



**THE LAW OF DEFAMATION AND ITS EFFECTS ON FREEDOM OF EXPRESSION  
VIS-À-VIS PRESS FREEDOM**

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**UNZA**

**2009**

**THE UNIVERSITY OF ZAMBIA**

**SCHOOL OF LAW**

I recommend that the obligatory essay prepared under my supervision

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**THE LAW OF DEFAMATION AND ITS EFFECTS ON FREEDOM OF EXPRESSION  
VIS-À-VIS PRESS FREEDOM**

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## DECLARATION

I, Joanne K. Mwaanga, do hereby declare that the contents of this Directed Research paper are entirely based on my own findings. The work used herein that is not my own, I have endeavored to acknowledge the same. I, therefore, take full responsibility for the contents, errors, defects and omissions herein.

13<sup>th</sup> February, 2009  
Date

  
Signature

**THE LAW OF DEFAMATION AND ITS EFFECTS ON FREEDOM OF EXPRESSION  
VIS-À-VIS PRESS FREEDOM**

by

**JOANNE K. MWAANGA**

Being a paper submitted in partial fulfillment of the examination requirements for the degree of  
Bachelor of Laws of The University of Zambia.

## **DEDICATION**

This is for my lovely daughter Nomthuzi Tamba, my Husband Nicholas Tamba, My Parents Mr. and Mrs. Mwaanga, my siblings, Joe, Jocelyn, Bwalya, Loyiswayo and Shupekile. You have all been my source of inspiration.

Most of all, I dedicate this work to my Almighty God, without whom none of this would be possible. May your name be glorified always!

## **ACKNOWLEDGMENTS**

I am greatly indebted to my supervisor for his assistance and encouragement. To you Judge Kabaso Chanda (Rtd) I say thank you very much and God bless you.

My special thanks and gratitude go to my dear husband Nicholas Tamba for his continued support and encouragement to soldier on even when times were unbearable. You have been a true friend all the way, thank you, I will always love you. God bless you always.

This research would not be possible if not for the care and support from mum, dad and everyone at home; you are the best in the world. I love you all. Stay blessed.

Lastly, I would like to acknowledge the assistance rendered by Mr. Geoffrey Samusungwa. Your material and moral assistance made it very easy for me to do my work with. Thank you and God bless you.

**LIST OF STATUTES**

The Constitution of Zambia Chapter 1 of the Laws of Zambia

The Penal Code Chapter 87 of the Laws of Zambia

## **LIST OF CASES**

- R V Keegstra (1990) 3WLR 278
- Ltd Lewis V Daily Telegraph (1964) AC 234 at 258
- Hulton V Jones (1909) 2KB 444
- Eastwood V Holmes (1858) 1 F & F 347
- Huth V Huth (1915) 3 KB 32
- Wennhak V Morgan (1888) 20 QB 635 at 639
- Youssoupoff V Metro-Goldwyn-Mayer Pictures Ltd (1934) 50 TLR 581
- Lynch V Knight (1861) 9 HLC 597
- Gray V Jones (1939) 160 L.T 361
- Kerr V Kennedy (1942) 1 K.B 409
- Jones V Jones(1916)2 A.C.481
- Jones V Skelton (1963) 1 WLR 1362
- William Banda V The Attorney General 1992 HP 1005
- New York Times V Sullivan (1964) 376 US 254
- Michael Chilufya Sata V Post Newspaper Limited and Printpak Ltd 1992 HP 1395
- Andrew Theophanus V the herald and weekly times and another F.C 94/91
- Ltd Rookes V Barnard (1964) A.C 1129 at 1221
- Times Newspaper of Zambia V Kapwepwe (1973) Z.R. 292



## ABSTRACT

This study is a qualitative research carried out to investigate the effects of the Law of Defamation on the freedom of speech generally and on the freedom of the press in particular. The researcher used both theological and conceptual methods of research. The general objectives are to explore the common law of defamation as well as the theories and justifications of free speech and expression. After doing so, the researcher endeavors to establish ways that can be employed to strike a balance between these two conflicting interests.

The law of defamation seeks to protect the reputation of an individual; this is done by restricting what can be said about a person's character. Defamatory matter is said to be that which tends to lower a person in the minds of right thinking members of society. It generally consists of libel and slander. The problem arises due to the fact that any law which seeks to protect reputation will invariably infringe on freedom of expression.

Freedom of speech or expression connotes the right to speak freely and also involves the right to receive and share information. This right, though not absolute is of great importance in a democratic society as it allows the electorate to discuss the political candidates and enables them to make informed decisions.

The findings revealed that in Zambia the protection of the freedom of expression especially that of the press leaves much to be desired. The press has no express protection. Further that the courts have taken a very narrow and rigid approach in applying defamation laws, the result of which has led to serious fetters on the freedom of expression.

The researcher concluded that in a democratic state like Zambia, it is imperative that the freedom of expression be protected and the freedom of the press be constitutionally guaranteed. Further that Zambia can learn a lot from the constitutions of other countries such as the American Constitution. Lastly that there is need to develop political will among the leaders because this is the best way this can be achieved.

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## **CHAPTER ONE**

This chapter introduces the topic of discussion and gives a general over view of the issue of the law of defamation and freedom of expression and press freedom. It lays the foundation for the discussion by giving the background of the study. In addition, this chapter outlines the importance, rationale and purpose of the research.

The law on defamation can be traced back to the Roman Jurisprudence. During this time, verbal defamations were dealt with under two heads. The first comprehended defamatory and injurious statements made in a public manner (*convicum contra bonos mores*).<sup>1</sup> In this case, the essence of the case lay in the unwarranted public proclamation, and the truth of the statement was no justification for the unnecessary public and insulting manner in which they had been made. The second head included defamatory statements made in private, and in this case, the offence lay in the imputation itself, not in the manner of its publication. The truth was therefore a sufficient defense for no man had the right to demand legal protection for a false reputation.<sup>2</sup>

The law thus aimed at giving sufficient scope for the discussion of a man's character, while it protected him from needless pain and insult. For a very long time, the remedy for verbal defamation was confined to a civil action for monetary penalty which was

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<sup>1</sup> Martin Edward, Defamation, Samford University, 2006,p1

<sup>2</sup> ibid

estimated according to the significance of the case.<sup>3</sup> As time passed, a new remedy was introduced under which defamation begun to be punished with great severity.

Today the tort of defamation consists of libel and slander and both are aimed at protecting a person's interest in his reputation. A defamatory meaning can be conveyed in any medium but it is the choice of the medium which determines whether the action is libel or slander. If the defamatory meaning is conveyed in a permanent form, then the action is libel. And if it is in a temporary form, it is slander.<sup>4</sup> There are two important distinctions between the two forms of defamation; firstly that a libel which tends to provoke a breach of peace is a crime, while slander can only be tortious. Secondly, libel is actionable per se (without proof of actual damage), while slander is actionable only on proof of actual damage except in special instances such as where there is an imputation of a criminal offence to the plaintiff.<sup>5</sup>

Defamation presents particular problems as any law which protects reputation will also impinge on freedom of speech. Freedom of speech is being able to speak freely without censorship.<sup>6</sup> The right to freedom of speech is guaranteed under international law through various human rights instruments, notably under Article 19 of the Universal Declaration of Human Rights and Article 10 of the European Convention on Human Rights, though implementation remains lacking in many countries. In Zambia, this right is protected by the constitution under Article 20. The synonymous term of freedom of

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<sup>3</sup> *ibid*

<sup>4</sup> John Cooke, 1995, *Law of tort*, 2<sup>nd</sup> Ed

<sup>5</sup> John Cooke, 1995, *Law of Tort*, 2<sup>nd</sup> Ed

<sup>6</sup> Larson Arson, *Defamation and freedom of speech*, 2003

expression is sometimes preferred, since the right is not confined to verbal speech but is understood to protect any act of seeking, receiving and imparting information or ideas, regardless of the medium used.<sup>7</sup>

In practice, the right to freedom of speech is not absolute in any country, although the degree of freedom varies greatly. For example, in most liberal democracies it is generally recognized that restrictions should be the exception and free expression the rule. Nevertheless, compliance of this principle is often lacking.

