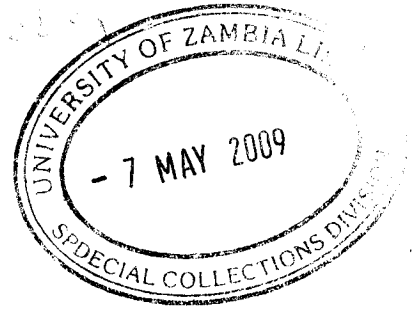


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SCHOOL OF LAW



ANALYSIS OF THE LAW ON DEFAMATION OF THE PRESIDENT

BY

NACHIMATA SIWALE

UNZA

2009

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...*nachimata*.....
Siwale nachimata
February, 2009

ANALYSIS OF THE LAW ON DEFAMATION OF THE PRESIDENT

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A research paper submitted to the University of Zambia in partial Fulfillment of the requirements of the Bachelor of Laws (LLB) Degree programme

School of law
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February 2009

UNIVERSITY OF ZAMBIA

SCHOOL OF LAW

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Dr. P. Matibini

(supervisor)

Date.....

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INTERNATIONAL INSTRUMENTS

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DEDICATION

This research paper is dedicated to my son chilufya, and my husband Kapungwe Nchito.

ACKNOWLEDGEMENT

I sincerely thank my husband Kapungwe Nchito whose untiring support made it possible for this research to be undertaken.

I would like to thank my supervisor Dr. P. Matibini for his supervision.

And lastly but not the least I thank all my friends who have assisted me through out the research.

Abstract

The paper analyses the law on criminal defamation of the President. It is divided into four chapters. Chapter one gives an introduction of the research topic and forms the foundation of the study. There is also the statement of the problem which has put in perspective the problem, which necessitated the conducting of the research. A justification of the research has been provided. The objectives of the research have also been brought out in chapter 1.

Chapter two constitutes a detailed discussion of defamation law. Chapter three looks at both the statutory and case law of defamation. Chapter four constitutes a comparative analysis of defamation law of three jurisdictions namely Australia, the United States of America and the United Kingdom. Chapter five draws the conclusions of the entire study upon which recommendations have been offered.

CHAPTER ONE

1. INTRODUCTION

The study endeavoured to analyze the law on criminalization of defamation of the President as envisaged by section 69 of the Penal Code. Section 69 of the Penal Code seeks to protect the President's reputation and the dignity of his office by providing that: "*any person who with intent to bring the president into hatred, ridicule, or contempt publishes any defamatory or insulting matter, whether by writing, print, word of mouth or in any other manner, is guilty of an offence and is liable on conviction to imprisonment for up to three years*"¹. Every man is entitled to his good name and to the esteem in which he is held Lord by others, and has a right to claim that his reputation shall not be disparaged by defamatory statements made about him to a third person or persons without lawful justification or excuse². Lord Atkin in **Sim v Stretch**,³ defined a defamatory statement as one which injures the reputation of another by exposing him to hatred, contempt, or ridicule, or which tends to lower him in the esteem of right-thinking members of society.

In a democratic state the president is a public figure. He is accountable to the people and should be transparent in his actions. This requires the people including the press, are not subjected to criminal sanctions for making unpalatable remarks about the president⁴. Generally, the perception of section 69 of the Penal Code is that it has been used to harass journalists and others who criticize the president. On this premise, what was of profound concern to this study was to investigate the consequence of criminalizing defamation of the president in a democratic society such as Zambia.

¹ Chapter 87 of the laws of Zambia

² Halsbury's Laws of England 3rd Ed Vol 4p.3

³ [1936] 2 All ER 1237, 1240

⁴ <http://www.zamlji.ac.zm/media/news/viewnews> Retrieved: 26/11/2008

Defamation is a tort which is in two different forms, namely libel and slander. It is important to distinguish libel from slander for two reasons; firstly, because 'libel is a crime as well as a tort. Slander per se is not criminal albeit spoken words may be punishable by common law or statute as being treasonable, seditious or blasphemous. Secondly, libel is actionable per se, that is, without proof of actual damage'⁵. Here, the implication is that no damages are recoverable merely for loss of reputation by reason of the slander and that the plaintiff must prove loss of money or some temporal or material advantage estimable in money.

2 STATEMENT OF THE PROBLEM

The law of defamation is important in that it aims at protecting the reputations of other persons. However; a stringent execution of defamation laws may impede the freedom of expression. In the case of **Fred M'membe and Bright Mwape v. Attorney-General**⁶, section 69 of the Penal Code⁷ was held to be constitutional by the Supreme Court on the grounds *inter alia* that; *it is reasonably required in the interest of public order and is reasonably justified in a democratic state*. However since its inception, there has been no effort to evaluate the impact of the law on criminal defamation of the president with regard to freedom of expression. The study aimed to fill this gap.

⁵Supra note 4
⁶SCZ Appeals Nos. 87 and 107 of 1995
⁷Supra 1

1.3 PURPOSE OF THE STUDY

The purpose of the study was to examine the impact of section 69 of the Penal Code⁸ in a democracy with regard to the freedom of expression as enshrined in Article 20(1) of the Constitution⁹ which states:

“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, whether the communication be to the public generally or to any person or class of persons, and freedom from interference with his correspondence”. In addition, an investigation was made as to whether or not the present law should be maintained.

1.4 OBJECTIVES OF THE STUDY

General Objective

To determine the ideal type of defamation law in a democracy

Specific objectives

- (i) To investigate the significance of criminalizing defamation of the President in a democratic society,
- (ii) To examine the impact of criminalization of the president vis-à-vis the freedom of expression, and
- (iii) Come up with recommendations that would aid in overcoming the flaws if any, with regard to the law on defamation of the president.

⁸ Supra note 4

⁹ Chapter 1 of the laws of Zambia

RESEARCH QUESTIONS

- a) Why should defamation of the president be a criminal offence?
- b) Should criminal defamation be sustained in a democracy?
- c) What is the effect of criminal defamation on the freedom of expression?

1.5 SIGNIFICANCE OF THE STUDY

The outcome of the study is important in the sense that it not only analyses the law on defamation of the president but addresses the subject in relation to freedom of expression. The research also makes recommendations with regard to the present law on defamation of the president.

1.6 SCOPE OF THE STUDY

The research was confined to the effect of the law on defamation of the president in Zambia. It would have been desirable for the study to cover criminal defamation as envisaged in section 191 of the penal code¹⁰. However, this was not possible due to limited time and space. Section 191 of the penal code provides that; *“any person who by print, writing, painting, effigy or by any means otherwise than 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 offence of libel”*.

¹⁰ Supra note 8

1.7 METHODOLOGY

This research is a qualitative one. The main methodology that was employed in this study was desk research. It involves case law, documentary analysis as well as field investigations. Relevant journals, institutional reports and case law were identified and reviewed. Open ended interviews were also carried out with members of the legal profession in Lusaka viz Judges, practising lawyers as well as students from the Faculty of Law at the University of Zambia. The data from interviews was analysed qualitatively.

