posts as part of the demand and threatened the withdrawal of their broadcast licenses, direct censorship, seizure of equipment, and even closure if they failed to comply. The Community Court of Justice ruled based on Article 9 of the African Charter on Human and Peoples' Rights, Article 19 of the Universal Declaration of Human Rights, and Article 19 of the International Covenant on Civil and Political Rights (ICCPR) that the actions of the NBC violated the right to freedom of expression of the defendants and ordered to withdrawal of the NBC regulatory requirement.[95]

[94] In the Community of Justice of the Economic Community of West African States (ECOWAS) Holden at Abuja, Nigeria on Tuesday, the 11th day of December 2018, Suit No: ECW/CCJ/APP/10/I5 and Judgment No: ECW/CCJ/JUD/31/18.
[95] Columbia Global Freedom of Expression, https://globalfreedomofexpression.columbia.edu/cases/ogwuche-v-federal-republic-of-nigeria/

5.2 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.[96] 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.[97]

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.[98] It is also an offence, under the Act, for a person to establish and operate a radio station or provide a radiocommunication service without a license. [99]

[96] Preamble to the Information and Communication Technologies Act, No. 15 of 2009
[97] Section 4(1) of the Information and Communication Technologies Act
[98] Section 9(1) of the Information and Communication Technologies Act
[99] Section 28(1) of the Information and Communication Technologies Act

6.1 African Union Convention on Cyber Security and Personal Data Protection

This convention was passed on the 27th of June, 2014 in Malabo, Equatorial Guinea, hence its name, the "Malabo Convention". The convention is divided into four chapters covering a total of 38 articles. The chapters in the convention cover electronic transactions, personal data protection, promotion of cyber security and combating cybercrime and final provisions relating the administration of the convention.[100] Chapter one covers electronic transactions extends to providing for such things as electronic commerce, contractual liability, advertising, electronic contracts, writing in electronic form, security and electronic transactions and ensuring security in electronic transactions. This can be found in articles one to seven.[101]

Chapter two covers personal data protection provides for personal data protection, institutional framework for personal data protection including status, composition and organization of national personal data protection authorities, duties and powers of such authorities, basic principles governing the processing of data personal data, basic principles governing the processing of sensitive data, obligations relating to conditions governing personal data processing, data subjects' rights and obligations relating to personal data controllers. In terms of data subjects' rights these include the rights to information, right to access, right to object and right of rectification. In terms of obligations of personal data controllers these include confidentiality, security, storage and sustainability. These provisions are to be found in articles 8 to 24.[102]

Chapter three of the Convention provides for promotion of cyber security and combating cybercrime. It provides for the need for a national policy and strategy to be in place first followed by a legal framework. The legal framework is to include legal measure, national regulation authorities, rights of citizens, protection of critical infrastructure, national cyber security systems, international cooperation, criminal provisions and the monitoring of safeguards. These provisions are to be found in articles 25 to 31. The fourth and final chapter provides for final provisions at the African Union level, i.e.,

[100] African Union website viewed at https://au.int/sites/default/files/treaties/29560-treaty-0048_-_african_union_convention_on_cyber_security_and_personal_data_protection_e.pdf on 9th February, 2023
[101] Ibid
[102] Ibid

with regards to the administration and carrying out of the convention by state parties to it. These provisions are to be found in artless 32 to 38.[103]

6.2 Freedom Online Coalitions

The Freedom Online Coalition (FOC) is an intergovernmental coalition that was established at the inaugural Freedom Online Conference in The Hague, the Netherlands, 8-9 December 2011. As indicated in its founding declaration, the FOC is committed to advancing Internet Freedom – free expression, association, assembly, and privacy online – worldwide. FOC member states are committed to work together diplomatically to voice concern over measures to restrict Internet Freedom and support those individuals whose human rights online are curtailed. Since 2011, the Coalition has grown from 15 initial Members to 36, spanning from Africa to Asia, Europe, the Americas, and the Middle East. [104] Zambia is not a Member of the FOC.