Freedom of speech is crucial in any democracy because open discussions of political candidates are essential for voters to make informed decisions during elections. Also, public officials are held accountable through criticisms that can pave way for their replacement. It is suggested that when citizens refrain from voicing their discontentment because they fear retribution, the government can no longer be responsive to them, thus is less accountable for its actions. Defenders of freedom of speech often allege that the main reason why governments suppress freedom of speech is to avoid accountability.<sup>8</sup>

Participation is a critical aspect of the democratic process, and this can only be achieved if the freedom of speech is respected and uplifted. This involves striking a balance between the two competing interests. When people are free to express themselves and openly criticize public officers, the government is kept accountable to the people. Freedom of speech is therefore an important aspect of healthy democratic governance.

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<sup>7</sup> *ibid*

<sup>8</sup> *Supra* note 6

In this light, freedom of speech must be protected from unnecessary hurdles and clogs which may include the abuse of the law of defamation.

The issue of freedom of speech is one of great importance as it borders on the rights of people to freely express themselves on matters that affect them as well as allows them to share and receive information without any fear of being faced with a defamation law suit. This however has not been the case as governments the world over have been using the law (especially the law of defamation) to try and intimidate members of the press from reporting freely as well as members of the opposition from commenting on the government's shortcomings. For example, the Penal Code under article 69 criminalises the defamation of the president.<sup>9</sup> Now this law has been used to deter even the slightest form of criticism of the president and as such, time and again, members of the press and media have been faced with difficulties when it comes to reporting without fear. The problem therefore lies in the abuse of defamation laws in order to curtail the freedom of speech and expression.

The purpose of this research is to explore the law of defamation and how this law is applied by the court. Furthermore, the study also attempts to explain the freedom of speech and discuss the restrictions on free speech with particular attention to the law of defamation. The overall *raison d'être* of this study is to establish ways that can be implored to strike a balance between the competing interests of defamation and the right to the freedom of speech, this is based on the reasoning that only until the freedom of expression is protected, can true democracy be achieved. It is hoped that in so doing,

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<sup>9</sup> Chapter 87 of The Laws of Zambia

the study will add a voice to the propagation of the promotion of a free press in a democratic society like Zambia. Furthermore, it is hoped that this study will encourage more scholars to make further investigation on the subject. Lastly it is hoped that the recommendations that will be made will help to promote not only media rights, but also the rights of all in relation to freedom of speech and expression.

The general objective of this study is to explore the law on defamation, on one hand, and to further explore the right to freedom of speech and expression on the other hand. Once this is done, the researcher will then establish the extent to which the law on defamation interferes with freedom of speech and expression. Finally, at the end of the research, the researcher will suggest ways in which a balance can be struck between the two aforesaid competing interests may be resolved.

The following are the specific objectives which will guide the researcher in the an attempt to achieve the overall objective;

Firstly, the researcher will explore the scope of law on defamation. This will include explaining what is meant by libel and slander, and the difference between the two will also be explained. Furthermore, all other major aspects of defamation will be highlighted with the aid of case law.

Secondly, the theories of speech will be explained and the reasons for justifying the right to the freedom of speech will be given. Hereby establishing the importance of the said right and why it should be guaranteed without being fettered.



The third objective is to establish how defamation interferes with the freedom of speech and expression.

Fourthly, to establish how press freedom is affected by defamation laws. This objective will be achieved by citing local cases as well as instances when the government has used the law to try and intimidate the press.

The last objective is to establish and suggest ways that can be implored to curb the abuse of the law on defamation as well as to suggest ways in which defamation may be in play without necessarily taking away the right to speak and express oneself freely.

In order to achieve these objectives, the researcher will be guided by the following research questions;

1. What is meant by freedom of speech and why is it important in a democratic state such as Zambia?
2. What is the law of defamation and matters related to the same?
3. How does defamation influence the right to express oneself freely?
4. How is the press affected by defamation laws?
5. What can be done to try and strike a balance between the two competing interests?

This study is of great significance because in any democratic society, freedom of speech is a crucial aspect of any as it allows for open discussions of political candidates, free flow of information, and open criticism of public officers, all of which are important in

the decision making process of the electorate during elections. Hence, whether or not its election time, people should be able to freely express themselves and receive information freely without fear of retribution. It is a common trend for governments to impinge on the rights of people to freely express themselves and even more common for them to use defamation to achieve it. Most often than not, the press has a tough time when it comes to doing their work without getting lawsuits for defamation. Therefore, this research is very important in the upholding of people's rights as it will shed more light on how the freedom of speech can be guaranteed without any impingements by defamation laws.

This study, being a qualitative research, encompasses both theoretical and conceptual methods. Most of the data was collected by way of desk research as well as internet research. Where necessary, this will be supplemented by interviews of members of the press on the issue of press freedom. The rest of the data will be sourced from books, statutes, case law, news paper articles and journals.

There have been various articles on the issue of defamation and freedom of speech especially by lawyers as non-governmental organizations that have a particular interest in press freedom. The two topics have been dealt with separately, however, the researcher found very limited material that covered both topics in depth. This research is therefore very essential and at the same time interesting as it gives a fresh and redefined approach to the issue of defamation laws and the freedom of expression.

The following are the definitions of key terms that will be used throughout the paper.

## **Freedom of speech**

This refers to the state of being able to speak freely without censorship. It is synonymous to the term freedom of expression and should be understood to protect any act of seeking, receiving and imparting information or ideas, regardless of the medium used. Freedom of speech promotes the free flow of ideas essential to political democracy and democratic institutions and limits the ability of the state to subvert other rights and freedoms.<sup>10</sup>

## **Defamation**

This term is used to refer to injury to a person's reputation. Reputation is a man's property and so if a person interferes with it, he interferes with that man's property.<sup>11</sup> Defamation can be defined as the publication of a statement which reflects on a person's reputation and tends to lower him in the estimation of right-thinking members of society.<sup>12</sup> The law on defamation thus, aims at giving sufficient scope for the discussion of a man's character, while it protects him from needless insult and pain.

## **Libel**

Defamatory matter can be conveyed in any medium. Libel is defamation in some permanent form. Examples include writing, printing, picture, effigy or statue.<sup>13</sup> Libel is not merely an actionable tort, but a criminal offence. It was once thought that the likelihood of a breach of peace was a vital factor in criminal libel, but now only one of the relevant factors. Therefore

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<sup>10</sup> <http://www.wikipedia.org>

<sup>11</sup> R.K. Bangia, 2003, Law of Torts, 7<sup>th</sup> Ed at 154

<sup>12</sup> W.V.H. Rogers, 2002, Winifield and Jolowicz on Tort, 16<sup>th</sup> Ed, at 404

<sup>13</sup> R.K. Bangia, Law of Torts, 17<sup>th</sup> Ed at 144

in order for a case of criminal libel to succeed the prosecution must prove that the libel is of a serious nature and not a trivial one. Apart from that, libel is actionable per se that is to say without proof of damage.