CHAPTER TWO

THE LAW OF DEFAMATION

2. INTRODUCTION

This chapter discusses the law of defamation as well as the basis of the freedom of expression under international law. Defamation is the communication of a statement that makes a false claim, expressly stated or implied to be factual, that may give an individual or nation a negative image¹¹. Slander refers to a malicious, false and defamatory spoken statement or report, while libel refers to any other form of communication such as written words or images¹². Most jurisdictions allow legal actions, civil or criminal, to deter various kinds of defamation and retaliate against groundless criticism. Lord Atkin in **Sim v Stretch**,¹³ defined a defamatory statement as one which injures the reputation of another by exposing him to hatred, contempt, or ridicule, or which tends to lower him in the esteem of right-thinking members of society.

The common law origins of defamation lie in the torts of slander which refers to a harmful statement in a transitory form, especially speech whereas, libel refers to a harmful statement in a fixed medium, especially writing but also a picture, sign, or electronic broadcast, each of which gives a common law right of action. Whether the case is one of libel or slander the following elements must be proved by the plaintiff:

- (a) The statement must be defamatory;
- (b) It must refer to the plaintiff, that is, identify him; and

¹¹ www.wikipedia.org/defamation Retrieved: 31/10/08

¹² *ibid*

¹³ [1936] 2 All ER 1237, 1240

(b) It must be published. That is, communicated to at least one person other than the plaintiff.

In practice the statement is almost always in the form of words but it can take any form which conveys meaning for instance, a picture, a cartoon or statue.

2.1 Libel and Slander

Libel and slander both require publication. The fundamental distinction between libel and slander lies solely in the form in which the defamatory matter is published. If the offending material is published in some fleeting form, as by spoken words or sounds, sign language, gestures and the like, then this is slander. If it is published in more durable form, for example in written words, film, compact disc and the like, then it is considered libel. Secondly, libel may be prosecuted as a crime as well as a tort, whereas slander can only be prosecuted as a tort. In this regard, the offence of libel is created under chapter XVIII of the Penal Code. Section 191 provides that: *any person who, by print, writing, painting, effigy, or by 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 libel.*

Publication of defamatory matter is unlawful unless the matter is true and it was for the public benefit that it should be published. In addition; it should be privileged on the grounds mentioned in the chapter. No prosecution will lie unless there has been a publication and the person who publishes a libel though he had no part in composing it may be liable to an action¹⁴. To support an action for libel, a publication must be to a third party. The other distinction is that libel is actionable per se, whereas damage must be proved for slander, except in four instances:

¹⁴ Supra note 2 pp. 3

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¹⁴ Supra note 2 pp. 3

- (i) Where there is an allegation that the claimant has committed an imprisonable offence;
- (ii) Where there is an imputation that the claimant is suffering from a contagious disease, such as a venereal disease, leprosy, plague, and HIV/AIDS;
- (iii) Where there is an imputation that a woman has committed adultery or otherwise behaved in an 'unchaste' fashion¹⁵ or
- (iv) Where there is an imputation that the claimant is unfit to carry on his trade, profession or calling.

Thus, if a defamatory statement is made in writing or some other permanent form, libel is committed and the law presumes damages. A libel for which an action will lie is a false and defamatory statement made or conveyed by written words or in some other permanent form, published of and concerning the plaintiff, to a person other than the plaintiff without lawful justification or excuse¹⁶. The similarity of libel and slander is that both are actionable. Also; the purpose of an action of both libel and slander is to vindicate the character of the person defamed, and the proper party to bring an action, is, accordingly, the person defamed. As a general rule the person to be sued as the defendant in an action of libel and slander, or to be prosecuted in an indictment for libel is he who published the defamatory statement.

Publication means the communication of material to a person other than the claimant, in a form capable of being understood by recipients¹⁷. And material includes words and images in fixed form¹⁸. Each entity that takes part in the process of publication can be responsible, including printers, distributors, and vendors. The defence sometimes known as 'innocent dissemination' is

¹⁵ Slander of Women Act 1891

¹⁶ Supra note 3

¹⁷ Bryanston Finance v De Vries [1975] QB 703

¹⁸ ibid

designed to protect booksellers and distributors of materials which may contain defamatory statements¹⁹. But liability can extend to publications using fictional names or even those omitting all names.

A publication's meanings are called imputations, and are characterized in two ways: ordinary meanings and innuendo meanings. Ordinary meanings are those conveyed directly by the publication. They can also be conveyed by inference, where the inference depends only on general community knowledge and common slang expressions.

Innuendoes are the second type of imputation and are often called "legal" or "true" innuendoes²⁰. Innuendoes can arise when an unusual meaning is given to words: for example, by uncommon slang. An innuendo can also arise where facts not included in the publication result in the particular meaning being conveyed to recipients knowing those facts. The test for determining meaning focuses on what an ordinary, reasonable publishee would understand from the whole material, in light of its manner of publication. In other words, the test does not focus solely on the recipients' actual understanding or on the publisher's intention relevant to the question of meaning. The publishee is often described as one, who reads between the lines, interprets publications in light of his or her general knowledge and experience, is neither too suspicious nor naive, and is not avid for scandal.

¹⁹ Section 1 of the Defamation Act, Cap 68 of the Laws of Zambia

²⁰ *Zambia Publishing Co Ltd v Kapwepwe* (1974) ZR 294 (SC)

2.2 Defences

Even if a statement is derogatory there are circumstances in which such statements are permissible in law. Defences excuse publications that otherwise would create liability for defamation. The main defences are justification, fair comment, and absolute or qualified privilege.

(a) Justification: - In many legal systems, adverse public statements about legal citizens presented as fact must be proven false to be defamatory. Proving adverse, public character statements to be true is often the best defense against a prosecution for defamation. Only false statements are actionable, so if the statement made about the claimant is true, there can be no action for defamation. The burden of proof is on the defendant to prove that the statement made is true rather than on the claimant to prove that it was false.

(b) Fair Comment: - the defence of fair comment is concerned with expressions of opinion as distinguished from assertions of fact. The press frequently relies upon the defence of fair comment, as it is designed to protect statements of opinion on matters of public concern. Lord Esher, in *Merivale v Carson*,²¹ stated that the test was: "Would any fair man, however prejudiced he may be, however exaggerated or obstinate his views, have said that which this criticism has said of the work which is criticised?" However, Lord Porter, in *Turner v MGM Pictures*²² said that he would adopt this test, but substitute 'honest' for 'fair' in order to avoid the suggestion that the comment must be reasonable. This position of the law was amplified in the case of *Mwanza v Zambia Publishing Company Limited*,²³ where it was held that; "if

²¹ [1887] 20 QBD 275

²² [1950] 1 All ER 449 at 461

²³ (1981) ZR24 (HC)

the defendant honestly believed his statement to be true, he is not to be held malicious merely because such belief was based on any desirable grounds; or because he was hasty, credulous, or foolish in jumping to a conclusion,...so long as he honestly believed what he said to be true". The defence only applies to comments made on matters of public interest. For instance, comments on works of literature, music, art, plays, radio and television; and also the activities of public figures. A publication made 'maliciously' or recklessly as to whether it was true or false destroys the defence of fair comment.