On 16 May 2017, at the FOC Strategy and Coordination Meeting held adjacent to the Stockholm Internet Forum 2017, the FOC officially adopted its new Terms of Reference (TOR). The new TOR - known as the 'Stockholm Terms of Reference' - contains, inter alia, updates to the Coalition's Membership criteria, the future of multistakeholder engagement in the Coalition, and provides clarification of FOC's working methods. Since its inception, Members of the Coalition have gathered informally as governments and in consultation with other stakeholders at numerous conferences and intergovernmental meetings relevant to Internet freedom as well as in specific countries, to coordinate viewpoints, share relevant information, and discuss strategies to advance an open Internet in each context.[105]

FOC Diplomatic Networks facilitate coordination of representatives in Paris, Geneva, New York and Vienna. FOC meetings have taken place in various forums, including the Organization for Security and Cooperation in Europe (OSCE), the United Nations Human Rights Council, the Internet Governance Forum, the Stockholm Internet Forum, and others.[106]

Notable examples of joint coordination include submission of coordinated FOC input into UNESCO's Internet Study (March 2015), the Joint Statement presented at the Human Rights Council (June 2015) and Joint Statements on

[103] Ibid
[104] Freedom Online Coaltion website viewed at https://freedomonlinecoalition.com/wp-content/uploads/2023/02/FOC-Factsheet-2023.pdf on 9th February, 2023
[105] Ibid
[106] Ibid

restrictive data localization laws (September 2015), cross-border attacks on freedom of expression online (March 2016), Human Rights and the UN GGE (February 2017), Joint Statement and Accompanying Good Practices for Government on State-Sponsored Network Disruptions (March 2017), Joint Statement on Internet Censorship (2018), Joint Statement on Defending Civic Space Online (2019), the Joint Statement on Artificial Intelligence and Human Rights (2020), and the Joint Statement on Spread of Disinformation Online (2020), and the Statement on Freedom of Expression Online delivered at the 47th session of the Human Rights Council at the Interactive Dialogue with the Special Rapporteur on freedom of expression (2021).[107]

6.3 Declaration for the Future of the Internet

The United States with more than 60 partners from around the globe launched the Declaration for the Future of the Internet.[108] Zambia is not one of such countries. This Declaration represents a political commitment among Declaration partners to advance a positive vision for the Internet and digital technologies. It reclaims the promise of the Internet in the face of the global opportunities and challenges presented by the 21st century. It also reaffirms and recommits its partners to a single global Internet – one that is truly open and fosters competition, privacy, and respect for human rights. The Declaration's principles include commitments to:[109]

a. Protect human rights and fundamental freedoms of all people;

b. Promote a global Internet that advances the free flow of information;

c. Advance inclusive and affordable connectivity so that all people can benefit from the digital economy;

d. Promote trust in the global digital ecosystem, including through protection of privacy; and

e. Protect and strengthen the multi-stakeholder approach to governance that keeps the Internet running for the benefit of all.

In signing this Declaration, the United States and partners committed to work together to promote this vision and its principles globally, while respecting each other's regulatory autonomy within their own jurisdictions and in accordance

[107] Ibid
[108] United States Department of State website viewed at https://www.state.gov/declaration-for-the-future-of-the-internet on 9th February, 2023
[109] Ibid

with their respective domestic laws and international legal obligations. The United States worked with partners from all over the world – including civil society, industry, academia, and other stakeholders to reaffirm the vision of an open, free, global, interoperable, reliable, and secure Internet and reverse negative trends in this regard. Under this vision, people everywhere will benefit from an Internet that is unified unfragmented; facilitates global communications and commerce; and supports freedom, innovation, education and trust.[110]

6.4 Paris Call

The Paris Call for Trust and Security in Cyberspace of 12 November 2018 is a call to come together to face the new threats endangering citizens and infrastructure. It is based around nine common principles to secure cyberspace, which act as many areas for discussion and action. The Paris Call invites all cyberspace actors to work together and encourage States to cooperate with private sector partners, the world of research and civil society. The supporters of the Paris Call commit to working together to adopt responsible behaviour and implement within cyberspace the fundamental principles which apply in the physical world. The Paris Call was sent in 2018 by the President of the French Republic, Emmanuel Macron, during the Internet Governance Forum held at UNESCO and the Paris Peace Forum.[111]

6.5 Budapest Convention

The Budapest Convention is more than a legal document; it is a framework that permits hundreds of practitioners from Parties to share experience and create relationships that facilitate cooperation in specific cases, including in emergency situations, beyond the specific provisions foreseen in this Convention. Any country in Europe may make use of the Budapest Convention as a guideline, check list or model law. Furthermore, becoming a Party to this treaty entails additional advantages. Any State may accede to the Convention under the procedure set out in Article 37.[112]