### **Press freedom**

Freedom of the press has been used to imply that all people should have the right to express themselves in writing or any other form of expression of personal opinion or creativity. This means that the modern definition of the term encompasses not only freedom of print media but also any other form of communication used to commune ideas.

## **CHAPTER TWO**

This chapter introduces the concept of Freedom of speech. The history of this fundamental human right can be seen to exist since time immemorial, however it was only around the 17<sup>th</sup> century that people begun to speak openly about this right and demand for it's respect. Furthermore, this chapter also highlights the modern definition and understanding of the concept of free speech and its place and importance in a modern democracy. This is followed by the provisions of the law that seek to protect this right as well as those provisions that tend to erode the same, after which a conclusion will be drawn based on the findings of this chapter.

Freedom of speech is being able to speak freely without censorship. This freedom is of great importance and as such has found its place both on the national and international platform. The right to the freedom of speech is recognized as a human right under article 19 of The Universal Declaration of Human Rights as well as article 19 of The International Covenant on Civil and Political Rights (ICCPR). The ICCPR recognizes the right to freedom of speech as “the right to hold opinions without interference”. In Zambia this right is recognized in the Zambian constitution under Article 20. In as much as freedom of speech has been described as the life blood of any democratic society, this right is not absolute in any country, (as will be shown), and is commonly subject to limitations.

Freedom of speech and expression has a long history that actually dates back to pre modern international human rights law. One of the earliest defenses of freedom of expression was by a British philosopher called John Milton. Milton wrote in reaction to an attempt by the English parliament to prevent “Seditious, unreliable, unreasonable and unlicensed pamphlets”.<sup>14</sup> This was around 1644. He advanced a number of arguments in defense of freedom and speech: a nation’s unity is created through blending individual differences rather than imposing homogeneity from above; that the ability to explore the fullest range of ideas on a given issue was essential to any learning process and truth cannot be arrived upon unless all points of view are first considered and that by considering free thought, censorship acts to the detriment of material progress.<sup>15</sup> Milton further argued that if the facts are laid bare, truth will defeat falsehood in open competition, but this cannot be left for a single individual to determine. According to Milton, it is up to each individual to uncover their own truth; no one is wise enough to act as a censor to all individuals.<sup>16</sup>

However, in modern times, the justifications of freedom of speech have been articulated in a specified manner. For example, Justice McLachlin of the Canadian Supreme Court identified the following as justifications of freedom of speech;

1. Free speech promotes the free flow of ideas essential to political democracy and democratic institutions and limits the ability of the state to subvert other rights and freedoms.

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<sup>14</sup> Harworth Allan, *Free Speech*, Newyork,Hamleton Publishers, 1998,p 34

<sup>15</sup> *ibid*

<sup>16</sup> A. Puddephatt, 2005, *Freedom of expression: The essentials of human rights*

2. It promotes a marketplace of ideas, which includes, but is not limited to the search for truth.
3. It is intrinsically valuable as part of the self actualization of speakers and listeners.
4. It is justified by the dangers for good government of allowing its suppression.<sup>17</sup>

Such reasons may overlap, but together they provide a widely accepted rationale for the recognition of freedom of speech as a basic civil liberty. A number of conclusions may be drawn from this analysis and they include; that there are powerful overlapping arguments for free speech as a basic political principle in any liberal democracy, that free speech is not a simple and absolute concept but a liberty that is justified by even deeper values, and lastly that the values implicit in the various justifications for free speech may not apply equally to all kinds of speech.

The first and fourth justifications can be bracketed together as democratic justifications and relate to self governance. Freedom of speech is crucial in any participatory democracy because open discussions are essential for voters to make informed decisions during elections. It also enhances the capacity of an individual to take part in the democratic process because everyone will be free to receive and share information freely. Research conducted over the last decade, like the Worldwide Governance Indicators project at the World Bank, recognizes that freedom of speech, and the process of accountability that follows it, have a significant impact in the quality of

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<sup>17</sup> R V Keegstra (1990) 3WLR 278

governance of a country. "Voice and Accountability" within a country, defined as "the extent to which a country's citizens are able to participate in selecting their government, as well as freedom of expression, freedom of association and free media" is one of the six dimensions of governance that the Worldwide Governance Indicators measure for more than 200 countries.<sup>18</sup> It is therefore important to note that freedom of the press is a constituent part freedom of speech and expression.

The second justification relates to discovery of truth. This theory assumes that there is a marketplace of ideas and once all ideas are allowed into the marketplace, truth will triumph over falsehood. This will in turn enable people to discover the truth. This theory has been criticized on the ground that it is wrong to assume that all ideas will enter the marketplace and even if that is to happen, it is not automatic that truth will triumph over falsehood.

It has however been agreed that freedom of speech is essential for the development and discussion of ideas in the search for truth. According to Hardworth<sup>19</sup>, society should be pictured as something like a large-scale academic seminar. This implies the need for tacit standards of conduct and interaction, including some degree of mutual respect. He goes on to argue that freedom of speech of certain kinds is needed for rational inquiry. However, not all kinds of speech should be given the same protection.

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<sup>18</sup> Government Indicators : A World Bank Research

<sup>19</sup>Free Speech, 2<sup>nd</sup> ED, 1998



Still another explanation is that freedom of speech is integral to tolerance, which some people feel should be a basic value in society. Professor Bollinger is an advocate of this view and argues that “the free speech principal involves a special act of carving out one area of social interaction for extraordinary self-restraint, the purpose of which is to develop and demonstrate a social capacity to control feelings evoked by a host of social encounters.” The free speech principal is left with the concern of nothing less than helping to shape “the intellectual character of society.”

This claim is to say that tolerance is a desirable, if not essential, value, and that protecting unpopular speech is itself an act of tolerance. Such tolerance serves as a model that encourages more tolerance throughout society. Critics argue that society need not be tolerant of the tolerance of others. Such as those who advocate great harm, such as genocide. Preventing such harms is claimed to be much more important than being tolerant of those who argue for them.

The development of the internet opened new possibilities for achieving freedom of speech using methods that do not depend on legal measures. The use of pseudonyms and data havens (such as free net) allows free speech; this is because the technology guarantees that material cannot be censored. Creating cites is one of the latest forms of exercising free speech on the internet.

Web sites which fall foul of government censors in the other countries are often re-hosted on a server in a country with no restrictions. Considering the fact that the United States has in many respects the least restrictive governmental politics in the world when

it comes to freedom of speech, many of these websites re-host their content on an American server and thus escape censorship while remaining available to their target audience.<sup>20</sup> This is especially the case with sites promoting racial hatred, since these are prohibited in a number of European countries. It should be mentioned, however, that the US government has attempted to regulate certain acts and speech on the internet although the effectiveness of this effort still remains unknown. This has been done through organisations such as The Electronic Frontier Foundation which is dedicated to protecting freedom of speech on the internet as well the Oxford Institute which aims to investigate, explore and analyse internet filtering and surveillance practices in a credible and non-partisan manner.

The Chinese government has developed some of the most sophisticated forms of internet censorship in order to control or eliminate access to information on sensitive topics such as the Tiananmen Square protests of 1989 Falun Gong Tibet, Taiwan, pornography or democracy. They have also enlisted the help of some American companies like Microsoft, who have subsequently been criticized by proponents of freedom of speech.