(c) Absolute privilege: - There are certain occasions on which the law regards freedom of speech as essential, and provides a defence of absolute privilege, which can never be defeated, no matter how false or malicious the statements may be. For instance; the following communications are 'absolutely privileged' and protected from defamation proceedings:

- (i) Parliamentary papers of an official nature. That is, papers, reports and proceedings that Parliament orders to be published such as the National Budget Address;
- (ii) Statements made in the course of judicial proceedings or quasi-judicial proceedings;
- (iii) Communications between lawyers and their clients; and
- (iv) statements made by officers of State to one another in the course of their official duty

(d) Qualified privilege: - Qualified privilege operates only to protect statements, which are made without malice or recklessness as to whether it was true or false. In the decision of *Horrocks v. Lowe*²⁴, the court held that where the defendant had an honest and positive belief in the truth of the statement and had not abused the privileged occasion, he is not to be held malicious.

Further; the following communications will be protected by 'qualified privilege':

- (1) Statements made in pursuance of a legal, moral or social duty, but only if the party making the statement had an interest in communicating it and the recipient had an interest in receiving it;
- (2) Statements made in protection of an interest. For instance, public interests or the defendant's own interests in property, business or reputation;
- (3) Fair and accurate reports of parliamentary proceedings;
- (4) Statements privileged by s15 of the Defamation Act²⁵, which applies to statements made in newspapers and radio and television broadcasts.

²⁴ [1975] AC 135

²⁵ Chapter 68 of the Laws of Zambia

2.3 Mitigating Factors

Section 12 of the Defamation Act²⁶ provides that a defendant may give evidence that he made or offered an apology to the plaintiff in respect of the words complained of, before the commencement of the action or as soon as he had an opportunity to do so. Moreover, the defendant may adduce evidence that the plaintiff has recovered damages or has brought actions for damages against other defendants in respect of the publication of the words complained of.

2.4 Freedom of Expression under International Law

Freedom of expression is guaranteed in all major international human rights instruments which emphasise its importance in a democratic society. The freedom is guaranteed in a number of the United Nations (UN) human rights instruments such as the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR), and regional human rights instruments such as the African Charter on Human and Peoples' Rights (ACHPR), the American Convention on Human Rights (ACHR) and the European Convention on Human Rights (ECHR). The declaration and conventions are considered in the succeeding sections.

²⁶ Ibid

2.4.1 Universal Declaration of Human Rights (UDHR)

Although the UDHR is not binding, the Declaration is taken to indicate goals rather than impose precise obligations upon States²⁷. Article 19 of the UDHR provides: *“Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive, and impart information and ideas through any media and regardless of frontiers”*. Article 19 must however be read in conjunction with Article 29, which provides for a limitation on the freedom imposed by certain responsibilities. Article 29 permits restrictions on the freedom of expression solely for the purpose of securing respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society²⁸.

2.4.2 International Covenant on Civil and Political Rights (ICCPR)

The ICCPR is an elaboration of the civil and political rights set forth in the UDHR and aims at transforming the rights spelt out in the latter into legally binding obligations. Article 19 (2) provides: *“Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in form of art, or through any other media of his choice”*.

²⁷ W Kleinwachter, *“The Birth of Article – A Twin Concept of the United Nations”* (1989) 10 (3) Media Law and Practice 93 at 99

²⁸ Article 29(1) of the UDHR.

2.5.3 African Charter on Human and Peoples' Rights (ACHPR)

Under the Charter, protection of freedom of expression is set forth in Article 9(2) which provides: *"Every individual shall have the right to express and disseminate his opinions within the law"*.

2.4.4 American Convention on Human Rights (ACHR)

Article 13(1) of the ACHR provides:

"Everyone has the right to freedom of thought and expression. This right includes freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one's choice".

2.4.5 European Convention on Human Rights (ECHR)

The Convention for the Protection of Human Rights and Fundamental Freedoms, guarantees the freedom of expression in the following terms:

"Everyone has the right to freedom of expression. This right shall include the freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises".

2.5 Status of International Human Rights Instruments

The Zambian constitution does not address the status of international human rights treaties in the domestic law of the Country. The status of international treaties is therefore governed by the common law. Zambia's common law is based on English common law, a colonial legacy. Under English common law, international treaties are not directly enforceable in the domestic law unless they have been specifically incorporated by the legislature.

Zambia has ratified both the ICCPR and ACHPR but none of these instruments has been incorporated into domestic law. Thus, in accordance with the strict dualistic approach, none of these instruments has direct application in Zambia. There is, however, evidence that courts in the country do not rigidly apply this concept. Courts have in a number of cases referred to, and drawn inspiration from international standards set out in the ICCPR and ACHPR.

Furthermore, courts in the country have sought guidance from other regional international human rights instruments that Zambia is not a party to. For example, courts have on a number of occasions drawn inspiration from ECHR and decisions of the ECHR because many provisions in the Bill of Rights of the Zambian constitution are modeled on the ECHR.

2.6 Conclusion

The Law of defamation and the basis of the freedom of expression under international law have extensively been discussed. It has been shown that despite the importance of the freedom of expression in a democratic society, the protection attached to it in international law is not absolute. This is premised on the rationale that the exercise of freedom of expression should be reconciled with the protection of other equally important social interests. Albeit international law requires a delicate balance to be struck between the exercise of freedom of expression and any restrictions that may be imposed. In an effort to strike this balance, the international human rights instruments that have been referred to set forth essentially the same three-part test for the determination of restrictions. First, any restriction must be prescribed by law; secondly, it must serve one of the legitimate purposes expressly enumerated in their text; and thirdly, it must be necessary²⁹ in a democratic society.

²⁹ MISA 2004 UNDUE restriction Laws impacting on media freedom in the SADC

CHAPTER THREE

CRIMINAL DEFAMATION

3. INTRODUCTION

This chapter looks at case law and the salient provisions of the law on criminal defamation. Many nations have criminal penalties for defamation in some situations, and different conditions for determining whether an offense has occurred. For instance, in Britain, the Italian anarchist Errico Malatesta was convicted of criminal libel for denouncing the Italian state agent Ennio Belelli in 1912. In Canada, the law has been applied on only six occasions in the past century, and all of those cases involve libellants attached to the state such as police officers and judges. In the most recent case, Bradley Waugh and Ravin Gill were charged with criminal libel for publicly accusing six prison guards of the racially motivated murder of a black inmate³⁰.

Section 191 of the penal code³¹ provides that:

any person who, by print, writing, painting, effigy, or by 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 libel.

This offence carries a custodial penalty. A criminal prosecution for libel can be launched in respect of the same libel that is the subject of a civil suit.

³⁰ Moles, Robert N, PhD. "Canada reports: Libel case may set precedent". *Networked Knowledge*. <http://netk.net.au/Canada/Canada15.asp>. Retrieved on 2009-01-03

³¹ Supra note 1 pp.83

3.1 Defamation of the President

Section 69 of the Penal Code states;

“any person who with intent to bring the President into hatred, ridicule, or contempt publishes any defamatory or insulting matter, whether by writing, print, word of mouth or in any other manner, is guilty of an offence and is liable on conviction to imprisonment for up to three years”³².