Once a (draft) law is available that indicates that a State already has implemented or is likely to implement the provisions of the Budapest Convention in domestic law, the Minister of Foreign Affairs (or another authorised representative) would send a letter to the Secretary General of

[110] Ibid
[111] Paris Call website viewed at https://pariscall.international/en/ on 9th February, 2023
[112] Council of Europe website viewed at https://www.coe.int/en/web/cybercrime/the-budapest-convention on 9th February, 2023

the Council of Europe stating the interest of his or her State to accede to the Budapest Convention. Once there is agreement among the current Parties to the Convention, the State would be invited to accede.[113]

6.6 Blueprint for an AI Bill of Rights

To advance United States President Joe Biden's vision, the White House Office of Science and Technology Policy has identified five principles that should guide the design, use, and deployment of automated systems to protect the American public in the age of artificial intelligence. The Blueprint for an AI Bill of Rights is a guide for a society that protects all people from these threats—and uses technologies in ways that reinforce our highest values.[114]

Responding to the experiences of the American public, and informed by insights from researchers, technologists, advocates, journalists, and policymakers, this framework is accompanied by From Principles to Practice—a handbook for anyone seeking to incorporate these protections into policy and practice, including detailed steps toward actualizing these principles in the technological design process. These principles help provide guidance whenever automated systems can meaningfully impact the public's rights, opportunities, or access to critical needs.[115]

6.7 AI Risk Management Framework

In collaboration with the private and public sectors, United States National Institute for Standards and Technology (NIST) has developed a framework to better manage risks to individuals, organizations, and society associated with artificial intelligence (AI). The NIST AI Risk Management Framework (AI RMF) is intended for voluntary use and to improve the ability to incorporate trustworthiness considerations into the design, development, use, and evaluation of AI products, services, and systems.[116]

Released on January 26, 2023, the Framework was developed through a consensus-driven, open, transparent, and collaborative process that included a Request for Information, several draft versions for public comments, multiple workshops, and other opportunities to provide input. It is

[113] Ibid
[114] United States White House website viewed at https://www.whitehouse.gov/ostp/ai-bill-of-rights/ on 9th February, 2023
[115] Ibid
[116] United States National Institute for Standards and Technology website viewed at https://www.nist.gov/itl/ai-risk-management-framework on 9th February, 2023

intended to build on, align with, and support AI risk management efforts by others.[117]

6.8 Council of Europe and Artificial Intelligence

The Council is a leader in the realm of international legal instruments and human rights. All Council of Europe (COE) member states have ratified the European Convention on Human Rights, a treaty designed to protect human rights, democracy and the rule of law. And Article 8 of that Convention has done much to shape modern privacy law. There are 47 member states, including the 27 members of the European Union. COE Conventions are also open for ratification by non-member state. The original COE Convention on Privacy (Convention 108) was ratified by 56 countries.[118]

In 2020, the Parliament Assembly of the Council of Europe adopted a resolution on the Need for Democratic Governance of Artificial Intelligence. The Assembly called for "strong and swift action" by the Council of Europe. The parliamentarians warned that "soft-law instruments and self-regulation have proven so far not sufficient in addressing these challenges and in protecting human rights, democracy and rule of law."[119]

The Council of Europe resolution also follows extensive work by the COE Ad Hoc Committee on Artificial Intelligence (CAHAI). In September 2020 the COE Committee of Ministers approved the CAHAI progress report, which concluded that the "Council of Europe has a crucial role to play today to ensure that AI applications are in line with human rights protections." The Ministers asked the CAHAI to draft a feasibility study on a legal instrument that could "regulate the design, development and application of AI that have a significant impact on human rights, democracy and the rule of law." The COE Ministers also proposed that the CAHAI should examine "human rights impact assessments" and "certification of algorithms and AI systems."[120]

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[117] Ibid
[118] Centre for AI and Digital Policy website viewed at https://www.caidp.org/resources/coe-ai-treaty/ on 9th February, 2023
[119] Ibid
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The Legal Note provides an overview and detailed legal procedures for civil society organizations, media outlets, journalists and lawyers on cases relating to freedom of expression, media freedom, promoting respect and protection of human rights across the digital ecosystem.

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