In Zambia, the freedom of expression and freedom of the press are guaranteed by the constitution. Article 20 (1) provides that:

“Except with his consent, no person shall, be hindered of his freedom of expression, that is to say, freedom to hold opinions without interference, freedom to receive ideas

and information without interference, freedom to impart and communicate ideas and information without interference, whether the communication be to the public generally or to any person or class of persons, and freedom from interference with his correspondence.”

Article 20 (2) protects freedom of press as follows:

“Subject to the provisions of this constitution, no law shall make any provision that derogates from the freedom of the press.”

In order to avoid abuses within society, freedom of expression just like other rights is not absolute. The law therefore places some legitimate restriction on these rights. However, such restrictions must meet a three- part test in order to be valid. First, any restriction must be provided by law. Second, any restriction must serve one of the legitimate purposes expressly enumerated in the text. Lastly, any restriction must be shown to be necessary.<sup>21</sup>

According to the European Court of Human Rights, in order for a restriction to be prescribed by law, it must be adequately accessible and foreseeable, that is, formulated within sufficient precision to enable the citizen to regulate his conduct. To be necessary, a restriction does not have to be indispensable, but it must be more than merely reasonable or desirable.<sup>22</sup> A pressing social need must be demonstrated, the restriction must be proportionate to the legitimate aim pursued and the reasons given to justify the

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<sup>21</sup> Professor A Chanda, *Freedom of Expression and the Law in Zambia*, 2006, p 2

<sup>22</sup> *ibid*

restrictions must be relevant and sufficient. In any given case, public interest must be considered. Where the right subjected to restriction involves a matter of undisputed public concern, that right may only be restricted if it appears absolutely certain that its allowance would have the adverse consequences legitimately feared by the state.

The Zambian constitution permits derogations of various fundamental human rights including the freedom of expression and the freedom of the press. Article 20 (3) provides that:

“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 the law in question makes provision-

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

From the above, it is quite clear that the Zambian constitution offers a very wide derogation clause which if construed broadly, completely emasculates the protection of freedom of expression and the press contained in clauses 1 and 2. The interests listed in the derogation clause such as, 'public safety', or 'public order' are not adequately articulated and defined. Once given a broad interpretation, almost any restriction can be justified on the basis of those interests given. The Zambian standard is less stringent than that in international instruments as all that has to be shown is that the restriction is merely desirable or reasonable. It is not necessary to demonstrate a pressing social need or to give relevant and sufficient reasons for the restriction.<sup>23</sup>

The Zambian legal system imposes wide restrictions on freedom of expression. Most of such laws were enacted during the colonial days and the main purpose of this colonial legislation was to suppress the African struggle for independence. However, the repressive laws were not repealed at independence. Instead, they were either retained in their original form or reinforced by the UNIP government.<sup>24</sup> Even after the onset of political pluralism, the laws were not repealed and this has been attributed mainly to lack of political will. Many liberal democracies such as The United States of America recognise that restrictions to speech should be the exception and free expression the

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<sup>23</sup> Professor A Chanda, *Freedom of speech and the Law in Zambia*, 2006

<sup>24</sup> *ibid*

rule. For instance, the United States First Amendment theoretically grants absolute freedom, placing the burden upon the state to demonstrate when (if) a limitation of this freedom is necessary.

The derogations under the Zambian constitution have been criminalised as follows;

(1)Sedition- this is prohibited by Section 57 of the Penal Code<sup>25</sup>. The Penal Code prohibits any seditious acts done with intention, whether this is done verbally or in print form. Seditious intention is defined in very broad terms, but two of the most commonly used definitions are “to advocate the desirability of overthrowing the government by unlawful means” or “to bring into hatred or contempt or to excite dissatisfaction against the government”.<sup>26</sup> However, in determining whether the intention with which the act was done was seditious or not, every person shall be deemed to intend the consequences which naturally follow from his conduct at the time and under the circumstances in which he so conducted himself.<sup>27</sup> These provisions are serious fetters on freedom of expression because in any democratic society, it is usually normal for the opposition for instance, to create dissatisfaction among the electorate.

(2)Power to ban publications,- Section 53 (1) of the Penal code grants the President absolute discretion to prohibit any publication or series of publications published within or outside Zambia that he considers to be contrary to public interest. What constitutes

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<sup>25</sup> Chapter 87 of the Laws of Zambia

<sup>26</sup> Section 60 (1) of the Penal Code

<sup>27</sup> Ibid Section 60 (2)

public interest is solely within his discretion.<sup>28</sup> This section too is clearly against the spirit of true democracy as the existence of the press is entirely up to the president and is open to gross abuse especially if the judiciary is not strong enough to assert itself without any intimidation.

(3)Defamation, -this is targeted at protecting the reputation of other persons which includes the reputation of the president. Section 69 of the Penal code criminalises the defamation of the president whether by writing, print, word of mouth, or in any manner. The concept of defamation is a very complex one that has come up in the Zambian courts very often in the past decade. Defamation, like all the other derogations in the constitution, has chilling effects on the freedom of expression as will be shown in chapters to come.

From the foregoing chapter it can be seen that the importance of freedom of speech in a democratic society and its protection therein can not be overemphasised as it is one of the cardinal aspects of a true democracy not to mention it is every human being's right to express oneself freely without fear of persecution. It is for this reason that the law seeks to protect and uplift the freedom of speech. This right however is not absolute and this has led to its abuse in many countries. As has been shown, the Zambian constitution has wide derogations which tend to erode the essence of the free speech as it is construed in a democratic society.

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<sup>28</sup> Supra note 7

Therefore in conclusion, despite the fact that it is universally accepted that the right to speak and express oneself freely is a fundamental right, we cannot escape from the fact that its protection is far from flawless, and what is worse is that such flaws are found in the abuse and misapplication of the law, a good example being the law of defamation.



### **CHAPTER THREE**

In this chapter, the main concern solely revolves around the topic of defamation. This includes its definition, what it constitutes as well as its defences. In addition, its practical application will be given with the aid of case law and illustrations.

Defamation is the publication of a statement which reflects on a person's reputation and tends to lower him in the estimation of right-thinking members of society generally or tends to make them shun or avoid him.<sup>29</sup> In order for an action to succeed, three elements must be satisfied;

**1.The statement must be defamatory-** this requires that the statement must be one that tends to injure the reputation of the plaintiff. Whether or not a statement is defamatory depends upon how right thinking members of society are likely to take it.<sup>30</sup> The standard to be applied is that of a right minded citizen, a man of fair average intelligence, and not that of a special class of persons whose values are not shared or approved by fair-minded persons generally. Lord Reid in **Ltd Lewis V Daily Telegraph**,<sup>31</sup> indicated how a trial judge might proceed in deciding whether words in their ordinary and natural meaning are capable of bearing a defamatory meaning, he stated thus;

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<sup>29</sup> W.V.H Rogers, 2002, Winifield and Jolowicz on Tort, 16<sup>th</sup> Ed

<sup>30</sup> R.K Bangia, 2003, Law of Torts, 17<sup>th</sup> Ed

<sup>31</sup> (1964) AC 234 at 258

“What the ordinary person would infer without special knowledge has generally been called the natural and ordinary meaning of words. But the expression is rather misleading in that it conceals the fact that there are two elements in it. Sometimes it is not necessary to go beyond the words themselves, as where the [Claimant] has been called a thief or a murderer. But more often the sting is not so much in the words themselves as in what the ordinary person will infer from them, and that is also regarded as part of their natural and ordinary meaning. In this case it is, I think, sufficient to put the test in this way. Ordinary men and women have different temperaments or outlooks. Some are unusually suspicious, and some are unusually naive. One must try to envisage people between these two extremes and see what the most damaging meaning they would put on the words in question is.”