In order to understand the impact of section 69 of the Penal Code on the freedom of expression, the study took time to examine the origin of the Penal Code. For our purposes, it is important to understand the origin of the Code because some of the offences it creates such as criminal defamation of the President do not exist in the United Kingdom. Moreover; some of the offences still in the Code have been abolished in England.

3.2 The Penal Code

The Penal Code was introduced in 1930; six years after the British Government took direct administration of Northern Rhodesia. It was drafted in the Legal Department of the Colonial Office under the direction of the Secretary of State for Colonies³³. Its preparation was undertaken in pursuance of a decision to replace in East African dependencies the Indian Penal Code, which was in force there, by a Code based on English Law³⁴. The Code was uplifted from Nigeria, where a Code of English Criminal Law had been in operation by 1930 for fourteen years. The volume of English law and English statutory law dealing with criminal matters had by then become so enormous that it was quite impossible to place it at the disposal of an up country

³² *ibid*

³³ REPORT ON THE TASK FORCE ON MEDIA LAW REFORM (Sangwa Report) January, 2000 pp. 24

³⁴ *Supra* note 33 pp. 24

Magistrate when called upon to deal with criminal offences³⁵. The Code was thus a substitute and a comprehensive compilation setting out important principles, likely to be dealt with in criminal matters. The intention was to place in the hands of those officers who discharge judicial functions, in a consolidated form, the statutory provisions then in force in England on criminal matters³⁶. The reckoning was that with a Code, such officers were less likely to overlook a principle or act on a decision which was no longer law.

3.3 Defamation of the President vis-à-vis Freedom of Expression

In the past few years since 1991, a number of journalists have been arrested and charged for violating the provisions of section 69 of the Penal Code. As earlier pointed out; it is an offence under this provision for anyone with intent to bring the President into hatred, ridicule, or contempt to publish any defamatory matter insulting of the President. The insulting matter may be in writing, print, or word of mouth or in any other form or manner. Upon conviction, one may be sentenced to prison for a term not exceeding three years. There is no provision for a fine. The law on defamation of the President is one of the major limitations on the freedom of expression. Such a law has the effect of stifling the freedom of expression as it does not lay any guidelines for determining what constitutes 'insulting manner'. The police have the discretion to decide what publication is defamatory or insulting as well as what is not. This provision of the law has been used to harass citizens who criticise the President especially journalists from the independent media.

³⁵ Supra note 17

³⁶ Supra note 34 pp. 25

The constitutionality of section 69 of the penal code has been challenged both in the High Court and Supreme Court in the cases of *The People v. Bright Mwape & Anor*³⁷; *Fred M'membe & Anor v. The People*,³⁸ and *M'membe, & Others v The People*³⁹. Both courts upheld the constitutionality of the provision on the ground that it was reasonably required to forestall a breakdown of public order. The Supreme Court held that no one could dispute that side by side the freedom of speech was equally a very important issue of public interest in the maintenance of the public character of men for the proper conduct of public affairs, which requires that they be protected from destructive attacks upon their honour and character. The court went on to say that when the public person was the head of State; the public interest was even more self-evident. In the courts view, the Constitution elevates the President above everyone else and therefore; cannot be compared to an ordinary person. For example, the President is immunized from both civil and criminal proceedings while in office. These decisions have been criticized on the basis that they miss the point that the President is a servant of the people and not their master. The aspect of whether or not the President has a good reputation should depend on the incumbent's conduct while in office. It has further been argued that the Supreme Court's judgment that the public character of public men must be protected could easily be misinterpreted to mean that any criticism of the people in government can be punished under this law.

Another contentious provision of the Penal Code that appears to elevate the President above everyone else is found in section 53(1). This provision confers on the President absolute discretion to prohibit any publication or series of publications published within or outside Zambia that he/she considers are contrary to the public interest. The provision has been criticised

³⁷ HPR/36/94

³⁸ [1995-97] ZR 118; SCZ Appeal Nos. 87 and 107 of 1995

³⁹ Fred M'membe, Masauso Phiri & Goliath Munkonge v The People (unreported)

on the premise that what is in the public interest is within the sole discretion of the President. Also, it appears that the courts are unenthusiastic to review the exercise of this presidential prerogative. For example, in the 1981 decision of *Shamwana v. Attorney General*⁴⁰, two political detainees had sent a petition to the National Assembly requesting it to review the state of emergency which had been in existence since independence. The then President banned the petition, whereupon the detainees brought an action before the High Court seeking an order declaring the banning of the petition to be unlawful, wrongful and unconstitutional. However, the Court held that an exercise of powers conferred on the President under section 53 was not open to question and therefore cannot be impugned. It is contended that section 53 is incompatible with democratic principles in the sense that it creates a state of affairs where the existence of the freedom of expression is wholly contingent on the goodwill of the President. The discretion conferred on the President by the section is clearly a threat to the freedom of expression as it is may be subject to abuse, especially in the absence of checks and balances on the exercise of the discretion.

3.4 Damages

Two types of damages may be awarded for defamation viz compensatory and exemplary damages. Compensatory damages may include either one or both of the following; actual pecuniary loss and anticipated pecuniary loss which may result from the wrong which has been done. Exemplary damages are awarded where the conduct of the defendant merits punishment, which is only considered to be so where his conduct is unjustifiable as where it discloses fraud, malice, violence, cruelty, insolence or the like or as it sometimes put, where he acts in

⁴⁰(1981) ZR 41

contumelious disregard to the plaintiff's rights. The object of exemplary damages is to punish the defendant and to deter him from engaging in the same behavior in future. In England exemplary damages are awarded in a limited category of cases. The House of Lords in *Rookes v. Barnard*,⁴¹ limited the cases in which exemplary damages could be awarded to the following categories:

- (1) Oppressive, arbitrary or unconstitutional action by the servants of the government
- (2) Where "the defendant's conduct has been calculated by him to make a profit for himself which may well exceed the compensation payable to the plaintiff" and
- (3) Cases in which exemplary damages are expressly authorized by statute.

The Supreme Court of Zambia in *Times Newspapers (Z) Ltd v. Kapwepwe*,⁴² rejected the law as laid down in *Rookes v. Barnard*⁴³, as it considered it too narrow. The Court said the categories were illogical and produced illogical results and created more problems than they solved. In Zambia; any aggravating conduct by definition entitles the court to award exemplary damages. Exemplary damages may be awarded in any case where the defendant has acted in contumelious disregard of the plaintiff's rights. This is the position in Canada, Australia and New Zealand. Baron, D. C. J, stated at p.301:

I see no reason to limit the kind of case in which such damages may be awarded. Furthermore; in the context of modern commercial and industrial societies and in particular in the context of a young developing society such as ours, I see very positive reasons for declining to lay any such limitations. The actions of large corporations may be every bit as oppressive as those of governmental or quasi-governmental bodies; and I agree with Doyle, C.J., when he said in Cobbet-Tribe v. Zambia Publishing Co. Ltd⁴⁴ ∴

⁴¹ [1964] 1 All 367

⁴² (1973) ZR 292

⁴³ [1964] 1 All 367

⁴⁴ (1973) ZR 9

“Zambian society is in a state of development of much less sophistication than that of England. Its two daily newspapers are in a very powerful position....Daily newspapers, and no doubt other organizations and persons, are in a position to do great good or great harm. I see powerful reasons why the court in awarding damages should have the power, where a person wantonly, maliciously, or contumeliously does great harm, to give such damages as will bring home to him that tort does not pay and will restrain him in the future from indulging in similar conduct”.