2. **The statement must refer to plaintiff-** In an action for defamation the plaintiff has to prove that the statement of which he complains referred to him. It is immaterial that the defendant did not intend to defame the plaintiff. If the person to whom the statement was published could reasonably infer that the statement referred to the plaintiff, the defendant is nevertheless liable. In **Hulton V Jones**<sup>32</sup> H were newspaper proprietors and published a humorous account of a motor festival at Dieppe in which imputations were cast on the morals of one Artemus Jones a church warden. This person was intended to be and was believed by the writer of the article and the editor of the paper to be, purely fictitious. In fact there was a barrister named Artemus Jones, who was not a church warden, did not live in Peckham and did not take part in the Dieppe motor festival. He sued H for libel and his friends swore they believed the article referred to

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(1909) 2KB 444

him. According to Lord Alverstone, CJ,<sup>33</sup> “If the libel speaks of a person by description without mentioning the name in order to establish a right of action, the plaintiff must prove to the satisfaction of a jury that the ordinary readers who knew him would have understood that it referred to him.”

There is abundant authority to show that it is not necessary for everyone to know to whom the defamation (in this case the article) refers to, this would in many cases be impossible. It is enough that a substantial number of persons who knew the plaintiff, reading the article, would believe that it refers to him.<sup>34</sup> However, the defendant need not have intended the statement to refer to the plaintiff, provided that people who know the plaintiff understand that he was pointed at by the words used.

A statement may be defamatory of a class of people, for example, ‘All doctors are quacks.’ A question may then arise as to whether any individual doctor may sue.<sup>35</sup> It has however been held that when the words refer to a group of individuals or a class of persons, no member of that group or class can sue unless he can prove that the words could reasonably be considered to be referring to him.<sup>36</sup> Willes J. said in **Eastwood V Holmes**,<sup>37</sup> “if a man wrote that all lawyers were thieves, no particular lawyer can sue him unless there was something to point to the particular individual.”

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Jones V Hulton & Co. (1909) 2 KB 444 at 454  
R.K. Bangia, 2003, Law of Torts, 17<sup>th</sup> Ed  
John Cooke, 1995, Law of Tort, 6<sup>th</sup> Ed  
Eastwood V Homes (1858) 1 F & F 347  
(1858) 1 F&F 347 at 349

The ultimate question is not what the defendant intended but what the words can be reasonably understood as conveying. Therefore a person may be liable at common law even if he intended to write or speak about a fictitious person if a reasonable reader or speaker might think he referred to the claimant. It must be noted that mere coincidence of name is not necessarily enough to lead to this conclusion otherwise it would be impossible to write on fiction. One of the factors that influenced the jury's decision in the Hulton case was the fact that the claimant had once worked for the news paper in which the article appeared. Furthermore, the question whether a publication is defamatory of a particular person depends not only on the words used but also the surrounding circumstances.

3. **The statement must be published** – There is no actionable wrong of defamation unless the words are communicated to at least one person other than the claimant. Communication to the claimant does not amount to publication because defamation is injury to the reputation and reputation consists in the estimation in which others hold him and not a man's own opinion of himself.<sup>38</sup> Dictating a letter to one's typist is enough to be called publication. If a third person wrongfully reads a letter meant for the plaintiff, the defendant is not liable.<sup>39</sup>

Communication of defamatory matter by a husband to his wife or vice versa is not publication: what passes between them is protected on the ground that any other rule

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R.K Bangia, Law of Torts,  
Ibid p 167

might lead to disastrous results to social life.<sup>40</sup> But communication by a third party to one spouse of matter defamatory of the other is a publication.

The statement must be intelligible to the recipient of it. There is no publication if it is in a foreign language which he does not understand or if he is too deaf to hear it or too blind to read it, though in the case of books, newspapers or broadcasts it will of course be inferred that it was intelligible to the majority of recipients.<sup>41</sup>

Although publication usually occurs intentionally, it can also happen otherwise than intentionally. For example D sends a letter to C containing defamatory imputations about C, D would be liable if the letter is not marked private ( or with some similar expression) and is opened in the ordinary course of business by an employee of C.<sup>42</sup> It is a question of what the defendant should have reasonably foreseen. In **Huth V Huth**<sup>43</sup> there was no publication where the letter was opened by an inquisitive butler, even though it was not sealed.

A defamatory meaning can be conveyed by any medium, but it is the choice of medium which determines whether the action lies in slander or libel. Libel is committed when the defamatory matter is made in some permanent form while slander is committed in some transient form.<sup>44</sup> Examples of libel are writing, printed material or other mark or sign exposed to view, or a picture, waxwork, statue or effigy. On the other hand,

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<sup>40</sup> Wennhak V Morgan (1888) 20 QB 635 at 639

<sup>41</sup> W.V.H. Rogers, Winifield & Jolowicz on Tort, London: Sweet & Maxwell, 2002, p 426

<sup>42</sup> ibid

<sup>43</sup> (1915) 3 KB 32

<sup>44</sup> ibid p 405

defamation in the sign language of the deaf and dumb and mimicry and gesticulation generally would amount to slander because the movements are more transient. The Court of Appeal in **Youssouppoff V Metro-Goldwyn-Mayer Pictures Ltd**<sup>45</sup> had no doubt that the showing of defamatory matter embodied in a film with a sound track was libel:

“There can be no doubt that, so far as the photographic part of any exhibition is concerned, that is a permanent matter to be seen by the eye, and is the proper subject of an action for libel, if defamatory. I regard the speech which is synchronized with the photographic reproduction and forms part of one complex, common, exhibition as an ancillary circumstances, part of the surroundings explaining that which is to be seen”

The consequences of the distinction between libel and slander are that libel is a crime and slander is not; and libel is always actionable *per se*, whereas in most cases of slander, special damage must be shown. As to criminal liability, it is of very limited practical importance since very few prosecutions occur and in the case of proceedings against a newspaper or its editor, leave of a High court judge must be obtained.<sup>46</sup>

In the case of slander, the special damage must not be too remote a consequence of the slander. In **Lynch V Knight**<sup>47</sup> the court held that, “to make the words actionable by reason of special damage, the consequences must be such as, taking human nature as it is, with its infirmities and having regard to the relationship of the parties concerned,

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<sup>5</sup> (1934) 50 TRL 581

<sup>6</sup> W.V.H. Rogers, Winifield & Jolowicz on Tort, London: Sweet & Maxwell, 2002, p 407

<sup>7</sup> (1861) 9 HLC 597

might fairly and reasonably have been anticipated and feared would follow from the speaking of the words.” There are however four exceptional cases in which slander is actionable without proof of special damage. These are:

1. Imputation of a criminal offence punishable with imprisonment - this entails that there must be a direct accusation of the offence and not merely suspicions. Further it must be an offence punishable by imprisonment in the first instance and not merely because for example, a fine imposed on conviction has not been paid.<sup>48</sup> It has been duly observed that and perhaps established that the basis of this exception largely depends on the probability of social ostracism of the claimant and not his jeopardy of imprisonment.<sup>49</sup>

2. Imputation of infectious disease - This disease should be one that is likely to prevent people from associating with the claimant. This category has always included leprosy, venereal diseases, and plague. However due to the obscurity of the scope of this exception it is not clear how far it extends especially in the light of HIV and AIDS being such a controversial disease.

3. Imputation of unchastity to a female – this exception relates to women and girls and includes imputation of adultery. It has also been held in the case of **Kerr V Kennedy**<sup>50</sup> that this exception now includes imputation of lesbianism. 4. Imputation of unfitness or incompetence- This exception is the most important one as it is the most widely

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<sup>48</sup> W.V.H. Rogers, Winifield & Jolowicz on Tort, London: Sweet & Maxwell, 2002 p408

<sup>49</sup> Gray V Jones (1939) 160 L.T 361

<sup>50</sup> (1942) 1 K.B 409

invoked. It is actionable *per se* to impute to any person unfitness, dishonesty or incompetence in any office, profession, calling trade or business carried on by him at the time when the slander was published. At common law its scope was severely restricted by the rule that the slander must be spoken of the claimant in the way of his office so that it was not, for example, slander actionable *per se* to say of a schoolmaster that he had committed adultery with one of the school cleaners<sup>51</sup>. Now, however, in an action for slander in respect of words calculated to disparage the claimant in any office, profession, calling, trade or business held or carried on by him at the time of publication, it shall not be necessary to allege or prove special damage, whether or not the words are spoken of the claimant in the way of his office, profession, calling, trade or business.

A statement may be *prima facie* defamatory or defamatory in the light of additional facts or circumstances known only to persons to whom the words are published. Where the words are said to have this hidden meaning, this is known as an *innuendo*<sup>52</sup>. The plaintiff must specifically plead the meaning he attributes to the words used and must prove the existence of facts to support that meaning. There is a distinction drawn between the false innuendo and the true innuendo. The former is where the plaintiff pleads that the words in their natural and ordinary meaning have a particular meaning which can be discovered without the need for additional evidence.<sup>53</sup> The natural and ordinary meaning may include any implication or inference which a reasonable reader guided not by any special but only by general knowledge, and not fettered by any strict

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<sup>1</sup> Jones V Jones(1916)2 A.C.481

<sup>2</sup> Cooke.J, Law of Tort, London: Pitman publishing, 1995, p256

<sup>3</sup> Ibid



legal rules of construction would draw from the words.<sup>54</sup> Identifying the innuendo in a given case is one of the most difficult tasks faced by libel lawyers. An innuendo in the legal sense arises only when the defamatory nature

The manner and context in which the alleged defamatory words are spoken is also very important. It is commonly said that mere vulgar spoken abuse is not defamation, furthermore, spoken words which are *prima facie* defamatory are not actionable if it is clear that they were uttered merely as a general vituperation and were so understood by those who heard them. The same applies to words spoken in jest,<sup>55</sup> it is generally said that written words cannot be protected as abuse because the defendant had time for reflection before he wrote and his readers may know nothing of any dispute which caused him to write as he did.

There are certain special defences which are peculiar to an action for defamation, but these defences do not preclude a defendant from denying in addition that the words are defamatory, or asserting that they do not refer to the claimant, or that they were not published. The defences are as follows;

1. **Justification or Truth**- there is no burden of proof on the claimant to establish that the defendant's statement is false, all he has to prove is the publication plus the defamatory nature of the statement. However, as the essence of defamation is a false statement, the defendant may always plead the truth of the statement as a defence in

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Jones V Skelton (1963) 1 WLR 1362 at 1370  
W.V.H. Rogers, Winifield & Jolowicz on Tort, London: Sweet & Maxwell, 2002, p407

civil proceedings. If the statement is true, no injury is done to the claimant's reputation, it is only brought to its true level. It matters not that the statement was made maliciously or even that the defendant did not believe it to be true, so long as it is true the defence of justification is complete.<sup>56</sup>

In the defence of justification, the defendant must assert that the statements are true both in substance and in fact. He must show not merely that the words are literally true, but also that there are no significant omissions which would affect the truth of the statement taken as a whole. Apart from this, that which is proved to be true must tally with that which the defendant's statement is interpreted to mean.

2. **Fair Comment**- This defence is meant to cover criticism of matters of public interest in the form of comment upon true or privileged statement or fact, such comment being made honestly by a person who did not intend the statements to be untrue and who was not otherwise actuated by malice.<sup>57</sup> The malice element makes the defense similar to that of qualified privilege. Therefore, the defendant must show that the statement alleged to be defamatory is in fact legitimate comment.

For comment to be fair it must be first of all be based on true facts in existence when the comment was made. One cannot invent untrue facts about a person and then comment upon them. To this, however, there is one necessary exception, namely, that fair comment may be based upon an untrue statement which is made by some person

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<sup>56</sup> Keenan D, English Law, Harlow: Longman, 2004, p566

<sup>57</sup> Ibid, p567

upon a privileged occasion, for example a statement made by a witness in the course of judicial proceedings and properly attributed to him in a fair and accurate report of those proceedings.<sup>58</sup>

3. **Privilege** – In addition to cases covered by the defence of fair comment, the law recognizes that there are other occasions on which freedom of communication without fear of an action for defamation is more important than the protection of a person's reputation. Such occasions are said to be privileged, and the privilege maybe either absolute or qualified

Absolute privilege covers cases in which complete freedom of communication is regarded as of such paramount importance that actions of defamation cannot be entertained at all. Thus, a person defamed on an occasion of absolute privilege has no legal redress, however outrageous the statement and however malicious the motive.<sup>59</sup>

Qualified privilege, on the other hand, though it also protects the maker of an untrue defamatory statement, does so only if the maker of the statement acted honestly and without malice. If the claimant can prove malice the privilege is displaced and he may recover damages. The burden of proof is on the claimant to prove malice.

Absolute Privilege may be divided into three broad headings;

Firstly, no action will lie for defamation in respect of anything said in parliamentary proceedings, either in debate or committee or in petitions to parliament. Thus if a

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<sup>58</sup>W.V.H. Rogers, Winifield & Jolowicz on Tort, London: Sweet & Maxwell, 2002 p439

<sup>59</sup> ibid p443

member of parliament repeats outside the house what was said in the house, he is not protected by privilege. Secondly, there is judicial privilege. This applies to statements made in the course of judicial proceedings as well as documents used. Judicial proceedings cover ordinary courts of law and tribunals acting judicially. The privilege does not extend to the activities of administrative bodies. Communications between solicitor and client attract privilege although it is not certain whether this is absolute or qualified. Lastly, statements made by one officer of state to another in the course of duty are also absolutely privileged.

In terms of the remedies available for defamation, damages awarded by the court are the normal remedy. The principle that guides the court when assessing damages is simply that the award must be reasonable and moderate.

Having looked at the freedom of speech and having given an over view of defamation this paper now turns to discussing how defamation affects freedom of speech and further how this dichotomy can be resolved.

## CHAPTER FOUR

In many countries, the right to freedom of speech and expression is mainly associated with the press. To a great extent this is because members of the press work directly within this right, meaning that the effectiveness of the press greatly depends on whether the right to freedom of speech is protected or not. With the onset of multi party democracy, there has been an increased call by the public to broaden the freedom of speech and expression. In **William Banda V The Attorney General**, the court observed as follows,

“The freedom of expression rests on the assumption that the widest possible dissemination of information from divergent and antagonistic sources is essential to the welfare of the public. Such freedom is the foundation of a government of a free people. The purpose of such a guarantee is to prevent public authorities from assuming guardship of the public mind.”<sup>60</sup>

The term freedom of press was traditionally used to refer to the freedom of newspapers (the printed media) to gather and report information without interference. Its use was unquestioned until new forms of communication media, initially radio, then television, emerged and begun to assume a place equally important if not more important than news papers.<sup>61</sup> Since then Press freedom has ceased to refer strictly to liberty of

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992 HP 1005 at p 14

MISA Zambia submission to the Committee on Information and Broadcasting Services, 2006; p 2

newspapers to report, and is now used as a generic term referring to freedom of different types of communication media to publish information without any impediments. It is now commonplace to speak of media freedom as opposed to press freedom because the former is more encompassing.