The granting of excessive damages to plaintiffs may have a chilling effect on freedom of expression. The court in the case of *Sata v Post Newspapers Limited*⁴⁵ recognized this danger. Chief Justice Ngulube stated that; *“I have considered the Kapwepwe case and bear in mind that the prima object of awarding damages for defamation is to offer vindication and solatium; money cannot really be compensation for such cases. The principles of exemplary or punitive damages, incorporating any aggravating element, are insufficient to drive home to a defendant the error of his ways. I am myself not in favour of encouraging the notion of punishment in a civil case, especially where there has been little actual loss suffered by the plaintiff. I did also say much earlier on what I considered the true ‘chilling effect on the freedom of expression’ to emanate from the possibility of awards which are exorbitant and crippling. The plaintiff is a political public figure and a permanent injunction, like any excessive award, would be certain to inhibit free debate even on current and future subjects. Newspapers who cause damage while performing a vital public service should only be made to pay the freight but not to be altogether stopped dead in their tracks”.*

In the *Sata* case the plaintiff was awarded K1, 000,000 compensatory damages instead of the K3 billion he had demanded.

3.5 Freedom of Expression under the Constitution

As earlier alluded to; there are laws in the Penal Code, which impede freedom of expression such as Section 69 relating to defamation of the President. The colonial government which introduced most of the oppressive legal provisions was undemocratic. The post independence government was no better. Until 1963, freedom of expression was not guaranteed to the people of Northern Rhodesia. It was assured for the first time through the Northern Rhodesia (Constitution) Order in Council, 1963, which conferred internal self-rule to the territory. This was just a few months

⁴⁵ (1992) /HP/1399 (unreported)

before full independence was conferred upon the territory. Although it was guaranteed there were broad situations in which the freedom could be derogated from. This meant that every piece of legislation was constitutional until declared otherwise by the Court. Secondly, since independence no steps have been taken by the post-independence governments to review the laws and eliminate those, which are not in line with the new constitutional order. The laws have remained in place even after 1991 when a new democratic order was endorsed.

Article 20(1) of the Constitution⁴⁶ provides:

“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, whether the communication be to the public generally or to any person or class of persons, and freedom from interference with his correspondence”.

Thus, Article 20 (1) expressly guarantees the freedom of expression. The freedom provided in Article 20(1) of the Zambian Constitution is for all intents and purposes taken away in Article 20(3) which provides sweeping derogations by providing that:

Nothing contained in or done under the authority or 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 defense, public safety, public order, public morality or public health; or*
- (b) that it is reasonably required for the purpose of protecting 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*

⁴⁶ Chapter 1 of the laws of Zambia

institutions in the interests of persons receiving instruction therein, or the registration of, or regulating the technical administration or publications, telephony, telegraphy, posts, wireless, broadcasting or television; or

(c) that imposes restrictions upon public officers;

and except so far as that provision or, the thing done under the authority thereof as the case may be, is shown not to be reasonably justifiable in a democratic society⁴⁷.

⁴⁷ Chapter 1 of the Laws of Zambia

3.6 Conclusion

The preceding discussion has outlined the provisions regarding Zambian statutory and case law on criminal defamation. It may be argued that section 69 of the Penal Code in seeking to protect the reputation of the President derives its validity from the Constitution in Article 20(3) (b) which recognizes the right to protect reputations. Though the Constitution expressly recognizes the right to freedom of expression, the limitation clauses in the Constitution coupled with other legislation render this freedom almost meaningless. Limitations on the freedom of expression extend from the President having absolute unchallengeable powers to ban publications to controls on reporting of parliament and other material which is defined so loosely and broadly to cover perfectly normal everyday activities in a democratic state. For instance, publication of "false news", a highly subjective offence, is a crime⁴⁸. Therefore; it is more accurate to say that there is a semblance of freedom of expression in Zambia rather than to say that there actually *is* freedom of expression in the country. This is premised on the fact that the perceived freedom of expression that is manifested in the Constitution is subject to the whims of the President and the government in power. For example, though the media was liberalised during the rule of former President Frederick Chiluba in pursuit of the freedom of expression, giving rise to a multiplicity of newspapers, radio and television stations, that government was equally ruthless in dealing with citizens, especially journalists from the private media, who were deemed to be a threat to its survival through their exposes of bad governance and human rights abuses, and giving the opposition and civil society a platform to express their often critical views. It is not an exaggeration to assert that during the 10 years of the Chiluba government, more journalists were arrested, detained and taken to court than during the 27 years of Dr. Kenneth Kaunda's rule.

⁴⁸ Section 67 (1) of the Penal Code Chapter 68 of the Laws of Zambia

CHAPTER FOUR

DEFAMATION LAW: AUSTRALIA, THE UNITED STATES OF AMERICA (U.S) & THE UNITED KINGDOM (U.K)

4. Introduction

The Chapter gives a comparative analysis of defamation law. This will be in relation to three jurisdictions namely Australia, the United States of America and the United Kingdom.

The law of defamation presents an inevitable conflict between the need to compensate those whose reputations have been injured by defamatory statements and the societal need for freedom of expression. Until the second half of the twentieth century, most countries resolved this conflict in favor of reputation. Some countries valued individual reputation as a quasi-personal property right that deserved compensation if damaged, while others recognized reputation as an aspect of the growing concept of privacy.

The European Court of Human Rights (ECHR) distinguishes between private individuals and public figures, that is, politicians. In *Lingens v. Austria*,⁴⁹ the court ruled that the “limits of acceptable criticism are wider as regards a politician as such than as regards a private individual”. It has been argued that the reason why politicians must have a greater tolerance for criticism is because freedom of expression affords the public one of the best means of discovering and forming opinions of the ideas about political leaders. More generally, freedom of debate is at the very core of the concept of a democratic society. The court also stressed the fact that a careful distinction needs to 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. In

⁴⁹ [1986] 8 EHRR

Oberschlick v. Austria,⁵⁰ the European Court in rationalizing the different levels of scrutiny noted that the politician inevitably and knowingly lays himself open to close scrutiny of his every word and deed by both journalists and the public at large, and he must play a greater degree of tolerance, especially when he himself makes public statements that are susceptible to criticism. In *Castells v. Spain*,⁵¹ the European Court held inter alia that; not only is criticism of politicians and governments accorded special protection, additional protection is due when the criticism is made by an elected representative, especially a member of the opposition. The courts in the United States have adopted a similar approach in cases of defamation.