Freedom of the media is visible in news papers, television, radio, magazines as well internet websites. In cases where the media is regulated by law, it can only flourish with the blessing of the law especially the constitution. However, not even the law can completely protect the media from defamation due to the importance of social standing.

The Zambian media have never been explicitly protected by the constitution. Press freedom is inferred from the general freedom of expression. Zambia can learn from more advanced democracies such as the United States of America and South Africa which have both taken a step further and have explicitly provided for the freedom of the press and prohibit the enactment of any laws that derogate from that right. However, the main problem lies in the fact that the past governments had lacked political will to amend existing laws.

The real dilemma lies in the fact that the Zambian constitution, like many others, guarantees both the freedom of expression and the right to ones reputation without stipulating whether such reputation belongs to a public or private individual.

The European Court of Human Rights distinguishes between private individuals and public figures, especially politicians. In **Ligens V Austria**<sup>62</sup>, the court ruled that the limits of acceptable criticism are wider as regards a politician as such than as regards a private individual. The reason why politicians must have a greater tolerance for criticism is because freedom of the press affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of political leaders.<sup>63</sup> More generally, freedom of political debate is at the very core of the concept of a democratic society. The court further stressed the fact that a careful distinction must be made between facts and value-judgments. The existence of facts can be demonstrated, whereas the truth of value-judgments is not susceptible of proof. The reasoning behind this is that a politician inevitably and knowingly lays himself open to close scrutiny of his every word and deed by not only journalists but also the public at large. Therefore, he must have a greater level of tolerance than any ordinary member of society.

The courts in the United States have adopted a similar approach in cases of defamation. In **New York Times V Sullivan**<sup>64</sup>, the Supreme Court held that public officials, in order to sustain an action for defamation, must prove the falsity of the alleged defamatory statement as well as actual malice, that is, that the defendant published a falsehood with knowledge that it was false or with reckless regard of its truth or falsity.

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European court  
Chanda, Freedom of Expression and the Law in Zambia, 2006, at p7  
(2004) 376 US 254

This rule was extended in **Gertz V Robert Welch Inc**<sup>65</sup> where the Supreme Court stated as follows;

“We have no difficulty in distinguishing among defamation plaintiffs. The first remedy of any victim of defamation is self-help using available opportunities to contradict the lie or correct the error and thereby minimize its adverse impact on reputation. Public officials and public figures usually enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements than private individuals normally do. Private individuals are therefore more vulnerable to injury and the state interest is correspondingly greater. More importantly, an individual who decides to seek governmental office must accept certain necessary consequences of that involvement in public affairs. He runs the risk of closer scrutiny than might otherwise be the case. Those classified as public figures stand in a similar position. Even if the foregoing generalities do not obtain in every instance, the communications media are entitled to act on the assumption that public officials and public figures have voluntarily expose themselves to increased risk of injury from defamatory falsehoods concerning them.”

It is obvious that the above decisions are very protective of freedom of expression generally and freedom of press particularly. This is evident from the fact that the approach taken by the American and European courts emphasise that public figures expose themselves to a higher level of scrutiny and criticism than private members

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1974) 418 US 323



hence members of the press are given relatively more room within which to report on public figures.

The Zambian Courts have however taken a different view. In the case of **Michael Chilufya Sata V Post Newspaper Limited and Printpak Ltd**,<sup>66</sup> the plaintiff, who was at all times a politician and public official holding a ministerial appointment commenced three separate suits for defamation against the defendants for publishing in their newspaper, The Post, various articles and a cartoon. The court had to consider whether the law of defamation as currently applied derogates from *inter alia*, the freedom of press and if so, what modifications would reasonably be required to be imposed in order to give effect to the intention of the constitution.

The defendant pleaded justification and fair comment on matters of public interest. The three actions were later consolidated and heard by the chief justice. They submitted that because of article 20 of the Constitution specifically recognizes among other things, the principle of the freedom of the press, time had come to modify the common law principles of the law of defamation in their application to the plaintiffs who are public officials as to their right of action, the burden and standard of proof, and the latitude the press should be permitted to subject public officials to criticism and scrutiny. In this regard, they urged the court to apply the approach taken in the Sullivan case.

Chief Justice Ngulube, in passing judgment, accepted some of the principles in the Sullivan case but rejected others. He particularly rejected the principle that sought to

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992 HP 1395

legalise character assassination of public officials or to shift the burden of proof so that knowledge or falsity or recklessness should be proved by the plaintiff and to a degree of convincing clarity.

The Zambian court endorsed the rejection of Sullivan in the Australian case of **Andrew Theophanus V the herald and weekly times and another**<sup>67</sup> in which the high court of Australia stated, *inter alia*,

“The law of defamation, whether common law or statute law, must conform to the implication of freedom, even if conformity means that plaintiff experience greater difficulty in protecting their reputation. The interests of the individual must give way to the requirements of the constitution. At the same time, the protection of free communication does not necessitate such a subordination of the protection of the individual reputation as appears to have occurred in the United States. For that reason the defendant should be required to establish that the circumstances were such as to make it reasonable to publish the impugned material without ascertaining whether it was true or false.

The publisher should be required to show that, in the circumstances which prevailed, it acted reasonably, either by taking some steps to check the accuracy of the impugned material or by establishing that it was otherwise justified in publishing without taking such steps or steps which were adequate. To require more of those wishing to participate in political discussion would impose impractical and, sometimes, severe

straint on commentators and others who participate in discussion of public affairs. Such a restraint would severely cramp that freedom of political discussion which is so essential to the effective and open work of modern government. At the same time, it cannot be said to be in public interest or conducive to the working of democratic government if anyone were at liberty to publish false and damaging defamatory matter free from any responsibility at all in relation to the accuracy of what is published. In other words, if a defendant publishes false and defamatory matter about a plaintiff, the defendant should be liable in damages unless it can establish that it was unaware of the falsity, that it did not publish recklessly (that is, not caring whether the matter was true or false), and that the publication was reasonable in the sense described. These requirements will redress the balance and give the publisher protection, consistently with the implied freedom, whether or not the material is accurate<sup>68</sup>.”

Chief Justice Ngulube favored the Australian approach and in concluding the matter, he said as follows;

I have come to the conclusion that there is no need to formulate a new set of principles which impose new fetters on the right of a public official to recover damages. However, in order to counter the inhibiting or chilling effect of litigation, I am prepared to draw a firm distinction between, an attack on the official public conduct of an official and reputations that go beyond this and attack the private character of such official which such attack would be universally un-sanctioned. I am also prepared, when considering the

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Footnote 60 at p119

defence of fair comment on a matter of public interest arising from the conduct from the conduct of a public official, to be more generous and expansive in its application.”<sup>69</sup>

The court was of the opinion that in cases where the plaintiff is a public officer and has been attacked in that capacity, the constitutional protection of reputation and free speech or press can be best balanced by a more generous application of the existing defenses.

The refusal of the court to apply the principles laid down in the Sullivan case can be seen as an impediment for the protection of freedom of expression and the press. The solution offered by the Chief Justice does not offer strong protection for free expression and it leaves a lot of room for discretion, meaning that future outcomes of similar cases will depend on whether or not the judge hearing the case is a strong libertarian.

In an action for defamation, two types of damages may be awarded, namely, compensatory and exemplary. Exemplary damages are awarded to punish the defendant and to deter him and others from similar behaviour in the future.<sup>70</sup> The House of Lords in **Ltd Rookes V Barnard** <sup>71</sup> gave a limited number of cases where exemplary damages can be awarded. They are categorised as – oppressive, arbitrary or unconstitutional action by the servants of government, where the defendant’s action has been calculated by him to make a profit for himself which may well exceed the compensation payable

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<sup>69</sup> 1992 HP 1395 pp 23-24

<sup>70</sup> V.H Rogers, Winifield and Jolowicz on Tort, London : Sweet and Maxwell, 2002, p751

<sup>71</sup> 1964) A.C 1129 at 1221

to the plaintiff and in cases where exemplary damages are expressly authorized by statute.

The law as laid down in the Rookes case was rejected by the Supreme Court in **Times Newspaper of Zambia V Kapwepwe**.<sup>72</sup> The court considered this approach to be very narrow and that the categories laid down were illogical and created illogical results. The consequence of this is that any infuriating conduct by definition entitles the court to award exemplary damages. The granting of excessive awards to plaintiffs may also have a negative impact on freedom of expression and press as it may dissuade members of the press and the public at large from writing objectively. It may also inhibit journalists from engaging in investigative journalism and public debate due to fear of law suits which may result in them being asked to pay huge sums of money to the plaintiff in the name of exemplary damages.

Apart from this, the Penal code criminalizes libel and provides that any person who by print, writing, painting, effigy, or by any means otherwise than solely by gestures, spoken words, or other sounds, unlawfully publishes defamatory matter concerning another person, with intent to defame that other person, is guilty of libel.<sup>73</sup> This law has been criticized on the ground that the law on civil defamation is sufficient to protect the reputation of individuals and as such it is not necessary to criminalize libel. In practice,

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<sup>72</sup> (1973) Z.R. 292

<sup>73</sup> Chapter 87 of the Laws of Zambia, Section 191

prosecutions for criminal libel have been instituted mainly against those who have allegedly defamed politicians of the ruling party.<sup>74</sup>

There is also what is referred to as seditious libel. This is criminalized by virtue of Section 57(1)(c) of the Penal Code.<sup>75</sup> The section prohibits the printing, publishing, selling, distributing or reproducing any seditious publication. This section is a serious fetter on press freedom and freedom of speech generally. What makes it worse is the fact that this provision of the law not only prohibits peaceful opposition of the government, but also the fact that the truth is not a defence.

Finally, section 69 of the Penal code seeks to protect the reputation of the president by criminalising the defamation of the President. The courts have time and again upheld the constitutionality of section 69 on the ground that the constitution elevates the President above everyone and that it is therefore justifiable and legitimate to seek to protect his reputation. Moreover allowing people to defame the President may lead to the breakdown of law and order as supporters of the president may physically attack those defaming the President.<sup>76</sup>

The provisions of Section 69 of the Penal code are not in the spirit of a true democracy because the reputation of a President depends on how the President conducts himself during his term of office. Those who run for any public office must be ready to lose a good portion of their privacy. Further the notion that a President is above all is

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<sup>74</sup> A. Chanda, *Freedom of Expression and the Law in Zambia*, 2006, p13

<sup>75</sup> Chapter 87 of the Laws of Zambia

<sup>76</sup> Supra note 15

misplaced as he is not above the law and is a servant of the people who made it possible for him to be in that particular office.

Therefore, in conclusion, this Chapter has highlighted the negative effect of some of the provisions of the law relating to defamation. It has been noted that members of the press being the ones most active in reporting on public figures are the most affected. Their right to investigate and report freely is threatened by the stringent laws that greatly infringe on the freedom of expression and freedom of the press.

## **CHAPTER FIVE**

This chapter focuses on the findings of the research and sums up these findings in order to arrive at a comprehensive conclusion. In addition, the researcher also makes recommendations that are intended to suggest means and ways of resolving or easing the matter at hand. The research sought to establish the competing interests of the law of defamation against the freedom of speech and expression with special attention to press freedom

### **CONCLUSION**

The findings from the research revealed that freedom of speech is very important not only in society as a whole but also for the self actualisation of the individual. Each human being is born with the right to express himself, receive and share information. This right is of such great importance that it is constitutionally guaranteed. It is of particular importance in a democratic country like Zambia. However, the research has found that there is no absolute protection of the freedom of speech and expression. Hence, there is an accepted degree of curtailing this right in order to accommodate the rights and interests of other members of society.

The researcher further found that amongst the factors that have a negative impact on the right to free speech is the law relating to defamation. The law of defamation seeks to protect the reputation of individuals and as such there it is inevitable that it restricts



what can be said and written about other people. The only problem arises as to how to strike a balance between the two.

The press owes its existence to the need to impart information to the public and allow for the public to express themselves through their facilities. In Zambia the private media have been slapped with numerous libel suits and this has been worsened by the reluctance of the courts to take a more flexible and embracing approach in interpreting the law. The fact that the Constitution does not expressly guarantee freedom of the press is a major set back and it is more accurate to say that there is a semblance of media freedom in Zambia than to actually say there is media freedom. This is because the perceived media freedom seen in the light of numerous newspapers, magazines, radio stations and television stations in the country, is subject to the whims of the president and the government of the day.

Therefore in conclusion, this paper is of the view that the protection of the freedom of expression in Zambia is unsatisfactory and below the bar in as far as international standards of press freedom are concerned. Furthermore, the courts have shown reluctance in emulating other national and international courts in broadening the boundaries of liberty when interpreting the restrictions of fundamental. It is important to note that this does not give anyone the blanket right to say and write as they please about anyone especially public figures. What it means is that the law of defamation should not be abused so as to infringe on the right to express oneself freely. It further means that the law should allow for the discussion of public figures without necessarily interfering with his right to a good reputation.

It is hoped that this research and its findings will not only be of academic value but also add to the voice of advocacy for reformed media laws as well as the protection of the freedom of speech and expression for all.

## **RECOMMENDATIONS**

1. Firstly, this paper submits that there is an urgent need to amend the constitution in order to include an express provision for the guarantee of press freedom and a further provision of a clause that prohibits the enactment of any law which derogates from the freedom of the media. In this light it is also recommended that the provisions in the Mung'omba draft constitution be adopted by the current Constitution Commission because when this done Zambia will have one of the strongest protections of media freedom in the world.
2. Regarding freedom of speech generally, it is also recommended that the wide derogation clause in Article 20 (3) of the Constitution be amended to reduce the number of instances in which it is permitted to take away the freedom of expression. Further, this paper calls for the definition of terms contained in that article such as 'public order' and 'public safety'. This is to cut down on the amount of discretion given to the courts.

3. In terms of interpretation of defamation laws, the courts have shown some reluctance in taking a more liberal approach in applying the law. Thus it is recommended that the courts set a higher standard of proof for public figures because unlike private individuals, they must accept certain necessary consequences flowing naturally from their positions. One such example is close scrutiny.
4. The reputation of the President is protected by the criminalisation of defamation of the President. This has a stifling effect on the freedom of speech and the press. It is therefore submitted that the defamation of the President be left to be dealt with under civil law just like any other form of defamation.
5. Finally, this paper recommends for the express protection of press freedom and that it is constitutionally protected. This will enable the members of the press to report fairly and without fear of law suits.

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