4.2 The United States of America

The origins of US defamation law pre-date the American Revolution; one famous 1734 case involving John Peter Zenger established some precedent that the truth should be an absolute defense against libel charges. Though the First Amendment of the U.S. Constitution was designed to protect the freedom of expression, for most of the history of the United States, the Supreme Court neglected to use it to rule on libel cases. This left libel laws, based upon the traditional common law of defamation inherited from the English legal system, mixed across the states. Special rules apply in the case of statements made in the press concerning public figures, which can be used as a defense. A series of court rulings led by *New York Times Co. v. Sullivan*⁵² established that for a public official to win a libel case, the statement must have been published knowing it to be false or with reckless disregard to its truth. In the United States, a comprehensive discussion of what is and is not libel or slander is difficult, because the definition

⁵⁰ [1994] 13 EHRR

⁵¹ [1992] 14 EHRR

⁵² 376 U.S. 254 (1964)

differs between different states, and under federal law. Some states codify what constitutes slander and libel together into the same set of laws. Criminal libel is rare or nonexistent, depending on the state. Defenses to libel that can result in dismissal before trial include the statement being one of opinion rather than fact or being "fair comment and criticism". Truth is always a defense. Most states recognize that some categories of statements are considered to be defamatory *per se*, such that people making a defamation claim for these statements do not need to prove that the statement was defamatory. Like in most commonwealth jurisdictions, four (4) categories of slander which are actionable *per se* are (i) accusing someone of a crime; (ii) alleging that someone has a foul or loathsome disease; (iii) adversely reflecting on a person's fitness to conduct her business or trade; and (iv) imputing serious sexual misconduct. All that has to be proved is that someone had published the statement to a third party. No proof of special damages is required.

Under United States law, libel generally requires five key elements. The plaintiff must prove that the information was published, the plaintiff was directly or indirectly identified, the remarks were defamatory towards the plaintiff's reputation, the published information is false, and that the defendant is at fault. The First Amendment of the United States Constitution provides that:

*Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances*⁵³

⁵³ <http://www.barefootsworld.net/article1.html>

In the landmark *New York Times Co. v. Sullivan*,⁵⁴ the United States Supreme Court established constitutional protections for expression and limited the ability of defamation plaintiffs to recover. The essence of the *Sullivan*⁵⁵ case is a rule that prevents public officials from recovering for defamation unless they can show that the defendant had acted with "*actual malice*." This actual malice standard, which was later extended to "*public figure*" plaintiffs required public officials to show that those who defamed them knew that what they printed was untrue. In the *Sullivan*⁵⁶ case the Supreme Court held that public officials, in order to sustain an action of defamation, must prove the falsity of the alleged defamatory statement, as well as "*actual malice*". That is, that the defendant published a falsehood with knowledge that it was false or with reckless disregard of its truth or falsity. In other words evidence should be clear and compelling that the words published were defamatory.

In *Cutis Publishing Co. v. Butts*⁵⁷ and *Associated Press v. Walker*⁵⁸ the Supreme Court extended the *Sullivan*⁵⁹ rule to apply to all Public figures. The reasoning being that public figures have access to the media to counteract false statements and, at least to some degree, invite the comment to which they are exposed. Despite the *Sullivan* decision, most Commonwealth countries steadfastly clung to the notion that defamation is a necessary protection lest good people fall to tainted gossip. But, even in Commonwealth countries, the balance is beginning to shift in favor of free expression.

⁵⁴ Supra note 54

⁵⁵ *ibid*

⁵⁶ *ibid*

⁵⁷ [1967] 388. U. S. 130

⁵⁸ [1967] 389. U. S. 28

⁵⁹ Supra 58

4.3 Australia

The Sullivan decision was rejected in the Australian case of *Theophanus v The Herald and Weekly Times Ltd & Another*⁶⁰. In this case, the High Court of Australia stated that the interests of the individual must give way to the requirements of the Constitution. At the same time, the protection of free speech does not necessitate such a subordination of the protection of 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 severe restraint on commentators and those who participate in the discussion of public affairs. Such a restraint would severely cramp that freedom of political discussion which is essential to the effective and open working of modern government.

The court further stated; at the same time, it cannot be said to be in the 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 and that it did not publish recklessly. That is, without caring whether the matter was true or false, and that the publication was reasonable in the sense described. These requirements

⁶⁰ [1994] 182 CLR 104

will redress the balance and give the publisher protection with implied freedom, whether or not the material is accurate.

From the foregoing; the Sullivan concept of actual malice calls for some justification in one respect. As already noted, the common law connotation of malice embraces ill-will, spite and improper motive. There is an argument for saying that 'actual malice' should likewise extend to such motivating factors. However, it seems that once it is accepted that it is necessary to show that the publication was reasonable in the sense which has been referred, there is no occasion to conclude malice according to its common law understanding as an element in the test to be applied. According to the Australian approach, the plaintiff should bear the onus of proving that the publication was not protected and establish that the publication falls within the constitutional protection. This standard accords with the approach that the courts in Zambia have taken in the past to proof of matters of justification and excuse. In the case of *Sata v. Post Newspapers Limited*,⁶¹ the court stated inter alia; that it was not persuaded that the constitutional character of the justification should make any difference to the onus of proof. Whether the defendant acted reasonably will involve consideration of any inquiry made by the defendant before publishing which is a matter peculiarly within the knowledge of the defendant. In *Lange v. Australian Broadcasting Corporation*⁶², Australia's High Court extended the common law doctrine of qualified privilege to protect publications related to the conduct of governmental affairs.

⁶¹ Supra note 45

⁶² [1997]189 CLR 520

4.4 Britain

English law allows actions for libel to be brought in the High Court for any published statements which are alleged to defame a named or identifiable individual or individuals in a manner which causes them loss in their trade or profession, or causes a reasonable person to think worse of them. Allowable defenses are justification, fair, and privilege as to whether the statements were made in Parliament or in court, or whether they were fair reports of allegations in the public interest. An offer of amends is a barrier to litigation. A defamatory statement is presumed to be false unless the defendant can prove its truth. Furthermore, to collect compensatory damages, a public official or public figure must prove actual malice. A private individual must only prove negligence to collect compensatory damages. In order to collect punitive damages, all individuals must prove actual malice.

In 1999, Britain's House of Lords decided *Reynolds v. Times Newspapers*,⁶³ and expanded common law qualified privilege to provide special protection to the English media for reporting on matters of public interest. Although Britain is a signatory to the European Convention and has adopted a statutory bill of rights in the form of the Human Rights Act of 1998⁶⁴, the relevant statement on free speech is in qualified form and is therefore quite distinct from the United States Constitution's First Amendment. It is not easy to explain the English common law of defamation suffice to say; defamation of the queen gives rise to civil proceedings as opposed to criminal proceedings as is the case in Zambia. As a leading United Kingdom commentator stated, "the law of defamation is notoriously complex." Its complexity arises from numerous detailed and technical rules, which stem from the common law, as well as from recent developments. The

⁶³ [1999] 4 All ER 609

⁶⁴ Schedule 1, Article 10

common law provided no comprehensive definition of what is defamatory. There are three commonly stated tests, and satisfying any one of them is sufficient. Material is defamatory if it; (1) exposes the claimant to hatred, ridicule, or contempt; (2) "tends to lower the plaintiff in the estimation of right-thinking members of society generally"; or (3) leads people to shun or avoid the claimant.

However, the English common law of defamation was altered by the 1952 Defamation Act and the 1996 Defamation Act, as well as by the European Convention on Human Rights and Fundamental Freedoms, which has been incorporated into United Kingdom law through the 1998 Human Rights Act. There is a specific Practice Direction for defamation under the Civil Procedure Rules and a Pre-Action Protocol for Defamation that sets out expected practice before commencing litigation and during pre-trial and trial stages. The objective of the Rules is to deal justly with disputes, taking into account the parties' relative positions in proportion to the number, importance, and complexity of the issues. English common law has historically asked little of defamation claimants. They need only establish that the published material that identified them conveyed a defamatory meaning. The normal civil standard of proof applies viz the balance of probabilities. The United States standard of 'clear and compelling' evidence is not applied.

The law allows corporations, but not local authorities, to sue for defamation. In *Derbyshire County Council v. Times Newspapers*⁶⁵, Britain's House of Lords held that local authorities may not bring defamation actions because of the importance of robust discussion about their activities, especially given that their members are elected. *Derbyshire* is perceived as an

⁶⁵ [1993] 1 All ER 1011

important precursor to *Reynolds v. Times Newspapers*⁶⁶. In addition; the claimant is required to show that the publication conveys a defamatory meaning. In most instances, this is the only contentious element of the claimant's case. Indeed, the meaning conveyed by a publication, and how the parties differ as to that meaning, is the central issue in the vast majority of cases.

4.5 Canada

As is the case for most Commonwealth jurisdictions, Canada follows English law on defamation issues. At common law, defamation covers any communication that tends to lower the esteem of the subject in the minds of ordinary members of the public⁶⁷. Intent is always presumed, and it is not necessary to prove that the defendant intended to defame. In *Hill v. Church of Scientology of Toronto*⁶⁸ the Supreme Court of Canada rejected the *actual malice* test adopted in the United States case of *New York Times Co. v. Sullivan*⁶⁹. Once a claim has been made, the defendant may avail him or herself to a defense of justification, fair comment, or privilege. Publishers of defamatory comments may also use the defense of innocent dissemination where they had no knowledge of the nature of the statement.

⁶⁶ *ibid*

⁶⁷ *Murphy v. LaMarsh* (1970), 73 W.W.R. 114

⁶⁸ (1995)

⁶⁹ *Supra* note 61

4.6 Zambia

The courts in Zambia can learn valuable lessons from the decisions of the European Courts as well as the American Courts. It is patent that these decisions are very protective of the freedom of expression and go a long way in promoting public debate and scrutiny of public figures. As evidenced from case law, the Zambian Courts have not gone as far as the European and American Courts. In the case of *Sata v. Post Newspapers Limited*⁷⁰, the High Court had to consider whether the law of defamation as currently applied derogates from, inter alia, the freedom of expression as guaranteed by Article 20 of the Constitution and, if so, what modifications would be reasonably required to be imported or imposed in order to give effect to the intention of the Constitution. In this case the plaintiff who was at all times a politician and public official holding a Ministerial appointment commenced three separate suits against the defendants for publishing in their newspaper, *The Post*, various articles and a cartoon. The defendants pleaded justification and fair comment on matters of public interest. The three actions were letter consolidated and heard by the Chief Justice. The defendants submitted that because Article 20 of the Constitution of 1991, 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 plaintiffs who are public officials as to their right of action, the burden and standard of proof and the latitude to subject public officials to criticism and scrutiny. It was submitted that because of the similarity between the provision in the Zambian Constitution and that of the USA, the court should follow the line taken by the American courts. In this regard, the court was urged to apply the *Sullivan* case in which the Supreme Court of the United States laid down some principles grounded in the First and Fourteenth Amendments to fetter

⁷⁰ Supra note 61

libel actions by public officials in order to advance freedom of expression. Chief Justice Ngulube, while accepting some of the principles enunciated in Sullivan rejected others. He stated that Article 20 of the Constitution recognizes both the freedom of the expression and the right to reputation. A balance had to be struck but he did not consider that a good balance could be struck by shifting the burden or standard of proof nor by straining to discover the new qualified privilege nor by immunizing falsehoods to any greater extent than the Defamation Act⁷¹ already provides. He continued;

“Let me make it clear that I fully endorse the constitutional provisions in Article 20 and I accept that impersonal criticism of public conduct leading to injury to official reputation should generally not attract liability if there is no actual malice and even if, pursuant to section 7 (b) of the defamation Act⁷², the truth of all facts alleged is not established if the imputation complained of is competent on the remainder of facts actually proved. However, I would reject the proposition in Sullivan to the extent that it sought to legalise character assassination of public officials or to shift the burden of proof so that knowledge or falsity recklessness should be proved by the plaintiff and to a degree of convincing clarity”.

Chief Justice Ngulube preferred the Australian approach and said that; *if we were in the same boat with the Americans and the Australians, I would side with the Australians and the way they have proposed to protect the freedom to debate political issues and the fitness of a politician to hold office. In both countries, they were distilling principles by implication after finding that their Constitutions required such an exercise. In contrast, our own Constitution is less vague though I agree with the general principle of not simply allowing the existing law of defamation to operate without due regard to lend greater meaning and effect to the provisions of Article 20 of the Constitution.*

According to the *Sata* case, the dilemma was that the Zambian constitution attaches equal importance to freedom of expression and the right to reputation, without distinction whether such reputation belongs to a private or public individual. Chief Justice Ngulube was of the view that it was in the interest of society that the public conduct of public men should be criticized without

⁷¹ Chapter 68 of the Laws of Zambia

⁷² *ibid*

any other limit, than the writer should have an honest belief that what he writes is true and; the equally important public interest in the maintenance of the public character of men for the proper conduct of public affairs. This requires that they be protected from destructive attacks upon their honour if made without any foundation. There was therefore no need to formulate a new set of principles to 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 the court made a distinction between an attack on the official public conduct of an official and imputations that go beyond this and attack the private character of such official which attack would be universally un-sanctioned. The preferred standard was that when considering the defence of fair comment on a matter of public interest arising from the conduct of a public official, the court had to be more generous and expansive in its application. Chief Justice Ngulube expounded that;

“In sum, it is my considered opinion that constitutional protection of reputation and free speech or press can best be balanced in Zambia, when the plaintiff is a public official who has been attacked in that character, by a more generous application of the existing defences. The chilling effect of litigation would thereby be mitigated to some extent, just as it would be considerably eased by the courts constantly seeking to promote free speech and press by keeping a careful eye on the size of awards which perhaps are the true chilling factor especially if they involve any exemplary or punitive element. What is certain also is that, as Mr. Sikatana suggested, since both the freedom of press and right to reputation are recognized in Article 20, no higher value can be placed on the one as against the other nor one part of the Constitution be said to be in conflict with another part in any ‘unconstitutional’ way since the whole document legalizes itself. The trick is to balance the competing rights and freedoms and on principle, as I hope I have managed to explain, the solution lies in the application of existing law in a more imaginative and innovative way in order to meet the requirements of an open and democratic new Zambia”.

4.7 Conclusion

It has been highlighted that diverse approaches have been taken regarding defamation law; the United States has taken a constitutional approach, while England and Australia have taken varying common law qualified privilege approaches, while using different standards. This difference in approach may have been dictated by differences in constitutional structure. Britain, for instance, has no written constitution. The preceding chapter demonstrated that The *Sullivan* case dramatically changed the nature of libel law in the United States by establishing that public officials could win a suit for libel only if they could demonstrate publishers' "knowledge that the information was false" or that it was published "with reckless disregard of whether it was false or not. Defamation law in the United States is much less plaintiff-friendly than its counterparts in European and the Commonwealth countries.

The discussion also shows that the state of the law on freedom of expression in Zambia is unsatisfactory. There is need for substantial reforms in this area. The provisions on criminal defamation are overboard and undemocratic as they are directed at stifling freedom of speech. A democratic society can only endure if peaceful protest against the government is allowed. As the United States Supreme Court stated in *Terminiello v. Chicago*⁷³, a function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. The succeeding chapter draws the conclusions of the entire study upon which recommendations will also be offered.

⁷³ 337 U.S. [1949]

CHAPTER 5

CONCLUSIONS AND RECOMMENDATIONS

5.1 Introduction

Defamation laws may deter the freedom of expression in instances where publishers fear lawsuits. On the other hand, a complete eradication of defamation laws may lead to loss of reputation where individuals have no protection against unfounded allegations. Jurisdictions resolve this tension in different ways. The study has pointed out that Article 10 of the European Convention on Human Rights permits restrictions on freedom of speech which are necessary for the protection of reputation and the rights of others. As evidenced by the decision of *Lingens v. Austria*⁷⁴, the European Court of Human Rights has placed notable restrictions on criminal libel laws because of the freedom of expression provisions of the European Convention on human Rights. There is a broader consensus against laws which criminalize defamation. For instance, Human rights organizations, and other organization such as the Council of Europe and Organization for Security and Co-operation in Europe, have campaigned against defamation laws which criminalize defamation⁷⁵. The study notes that criminal libel has no place in a democratic society as the civil law of defamation is adequate to protect everyone's reputation. It is contended that the nature of the political process requires the person occupying the office of President to convince the electorate that he is a better candidate than his challengers.

⁷⁴ Supra note 51

⁷⁵ IRIS 2006-10:2/1: Ilia Dohel, Office of the OSCE Representative on Freedom of the Media. Representative on Freedom of the Media: Report on Achievements in the Decriminalization of Defamation

Consequently, the President may be brought into contempt or ridicule. Therefore; it cannot be in conformity with the ideals of democracy to criminalise what may be said about the President.

This paper contains five chapters. Chapter one gave a general introduction of the research topic and formed the foundation of the study. In this chapter it was advanced that every man is entitled to his good name and reputation. Thus, every person has a right to claim that his reputation should not be disparaged by defamatory statements made about him without lawful justification. In this connection, section 69 of the Penal Code seeks to protect the President's reputation by criminalizing defamation of the President. However, as shown the President in a democratic state is accountable to the people. Therefore, chapter one pointed out that the people should not be subjected to criminal sanctions for making unpleasant remarks about the President.

Chapter two outlined the law of defamation and the basis of the freedom of expression under international law. It was pointed out that despite the importance of the freedom of expression in a democratic society; the protection attached to it in national law and international law is not absolute. This is on the basis that the exercise of freedom of expression has to be reconciled with the protection of other equally important social interests. Also, it was indicated the extraordinary wide compass of the limitations and the restrictive laws on the freedom of expression place Zambia in the middle ages in view of the freedoms that its citizens are allowed. Further, it was pointed out that international law requires a delicate balance to be struck between the exercise of freedom of expression and any restrictions that may be imposed.

Chapter three was dedicated to outlining the provisions regarding Zambian statutory and case law on criminal defamation. It was noted that though the Constitution expressly recognizes the right to freedom of expression, the limitation clauses in the Constitution coupled with other

legislation render this freedom almost meaningless. It was further pointed out that the present law gives the President liberty to defame his opponents at will while immunizing him from legal suits and making it criminal for his opponents to defame him.

In chapter four it was established that diverse approaches have been taken regarding defamation law. The United States has taken a constitutional approach, while England and Australia have taken varying common law qualified privilege approaches, while using different standards. These disparities may be attributed to the differences in constitutional structure. The objection to criminal defamation in these jurisdictions is that it is unnecessary as the civil law provides an adequate remedy and the civil law has become the accepted means of redressing defamation in democratic countries.

The discussion also showed that the state of the law on freedom of expression in Zambia was unsatisfactory. It was further highlighted that the provisions on criminal defamation are overbroad and undemocratic as they are directed at stifling freedom of speech. It was shown that the courts have an important role to play in protecting citizens against persecution from the State for merely exercising the human right to freedom of expression.

5. 2 RECOMMENDATIONS

The current constitutional order allows for competition to the office of President. Invariably this will require and will entail criticism of the incumbent President, which may extend to examination of his personal character. It is likely that the person occupying the office of President may be brought into contempt or ridicule. In practice, prosecutions for criminal defamation have been instituted against those who have allegedly defamed politicians of the ruling party as well as members of their families such as the President's wife and children and senior government officials. This has resulted in a situation where the tenets of democracy such as the freedom of expression are undermined. On this basis, the study recommends that:

(i) Criminal Defamation

Since the law on civil defamation is sufficient to protect the right to reputation, there is no reason why criminal defamation should be maintained in a democratic country. In fact, almost all genuine democracies do not have such discriminatory laws. There is need to reform the law on criminal defamation for the sake of democracy and good governance in the country.

(ii) The President's power to Prohibit Publications

It is recommended that there should be checks and balances to ensure that the President in a society such as ours uses his power as envisaged in section 53 the Penal Code with the utmost responsibility. The power that the section confers on the President can be easily abused in the absence of checks and balances.

(iii) Criminal libel in a democracy

Criminal libel is often used to harass political opponents or critical journalists. However; criminal libel has been abolished in many democratic countries while in others its scope has been severely circumscribed. If the gains that have been made in the past few years in democratising Zambia are to be consolidated, and an open and free society created, criminal libel must be abolished.

(iv) Zambian Courts and the Freedom of expression

Zambian courts must take a leaf from the valiant efforts of international courts to broaden the frontiers of liberty by construing restrictions on the freedom of expression as narrowly as possible.

(v) Defamation of Public figures

It is important for the courts to set a higher standard of proof in defamation cases for public figures because, firstly, unlike private individuals, public figures must accept certain necessary consequences of their involvement in public affairs and secondly, public figures have access to the media to counteract false statements thereby minimising their adverse impact on reputation.

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